



Hussein v Mander County Government & 3 others; Controller of Budget & 2 others (Interested Parties) (Petition E005 of 2022) [2022] KEHC 12088 (KLR) (18 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA**

PETITION E005 OF 2022

A ALI-ARONI, J

AUGUST 18, 2022

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT
OF THE RIGHTS AND FREEDOMS IN ARTICLES 2,10, 19, 22, 23, 174,
185, 186, 187, 201, AND 207 OF THE CONSTITUTION OF KENYA, 2010;**

AND

**IN THE MATTER OF: IN THE MATTER OF ACCOUNTABLE AND
PRUDENT USE OF PUBLIC FINANCES BY COUNTY GOVERNMENTS**

AND

**IN THE MATTER OF: IN THE MATTER OF THE REQUISITION OF MANDERA
COUNTY GOVERNMENT DATED 20TH JUNE 2022 AND SUBSEQUENT
LETTER OF THE CONTROLLER OF BUDGET DATED 27TH JUNE 2022**

AND

IN THE MATTER OF: PUBLIC FINANCE MANAGEMENT ACT, 2012

BETWEEN

ADAN HASSAN HUSSEIN PETITIONER

AND

MANDERA COUNTY GOVERNMENT 1ST RESPONDENT

COUNTRY ASSEMBLY OF MANDERA 2ND RESPONDENT

COUNTY GOVERNOR OF MANDERA 3RD RESPONDENT

COUNTY EXECUTIVE COMMITTEE FOR FINANCE MANDERA

COUNTY 4TH RESPONDENT

AND

CONTROLLER OF BUDGET INTERESTED PARTY



RULING

1. The petitioner Adan Hassan Hussein, a resident of Mandera County who described himself as an ardent crusader of constitutionalism and a champion of prudential and transparent use of public funds petitioned this court on his behalf, on behalf of the residents of Mandera and further says on behalf of Kenyans at large, ostensibly to arrest the release to the 1st respondent from the National Treasury, a sum of Kshs 1,487,782,477 which was approved by the 1st interested party in a letter dated June 27, 2022.
2. The petitioner further states that he had established that the respondents sought for the funds in order to finance dubious expenditure, and the said amount forms more than ten percent (10%) of the County budgetary allocation.
3. To this end he sued Mandera County Government as the 1st respondent, County Assembly of Mandera as the 2nd respondent. The third respondent, the County Governor of Mandera (though the heading reads Wajir), and the County Executive Committee for Finance as the 4th respondent. He enjoined the Controller of Budget, the Auditor General and the Ethics and Anti-Corruption Commission as the 1st, 2nd and 3rd interested parties.
4. In the amended petition dated July 1, 2022 the petitioner applicant sought for;
 - a. A declaration to issue to the effect that the expenditure linked to the requisition of June 20, 2022 is illegal for want of public participation.
 - b. An order do issue compelling the Auditor General to conduct a thorough forensic audit on the financial accounts of the respondents with a specific focus on the contents in the requisition of the June 20, 2022 and the subsequent expenditure if any.
 - c. Pending the said audit, he respondents be restrained from utilizing funds released pursuant to the letter dated June 27, 2022.
 - d. Costs of the suit.
5. Together with the petition was filed an application seeking for the following orders;
 - a. Has been taken over by events.
 - b. Pending hearing and determination of the application and the petition the court grants an order staying implementation of the letter of June 27, 2022, in any manner or form, or otherwise stop the transfer of Kshs 1,487,782,477 to the County treasury of Mandera on account of the County Development Exchequer Account, to the County Development Account for the services of the year ending June 30, 2022.
 - c. In the alternative to the above prayer and in case of the said funds have been disbursed to the 1st, 2nd and 3rd respondents pending the hearing and determination of the motion and petition, this honourable court be pleased to grant an order staying any utilization of funds disbursed from the National Treasury on the strength of the letter dated June 27, 2022.



- d. The Auditor General be directed to conduct a forensic audit of the financials of the 1st to 3rd respondents including but not limited to the contents relating to the requisition provided for in the letter of June 20, 2022 within three (3) months and the same be tabled in court.
 - e. The 1st and 4th respondents be ordered to make public and table before court with seven (7) days the contents of the letter of June 20, 2022.
6. The application was predicated on the grounds that in a letter dated June 27, 2022 addressed to the Chief Finance Officer, Mandera County, the Controller of Budget granted credit of Kshs 1,487,782,477 to the County Treasury of Mandera on account of the County Development Exchequer Account, to the County Development Account for Services for the year ending June 30, 2022. Further that in the financial year 2021/2022 the Controller of Budget did not monitor or evaluate the Mandera County and therefore it raised eye brows when the 1st interested party authorized the release of funds to the respondents and besides the said sum was authorized to be released a few days to the close of financial year and less than 2 months to the general elections, further the subject of the requisition was developed in an opaque manner without the input of stakeholders or subjecting the same to public participation, and it is based on unverifiable budget and expenditure.
 7. The application was supported by the replying affidavit, and further affidavit of the applicant Adan Hassan Hussein dated June 29, 2022 and July 1, 2022 where he has reiterated the grounds in his application. In addition, he stated that public interest would be greatly prejudiced should the amounts be credited when constitutional guarantees of transparency and accountability have been disregarded, the timing of the said disbursement in an opaque and clandestine manner is meant to push partisan political and selfish agenda of the officials of the 1st to 3rd respondent and likely to be used in political campaigns.
 8. On the other hand, the petition and the application were vehemently opposed by the 2nd, 3rd respondents and the 1st interested party. The 1st respondent, the 2nd and 3rd interested parties did not participate. They neither entered appearance nor filed any documents for or against the application.
 9. In its replying affidavit, sworn by Ahmed H Somow, the 2nd respondent's Clerk, he stated *inter alia*, that he believes the 1st interested party approved the crediting of the Exchequer Account of the 1st respondent in the cause of her day to day function; the Petition is based on mere apprehension, and unsubstantiated allegations; further there is an order staying previous orders of this court in Constitutional Petition No E002 of 2022; the application is frivolous and devoid of merit.
 10. The 3rd respondent filed grounds of opposition dated the July 6, 2022 objecting to the application and the petition on grounds that the financial year of a County Government comes to an end on the 30th of June every year, and the budget progress thereafter would begin in August of every year. Further article 196 of the Constitution, sections (3) (f) and 87 (b) of the County Governments Act 2012, and section 125 (2) of the Public Finance Management Act, 2012 provide for public participation during the County budget preparation process and in this instance there was adequate public participation in the budget process of the Mandera County budget for the financial year 2021/2022, and a County supplementary budget is based on the County annual budget.
 11. Further, the applicant failed to demonstrate that he attended the County Assembly or had petitioned through his Member of County Assembly where he raised his concerns; the Mandera County supplementary budget is subject of 2 court cases; that pursuant to article 252 (1) (a) the Controller of Budget Act has the powers to investigate and deal with complaints lodged pertaining to implementation of County budgets;



12. Further the requisition letter was administrative; the budget process started in 2020, and the applicant cannot stop the implementation of the last tranche of the funds allocated to the county.
13. In its grounds of opposition, the 1st interested party stated that the Constitution, the Controller of Budget Act and the Public Finance Management Act require that the Controller of Budget authorizes withdrawal from the County Revenue Fund, and the Controller only authorizes withdrawal if satisfied that the same is in compliance with the law. Further the Public Finance Management Act, 2012 provides for the budget process and the process for request for approval of withdrawal of funds in order to implement the budget and the two process are distinct and not interchangeable. Further the Act provide for distinct duties and roles for the County Treasury, Accounting Officer and the Controller of Budget.
14. Further the orders sought do not meet the threshold for issuance of injunctive and conservatory orders. Further the said orders are also directed to a party not enjoined in the proceedings; Central Bank of Kenya.
15. Having considered the pleadings and the submissions by counsel the issues for determination are;
 - i. Whether the application meets the necessary threshold for the issuance of a conservative order?
 - ii. Whether or not to stop the release of the funds &
 - iii. Whether or not to stop the usage of the funds if the same had been released.
16. In order to consider the above issues, it is necessary to appreciate that the budget process is a long and tedious process that begins a month after the closure of a previous financial year. The Constitution and the law guides the said process including the implementation of the same. The law envisages a participatory process, where the proposed budget is discussed and debated by concerned citizens of a particular area. The Law has also put in place organs and entities that oversee the implementation of the budget.
17. Under article 228 of the Constitution the Office of the Controller of Budget is created with the mandate of such an office bearer to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds in accordance with articles 204, 206 and 207 *ie* the equalization fund, consolidated and other public funds and revenue funds for County Government.
18. On its part the Pubic Finance Management Act, 2012 was enacted for purposes of providing

“effective management of public finances by the National and County Governments, oversight responsibility by Parliament and County Assemblies, the different responsibilities of Government entities and other bodies and for related purposes.”

Section 102 thereof sets out the responsibilities of the County Government as relates to public finance.

Section 103 establishes the County Treasury and section 104 sets the general responsibilities of the County which include the preparation of the budget, implementation and monitoring of the same.
19. Article 196 of the Constitution provides;
 1. A County Assembly shall;
 - a. Conduct its business in an open manner, and hold its sittings and those of its committees, in public; and



- b. Facilitate public participation and involvement in the legislative and other business of the assembly and its committees.
20. In line with the above provision of the *Constitution*, sections 3 (f) and 87 (b) of the *County Governments Act 2012* and section 125 (2) of the *Public Finance Management Act, 2012* provide for public participation in the process of budget preparation.
21. The court understands the applicant’s grievance to be that the public was not involved in the requisition of the funds subject matter; thus there is no information what the funds are to be used for, secondly the approval came a few days before end of the financial year and two (2) months to the election and this is suspect.
22. The law does not envisage or require public participation every time a County requisitions for funds. The participation of the public as envisaged by the law is at the time of preparation for the budget. Implementation, overseeing and monitoring is done by other entities. It will be impossible, unmanageable and expensive if citizens would have to be called upon at the implementation stage.
23. The suspicion by the applicant is not backed by any facts. The petition appears to be based on speculation to say the least. In any event by the time the application was heard the funds had been released from the national treasury and expenditure as confirmed by the 2nd and 3rd respondents ongoing.
24. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR the Supreme Court had this to say on the issuance of conservatory orders;
- (86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
25. In another case where the principles of granting a conservatory order was considered is the case of *Center for Rights Education and Awareness (CREAW) and 7 others v AG* [2011] eKLR where the court held;
- “It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition.... At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.”
26. As things stand in this matter for now, the applicant has simply displayed his suspicion, lack of background information which he could if he was diligent have obtained from the respondents and indeed as put by his opponents lack of appreciation of the budgeting process, implementation and oversight duties of relevant entities.



27. The applicant did not put before court a *prima facie* case, neither did he demonstrate violation of the Constitution simply put he did not meet the threshold necessary for issuance of the orders sought for. The application must fail with costs to the 2nd, 3rd respondents, and the 1st interested party.

DATED DELIVERED AND SIGNED AT GARISSA THIS 18TH DAY OF AUGUST, 2022.

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ALI-ARONI

JUDGE

