



Case Number:	Petition 62 of 2014
Date Delivered:	23 Dec 2014
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Ruling
Judge:	Edward Muthoga Muriithi
Citation:	Muslims for Human Rights (MUHURI) & 4 others v Inspector General of Police & 2 others [2014] eKLR
Advocates:	Mr. Wandugi holding brief Ndumbi for the Petitioners, Miss Kitty for the Respondents
Case Summary:	<p style="text-align: center;"><u>Court orders parties to agree on how to balance security concerns and the rights of the residents following the Lamu Curfew</u></p> <p style="text-align: center;">Muslims for Human Rights (Muhuri) and 4 Others V Inspector General of Police and 2 Others</p> <p style="text-align: center;">Petition No. 62 Of 2014</p> <p style="text-align: center;">High Court of Kenya at Mombasa</p> <p style="text-align: center;">Edward M. Muriithi J.</p> <p style="text-align: center;">December 23, 2014.</p> <p style="text-align: center;">Reported by Njeri Githang'a</p> <p>Brief facts</p>

The case before the court was predicated upon alleged contravention of the Bill of Rights by the imposition of a curfew by the Inspector General of Police, in Lamu purportedly in exercise of powers conferred upon the former office of Police Commissioner under the Public Order Act cap 56. It was reasoned that the Constitution of Kenya, 2010 did not contemplate imposition of curfew and the Inspector General of Police was not empowered to declare a curfew and that, in any event, the extent of the curfew in terms of duration and area was unlawful. It was also contended that the imposition of curfew specially affected and discriminated against the residents of Lamu on account of their religion, socio-economic activity and geographical climatic realities.

The petitioners hence sought for an order of injunction lifting the curfew imposed by the Inspector general of Police as an interim relief pending the hearing and determination of the main Petition.

Issues

- i. What were the principles for the grant of injunction or conservatory orders under the constitutional litigation?
- ii. Whether the fact that the Constitution did not set out the power to order a curfew as with the state of emergency, the Constitution had outlawed the curfew provisions set out in the prior Public Order Act.
- iii. Whether the powers conferred upon the Police Commissioner under section 8 of the Public Order Act could be exercised by the successor in office of Inspector General of Police.
- iv. Whether the provisions of the Public Order Act which allowed the imposition of curfew were a limitation on the rights and fundamental freedoms

v. Whether imposing less restrictive means as opposed to a curfew would balance the two interests of public safety and security and the enjoyment of the Bill of Rights

Constitutional Law - conservatory orders - principles to be considered for the grant of conservatory orders under constitutional litigation— where the Inspector General of Police had imposed a curfew in Lamu- where It was also contended that the imposition of curfew specially affected and discriminated against the residents of Lamu on account of their religion, socio-economic activity and geographical climatic realities— whether a conservatory order could be issued under the circumstances.

Constitutional Law-fundamental rights and freedoms-right to public safety and security-curfew-authority to impose a curfew- whether the fact that the Constitution did not set out the power to order a curfew as with the state of emergency, the Constitution had outlawed the curfew provisions set out in the prior Public Order Act- Public Order Act cap 56, section 8

Constitutional law-fundamental rights and freedoms-limitation of rights-curfew- balancing competing constitutional rights-whether imposition of curfew would limit some fundamental rights and freedoms - whether imposing less restrictive means as opposed to a curfew would balance the two interests of public safety and security and the enjoyment of the Bill of Rights

Constitutional Law-interpretation of constitutional provisions-transitional and consequential provisions-whether the Inspector General of Police

was the legal successor of the office of Police Commissioner and therefore had authority to exercise the powers of the Commissioner of Police in the Public Order Act in relation to imposition of curfew-Constitution of Kenya, 2010, Section 7 and 33 of the Sixth Schedule of the Constitution

Relevant provisions of the law

Public Order Act, cap 56 Laws of Kenya, empowers of the Commissioner of Police and Provincial Commissioner to declare curfew as follows:

“8. (1) The Commissioner of Police or a Provincial Commissioner may, if he considers it necessary in the interests of public order so to do, by order (hereinafter referred to as a curfew order) direct that, within such area (being, in the case of a Provincial Commissioner, within his province) and during such hours as may be specified in the curfew order, every person, or, as the case may be, every member of any class of persons specified in the curfew order, shall, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew order, remain indoors in the premises at which he normally resides, or at such other premises as may be authorized by or under the curfew order.”

Constitution of Kenya 2010

244. The National Police Service shall—

(a) ...

(b)...

(c) comply with constitutional standards of human rights and fundamental freedoms;

Section 33 provides as follows:

“33. An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”

Section 7 of the Sixth Schedule of the Constitution provides that –

7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

Held,

1. The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, were
 - a. the applicant had to demonstrate an arguable case - sometimes called prima facie arguable case - the reference to *arguable case* distinguishing it from the *prima facie* test of the *Giella v. Casman Brown* traditionally applied in regular civil cases;
 - b. the applicant had to show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and,
 - c. in constitutional cases, the public interest in the matter would be considered and generally upheld

2. All the courts required for the grant of conservatory orders was a prima facie case or a prima facie arguable case; irretrievability or irreparability if conservatory order was not granted and the subject matter was irretrievably lost (akin to the irreparability by damages test) and a balancing of the interests of the applicant and the respondents. There was confusion as to whether the test of standard of the applicant's case is on the prima facie or arguable case. Once accepted that the court could not determine the disputed merits of the case at the interlocutory stage, the correct standard had to be the standard of arguable case.

