



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO. 9 OF 2019

AINUSHAMSI CONSTRUCTION &

TRANSPORT LTD & 62 OTHERS.....PETITIONERS/APPLICANTS

VERSUS

THE COUNTY GOVERNMENT OF GARISSA.....1ST RESPONDENT

THE GOVERNOR COUNTY GOVT GARISSA.....2ND RESPONDENT

THE CECM FOR FINANCE.....3RD RESPONDENT

AND

THE CONTROLLER OF BUDGET.....INTERESTED PARTY

RULING

Introduction

1. The petitioners herein, who describe themselves as registered Limited liabilities Companies registered as such under Companies Act and with offices and place of business filed a petition before this Court and simultaneously also filed an application by way of Notice of Motion of the same date. The Petitioner in its Petition contends that they are contractors based in Garissa and that through various tenders in which the Respondents invited bidders, they were awarded various categories of tenders which they have executed to completion, certificates to that effect issued and part payments in some made by the Respondents.

2. The Petitioners allege that the President vide a directive asked the County Governments to clear all pending bills before contracting any other contract and the controller of budget pursuant to that directive has advanced and/or released to the Respondents Kenya Shillings One Billion Nine Hundred Twenty Seven Million, One Hundred Thirty-Seven Thousand and Ninety-Two (Kshs. 1,927,137,092/=) to pay pending bills to contractors.

3. It is the petitioner's contention that the Respondents intend and have started utilizing the above money to pay new contractors, which money was meant to pay eligible bills, thus leaving them out an action they allege infringes their constitutional rights.

4. The Petitioner sought various prayers in its Petition, namely, a mandatory order compelling the Respondents to release the balance of the sum of the petitioners eligible bills in the respective tenders of the petitioners, a conservatory order preventing the Respondent from utilizing the above funds for any other purpose other than paying pending contractors bills, an order of mandamus compelling the 1st Respondent to commence process of paying the contractors to prevent further economic loss, compensation for costs in this petition and a declaration that the Respondents have violated their economic rights.

5. In addition, the Petitioners are seeking the following prayers in its application:

- 1) THAT an order do issue compelling the Respondents to release the balance of petitioners eligible pending bills in the respective tenders of the petitioners pending hearing and determination of this application.**
- 2) THAT an order do issue compelling the Respondents to release the balance of petitioners eligible pending bills in the respective tenders of the petitioners pending hearing and determination of this Petition**

3) THAT a conservatory order be issued directing the respondents to prevent them from using Kenya Shillings One Billion Nine Hundred Twenty Seven Million, One Hundred Thirty-Seven Thousand and Ninety-Two (Kshs 1,927,137,092/=) released by the treasury for any other purpose other than for payment of the eligible pending bills.

4) THAT costs of this application be in the cause.

6. The Respondents in response to the application and the petition filed both grounds of opposition and a replying affidavit dated 14th August, 2019 and filed on 19th August, 2019 and a further Replying affidavit dated 2nd September, 2019 and filed on 3rd September, 2019. The Replying affidavit is sworn by Ismael Aden Dabar the 1st Respondent County Attorney.

7. The Interested Party filed their grounds of opposition dated 10th September, 2019 and filed on 12th September, 2019 in response to the Application.

8. The Applicants further filed a replying affidavit in response to the Respondents responses. The affidavit is dated 18th September, 2019 and filed on 26th September, 2019 and sworn by one Bare Mohamud Abdi a director of one of the Plaintiff companies.

9. Further the Respondents filed an application dated 14th August, 2019 seeking to have this court vacate the interim conservatory orders issued herein.

10. On 26 /9/2019 when the matter came up for directions, the parties were directed to file their respective submissions, and both the applicants and the Respondents filed their respective written submissions. The matter came for hearing on 11/11/2019 when the parties highlighted their submission.

