



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 29 OF 2018**

**REGENCY SYSTEMS.....PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF VIHIGA.....1<sup>ST</sup> DEFENDANT**

**THE COUNTY SECRETARY,**

**COUNTY GOVERNMENT OF VIHIGA.....2<sup>ND</sup> DEFENDANT**

**H. E. DR. WILBER OTTICHILLO.....3<sup>RD</sup> DEFENDANT**

**THE CLERK, VIHIGA COUNTY ASSEMBLY.....4<sup>TH</sup> DEFENDANT**

**THE COUNTY ASSEMBLY OF VIHIGA.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. The applicant moved this court by a notice of motion dated 24<sup>th</sup> October, 2018 seeking for orders that:-

(a) Spent

(b) Pending the hearing and determination of this application inter partes, a conservatory order by way of mandatory order is hereby issued compelling the 1<sup>st</sup> respondent to appropriate, set aside and devote from its development budget a sum of Ksh. 22,979,393/= being the equivalent of the applicant's unpaid/pending bills as security.

(c) The 1<sup>st</sup> respondent do furnish the court with evidence of appropriation and devotion of the said security of the sum of Ksh. 22,979,393/= and as such evidence be held by the court pending the hearing and determination of this application.

(d) In the alternative of (b) and (c) above, the 1<sup>st</sup> respondent do file a bank guarantee from a reputable bank or a performance bond from a reputable insurance company as the court shall approve in the sum of Ksh. 22,979,393/= being the equivalent of the applicant's unpaid/pending bills as security pending the hearing and determination of this application.

(e) Costs to be provided for.

2. The application was supported by the affidavit of the Managing Director of the applicant, **Solomon Lumumba** sworn on the 24<sup>th</sup> October, 2018. The same was opposed by the 4<sup>th</sup> and 5<sup>th</sup> respondents vide grounds of opposition dated 10<sup>th</sup> December, 2018 that were accompanied by the replying affidavit of **Ambaka Kilinga**, the Clerk to the 5<sup>th</sup> respondent. It was also opposed by the interested party vide the replying affidavit of **Nicholas Koech**, an investigator with the interested party.

**Applicant's Case –**

3. It was the applicant's case that they were contracted by the 1<sup>st</sup> respondent to do some construction works at Vihiga County Headquarters. That the company performed its obligations under the contract agreement. The County Government paid part of the contract sum and refused to settle a balance of Ksh. 22,979,393/=. The applicant was apprehensive that there is a real likelihood of the 1<sup>st</sup> respondent committing all monies earmarked for its development budget before the case is heard and determined. Hence the filing of the instant application.

#### Case for 4<sup>th</sup> and 5<sup>th</sup> Respondents –

4. The Clerk to the 5<sup>th</sup> Respondent, Mr. Ambaka Kilinga stated in his replying affidavit that there were irregularities and illegalities in the award of the tender to the applicant over which the Auditor-General raised issues on the legality of the tendering process. That the contract was not executed to the requisite standards and that there was no final handover report by the Project Management Committee nor a Completion Certificate hence the applicant lacks the locus to demand payment for work done and/or completed. That the prayers sought are not capable of being granted as budget making process of the 5<sup>th</sup> respondent involves several procedures including public participation with statutory timelines and ceilings governed by the Commission of Revenue Allocation. That it is impractical to appropriate money without undergoing such procedures. Further that granting the orders sought will amount to admission of liability yet the 5<sup>th</sup> respondent is not indebted to the applicant. More so that the prayers sought are untenable in the interim.

#### Case for the Interested Party-

5. The investigator for the interested party, Nicholas Koech, stated in his replying affidavit that they are investigating a report on alleged irregular award of tender to the applicant by the County Government of Vihiga. That the tender was never subjected to the procedure set out in the Public Procurement and Disposal Act as required of a public body. That the tender was unjustifiably split into various components contrary to the provisions of the said Act. That the applicant did not perform the work satisfactorily. That it would be irregular for the applicant to be paid for work not adequately done.