3. The argument that the petitioners were not residents of Lamu did not hold much weight in view of the expanded standing given by articles 22 and 258 of the Constitution, and indeed the petition pleaded that apart from 1st petitioner organization, the human petitioners were residents of Lamu County.

4. The object of the decision on pleading infringement of the Constitution with particularity with respect to the rights and manner of infringement was a requirement of good pleading so that the respondent was able to know with precision the case that he had to meet and so that the court understood the exact nature of intervention necessary. It was the same requirement codified under rule 10 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

5. Following the promulgation of the Constitution of Kenya 2010 the position in the Police force of a Police Commissioner was abolished and replaced with the office of the Inspector general of Police as the head of the Force. The Constitution of Kenya 2010 at section 33 of the Transitional and Consequential Provisions which had been held by the Court of Appeal to be an integral part, with of equal force as other provisions, of the Constitution, appeared to allow the Inspector General to exercise the powers of the Commissioner of Police to declare a curfew.

6. In terms of section 33 of the Sixth Schedule of the Constitution of Kenya 2010 it would appear that the Inspector General of Police was the legal successor of the office of Police Commissioner and therefore had authority to exercise the powers of the Commissioner of Police in the Public Order Act in relation to imposition of curfew.

7. In view of the section 33 of the Sixth Schedule of the Constitution and on the principle of interpretation that the Constitution was always speaking, the applicant did not have an arguable case with respect to the contention that the powers conferred upon the Police Commissioner under section 8 of the Public Order Act could not be exercised by the successor in office of Inspector General of Police.

8. With regard to the unconstitutionality of the curfew, article 244 of the Constitution provided for the operations of Police Service to be consistent *'with constitutional standards of human rights and fundamental freedoms'*

9. The Constitution provided under article 244 for the exercise of police function without laying out the tools that the police could use in their operations. The Public Order Act, the National Police Service Act and other relevant Acts then made detailed provisions on the exercise of police function. It could not be said that in not setting out the power to order a curfew as with the state of emergency, the Constitution had outlawed the curfew provisions set out in the prior Public Order Act. The trial court would make determination thereon upon full submissions on the matter. The provisions on curfew had a regime of accountability based on the requirements under article 244 for compliance with the standards of human rights contained in the Bill of Rights with exception only as permitted under article 24 of the Constitution.

10. There was no paradox in the constitutional provisions of article 244 establishing and giving police power to the National Police Service at the same time requiring that the operations of the National Police Service be consistent with the Bill of Rights. It was the reality of modern interplay of the guarantees in the Bill of Rights against the

interests of public security and safety through police function in an open democratic society based on respect for human rights and dignity of the person. The correlation of police power to the Bill of Rights meant that the Constitution recognized the need to provide for the security of the citizens and at the same time ensure enjoyment by rights and fundamental freedoms of the Bill of Rights; that the exercise or imposition of police powers should not unreasonably restrict the enjoyment of the rights and freedoms. The test for unreasonableness of police action was the criteria set out in article 24 of the Constitution.

11. The petitioners had an arguable case as to whether the imposition of the curfew, assuming the Inspector General had power to do so and the curfew was a lawful tool of police functionality, did unreasonably restrict the rights of the citizen's resident in Lamu County contrary to article 24 limitation threshold. The determination of that matter was province of the full trial, and the decisions on abuse of power and illegality would fall for in-depth consideration at the trial.

12. The Curfew was one of police devices for prevention and combat of crime, and the Police were in terms of article 244 of the Constitution entitled to utilize it subject to observation of the demands of human rights as prescribed under article 244 (c) and to the extent permitted by the provisions on limitation to rights under article 24 of the Bill of Rights.

13. The provisions of the Public Order Act which allowed the imposition of curfew were a limitation on the rights and fundamental freedoms such as, among others, movement, assembly, association and property in denying opportunity to earn living through night fishing and other socioeconomic enterprise as well as participate in local cultural and religious activities, and it could even amount to discrimination as alleged by the petitioners.

14. Without challenging the constitutionality of the Public Order Act or sections thereof and seeking declaration of invalidity in that behalf, in accordance with article 3 of the Constitution, the petitioners had to be bound by the provisions of the Act as an imperative of the doctrine of the Rule

of Law.

15. The consideration of irreparability of the situation should the sought conservatory order be denied resolved itself in the negative when compared to the real irretrievability of any lives that could be lost due to the enabling environment that could be created by lifting of the curfew orders. The people of Lamu could not remain in perennial curfew to curb insecurity hence the Respondents had to in the very due course of time implement remedial preventive security arrangements that made it difficult, if not impossible, for attacks on the lives of the residents of the county in the massacre proportions witnessed in Mpeketoni earlier in the year leading to the imposition of the curfew.

16. The interests of public safety and security and protection to the right to life pleaded in the grounds of opposition filed by the respondents had to, in the absence of a replying affidavit filed on behalf of the applicants be taken to be the justification offered for the limitation of the rights of the residents of Lamu through the curfew. In seeking a balance of the rights of the petitioners as representing the residents of Lamu County and the public interest to the protection of the lives and property of others, it was clearly a case of upholding the Bill of Rights for all the parties involved, subject only to the limitations recognized by the Constitution itself.

17. In upholding the premium thereby placed on the two interests of public safety and security and the enjoyment of the Bill of Rights, the Court had to consider that the enjoyment of the rights could therefore be limited only as provided by the Constitution. While acknowledging that there was relation between the limitation by imposition of curfew and its purpose of preventing the mounting of possible terrorist attacks, there could have been less restrictive means to achieve the purpose.

18. Without dictating the less restrictive means, reducing the timelines for the curfew and saving of occasions or celebrations such as the *Eidd ul Adh'a* which prompted the Petition; making exceptions with regard to days, times and areas or regions of the imposition of the curfew, and

	<p>increasing complementary police surveillance, escort or monitoring and community policing strategies could properly amount for less restrictive means in terms of reduction of the scope, period, nature and extent of the restriction and the geographical region of the curfew limits. The object had to be to ensure the highest level of enjoyment of rights and freedoms for all while addressing the public safety and security concerns engendered by the situation in the area.</p> <p>Orders</p> <p>1. <i>The respondent directed in consultation with the petitioners, within 14 days from the date of the ruling, to meet and develop, and report to the court, a revised scheme of such measures as would, consistently with the Bill of Rights, meet the public safety and security needs for the affected region.</i></p> <p>2. <i>Should the respondents fail, within the fourteen (14) days allowed, to devise in consultation with the applicants and with approval of the court, a scheme of curfew administration that allowed for reasonable protection and enjoyment of the Bill of Rights as commanded by article 244 of the Constitution, the curfew order made by the Inspector General of Police on June 20, 2014 and extended from time to time would be extinguished and be of no effect thenceforth. For purposes of compliance, the matter would be mentioned on January 6, 2015.</i></p> <p>3. <i>Costs to be in the cause.</i></p>
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Parties ordered to consult with each other
History County:	-

Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 62 OF 2014

MUSLIMS FOR HUMAN RIGHTS (MUHURI).....1ST PETITIONER

ALI BAKARI MOHAMED.....2ND
PETITIONER

AHMED OMAR3RD
PETITIONER

AMINA SHAKIR
.....4TH PETITIONER

NOODIN A. SANAY5TH
PETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE1ST RESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

THE CABINET SECRETARY MINISTRY OF INTERIOR

& CO-ORDINATION OF NATIONAL AFFAIRS.....3RD RESPONDENT

RULING

1. By an interlocutory Notice of Motion dated the 3rd October 2014 filed in a constitutional Petition of the same date, the petitioner sought the following specific orders:

1. *This application be certified urgent and service thereof be dispensed with in the first instance and be heard ex-parte.*

2. *An order of injunction do issue restraining the Respondents whether by themselves, agents, police officers, military officers or other assigns from continuing to enforce the orders of curfew affecting Lamu County residents until further orders of the Honourable Court.*

3. *In the alternative and without prejudice to prayer 2 above, an order of injunction restraining the Respondents, agents, police officers, military officers, or other assigns from in any way interfering with the free movement of, festivities celebrations or other events at all times being performed or engaged in during all that period necessary for the marking of Eidd ul Adh'a in Lamu County commencing on the 4th of October 2014.*

4. **Costs be in the cause.**

Prayer No. 3 was granted ex parte when the matter first came to court on the 3rd October 2014 in terms that *“the respondents while carrying out their routine duties facilitate and not disrupt the celebrations to be marked on 4th October 2014.”*

2. The Petition contained prayers for final orders at paragraph 26 thereof, as follows:

26. The Petitioners therefore pray as follows:-

I. A Declaration that the imposition of the order for curfew in Lamu discriminates against the people of Lamu.

II. A Declaration that that curfew imposed on the County of Lamu is illegal, unconstitutional, and null and void.

III. A Declaration that the 1st Respondent acted without authority to impose the curfew on the County of Lamu.

IV. An order directed at the Respondents that the order for curfew on Lamu County be and is hereby lifted.

V. An order directed at the respondents, their agent or assigns that the Eidd UI Adha'ha celebrations be and are hereby safeguarded.

VI. A Declaration that the people of Lamu, County more particularly, the Boni, the Fishermen, traders and business community have lost their business and livelihoods as a direct consequence of the curfew.

VII. An order for the payment of damages to communities and residents to be assessed.

VIII. Costs to the Petitioners.

IX. In the alternative and without prejudice the above prayer for costs, considering that this is a public interest matter that is not frivolous, that no costs be awarded against the Petitioners in the unlikely event that the Petition is lost.

3. The Notice of Motion and the Petition were supported by the affidavit of Khelef Khalifa, the chairperson of the 1st Petitioner filed on 3rd October 2014. For the Respondents, Grounds of Opposition dated 8th October 2014 were filed and subsequently supplemented by Further Grounds of Opposition dated 24th November 2014.

