



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY

CONSTITUTIONAL PETITION NO. 10 OF 2020

1. ELVIS OGWENO

2. RASTAS WASONGA.....PETITIONERS

VERSUS

1. ELIZABETH AYOO SPEAKER, HOMA BAY COUNTY ASSEMBLY

2. THE LOANS MANAGEMENT COMMITTEE COUNTY ASSEMBLY

3. SIMON OMONDI OIDHO

THE AG. TOWN CLERK HOMA BAY COUNTY ASSEMBLY

4. HON. ATTORNEY GENERAL

5. EQUITY BANK KENYA LIMITED.....RESPONDENTS

RULING

1. The petitioners herein moved the court by way of Notice of Motion dated 26th August, 2020 under sections 1A & 3A of the Civil Procedure Act, CAP. 21 Laws of Kenya and under Order 40 Rules 1, 5 & 10 of the Civil Procedure Rules. They are seeking the following orders:

a. That this application be certified as urgent and service thereof be dispensed with at the first instance.[Spent]

b. That this honorable court be pleased to issue an order of temporary injunction and or other conservatory measure restraining the respondents by themselves, their servants or agents from drawing any money and or in any way interfering with mortgage funds in account number 0980xxxx at Equity Bank Homa Bay Branch pending the hearing and determination of this application.

c. That this honorable court be pleased to order that the 1st, 2nd and 3rd respondents shall not initiate, open and/or operate any dummy, parallel and or fictitious account and or accounts for the purpose of Homa Bay County Assembly Members Mortgage Fund and/or purportedly for the benefit of any and/or all members of the aforesaid County Assembly in the aforesaid 5th defendant's bank and/or any other banking and/or financial institution and/or their branches whatsoever pending the hearing and determination of this application.

d. That this honorable court be pleased to issue an order of temporary injunction and/or other conservatory measure restraining the respondents by themselves, their servants or agents from drawing money and or in any way interfering with mortgage funds in account number 0980xxxx at Equity Bank Homa Bay branch pending the hearing and determination of this petition.

e. That costs of and incidental to this application be provided for.

2. The application was premised on the following grounds:

a. That the respondents illegally withdrew kshs.16,000,000 from account number 0980xxxx at Equity Bank, Homa Bay Branch on 14th August, 2020.

b. That the applicant is reliably informed that the respondents are planning to illegally withdraw further funds from the aforesaid account amounting to Kshs.20,000,000 only before the expiry of August 2020.

c. That the 1st, 2nd and 3rd respondents intended actions are illegal and contrary to the Public Finance management Act and the relevant Rules and Regulations of Homa Bay County Assembly.

d. That if not stopped by an order of temporary injunction, the respondent may deplete the revolving mortgage funds herein thus jeopardizing the future and availability of the same.

e. That the petitioners have a public interest in ensuring that funds devolved to the Homa Bay County is prudently utilized.

f. That it is in the interest of justice that public funds be protected from pilferage.

g. Further grounds to be adduced at the hearing hereof.

3. The 1st, 2nd and 3rd respondents opposed the petition on the following grounds:

a. That the Petitioners' application dated 27th August 2020 is devoid of any merit and a flagrant abuse of the court process.

b. That the application does not disclose with specificity the constitutional violation by the 1st, 2nd and 3rd Respondents upon the Petitioners.

c. That given the issues raised, the Petitioners/Applicants ought to have approached the court by way of judicial review and not through a constitutional petition.

d. That the 1st Respondent neither has any roles in the management of the loans committee nor is she the accounting officer of the Homa bay County both under the Mortgage and Car Loans Regulations 2016 and the County Assembly Services Act, 2017. She is therefore an improper party to this suit thus ought to be struck out.

e. That the purported Petition upon which this application is premised has not been annexed to the application thus prejudicing the 1st, 2nd and 3rd Respondents as to the contents of the same.

f. That the document marked A-1 annexed to the Application ought to be expunged from the records because the Petitioners have failed to disclose the source of the same.

g. That the document marked A-2 has no bearing on the issues raised in the application and ought to be struck too thus leaving the application and/or Petition with nothing tangible to demonstrate the Petitioner's position.

h. That the Honorable court should not admit the authenticity and/or legitimacy of the documents annexed unless the Petitioners reveal the source of the same because there is a real likelihood that they may have been illegally obtained, are not genuine or have been altered in free hand for the Petitioners benefit.

i. That in any case, there is nothing that connects the 1st, 2nd and 3rd Respondents to the document marked A-1 as it does not contain the name of the person who prepared it, verified it and approved it. It further contains no bank stamp or even the bank signatory. It can easily pass as a computer generated document.

j. That the Evidence Act Cap 80 Laws of Kenya stipulates that only the maker of a document can adduce it not just anybody who may have obtained a document through the complicity of public servants acting in breach of the Public Officers Ethics Act.

k. That since the Petitioners are not the makers of the documents annexed, they cannot be cross-examined on them as they have no competence to answer questions arising therefrom.

l. That the Constitution protects the privacy rights of the persons named in the document marked A-1 and their financial information ought not to be unnecessarily revealed without the due process of law.

m. That the Petitioners have not disclosed the nature of injury caused to them as they are neither members of the County Assembly nor staff of the assembly to whom mortgage and car loans ought to benefit.

n. That based on the evidence and material placed before the court, the Petitioners/applicants have not satisfied the conditions upon which a temporary injunction can be granted. They have not demonstrated the irreparable injury that they are likely to suffer if the temporary injunction is not granted.

o. That the Petitioners/Applicants may have a genuine desire to hold the 1st, 2nd and 3rd Respondents accountable in the discharge of their duties but they seemed to have acted in haste without getting all their facts right.

p. That the person named as Simon Omondi Oidho purported to be, the Ag. Town Clerk has no bearing on this suit and is a total

stranger to the proceedings.

q. That the Petition and the application is incurably defective, helpless, incompetent and only amenable for dismissal *in limine*.

4. The 4th respondent did not file any response while the 5th respondent contended that the Bank was only a custodian of the funds deposited and had no financial interest in the account the subject of this application.

5. There are clear regulations that govern public institutions management and utilization of funds. The petitioners herein have claimed that funds have been misused and or misapplied. Without specifically showing which regulations have been breached, it would not be in the interest of good governance for the court to issue the orders sought.

6. Secondly, if the petitioners are privy to information that public funds have been misused or misapplied, the most prudent thing to do is to report to the relevant investigative authority for action. They have clearly contended that criminal activities were committed. The court may not therefore be the right forum for investigations of the said allegations.

7. I therefore find that the petition does not merit the orders sought. The same is dismissed and each party to bear own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE.