



REPUBLIC OF KENYA



KENYA LAW
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**Oloo v County Government of Homa Bay & 2 others (Constitutional
Petition E003 of 2022) [2023] KEHC 2497 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CONSTITUTIONAL PETITION E003 OF 2022**

KW KIARIE, J

MARCH 28, 2023

BETWEEN

EVANS OTIENO OLOO PETITIONER

AND

THE COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT

THE HOMA BAY COUNTY SECRETARY 2ND RESPONDENT

SAFARICOM LIMITED 3RD RESPONDENT

RULING

1. The respondents herein moved the court by way of Notice of Motion dated February 16, 2023 under Rules 3 (8) & 32 (3) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules*, 2013. They are seeking the following orders:
 - a. This application be certified urgent and be heard ex parte in the first instance.
 - b. There be stay of execution of the ruling and orders issued on February 9, 2023, in Homa Bay High Court petition No. E003 of 2023, between the applicant's and the respondent, pending the hearing and eventual determination of this application inter partes.
 - c. The status quo ante the orders arising from the ruling dated February 9, 2023 at the county Government of Homa Bay on issues county Revenue collection should be maintained to last the determination of the main petition and or the intended appeal.
 - d. There be stay of execution of the ruling and orders issued on February 9, 2023, in Homa Bay High court Petition No.E003 of 2023 between the applicants and the respondent, pending the hearing and eventual determination of an intended appeal to the court of appeal, against the whole of the said decision.



- e. Such further and other directions as the court shall deem fit and just to grant be issued so as to ensure sustainable operations at the County Government of Homa Bay and to preserve the substratum of the intended appeal.
 - f. Costs of the application be provided for.
2. The application was premised on the following grounds:
- a. This court delivered on February 9, 2023 and resultant orders were extracted and issued on February 13, 2023. The same have since then been circulated everywhere in the County of Homa Bay and even in the internet and social media by the Petitioner.
 - b. The effect of the said orders is to stop forthwith collection of County revenues, provided for and as enabled by the constitution and statute law, such as rates, fees, levies, outdoor advertising fees, market dues, toll fees etc.
 - c. The county had introduced a cashless payment system directly to the County Revenue Fund Account using Mpesa and bank deposits only and has no other avenue of collecting county revenue, which is a constitutional and statutory duty and obligation.
 - d. The court it would appear issued the orders, many of which had been sought to last only until the hearing of the motion, on the singular issue that the petition and the motion raised public issues, which the court did not elaborate on.
 - e. Injunctions, in the context of public interest litigation are only issued in the interest of justice and to protect the public interest, a fact which the court failed to consider, as no public interest is served in stopping a county government from collecting county revenue.
 - f. Collecting of revenue authorized by the constitution and statute law, through a national payment system like Mpesa, which directly credits the county Revenue fund Account is neither unconstitutional and or illegal.
 - g. The court therefore really needs to reconsider the public interest in the sustenance of the orders it issued, which clearly are not deserved as no sufficient basis was laid to prove the allegations in the petition and motion.
 - h. The applicants have lodged a Notice of Appeal against the ruling and order and the intended appeal, has high chances of success, is definitely arguable and shall be rendered nugatory unless stay of execution as sought are granted.
 - i. The public interest dictates that the County Government of Homa Bay be allowed to continue collecting revenue, levies, fees and other charges in respect of which they render lawful services in line with the constitutional statutory and regulatory mandates, which are likely to be impacted heavily.
 - j. The court has issued orders dated February 9, 2023, restraining the County Government of Homa Bay from collecting or otherwise demanding for any revenues, fees, levies and lawful changes from any person or businesses within Homa Bay County pending the hearing and determination of Homa Bay High Court Petition No. E.003 OF 2022 now pending before court, and which orders were not even sought in the motion.
 - k. The County Government of Homa Bay and all its entities, and organs, many created and established by statutes, are aggrieved and dissatisfied with the entire decision of the court, made interlocutory motion and intends to appeal to this court of appeal. A Notice of Appeal in



terms of Rule 77 of the [Court of Appeal Rules, 2022](#), evidencing intention to appeal has been logged on behalf of the applicants and served as prescribed on the respondent.

- l. The County Government of Homa Bay, like that of the 46 counties in Kenya, is established under article 176(1) of the [Constitution](#) which, pursuant to the provisions of article 86(1) of the [Constitution](#), is required to perform the functions set out in the Fourth Schedule to the Constitution.
- m. As relevant and of particular importance in relation to the circumstances in this matter, is part 2(3) of the Fourth Schedule to the [Constitution](#) which lists the functions and powers of the county, is the power to collect county revenues as authorized by the Constitution and applicable states, and such statutes through which the county collects revenue, are many and varied.
- n. Section 5 of the [County Government Act](#), provides that the County Government shall be responsible for the functions provided for in article 186 and assigned in the Fourth schedule of the [Constitution](#) and that it is these provisions of the law that informs the County Government's move to include the charges or fees which forms part of the revenue.
- o. Collection of revenue therefore is a function which is undertaken by counties pursuant to express provisions of article 176(1), 186(1), part 2(3) of the Fourth Schedule of the [Constitution](#), as well as section 5 of the [County Government Act](#), and various other statutes it is the sole mandate of the County Government to levy charges or fees relating revenue streams in respect of activities falling within its area of jurisdiction.
- p. The trial court has issued final orders including a mandatory order of injunction, in nature compelling the County Government of Homa Bay and the County Secretary, Homa Bay county, to audit and publicly declare all amounts, allegedly illegally collected/received via an alleged 3rd respondent's Pay Bill within 14 days, and for immediate refund of these to the taxpayers within Homa Bay county who had made payments through the same system.
- q. The County Secretary for example, against whom the order has been made does not handle county revenue at all. County revenue is handled strictly as provided for under the constitution and the [Public Finance Management Act](#) by the county treasury, established under section 103 and headed by the county Executive committee member responsible for finance as spelt out in Part IV of the act.
- r. All the county revenues, fees levies and other charges so far collected have been dealt with and or spent in accordance with the constitution under article 207 and statute law, and with the concurrence of the controller of budget and are not available to be refunded as directed, a factor and circumstance which the court failed to take into account.
- s. There is no allegation and or any evidence before court that county revenue is not being collected and banked into the county revenue fund, and through the banking arrangements allowed by law under section 119 of the Act.
- t. The orders now sought to be stayed have taken away the oversight role of Homa Bay county assembly in the management of Public finances at the County.
- u. The Mpesa Pay bills in question belong to the County Government of Homa Bay and not to Safaricom limited, the 3rd respondent, the 3rd respondent in the petition before the trial court as alleged and it is common ground that Safaricom limited provides Mpesa cashless system



throughout Kenya and is licensed to undertake national payments system in Kenya and does so for many public and private institutions, including the Judiciary.

- v. Why a court of law would restrain a County Government from using Mpesa payment system to collect fees, revenues charges etc. is a decision which stands unexplained and will require further investigations.
- w. Consequent upon the said orders, now sought to be stayed, the collection of revenue, levies fees and other charges at the County Government of Homa Bay have ground to halt. The orders in place are likely to paralyze operations at the county of Homa Bay.
- x. The County Government of Homa Bay depend on locally generated revenue and revenue streams to add to the other allocations and without collections, it will not be able to meet both its development and recurrent expenditures most of which are made on the projections and depend on the collected revenues.
- y. Most revenue streams fall due and are collectable at the beginning of the year, mostly during the 1st quarter, beginning 1st January and ends on 31st January, a period when courtesy of these orders, the county government of Homa Bay is likely not to collect any revenues at all.
- z. The county secretary of Homa Bay for instance does not have powers and duties over county government finances and does not exercise any functions at the county treasury. The order it would appear are highly prejudicial and have been issued against the wrong county government entities.
- aa. The impact of these orders is that if they are not stayed pending the hearing and determination of the intended appeal, the County Government of Homa Bay are bound to suffer great irreparable harm in conducting their day to day business within the county.
- ab. Public interest will definitely suffer losses which shall be irreversible, and the respondent who had not even demonstrated that he is a businessman in Homa Bay and or a tax payer in that regard, shall not be able to make good that loss.
- ac. No undertaking in damages have been issued by the respondent as prescribed, and the substratum of the intended appeal, which is the constitutional and statutory mandate of the County Government of Homa Bay and its entities to collect revenues, levies, fees and other charges shall be lost.
- ad. It is in the interest of the public that the same be certified extremely urgent and heard at the earliest opportunity to avert a great injustice from occasioning upon the 1st and 2nd applicants and its residents.
- ae. The orders issued by the judge took effect immediately which is detrimental to the interests of the County Government of Homa Bay, its entities and its residents.
- af. The respondent will not suffer prejudice if the orders of stay of execution as sought are granted and it is inters of justice that this stay is allowed. The application has been made promptly and without delay.
- ag. The County Government of Homa Bay, its organs and entities does not have any other mode of collecting revenues, fees, levies and other charges and no such alternative methods were cited and or suggested to the court by the respondent. The applicants have an undoubted right of appeal which they should be allowed to exercise unhindered.