4. The case of the petitioners is predicated upon alleged contravention of the Bill of Rights by the imposition of the curfew by the Inspector General of Police, purportedly in exercise of powers conferred upon the former office of Police Commissioner under provisions of the Public Order Act cap 56. It is reasoned that the new Constitution does not contemplate imposition of curfew and the Inspector General of Police is not empowered to declare a curfew and that, in any event, the extent of the curfew in terms

of duration and area is unlawful. It was also contended that the imposition of curfew specially affected and discriminated against the residents of Lamu on account of their religion, socio-economic activity and geographical climatic realities.

5. In pleading their special loss and suffering on account of the curfew, the petitioners state in Paragraphs 17 – 23 of the Petition dated 3rd October 2014 as follows:

17. *The majority of the people profess the Muslim faith by virtue of which they do attend religious obligations before the hour of 6.30 am thus the curfew imposed on them breaches their right to freedom to religion under Article 32 of the Constitution.*

18. *The fishermen of Lamu ordinarily go out to sea at night to catch fish which is their economic mainstay and acquisition of food.*

19. *The hunter and gatherer community also known as Boni do hunt in the nearby forests for their food and economic sustenance usually at night thus the illegal and unconstitutional curfew directly impacts on their livelihoods.*

20. *Usually due to high temperatures of Lamu, shopping and social gatherings as well as family meetings are held at night under open skies. The unconstitutional and illegal curfew is in breach of the rights of the people to associate and move freely.*

21. *On or about the 4th October 2014, the people of Lamu and elsewhere who profess the Muslim faith will be celebrating Eidd ul Adha'ha which is popular for weddings and other forms of celebrations which run into the night. The petitioners fear that the right of the people to celebrate this occasion of Eidd freely without interference from the Respondents will breach or threatens to breach the various rights of the residents of Lamu County.*

22. *The action of imposing an unlawful curfew has discriminated and continues to discriminate against the people of Lamu because of their religion, place of origin or other unknown basis.*

23. *There are other areas of Kenya that have been experienced massive crime and violence yet no curfew has been imposed on those areas, even though it would be unconstitutional so to do. Such areas include Central Kenya with Mungiki menace, Bungoma, Mandera, Garissa , Marsabit among others."*

6. The principal contention by the Respondents in opposition to the application was that no constitutional rights had been demonstrated to have been breached and that the curfew order was justified by the limitation to the rights and fundamental freedoms as permitted under Article 24 of the Constitution and by public interest in the security of the residents, over and above the interests of the petitioners following the killing of innocent citizens in Mpeketoni area of Lamu county.

7. Counsel for the parties – Mr. Ndubi for the Petitioners and Ms. Lutta for the Respondents - made oral submissions on the 3rd December 2014 and ruling was reserved for the 23rd December 2014.

8. In urging the application for conservatory order, counsel for the applicant Mr. Ndubi submitted as follows:

Application of 3.11.2014 seeks substantively prayer No. 2. National Police Service is provided for under Article 244 with its command under Article 245. Former constitution had commander of Police Force as Commissioner of Police. There is no Commissioner of Police or Provincial Commissioner in the new Constitution. On 19.2.2014, the Inspector General of Police Service, David Kimaiyo purported to declare a curfew affecting Lamu County pursuant to section 8 of the Public Order Act. He sought to restrict freedom of movement of people living in Lamu County between 6.30 pm – 6.30am for 1 month to end in August 2014 and subsequently extended. It is still in force. Power to order a curfew or any person or restriction of movement or rights can only exist within constitutional framework. Under Constitution of 2010 there is no provision of curfew. There is provision for declaration of state of emergency under Article 132 and 58 of the Constitution. Article 132 (4) gives President the power to declare state of emergency subject to Article 58. Article 58 (1) (a) - statement of emergency only when the state is threatened by war, general insurrection. Irrespective of circumstances quoted by Inspector General in the statement communicating curfew order, there was no threat of war or invasion by a foreign enemy or general insurrection. General disorder exists in Mandera, Wajir and Kapedo. In seeking the conservatory order removing the curfew order is that the order of the Inspector General is illegal. The law does not give Inspector General any power to declare curfew. The law does also not recognize curfew order. The provisions in Public Order Act were last revised 1965 and are colonial terms. They were authorized by the colonial legislation. Section 8 of the Public Order was revised in 1960, 1963 and 1965. They are colonial terms.

The 2nd Annexure signed by Inspector General and Leader of Majority in National Assembly. Article 244, Inspector General is an independent officer and cannot take directions from any person except DPP or Cabinet Secretary for security. The Annexure components are the irregularity complained of. The curfew orders are irrational because they are not definitive of the public space they affect and they only state Lamu County and they do not identify the persons affected and they amount to collective punishment of all the residents of Lamu County. It is collective punishment.

*The Framers of the Constitution contemplated situation where the National Police Service and declaration of emergency would be accountable to a system. Article 58 – disorder, invasion or threat of order declaration by the President with approval of National Assembly within 14 days and even approval is set 2/3 majority and it cannot last for more than 2 months. If there is need for extension, the 2nd extension requires approval by ¾ of the National Assembly. There is a mechanism to account for power by police service. To the contrary the Inspector General seeks to invoke power that does not exist to him because that power is unaccountable and it is a colonial power to humiliate dignity of black Kenyans and there was no mechanism of accountability. The curfew order for purposes of accountability are excluded from legal accountability; section 8 (2) of Public Order Act. Curfew orders during day time could not be extended more than twice. The curfew orders for night is a blank cheque. It is irrational and illegal and unprocedural as there is no mechanism for authority or accountability to anyone else contrary to the scheme under the constitution including the Supreme Court to declare the state of emergency. Section 7 of the Sixth Schedule of the Constitution – all laws to be interpreted with alterations necessary to bring it into conformity with the Constitution. The Public Order Act ought to be interpreted as to bring it in conformity with the Constitution. The powers purported to be exercised by Inspector General ought to be seen by the mirror of Article 58 of the Constitution. Article 244 requires conformity with fundamental human rights. The curfew and its extension does not respect the fundamental human rights and freedoms and there are no circumstances and exceptions as to when those rights must be respected no matter what. The application has demonstrated that Curfew orders are tainted with illegality and illegal, irrational full of procedural impropriety of lacking internal mechanism of accountability and unconstitutional. I refer to **Pastoli v. Kabale District Local Government Council and Ors.** [2008] 2 EA 300. An applicant ought to show that the decision is so irrational, so illegal and full of procedural impropriety that it must be vacated. The power exercised by the Inspector General is*

illegal, discriminatory as it affects only part of the country. Manderu County has had 2 successive attacks, and curfew only affects Lamu which is undefined.

Grounds of Objection

*I refer to grounds 4 and 5 which support that curfew is necessary under Article 24 of Constitution. There is no law in compliance with Article 24 of the Constitution. The Public Order Act is general and it gives power to officers who do not exist in the Constitution. It is invalid. The Respondents cannot assert no rights are breached and yet state that the orders sought do not meet a particular threshold. Grounds No. 8 and 9. The grounds are contradictory, not specific. The grounds do not raise anything that is legal in the context of the petitioners. The grounds of objection transfer the responsibility to show that curfew is justified to the petition. I refer to Article 24 – The grounds do not demonstrate that the curfew satisfies the requirements of Article 24. Limitation to a right must be demonstrated to be necessary. There is no suggestion that it is necessary in a free and democratic society. I refer to **Pistoli** decision. **Anerita Karimi Njeru v. AG** – is overtaken by Article 258 of the Constitution.*

9. In response, counsel for the Respondent, Ms. Lutta, made submissions as follows:

We oppose the conservatory order application as misconceived. I refer to Bill of Rights, Article 26 right to life; Every citizen has human dignity, Article 28; freedom and security Article 29. Article 24 of the Constitution allow the limitation of certain rights specifically that in issues of human dignity, the court has to consider, the relevant sections for such limitation. Article 24 (1) (a) – nature of right, importance of purposes of limitation and nature and extent of limitation and need to ensure that enjoyment of rights does not prejudice rights by others.

Locus standi. *Public interest cases the issue of locus is important. The petitioners and deponent of affidavit are not residents of the region. There are no formal complaints by the region's residents. From the supporting affidavit the deponent is not resident. The curfew was placed in the interest of certain people not Muhuri or the Government. The residents of Lamu are the ones who would know where the curfew pinches. The court ought to lean towards public interest. The application Notice of Motion of 3.10.2014 does not have grounds. Prayer (3) it seems that the petition was brought for the court to allow the Eidd ul Adhá celebrations to go. This has been overtaken by events. When the celebrations were going on the curfew was still in force but there was no complaint as to the interruption of the celebrities during the time. Supporting affidavit – Conservatory orders are being sought for the function of Idd ul Adh'a. Judicial notice of events of Mpeketoni from July 2014, and the change of circumstances since 20.7.2014. It is an matter of public notoriety. I refer to paragraph (3) of the supporting affidavit that there was violence in Mpeketoni. At paragraph (4) investigations and criminal charges with respect to Mpeketoni. The existence of criminal prosecution on Mpeketoni can be judicially noted. **Article 24** Purpose of limitation by curfew – curfew was placed because of the eruption of violence in the region. Public Order Act is the Act that deals with curfew, cap 56 Part IV section 8 – Commissioner of Police or Provincial Commissioner in the interests of public places curfew orders within a specific area or to the class of persons. Section 8 (1) of the Act was complied with. If the Act provides and Article 245 gives the Inspector General powers to preserve security there is no reason to challenge the curfew. Curfew need not only be placed where there is a state of emergency. Curfew order was signed by Inspector General. Petition does not attack the constitutionality of the Public Order Act. The petition only attacks the curfew. I apply the conformity rule as the same has not been challenged. **Grounds of Opposition:** I rely on the complaints of the grounds. Ground No. (2) **Anerita Karimi Njeru v. AG** is relevant because it lays down the principle of precise petition and clear demonstration of the breach or wrong suffered by the petitioner. The petition and supporting affidavit do not show the ills suffered by the petitioners. I submit that the petition and affidavit does not have any interests of residents of Lamu. I refer to **Giella v.***

Casman Brown. Conservatory orders should be considered on **Giella** principles, prima facie case, loss suffered and balance of convenience. **Prima facie** case – The petitioners do not have a case. Public interest case. Wrong suffered must come from the person directly offended. **Irreparability of damage** – No loss suffered. The petition was brought as a result of the threat to the Eidd ul Adh'a which still went on under the curfew. Balance of the convenience lies with the interests of the public being the residents of Lamu. There is greater threat in attempting to remove the curfew orders than having them in place. Just because there is calm does not mean that the threat is removed. Other security violations in Mandera occurred subsequently and solutions and circumstances are different. I therefore submit that the application is unsubstantiated and it has no merit, and pray that the same be dismissed.

10. In reply Mr. Ndubi argued –

Article 24 of the Constitution on limitations. No facts pleaded or demonstrated by respondent to show why it is necessary to limit the right in accordance with Article 24. The applicant does not have to demonstrate that the curfew is not necessary. Petitioners resident in Lamu" Petition paragraph 2 and 3 - Petitioners 3, 4 and 5 are residents of Lamu. Article 258 is curative on locus standi. Judicial Notice . It is true that there was a series of attacks at Mpketoni on 2 or three days in July 2014. There is no demonstration by evidence to show what has happened since then save that there is a curfew which is admittedly enforced by military and police. There is no response on the illegality of the curfew. There is no law or fact. The question of illegality of the Public Order Act has not been addressed save that the petition does not attack the constitutionality of the Act. I refer to paragraph 26 of the petition seek declaration that curfew is illegal, unconstitutional, null and void. The objection by respondent is unmerited. Curfew is a good thing" The court is guided by the fact that there is abuse of power, discretion and authority. A pretended power cannot be justified because of opinion that it is a good thing. A court of law must never sanction abuse of power arising from statute. The Constitution is clear as to its reform of security super-structure with Inspector General and Command of Police Service. It did away with the Police Commissioner and Provincial Commissioner. It cannot be assumed that the officers exist by another name. The powers exercised by the Police Commissioner and Provincial Commissioner have been limited by the new Constitution 2010. Suspension of fundamental rights and freedoms the holder of office must comply with Constitution. **Anerita Karimi Njeru v. AG** – Civil Appeal No. 79 of 2012, **Peter M. Kariuki v. AG** – Narrow approach by **Anerita Karimi Njeru** for purposive interpretation in **Harun Ndungu Wakaba v. AG**. The Court of Appeal ruled for broad construction of the Constitution. I also refer to **R. v. Commissioner General KRA ex p BOC (K) Ltd.** at p. 26-8. The Notice of Motion of 3.10.2014, has shown that there is prima facie case arguable case. We have demonstrated that irrespective of the balance of convenience, the petition raises important questions with high probability of success on breach of the Constitution and conservatory order to vacate the curfew order would be most appropriate. A balance of convenience must be demonstrated by fact not by judicial notice of facts not there or by presumptions as there is no affidavit in reply. Balance lies with upholding the Constitution of Kenya as Kenya must be treated as one country and not Lamu treated differently from other parts.

Issue for determination

11. I have considered the pleadings, affidavits, grounds of opposition and submissions by counsel on the matter and I find that the issue before the court is whether it will order the lifting of the curfew imposed by the Inspector general of Police as an interim relief pending the hearing and determination of the main Petition herein, which seeks principally declarations relating to unconstitutionality of the curfew and the lifting of the curfew, among other reliefs.

Determination

12. The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, as I understand them, are firstly, that the applicant must demonstrate an arguable case - sometimes called prima facie arguable case - the reference to *arguable case* distinguishing it from the *prima facie* test of the ***Giella v. Casman Brown*** (1973) EA 385 traditionally applied in regular civil cases; secondly, that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and, thirdly, that in constitutional cases, the public interest in the matter would be considered and generally upheld. See ***Kenya Transport Association Limited v. Cabinet Secretary for Transport and Infrastructure and Ors.***, Mombasa HC Petition No. 16 of 2014 where I considered some of the decisions on the matter as follows:

“The tests for the grant of conservatory orders has been variously expressed by different courts. See Mombasa High Court petition No. 7 of 2011, Muslim for Human Rights and 2 Ors v the Attorney General, per Ibrahim J (as he then was), Mombasa High Court Petition No. 47 of 2011 Harun Barky Yator v. Judicial Service Commission (JSC), per Okwengu J, (as she then was), Nairobi High Court Petition No. 557 of 2013, per Majanja J, and Mecha Magaga v Jackson Obiero Magaga (2014) eKLR, per Okong’o, J. All the courts require for the grant of conservatory orders a prima facie case or a prima facie arguable case as in Yator’s case; irretrievability or irreparability if conservatory order is not granted and the subject matter is irretrievably lost (akin to the irreparability by damages test) and a balancing of the interests of the applicant and the respondents. There arises confusion as to whether the test of standard of the applicant’s case is on the prima facie or arguable case. Once accept that the court cannot determine the disputed merits of the case at the interlocutory stage, the correct standard must be the standard of arguable case. See Mbutia v. Jimba Credit Corporation (1988) KLR 1. I also consider that Under Article 23(3) of the Constitution, the court may make a broad spectrum of orders as conservatory orders to preserve the status quo where circumstances warrant and that may include fashioning a remedy to fit the particular circumstances of the application before the court.”