Applicants' Case

11. The summary of the applicants case is that they allege that they are members of Garissa County Contractors and Suppliers Welfare Association, which is a welfare group who were awarded various tenders by the Respondents , and that they are yet to be paid for their services and are seeking the court to compel the Respondents to pay them their outstanding bills from the above amount of Kenya Shillings One Billion Nine Hundred Twenty Seven Million, One Hundred Thirty-Seven Thousand and Ninety-Two (Kshs. 1,927,137,092/=) released by the treasury specifically for that purpose, and are seeking this court to issue a conservatory order preventing the Respondents from using the above moneys for any other purpose other than paying pending eligible bills.

12. Vide their written submissions dated 7th October, 2019 and filed on 9th October, 2019 they addressed three issues in support of their application. The first issue is on whether the court ought to issue the orders compelling the respondents to release the balance of petitioners' eligible pending bills in their respective tenders as prayed. They submitted that the Constitution envisages the continuity of Government Contracts in counties and that when there is a change of regime, the contracts and systems in place continue and therefore the County ought to meet its obligations. and therefore, the current county government ought to pay outstanding bills accrued by the other regime. Additionally, they submitted that their bills have been audited and confirmed as outstanding as evidenced by the Auditor General Report showing pending bills standing at 509 as at 15th February, 2019 and therefore the respondents claim that some contracts are ghost is questionable and unverified.

13. Further, they submitted that the Respondents action of paying the new contractors and leaving them out is an infringement of their Constitutional rights, and more specifically the infringement of the following provisions of the Constitution, Articles 43, 21, 27(1), 174(e). Furthermore, they argue that the Court has the jurisdiction to hear the matter and can consolidate the two suits. In this regard they rely in the case of ***Samuel Kamau Macharia vs Kenya Commercial Bank Limited and 2 Others (2012) eKLR.***

14. The second issue addressed by the applicants is whether the court ought to issue conservatory orders preventing the Respondents from using the above funds of Kshs. 1,927,137,092/= for any other purpose other than the settlement of pending bills. In this regard they submitted that this court has the jurisdiction pursuant to Article 22(1) and 23(3) of the Constitution to issue the reliefs sought herein. And that the Constitution under Article 27(1) and (4) prohibits any form of discrimination.

15. It is their submissions that they have met the grounds for issuance of the sought conservatory orders herein as established, being that they have established a prima facie case, demonstrated that they will suffer irreparable loss, that Constitutional values are in favour of the same and public interest lie in their favour .In this they rely in the authorities of ***Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others (Supra), Center for Human Rights and Democracy & Others vs The Judges and Magistrates Vetting Board & 2 Others Eldoret No. 11 of 2012, Kenya Small Scale Farmers Forum vs Cabinet Secretary Ministry of Education High Court Petition No. 399 of 2015 and Suleiman v Amboseli Resort Limited (2004) 2KLR 589.***

16. The final issue addressed by the Applicants is on costs, and in this respect, they submitted that they expended time and money to prosecute this application and therefore they ought to be reimbursed costs. In this they rely in the case of ***Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (2014) eKLR.***

Respondents' Case

17. The respondents on their part filed an application on 14th August, 2019 and are seeking to have this court set aside the interim orders issued herein and through their above responses and submissions have vehemently opposed the applicant's application herein.

18. Through their filed written submissions dated 2nd September, 2019 and filed on 3rd September, 2019 the Respondents addressed seven

issues. The first issue is that the application for conservatory orders by the applicants is final in nature. They submitted that the orders sought in the application are determinative of the petition, and therefore capable of rendering the petition nugatory. In this regard they relied in the cases of *Vivo Energy Kenya Limited vs Maloba Petrol Station Limited and 3 Others (2015) eKLR* and *Olive Mhihak Mugenda & Another vs Okiya Omtata Okoiti & 4 Others (2016) eKLR*.

19. Secondly, the Respondent submitted that the applicants' application does not meet the threshold for grant of conservatory orders, they argued that they have not demonstrated that they would suffer irreparable loss which cannot be compensated by damages, and that balance of convenience lies in favour of dismissal as allowing the same would be contrary to public interest as it will cripple the 1st respondents and its ability to render services to the people of Garissa County. In this they relied in the case of *Mwangi WA Iria & 2 Others vs Speaker Muranga County Assembly & 3 others (2015) eKLR*.

20. Thirdly, the Respondents argued that this court lacks the jurisdiction to issue the sought orders and determine the instant petition. In this regard they submitted that the applicant's application and claim in the petition are based in contractual disputes, which forum ought to be a civil or commercial court and not a Constitutional court. And that the said dispute is a private law matter arguing that no Constitutional arises as no right or fundamental freedom has been violated by the Respondents. Additionally, they argued that the instant litigation by the applicants is intended to avoid structures of proving individuals claims by the respective contractors which contracts are paper projects which are yet to be executed. In this regard they rely in cases of *COD & Another vs Nairobi City Water & Sewerage Co. Ltd (2015) eKLR* and *Godfrey Paul Okutoyi vs Habil Olaka & Another (2018) eKLR*.

21. The fourth issue addressed by the Respondents is that the petitioners have not pleaded with precision the Constitutional provisions violated and the manner of violation as held in *Anarita Karimi Njeru vs Republic (No.1)(1979) KLR 154*. They argue that the petitioners' petition has no semblance of a constitutional petition pleading or breach of known constitutional provisions, violation of and or infringement of any right and fundamental freedoms of the petitioners and therefore discloses no reasonable cause of action against the respondents warranting this court intervention.

22. The fifth issue argued by the Respondents is that the instant application and petition is an abuse of the court process. In this regard they submitted that the instant matter is subjudice as the petitioners had filed High Court Civil Suit No. 7 of 2019 before subsequently and unprocedurally abandoning the same, without formal withdrawal and that the instant petition is an attempt to subvert the overriding objective of the court and the same is forum shopping. They rely in the case of *Governors Baloon Safaris Limited vs Attorney General & 2 Others (2014) eKLR*.

23. The sixth issue submitted on by the respondent is that the application and the petition herein are premature, misguided misconceived, misconstrued and misapprehended. In this regard they submitted that the controller of budget directed the 1st Respondent to set up County Pending Bills Committee prior to payment process, which committee was appointed by the 3rd Respondent and thereafter gazetted on the 9th August, 2019 and that pending the conclusion of this process no payment on the pending bills can be paid by the Respondents. They submitted that it is not the mandate of this court to order payment of pending bills without prior verification and the same would be an affront to fiscal integrity under the Public Finance Management Act, 2012. Additionally, they argued that the payment of the applicants pending bills is subject to the budgeting process envisaged under the Public Finance Management Act, which also must include public participation and that failure to adhere to the processes carries with it criminal sanction .

24. The final issue argued by the Respondent is the submission that the instant petition is an invitation to this court to violate the doctrine of separation of powers. it is their argument that the petitioners petition is made out of lack of understanding of the various processes and roles played by different parties, and instead the applicants are seeking this court to exercise the powers of the county assembly and the County pending bills committee, which role the court does not have and ought not arrogate itself and urged the court to exercise restraint. In this they rely in the Court of Appeal case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR*.

25. In sum the respondents urged the court to dismiss the instant application and petition with costs for not disclosing a reasonable cause of action, being frivolous, scandalous, vexatious and an abuse of the court process and to vacate the Conservatory orders issued on 7th August, 2019.

Issues and Determination

26. I have considered both parties pleadings and submissions, and the main issue for determination at this stage of the proceedings is as to whether this court ought to issue the conservatory orders sought by the applicants.

27. Prayer 2 sought by the applicants herein has the ability to render this Petition determined as argued by the Respondent, and therefore this court is reluctant to consider and issue the same at this stage of the proceedings. The only appropriate prayer for consideration at this stage is prayer No. 3 above where the applicants are seeking a Conservatory order restraining the Respondents from using the Kshs 1,927,137,092/= released by treasury for any other purpose other than the settlement of eligible pending bills.

28. Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that despite any provision to the contrary a judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders. Consequently, this court has the jurisdiction to determine this application and petition, this is in view of the petitioner's allegation in their petition, where they are alleging infringement of their fundamental rights protected under the Constitution, therefore the Respondents allegations that this court lacks jurisdiction has no basis.

29. In the case of *Kevin K Mwiti & others vs Kenya School of Law & Others, [2015] eKLR* the court considered an application for conservatory orders and stated that the court must consider whether an applicant has established a prima facie case and in the view of the court;

“A prima facie case... is not a case which must succeed at the hearing of the main case, but must be a case that is not frivolous. The petitioners have to show that he has a case which discloses arguable issues and, in this case, arguable constitutional issues, but the court should not at this stage make definitive findings either of fact or law as that is the province of the court that will intimately hear the petition.”

30. Therefore a party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted as the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition.

31. Additionally, in *Rights Education and Awareness (CREW) & 7 Others vs Attorney General [2011] eKLR*, the court in this regard noted that at this stage a party seeking a conservatory order is only required to demonstrate that he has a Prima facie case with a likelihood of success and that unless the conservatory order is granted, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

32. Further, in *Judicial Service Commission vs Speaker of the National Assembly Another [2013] eKLR* the Court stated that;

“Conservatory orders... are not ordinary civil law remedies but are remedies provided for under the constitution, the supreme Law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person”

33. Furthermore, the Supreme Court in *Gatiru Peter Munya vs Dickson Mwaura Kithinji & 2 Others [2014] eKLR* in this regard stated:-

“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 adjudicatory authority of the court in the Public interest. Conservatory orders therefore are not unlike interlocutory injunctions linked to such private party issues on the prospects of irreparable harm occurring during the pendency of a case or high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

34. It is therefore apparent from the above established legal principles that a conservatory order is issued where there is real impending danger to violation of the Constitution or fundamental rights and freedoms with a consequence that a petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute.

35. Considering the Instant application, the Petitioners allege that they are members of Garissa County Contractors and Suppliers Welfare Association, and that they were awarded various tenders by the Respondents after their successful bids, and that after delivering on their part of their obligations the Respondents are yet to pay them for their services. They allege that the National Treasury released the sum of Kshs. 1,927,137,092/= for purposes of settling pending eligible bills, and that the Respondents instead of settling their outstanding bills intend to divert the said money for other purpose, which action they allege infringes their rights under Articles 43, 21, 27(1), 174(e) of the Constitution.

36. Additionally, they allege that Respondents Contrary to Article 27 of Constitution have acted discriminately and started selectively settling bills for new contractors leaving their pending bills which were accrued during the other regime of the county government outstanding.

37. The Respondents submissions largely addresses the main Petition instead of the application at hand, they challenge the jurisdiction of this court and have argued that the applicants will not suffer any irreparable harm that cannot be compensated by way of damages.

Conclusion

38. Taking the view that a Conservatory order is meant to preserve the subject matter or prevent further breach pending the determination of a pending cause or petition, it is my view that the Applicants have not demonstrated a prima facie case as no amount has been proved to have been set aside and released for settlement of unpaid bills and therefore this court in the circumstances is disinclined to issue the sought conservatory order pending the hearing and determination of the petition.

39. In any event the instant matter is sub-judice as the petitioners had filed High Court Civil Suit No. 7 of 2019 at Garissa before subsequently and unprocedurally abandoning the same, without formal withdrawal and that the instant petition is an attempt to subvert the overriding objective of the court and the same is forum shopping. See the case of *Governors Baloon Safaris Limited vs Attorney General & 2 Others (2014) eKLR*.

40. Thus the court makes the following orders;

(i) ***The application is dismissed and the petition is struck out with no orders as to costs.***

(ii) ***The interim orders are set aside.***

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE