



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 6 OF 2019

IN THE MATTER OF ALLEGED INFRINGEMENT AND VIOLATION OF ARTICLES 22, 23, 47, 50

AND

IN THE MATTER OF ARTICLES 3, 22 & 258 OF THE CNSTITUTION

AND

IN THE MATTER OF DISCRIMINATION, UNFAIR ADMINISTRATIVE ACTION AND IN VIOLATION OF THE BILL OF RIGHTS AND PROVISIONS OF THE CONSTITUTION AS THE SAME RELATE AND CONCERN THE APPLICANT

BETWEEN

- 1. JAMES MARIENGA OBONYO**
- 2. PHILIP OGWARI MWABE**
- 3. JAOKO TOBIAS DEMBA.....PETITIONERS**

VERSUS

- 1. FUND MANAGER SUNA WEST NATIONAL GOVERNMENT
CONSTITUENCY DEVELOPMENT FUND COMMITTEE**
- 2. NATIONAL GOVERNMENT CONSTITUENCY
DEVELOPMENT FUND BOARD.....RESPONDENTS**

RULING NO. 2

Background:

1. This ruling is on the Notice of Motion dated 14/08/2019 (hereinafter referred to as '*the application*'). The application was filed by the Petitioners herein on 14/08/2019 alongside the Petition.
2. The application prayed for six orders. The first three prayers are by now spent. The fourth to six prayers were tailored as follows: -

4. THAT this Honourable Court be pleased to grant conservatory orders restraining the National Government Constituency Development Fund Board through its servants, agents, workers, proxies, representatives and/or any other person assigned or with their authority from releasing any funds to the Suna West National Government Constituency Development Fund Committee pending the hearing and determination of this Petition.

5. THAT this Honourable Court be pleased to grant conservatory orders restraining the Fund manager the National Government Constituencies Development Fund for Suna West through its servants, agents, workers, proxies, representatives and/or any other person assigned or with their authority from spending any further funds allocated to the Suna West national Government Constituency Development Fund Committee pending the hearing and determination of this petition.

6. THAT the Respondent to meet costs of this application.

3. The application was supported by three Affidavits sworn by *Philip Ogwari Mwabe*, the second Petitioner herein. The affidavits were sworn on 04/08/2019, 31/09/2019 and 18/12/2019 respectively.
4. The application was opposed by the Respondents. The First Respondent filed a Replying Affidavit through one *Moses Oduor Agolla* who was the acting Fund Manager. The affidavit was sworn and even filed in Court on 14/10/2019. The Second Respondent also filed a Replying Affidavit through its Corporation Secretary. The affidavit was sworn on 17/10/2019 and filed in Court on 18/10/2019.
5. Directions on the hearing of the application were taken. The parties proposed and the Court agreed that the application be heard by way of filing written submissions. Both parties duly complied.

The Petitioners' case and submissions:

6. The Petitioners prayed for the conservatory orders on the basis of the pending Petition. The Petition which was also dated and even filed on 14/08/2019 prayed for the following reliefs: -
- (a) A declaration that the petitioners' rights have been violated and is threatened with further violation.
 - (b) A declaration that by brazenly infringing on the rights of the petitioner, the Respondent has acted unconstitutionally and thus its members and Chief Executive Officer are not fit to hold Public Offices.
 - (c) An order of Judicial Review in the Nature of Mandamus bringing into this court and compelling the 2nd Respondent to hear and determine the petition before it expeditiously.
 - (d) An order of Judicial Review in the nature of Mandamus compelling the 2nd Respondent to halt any further disbursement of monies to the 1st respondent monies which ought to be subject of the Suna West National Government Constituency Fund Committee deliberations pending
 - (e) An order that the petitioner is entitle to compensation quantum of which be assessed by the court for the past violation and continued violation of his constitutional and human rights.
 - (f) Such other or further relief this court deems just and fit to grant.
 - (g) The costs f and occasioned by this petition be borne by the Respondent.
7. In urging this Court to allow the application the Petitioners deponed that they were *bona-fide* and duly gazetted members of the Suna West Constituency Development Fund Committee (hereinafter referred to as 'the Committee'). They annexed copies of the Gazette Notice Vol. CIXIX No. 180 dated 08/12/2017 and their respective appointment letters in confirmation.
8. The second Petitioner was subsequently elected as the Chairman of the Committee.
9. The Petitioners further deponed that they took over office from a previous Committee. At the time of taking-over the Committee maintained bank account No. xxxx with the Co-operative Bank Migori Branch. By then the account had a credit balance of Kshs. 2,291,026/70.
10. It was contended that the Petitioners noted some disturbing developments in the bank account. On enquiries the Petitioners realized that the former Committee members still operated the bank account. They confirmed the encashment some cheques drawn and signed by the members who served before them.
11. Alarmed, the Petitioners immediately brought the matter to the attention of the Suna West Deputy County Commissioner. The Commissioner then wrote a letter dated 12/02/2018 to the Co-operative Bank at Migori suspending all withdrawals from the account. A copy of the letter was annexed as an exhibit.
12. According to the Petitioners, the First Respondent was not pleased with the actions the Petitioners took to safeguard the public funds. They contended that the First Respondent then declined to call for any Committee meetings. Infact no meetings were called for the financial years 2017/2018 and 2018/2019. Instead the First Respondent embarked on a spree of generating false and fictious minutes of alleged meetings of the Committee and accordingly made payments thereof.
13. The Petitioners then approached the Second Respondent sometimes in 2018 and orally complained of the then prevailing *status quo* at the Suna West Constituency Development Fund offices (hereinafter referred to as 'the Suna West CDF'). To their surprise the Second Respondent did not take any action.
14. The Petitioners sought legal advice from their Counsel. The Advocates formally wrote to the Second Respondent on the issue. A copy of the letter dated 06/03/2019 was annexed. The Second Respondent acknowledged receipt of the letter *vide* their letter dated 22/03/2019. The Petitioners were aware that the Second Respondent formally wrote to the First Respondent on the matter. Through its letter dated 22/03/2019 the Second Respondent called for a response within 21 days. That was the end of the matter.

15. Given the sensitivity of the matter and the complacency on the part of the Respondents the Petitioners filed a petition before the Second Respondent for dissolution of the Committee. That was in July 2019. The petition is still pending.

16. The Petitioners then instituted the current proceedings with a view of compelling the determination of the Petition before the Second Respondent. In public interest, the Petitioners sought for the conservatory orders through the application.

17. Through the further affidavits of the second Petitioner the Petitioners reiterated the above position.

18. The Petitioners submitted that they were entitled to the prayers sought. Relying on the High Court in **Platinum Distillers Limited vs. Kenya Revenue Authority (2019) eKLR** the Petitioners rendered themselves on the nature of conservatory orders. They affirmed the position that the Petition had high chances of success and that it was brought in public interest. The Petitioners contended that as members of the Committee they were under a legal duty to ensure that the funds availed to Suna West CDF were only used to the benefit of the intended public.

19. This Court was also urged to follow the finding of the High Court in **Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General, Nairobi High Court Petition No. 16 of 2011 (2011) eKLR**. The Petitioners made a passionate plea for the application.

The Respondents' cases and submissions:

20. The First Respondent deponed that he was also a member of the Committee by virtue of being the Acting Fund Manager at the Suna West CDF. He further deponed that the problems bedeviling the Committee only arose after the second Petitioner was lawfully removed as the Chairman of the Committee.

21. The First Respondent contended that the First Respondent was duly advised by the Second Respondent of the legal position in respect to the Chairmanship of the Committee. The First Respondent was informed that since the second Petitioner had been nominated by the Suna West CDF as its representative into the Committee then he was not eligible to become a Chairman. The Committee took the requisite remedial and compliance steps. The second Petitioner was aggrieved.

22. It was also deponed that the second Petitioner then decided to cause disharmony in the Committee by pulling along the two other Petitioners who are his relatives in mounting warfare against the Committee.

23. The First Respondent contended that all the allegations put forth by the Petitioners were false. It was also revealed that the First Respondent had duly responded to all the allegations to the Second Respondent when called to do so.

24. It was further deponed that contrary to the allegations that no Committee meetings had been held there was evidence to the effect that the Petitioners have been participating in the Committee meetings and all other affairs of the Committee upto and until August 2019 when they received some monetary allowances for taking part in the activities of the Committee.

25. The First Respondent filed its submissions. It contended that the application did not meet the legal threshold for conservatory reliefs. It further contended that the petition was not brought in public interest. According to the First Respondent the petition was disguised as a public interest litigation, but it was infact a private revenge mission by the second Petitioner. The High Court decision in **Brian Asin & 2 Others vs. Wafula W. Chebukati & 9 Others (2017) eKLR** was cited on the aspect of public interest. The First Respondent called for the dismissal of the application.

26. The Second Respondent deponed in support of the position taken by the First Respondent. It particularized the steps it had taken from the time it received the complaints from the Petitioners. It also disclosed that due to the weight of the matters raised the second Respondent caused an audit to be undertaken. The Court was informed during the highlighting of submissions that the audit exercise was completed and a report had been rendered to the Second Respondent.