Arguable case

13. The objection to locus standi of the petitioners on the grounds that they are not residents of Lamu does not, in my view, hold much weight in view of the expanded standing given by Articles 22 and 258 of the Constitution, and indeed the petition pleads that apart from 1st petitioner organization, the human petitioners are respectively a Member of the County Assembly, and residents and leaders, of Lamu ‘ordinarily resident thereat’. There was no affidavit to contradict the averment.

14. The object of the decision of ***Anerita Karimi Njeru v. AG*** on pleading infringement of the Constitution with particularity with respect to the rights and manner of infringement is a requirement of good pleading so that the respondent is able to know with precision the case that he has to meet and so that the court understands the exact nature of intervention necessary. It is the same requirements now codified under Rule 10 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 in the following terms:

10. (1) *An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.*

(2) *The petition shall disclose the following—*

(a) *the petitioner’s name and address;*

(b) ***the facts relied upon;***

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

On the other hand, Article 22(3) (b) of the Constitution in providing that “formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation” requires that the rules of procedure be such as to afford easy access to the Court. At this stage of conservatory order, however, I do not think it appropriate to make any final finding on the issue so as not to embarrass the trial court when it considers the merit of the Petition.

15. On the authority to impose a curfew, the Public Order Act, cap 56 Laws of Kenya, empowers of the Commissioner of Police and Provincial Commissioner to declare curfew as follows:

“8. (1) The Commissioner of Police or a Provincial Commissioner may, if he considers it necessary in the interests of public order so to do, by order (hereinafter referred to as a curfew order) direct that, within such area (being, in the case of a Provincial Commissioner, within his province) and during such hours as may be specified in the curfew order, every person, or, as the case may be, every member of any class of persons specified in the curfew order, shall, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew order, remain indoors in the premises at which he normally resides, or at such other premises as may be authorized by or under the curfew order.”

16. Following the promulgation of the Constitution of Kenya 2010 the position in the Police force of a Police Commissioner was abolished and replaced with the office of the Inspector general of Police as the head of the Force. Without expressing a finalized view of the matter the Constitution of Kenya 2010 at section 33 of the Transitional and Consequential Provisions, which has been held by the Court of Appeal in **Dennis Mugambi Mong’are v. AG & 3 Ors.**, (2014) eKLR to be an integral part, with of equal force as other provisions, of the Constitution, does appear to allow the Inspector General to exercise the powers of the Commissioner of Police to declare a curfew. Section 33 provides as follows:

“33. An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”

17. This is also consistent with the Article 259 constitutional principle of interpretation that the Constitution is always speaking to the effect that

259 (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—

(a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;

(b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

(c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and

(d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

18. It would appear that the Inspector General of Police is the legal successor of the office of Police Commissioner in terms of section 33 of the Sixth Schedule of the Constitution of Kenya 2010 and therefore has authority to exercise the powers of the Commissioner of Police in the Public Order Act in relation to imposition of curfew.

19. It does appear to me that, in view of the section 33 of the Sixth Schedule of the Constitution and on the principle of interpretation that the constitution is always speaking, the applicant does not have an arguable case with respect to the contention that the powers conferred upon the Police Commissioner under section 8 of the Public Order Act cannot be exercised by the successor in office Inspector General of Police.

20. With regard to the unconstitutionality of the curfew, Article 244 of the Constitution provides for the operations of Police Service consistently '**with constitutional standards of human rights and fundamental freedoms**' as follows:

244. The National Police Service shall—

(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote and practice transparency and accountability;

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society.

21. Section 7 of the Sixth Schedule of the Constitution provides that –

7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

The Constitution provides under Article 244 for the exercise of police function without laying out the tools that the police may use in their operations. The Public Order Act, the National Police Service Act and

other relevant Acts then make detailed provisions on the exercise of police function. I am not able to accept that in not setting out the power to order a curfew as with the state of emergency, the Constitution has outlawed the curfew provisions set out in the prior Public Order Act. The trial court will make determination thereon upon full submissions on the matter. With respect, I also consider that the provisions on curfew have a regime of accountability based on the requirements under Article 244 for compliance with the standards of human rights contained in the Bill of Rights with exception only as permitted under Article 24 of the Constitution.

22. There is no paradox in the constitutional provisions of Article 244 establishing and giving police power to the National Police Service at the same time requiring that the operations of the National Police Service be consistent with the Bill of Rights. It is the reality of modern interplay of the guarantees in the Bill of Rights against the interests of public security and safety through police function in an open democratic society based on respect for human rights and dignity of the person. The correlation of police power to the Bill of Rights means that the Constitution recognizes the need to provide for the security of the citizens and at the same time ensure enjoyment by rights and fundamental freedoms of the Bill of Rights; that the exercise or imposition of police powers should not unreasonably restrict the enjoyment of the rights and freedoms. The test for unreasonableness of police action is the criteria set out in Article 24 of the Constitution.

23. Article 24 of the Constitution is in the following terms:

“24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal

or other authority that the requirements of this Article have been satisfied.”

24. I think that the petitioners have an arguable case as to whether the imposition of the curfew, assuming the Inspector General has power to do so and the curfew is a lawful tool of police functionality, does unreasonably restrict the rights of the citizens resident in Lamu County contrary to Article 24 limitation threshold. The determination of that matter is province of the full trial, and the decisions on abuse of power and illegality, respectively, ***R. v Commissioner General, Kenya Revenue Authority ex parte BOC Kenya Limited*** Nairobi HC Misc. Appl. 340 of 2012 and ***Pastoli v. Kabale District Local Government Council and Ors.*** [2008] 2 EA 300 will fall for in depth consideration at the trial. Without expressing a concluded view, I consider that the Curfew is one of police devices for prevention and combat of crime, and the Police are in terms of Article 244 of the Constitution entitled to utilize it **subject to observation of the demands of human rights as prescribed under Article 244 (c) and to the extent permitted by the provisions on limitation to rights under Article 24 of the Bill of Rights.**

25. However, there can be little doubt that the provisions of the Public Order Act which allow the imposition of curfew are a limitation on the rights and fundamental freedoms such as, among others, movement, assembly, association and property in denying opportunity to earn living through night fishing and other socioeconomic enterprise as well as participate in local cultural and religious activities, and it may even amount to discrimination as alleged by the petitioners.

26. The disputes to be determined are whether the curfew limitation *‘is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’*; whether the limitation can be justified as seeking *‘to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;’* and *‘whether there are less restrictive means to achieve the purpose’* in accordance with Article 24 quoted above.

27. The Curfew Order of 20 July 2014 was issued cover the Lamu County for the period from 20th July 2014 to 20th August 2014 during the times from 6.30pm to 6.30am. The Order provided that ***“Every person residing within Lamu County is directed to remain indoors during the period the curfew order is in force except under and in accordance with the terms and conditions of a written permit granted by the Police County Commander.”*** The curfew order is still in force having subsequently been extended by the Inspector General of police from time to time.

28. Without challenging the constitutionality of the Public Order Act or sections thereof and seeking declaration of invalidity in that behalf accordance with Article 3 of the Constitution, the petitioners must be bound by the provisions of the Act as an imperative of the doctrine of the Rule of Law.

Irreparability of injury

29. The consideration of irreparability of the situation should the sought conservatory order be denied resolves itself in the negative when compared to the real irretrievability of any lives that may be lost due to the enabling environment that may be created by lifting of the curfew orders. Then again the people of Lamu cannot remain in perennial curfew to curb insecurity. The Respondents must in the very due course of time implement remedial preventive security arrangements that make it difficult, if not impossible, for attacks on the lives of the residents of the county in the massacre proportions witnessed in Mpeketoni earlier in the year leading to the imposition of the curfew.

Public Interest

30. The interests of public safety and security and protection to the right to life pleaded in the grounds of

opposition filed by the respondents must in the absence of a replying affidavit filed on behalf of the respondent be taken to be the justification offered for the limitation of the rights of the residents of Lamu through the curfew. In seeking a balance of the rights of the petitioners as representing the residents of Lamu County and the public interest to the protection of the lives and property of others, it is clearly a case of upholding the Bill of Rights for all the parties involved, subject only to the limitations recognized by the Constitution itself.

31. In upholding the premium thereby placed on the two interests of public safety and security and the enjoyment of the Bill of Rights, the Court must consider that the enjoyment of these rights can therefore be limited only as provided by the Constitution. While acknowledging that there is relation between the limitation by imposition of curfew and its purpose of preventing the mounting of possible terrorist attacks, the court considers that there may be less restrictive means to achieve the purpose.

32. Without dictating the less restrictive means, the court takes the view that reducing the timelines for the curfew and saving of occasions or celebrations such as the *Eidd ul Adh'a* which apparently prompted the Petition herein; making exceptions with regard to days, times and areas or regions of the imposition of the curfew, and increasing complementary police surveillance, escort or monitoring and community policing strategies may properly amount for less restrictive means in terms of reduction of the scope, period, nature and extent of the restriction and the geographical region of the curfew limits. The object should be to ensure the highest level of enjoyment of rights and freedoms for all while addressing the public safety and security concerns engendered by the situation in the area.

Orders

33. In this regard, and to facilitate the parties' reconsideration of less restrictive means of achieving the public security purposes sought to be addressed by the county-wide 12-hour night curfew, including the ones suggested by the court herein-above, the Court directs the respondent in consultation with the petitioners, within 14 days from today, to meet and develop, and report to the court, a revised scheme of such measures as will, consistently with the Bill of Rights, meet the public safety and security needs for the affected region.

34. Should the respondents fail, within the **fourteen (14) days** allowed above, to devise, in consultation with the applicants and with approval of this court, a scheme of curfew administration that allows for reasonable protection and enjoyment of the Bill of Rights as commanded by Article 244 of the Constitution, the curfew order made by the Inspector General of Police on the 20th June 2014 and extended from time to time will be extinguished and be of no effect thenceforth. For purposes of compliance, this matter will be mentioned on the **6th January, 2015**.

35. Costs are in the discretion of the Court. At this interlocutory stage before the respective claims of the parties are finally determined, the court will order that costs be in the cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS DAY OF 23RD DECEMBER 2014.

MARY KASANGO

JUDGE

In the presence of: -

Mr. Wandugi holding brief Ndumbi for the Petitioners

Miss Kitty for the Respondents

Mr. Mbiu - Court Assistant.



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