#### Submissions –

6. The advocates for the applicant, **Kwengu & Co. Advocates**, submitted that the application is based on the provisions of Order 40 Rule 2 (1) and (2) which provides that:-

*“(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.*

*(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”*

7. It was submitted that the applicant is reasonably apprehensive that unless the court orders the 1<sup>st</sup> respondent to set aside the amount mentioned as security, there is a very high chance of the respondent allocating the money to other uses thus frustrating its effort if judgment is delivered in its favour. Counsels submitted that they have met the test of granting interlocutory injunctions as set out in the case of **Giella –V- Cassman Brown (1973) EA 358** which is that they have established a prima facie case with a probability of success. That the issue of whether the tender was awarded legally was not something that the applicant was privy to, besides which it is an issue to be canvassed at the main hearing and not at an interlocutory stage.

8. It was further submitted that failure by the 1<sup>st</sup> respondent to pay the pending bill has occasioned the applicant irreparable loss as it is not able to operate as a going concern. That the balance of convenience tilts in favour of the applicant for the orders sought being granted.

9. The advocates for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, **S. N. Masila & Co. Advocates**, submitted that the application has no proper basis in law. That it is grounded on a misapprehension of the law that the 1<sup>st</sup> respondent and the 5<sup>th</sup> respondents are in law one and the same corporate entity which is not the case. That the orders sought that the court orders for appropriation of monies to cater for anticipatory claims has no foundation in law and are incapable of being enforced. That the process of budgeting as dictated by Public Finance Management laws does not make provisions to appropriation of monies for claims of that nature. That the claim is yet to be ascertained and if the application is granted would be tantamount to execution albeit before judgment and without a decree. That the application is founded on a cause of action for specific performance as opposed to a breach of contract and hence the provisions of order 40 Rule 2 (1) and (2) are not applicable in the circumstances of the case.

10. It was submitted that the applicant has not satisfied the conditions precedent to grant of interlocutory orders in the form of mandatory orders. That an applicant in a mandatory injunction must in addition to the principles set out in **Giella –V- Cassman Brown & Co. Ltd** (Supra), establish the existence of special circumstances. That the standard of prove in a mandatory injunction is higher than the standard in prohibitory injunctions. In support of this proposition the advocates cited the case of **Kenya Breweries Ltd & Another –V- Washington O. Okeya (2002) eKLR** where the Court of Appeal stated that:-

*““A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”*

11. The advocates for the 4<sup>th</sup> 5<sup>th</sup> Respondents, Francis Rakewa, raised similar submissions as those of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

12. The advocate for the interested party, **Grace K. Omweri**, submitted that the applicant has not met the threshold for granting of interim orders. That the tendering process was tainted with irregularities. That the interested party disputes the assertion that the works were done to

the completion and satisfaction of the respondents. That in the premises, the applicant cannot rely on the provisions of Order 40 Rule 2 (1) and (2) as the respondents are not in any breach and neither are they continuing with any breach of contract that would warrant exercise of the court's discretion under the said provision.

13. The interested party contends that the applicant does not have a prima facie case with a probability of success neither are they likely to suffer irreparable loss as an award of damages will be sufficient compensation should the outcome be in its favour, the claim being a money claim.

14. It was submitted that the County Assembly of Vihiga is a distinct institution in the County Government that is capable of suing or being sued. That the application targets a wrong party. The case of **Simon Wachira Kagiri –V- County Assembly of Nyeri & 2 Others (2013) eKLR** was cited in this regard.

15. It was submitted that the interested party is still investigating the contract which preliminary findings have highlighted irregularities. That granting the orders sought will be appropriating public funds towards an irregularity.

#### **Analysis and Determination -**

16. I have gone through the pleadings and rival submissions of the parties. The main issue for determination is whether the court ought to grant the orders sought. The applicant seeks for a conservatory order in the nature of a mandatory order. It is then proper for me to consider the meaning of conservatory orders and the circumstances in which they can issue.

17. In the case of **Kitale Industries Limited v County Government of Nakuru; Kenya Railways Corporation( Interested Party) [2020] eKLR D. O Ohungo J** held as follows:

*“12. The orders sought in Notice of Motion dated 31st May 2019 are what are generally referred to as conservatory orders. They are public law remedies aimed at preserving the subject matter of a dispute pending hearing and determination of the main petition. In **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR, Odunga J** stated as follows:*

***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.***

*13. The Supreme Court emphasized the public law nature of conservatory orders in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** 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 causes.”*

18. In the case of **Tom Odhiambo Ojienda v Kenya Revenue Authority & another [2018] eKLR W.A. Okwany J** held that:

*“39. Courts have severally held that in considering an application for conservatory orders the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and will not venture into making any definite and conclusive findings on either fact or law as to do so may have the impact of prejudicing the hearing of the main Petition.*

*40. Apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger or prejudice. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General, Nairobi HC Pet. No 16/2011, Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission, Mombasa HC Pet. No. 7 of 2011.***

*41. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi Petition No. 16 of 2011 Musinga, J (ahw)** stated that:*

*“...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. I will therefore not delve into a detailed analysis of facts and law. 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.”*

42. In a majority decision in the case of *The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012*, it was held as follows:

**“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”**

19. In the case of *Makueni County Assembly v County Executive Committee Member of Finance, Government of Makueni County & 3 others [2014] eKLR Mumbi Ngugi J* held as follows:

*“The principles that a court considers in determining whether or not to grant a conservatory order are fairly well settled. In the case of Philip K Tunoi and Another vs Judicial Service Commission and Another Petition 244 of 2014, the court quoted with approval the decision of the Privy Council in Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 where Braithwaite J.A. expressed himself as follows:*

**“Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has come to be known as the “Conservatory Order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction,...” (Emphasis added)**

.....

34. Finally, in the case of *Martin Nyaga Wambora -vs- Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014*, the court pointed out that:

**[59] In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [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 real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”**

**[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.**

**[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.”**

20. From the above authorities, it is clear that the threshold for the grant of conservatory orders in the nature of mandatory orders are far more stringent and higher than those for the grant of interlocutory injunctions under Order 40 rule 2 of the Civil Procedure Rules, 2010 since the former is a public law remedy. In my view, the applicant has not satisfied the criteria and conditions for the grant of a conservatory relief for a number of reasons. Firstly, the applicant has not demonstrated a prima facie case with a chance of success. The impugned pending bill of Kshs. 22,979,393/- has been vehemently contested and denied by the respondents who have raised serious factual and legal issues that can only be determined at the hearing of the substantive suit. Indeed, ordering the respondents to set aside and devote from its development budget the said sum as security at this stage would be tantamount to deciding the case before hearing its merits. Secondly, it would not be in the public interest to set aside this sum of money pending the hearing and determination of the suit as this would deny the larger citizenry of the 1<sup>st</sup> and 5<sup>th</sup> respondents much needed provision of development and services. Besides that the budget making process is not a preserve of one institution like the 5<sup>th</sup> respondent. It would be difficult to enforce the orders sought. In any case it is not known when the pending suit will be finalized. Fourthly, I do not think that there is any “real danger” posed to the applicant that is imminent so much so that it deserves immediate remedial attention or redress by the court. The balance of convenience and public interest tips in favour of the respondents rather than the applicant.

20. The upshot is that there is no merit in the application. The same is dismissed with costs to the respondents.

**Delivered, dated and signed at Kakamega this 29<sup>th</sup> day of October, 2020.**

**J. N. NJAGI**

**JUDGE**

No appearance for Applicant

No appearance for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

No appearance for 4<sup>th</sup> and 5<sup>th</sup> Respondents

No appearance for Interested Party

Applicant - Absent

Respondents - Absent

Interested Party - Absent

Court Assistant - Polycap

30 days right of appeal.