3. The petitioner opposed the application on the following grounds:
- a. That the applications deficient for not highlighting pertinent grounds necessary for stay pending appeal stipulated expressly in order 42 rule 6(2) of Civil Procedure Rules 2010.
 - b. That the applicants are in contempt of court and have lost the right of audience until they purge the contempt proceeding filed against them as was decided in the case of Fred Matiang'i the Cabinet Secretary of the Ministry of Interior and 4 others vs Miguna Miguna, Civil Application Number 1 of 2017 and Victoria K Wanyike T/A Lugayen v Victoria Commercial Bank Limited (200).
 - c. That the application is an afterthought brought late in the day after the court had issued directions for expedient settlement of the matter and even set directions with regard to written submissions which he petitioner has complied with as directed by court in which case, the petitioner ought to file his submissions or the matter to be settled once and for all.
 - d. That purporting to commence an appeal on an application whose petition has been marked and time fixed for expedient disposal is only meant to wood wink [sic] the court and waste the court's time with a view of continuing with an action which has been set for review.
 - e. That the applicant has obviously misinterpreted the court order: the court did not stop an taxation but stopped a new mode of taxation through a pay bill which was done unilaterally without due process: it is proper to emphasize that there was a manner of tax collection prior to the impugned procedures subject to this petition which applicants can use in the interim pending hearing of this petition and or their intended appeal.
 - f. That there is not prejudice that the applicant will suffer because the court has not stopped tax collection but manner and reviewed illegal quantum of collection.
 - g. That the petitioners rights in articles 10 and 232 of the Constitution of Kenya is likely to be infringed and as such these hard economic times, they are likely to be subjected to illegal taxation whose damages could not be compensated in damages.
 - h. That the petition and the response will disclose that prior to implementing the impugned tax mode, the county government of Homa Bay had issued a 15-day tax holiday for the people of Homa Bay through notice and cannot allege anarchy pending hearing of the petition and or the intended appeal if they at all have intention to expedite proceedings.
 - i. That the applicants should instead file their submissions as directed by court and seek for the earliest date of disposing the matter instead of beating around the bush.
 - j. That the court had granted the stay based on assessment of the principle in Giella v Cassman Brown and asking the court to stay the same based on the same principle in the same case if inviting the court to sit on its own appeal.
 - k. That the applicants have not even responded to the petition, filed notice of appeal and or wrote to request proceedings at the time of making application which is a demonstration that they intend to waste time and are proceeding in bad faith.
 - l. That the belated notice of appeal which had been filed way before the request 14 days without an extension of leave to appeal out of time is defective and cannot ground an appeal in law.
 - m. That the application should therefore be dismissed with costs.



4. The respondents herein are seeking for a stay of execution of orders that flowed from the ruling of this court dated February 9, 2023. It is trite law that an appeal does not operate as a stay for execution. Order 42 Rule 6 of the Civil Procedure Rules states as follows:

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

5. In the case of RWW v EKW [2019] eKLR, the court while addressing its mind to the purpose of a stay of execution order pending appeal, stated:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

6. The first issue to address is whether there is an appeal against the impugned order. An appeal is initiated by a Notice of Appeal. The respondents have therefore demonstrated that they have lodged an appeal.

7. The second issue is whether they have satisfied the court that they have met conditions for issuance of the stay orders. The respondents have not demonstrated what loss they will suffer if the status quo prior to the challenged mode of revenue collection is not disturbed until this petition is heard and determined.

8. A citizen has claimed that the Constitution has been violated. It is only fair that he be given a hearing to determine whether what he asserts is true or not.

9. I therefore find that the application lacks merit. In order to expedite this matter, I will direct that pending the determination of the appeal, no other application will be entertained except with the leave of court. Costs shall abide with the outcome of the petition.

Delivered and signed at Homa Bay this 28th day of March, 2023

KIARIE WAWERU KIARIE

JUDGE.

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