27. The Second Respondent further deponed that the matter had taken long to be disposed since the Petitioners resorted to filing several complaints against the Committee and the Second Respondent hardly got time to deal with the matters raised. The Second Respondent submitted that the **National Government Constituencies Development Fund Act, No. 30 of 2015** (hereinafter referred to as '**the CDF Act**') did not set timelines within which the disputes ought to be determined. As such the Court was urged to apply the principle of reasonable of time and find that the Second Respondent had not been indolent.

28. The Second Respondent submitted that the Petitioners had failed to satisfy the principles for granting conservatory orders. It relied on the High Court in **Kenya Small Scale Farmers Forum vs. Cabinet Secretary Ministry of Education Nairobi HCCP No. 399 of 2015 (2015) eKLR** in support of the submission.

29. It was further submitted that granting the prayers sought will be curtailing the objectives of the Second Respondent in serving the people. The Second Respondent also submitted that it is duty-called to act within the law and having received the audit report the matters shall be accordingly dealt with. The Court was urged to disallow the application.

Analysis and Determination:

10. The application was interlocutory in nature. It sought two main conservatory orders pending the hearing and determination of the Petition.

11. I reaffirm the caution by Ibrahim, J (as he then was) in Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR regarding interlocutory orders. The Judge stated that: -

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

12. The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR defined conservatory orders as follows: -

5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.

13. In Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR the Court had the following to say about the nature of conservatory orders: -

Conservatory orders in my view 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.

14. The principles for consideration by a Court when faced with exercise of its discretion in deciding whether to grant conservatory orders are by now well settled.

15. The Supreme Court in Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR at paragraph 86 stated as follows: -

[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 courses.

(emphasis added)

16. Adding its voice to the discussion on conservatory orders, the Court in Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 summarized the main principles for consideration in whether to grant conservatory orders as follows:

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

17. I will now consider the foregone three principles in light of the application as under: -

(i) On whether a prima-facie case was established: -

18. A prima facie case was defined in MRAO vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 to mean: -

.... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

19. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another (2015) eKLR while dealing with what a prima facie case was made reference to Lord Diplock in American Cyanamid vs. Ethicon Limited (1975) AC 396 when the Judge stated thus: -

If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that

is the end of any claim to interlocutory relief.

20. What constitutes a *prima-facie* case was further dealt with by the Court of Appeal in **Mirugi Kariuki -vs- Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8.** The Court in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court stated as follows: -

It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.

21. In **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43,** the Court stated while expounding on what a *prima-facie* case or arguable case was, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

22. In sum therefore in determining whether a matter discloses a *prima-facie* case a Court must look at the case as a whole. It must weigh, *albeit* preliminarily, the factual basis, the respective parties' positions, the remedies sought and the law.

23. In this case the Petitioners alleged failure by the Second Respondent to expeditiously hear and determine a complaint they filed to the said Respondent sometimes in 2018. The complaint related to the administration of the Suna West CDF. The Petition cited several fraudulent and corrupt activities within the said office. As it took long to determine the complaint the Petitioners filed these proceedings to *inter alia* to compel the Respondents to discharge their respective legal mandates. The Petitioners' complaint before the Second Respondent is still pending.

24. The Petition before this Court was mainly hinged on **Articles 47 and 50 of the Constitution.** The Respondents informed the Court that the complaint was being attended to and that an audit had been completed.

25. It is a fact that the Respondents conceded that indeed the Petitioners filed a complaint sometimes in 2018 with the second Respondent. That complaint is yet to be determined. The Petitioners cry foul play. They see a deliberate and orchestrated move by the Respondents to deny them the hearing and determination of the complaint. They cited the Respondents for infringing their rights under the law.

26. To me, the Petition before Court unveils a *prima facie* case. The Petitioners alleged that their rights as protected under the **Constitution** were being infringed by the indolence on the part of the Respondents. They sought to accordingly compel the Respondents.

27. The first principle is hence answered in the affirmative.

(b) On whether there is real danger that the Petitioners will suffer prejudice and the Petition rendered nugatory unless the conservatory orders are granted:

10. The nature of the Petition before this Court is clear. The Petitioners contended that as members of the Committee they were concerned with the manner in which the funds were disbursed and utilised. To them, the activities of the Committee were riddled with illegalities and outright theft and wastage of public resources. The Petitioners are therefore in a mission to stop such pilferage of public funds.

11. There is no doubt the allegations by the Petitioners on the affairs of the Committee were grave. The Second Respondent so confirmed in one of its communications to the First Respondent. That is the more reason as to why the matter must be dealt with expeditiously.

12. The Petitioners are public officers by virtue of their membership to the Committee. They took the route of good citizenry in protection of public funds. They were indeed whistle blowers. Kenya has various laws that have a bearing on whistle blowing, corruption and generally the management of affairs of public offices. They include the *Constitution, Anti-Corruption and Economic Crimes Act, 2003, the Public Officers Ethics Act, 2003, Witness Protection Act* among others.

13. The said laws provide checks and balances in the management and expenditure of public funds. This country has witnessed various public officers charged with *inter alia* the failure to ensure prudent and efficient use of public resources.

14. The Petitioners played their part. They acted for public good. They informed the Second Respondent of the issues bedeviling the Suna West CDF. The Second Respondent is duty-bound to address the issues raised.

15. As said the Petition before the Second Respondent and the Petition before this Court are a further push by the Petitioners towards the resolution of the complaint before the Second Respondent.

16. Having carefully considered this issue and in the unique circumstances of this case I am inclined to find that the Petition will not be rendered nugatory in the absence of any conservatory orders. The Petition firmly awaits determination on whether the Respondents ought to be compelled to discharge public duty. I am further inclined to find that the Petitioners having taken steps to bring to the Second Respondent

the various issues on the administration of the Suna West CDF do not stand to suffer any prejudice in the absence of the conservatory orders.

17. From the foregone I answer the issue in the negative.

(c) **Public Interest:**

18. 'Public interest' is defined by the *Black's Law Dictionary 10th Edition* at page 1425 as: -

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

19. 'Public interest litigation' was described by the Court of Appeal in **Nairobi Civil Appeal No. 364 of 2017 Tom Mboya Odege vs. Edick Peter Omondi Anyanga & 2 Others (2018) eKLR** as follows: -

A legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

20. The Court further held that: -

..... The best examples are in Articles 22(2)(a) and 258 of the Constitution which grant every person the right to move to court in 'public interest' where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution.

21. The nature of public interest litigation was discussed in **Brian Asin's** case (supra). The Court distinguished real public interest litigation from litigation which were disguised as such. The Court referred to Supreme Court of India decision in **Ashok Kumar Pandey vs. State of West Bengal AIR 2004 SC 280** where the Supreme Court held that: -

.... Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either r by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

22. In this case the Petitioners are advocating for public good. They contended that public funds were mismanaged. It is the desire of the constituents of Suna West and the whole country at large that all funds allocated for public use be expended within the law. As said, there has been a plethora of instances where people have been charged as a result of mismanaging public funds. The Petition pending before this Court was therefore for enforcement of a public interest. It hence falls within the parameters of public interest litigation.

23. Having so found, I must now address the issue as to whether the application was also brought in public good.

24. The application sought to restrain the Second Respondent from disbursing any funds to the First Respondent. It also sought to restrain the First Respondent from dealing with any of its allocated funds.

25. The Suna West CDF is a public entity. It is regulated by law. The nature of that Fund is to receive monies allocated to the Constituency from the Second Respondent and undertake development projects within the constituency.

26. In the event the application is allowed then the Suna West CDF will not only not receive its allocation from the Second Respondent but will also not be able to utilize the funds already allocated and disbursed to it. As a settled government and financial policy such monies will revert to the Treasury at the end of a financial year if not utilized.

27. In the course of undertaking its mandate in law the Suna West CDF usually enters into contracts with third parties. Those contracts are likely to be adversely affected if the application is allowed. That will expose the Suna West CDF to liabilities which must at the end of the day be paid from the funds allocated to the Suna West CDF for development projects. The people of Suna West constituency will definitely suffer loss.

28. There is also the issue of the employees of the Suna West CDF. If the application is allowed, then some of the employees will be adversely affected. I say so because some of the employees oversee the implementation of the projects. If the projects are stalled, then it means that the salaries of the employees charged with the oversight of those development projects will not be able to discharge their duties. The effect thereof will be that the salaries of those employees be reviewed downwards otherwise the Suna West CDF will not get value for its monies.

29. The net effect of allowing the application will therefore be against the grain of public interest. The constituents of Suna West stand to

suffer irreparably.

Conclusion:

30. Whereas the Petitioners are litigating in public interest and they demonstrated a *prima facie* case I find that the unique nature of the application calls for restraint. Allowing the application will avail a greater harm to the public than the intended public good.

31. To me, the parties must fast-track the determination of the main Petition.

32. In the end the following orders do hereby issue: -

(a) The Notice of Motion dated 14/08/2019 is hereby dismissed with no orders as to costs.

(b) The matter is hereby fixed for directions on the hearing of the main Petition on 28/07/2020.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of June 2020.

A. C. MRIMA

JUDGE

Ruling No. 2 delivered electronically through: -

1. **luganoadvocates@gmail.com** for the firm of Messrs. Lugano & Lugano Advocates for the Petitioners.
2. **omondekiserawakili@yahoo.com** for the firm of Messrs. Omonde Kiseru & Co. Advocates for the First Respondent.
3. **info@oyoadvocates.com** for the firm of Messrs. Otieno, Yogo & Co. Advocates for the Second Respondent.
4. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE