



**THE REPUBLIC OF KENYA**

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

**PETITION NO 17 OF 2017.**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2, 3,4,6, 10, 19, 20,21,22,23,27,35,47,48,56,159,174,175,176, 183,185,186,207,220,221,224,228 AND 232 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTIONS 8,9,30,34,46,102,103 AND 116 OF THE COUNTY GOVERNEMENTS ACT (ACT NO 17 OF 2012)**

**AND**

**IN THE MATTER OF SECTIONS 3,41,43,44,45,92,93,94,95,96,97,98,99,100,101,109,127,128,129 AND 135 OF THE PUBLIC FINANCE MANAGEMENT ACT (ACT NO 18 OF 2012)**

**BETWEEN**

**THE COUNTY ASSEMBLY OF MACHAKOS.....PETITIONER**

**VERSUS**

**THE GOVERNOR, MACHAKOS COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNEMENT OF MACHAKOS.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, FINANCE**

**& NATIONAL TREASURY.....3<sup>RD</sup> RESPONDENT**

**THE CONTROLLER OF BUDGET..... 4<sup>TH</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

On 4<sup>th</sup> December 2017, the Petitioner herein, namely the County Assembly of Machakos, 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 the failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to release the funds requisitioned by the Petitioner is unconstitutional and illegal, and that the same has occasioned grave prejudice to its operations and has infringed or is likely to infringe its constitutional rights.

Further, that the Respondents have also contravened the Constitutional mandate to give audience to the Petitioner, and to promote the principles of fairness, competitiveness, fairness, equality, equitable representation and distribution of resources. Lastly, that the 1<sup>st</sup> Respondent has acted oppressively in light of the facts and applicable constitutional and statutory obligations, has not followed the due process of law and is ultra vires and in breach of the applicable laws.

The Petitioner sought various prayers in its Petition, namely, a permanent injunction restraining the Respondents from withholding any funds

budgeted for, approved and allocated to the Petitioner by the 4<sup>th</sup> Respondent; orders compelling the 1<sup>st</sup> to 4<sup>th</sup> Respondent to release all funds due to the Petitioner as per its budget; and declarations that the actions of the Respondents are unconstitutional, in breach of statutory provisions, oppressive, unreasonable, ultra vires and an abuse of power.

In addition, the Petitioner is seeking the following prayers in its application:

1. This Court be pleased to grant a mandatory order compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents jointly and severally, their agents, or any person acting under their behest to release and or remit funds to the tune of Kshs 63,248,046.00 for the recurrent budget and Kshs 16,006,613.00 for development budget as requisitioned on the 8<sup>th</sup> November, 2017 totalling Kshs 79,254,659 pending the hearing and determination of this application.
2. This Court be pleased to grant a conservatory order restraining and/or prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents jointly and severally, their agents, or any person acting under their behest from using, interfering, utilizing, withdrawing and or transferring all the funds in the County Revenue Fund specifically approved but for not remitted to the County Assembly of Machakos outstanding at Kshs 165,183,979.00 pending the hearing and determination of this application.
3. This Court be pleased to grant a conservatory order restraining and/or prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents jointly and severally, their agents, or any person acting under their behest from using, interfering, utilizing, withdrawing and or transferring all the funds in the County Exchequer Account specifically approved but for not remitted to the County Assembly of Machakos outstanding at Kshs 165,183,979.00 pending the hearing and determination of this Petition and or until the same has been remitted to the Petitioner.
4. This Court be pleased to grant a mandatory order compelling the Respondents jointly and severally, their agents, or any person acting under their behest to release and or remit funds for both the recurrent and development budgets as requisitioned at the beginning of the financial year and to timeously make monthly remittances pending the hearing and determination of this Petition.
5. The costs of the application be awarded to the Petitioner.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents subsequently filed their Responses to both the Petition and Petitioner's application together with a Notice of Preliminary Objection which were all dated 18<sup>th</sup> December 2017. The 4<sup>th</sup> Respondent filed a response to the application by way of grounds of opposition dated 18<sup>th</sup> December 2017. The 3<sup>rd</sup> and 5<sup>th</sup> Respondents did not file any responses to the Petition or application.

The parties were directed by this Court at a hearing held on 18<sup>th</sup> December 2017 to canvass the Preliminary Objection and application together by way of written submissions. The Petitioner who was represented by Ms. C. Kamende filed submissions dated 19<sup>th</sup> December 2017. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents who were represented by Mr. B. Mungata and Mr. S. Nthiwa, and Mr. Tuti who represented the 4<sup>th</sup> Respondent also filed submissions of the same date. A summary of the arguments made by the parties is as follows.

### **On the Preliminary Objection**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have objected to the Petitioner's application and Petition on the grounds that this Court lacks jurisdiction to deal with the issues raised therein, as the Petitioner was dissolved by the members of the County Assembly of Machakos when they passed a motion to create the People's Assembly; the issues raised fall within the purview of the oversight powers of Senate and County Assembly; and that under section 30(2) of County Government Act, the alleged actions do not fall within the functions and responsibilities of the 1<sup>st</sup> Respondent, and his name should be struck out with Costs

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied upon the definition of a preliminary objection as set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd, (1969) EA 696** as consisting of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. They contended that on the 9<sup>th</sup> December 2017, the members of County Assembly of Machakos passed a motion creating an amorphous entity they called People's Assembly, and that the effect of that motion was that they effectively dissolved the institution of the County Assembly as created under Articles 1(3), 176(1) and 177 of the Constitution, and the members of the County Assembly as was then constituted lost their legitimacy. In addition that there is no statutory and/ or Constitutional provision requiring funding of the illegal entity called Peoples' Assembly.

It was further contended by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that under the principle of separation of powers, the Court cannot usurp the powers the preserve of the Senate and County Assembly by dealing with the issues raised herein. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the issues raised fall squarely within the powers of the Senate and County Assemblies to investigate while exercising oversight role as provided by various legal instruments.

The provisions cited in this regard were Article 96(3) of the Constitution which empowers the Senate to exercise oversight authority over National Revenue allocated to County Governments, and it was urged that whenever an issue arises regarding disbursement, use and application of revenue between the different organs of the County Government, it is only the Senate which has the constitutional mandate to question while exercising its oversight role.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further submitted that the funding of a county Assembly is not a right under any written law in Kenya, but is a privilege which must and is always guided by law and appropriation statutes. It was also submitted that the constitution empowers County Assemblies to exercise oversight powers over Executive Committees of County Governments under Article 185(3) of the Constitution, which also provides them with immense powers to secure attendance of witnesses or persons of interest on the subject of investigation under Article 195 of the Constitution. Furthermore, that the Machakos County Assembly Standing orders provide an elaborate procedure of dealing with budget queries in addition to providing mechanisms for sanctioning Executive Committee members who do not comply with summons,

directives or a county Government legislation, particularly Standing Orders no. 185, 187 and 188.

Lastly, that the 1st Respondent has been wrongly joined in these proceedings to serve political reasons, as there is no single substantiation of the allegations as attributing to the 1st Respondent. It was contended that the alleged actions do not fall within the functions and responsibilities of the 1st Respondent under section 30(2) of County Government Act, and this Court should not allow for names of parties to be maligned for political gains and intimidation . As such, that the 1st Respondent should be struck out and that the Petition be dismissed with costs.

The 4th Respondent did not submit on the preliminary objection raised by the 1st and 2nd Respondents.

The Petitioner on its part submitted that Article 192(1) of the Constitution provides for the circumstances when the President may suspend a county government, and how the said suspension is to be effected; while Article 255 (1) of the Constitution provides that a proposed amendment to the provisions on the objects, principles and structure of devolved government shall be enacted in accordance with Article 256 or 257 , and approved by referendum. It was contended that there is no evidence tabled before this Court that the Petitioner has been or was dissolved through the recognizable means as per the existing laws in Kenya .

In addition that Article 177(4) of the Constitution provides that a county Assembly is elected for a term of five years, and the second county assembly of Machakos was duly constituted on the Thursday, the 7th September 2017 in accordance with section 7A of the County Governments Act No. 2012 at its first sitting, and when the Clerk of the County Assembly of Machakos administered the oath of office to the members of the county. The Petitioner stated that if any motion creating a Peoples' Assembly has been passed, the same has no legal basis and or foundation. In any event and without prejudice to the foregoing, if at all the Petitioner had been dissolved, then the 1<sup>st</sup> and 2nd Respondents would also stand dissolved and Article 255 of the Constitution provides for succession thereof.

The Petitioner further submitted that although it and the 1st and 2nd Respondents are established under Article 176(1) of the Constitution, they are distinct and separate entities, with the 1<sup>st</sup> Respondent who is the County Accounting Officer and a State Officer being key in matters of finance as per the provisions of sections 3 , 41, 43, 44, 45, 92 and 93 of the Public Finance Management Act. Therefore, that the assertion by the 1st and 2nd Respondents that the 1st Respondent is not the signatory to the accounts where funds are deposited is false as he is the key member of the County Executive Committee, the Accounting Officer of the County and a State Officer mandated by the Constitution, the Public Management Finance Act and the provisions of the County Government Act.

In addition, that the grounds of opposition by the 4th Respondent must also fail as it has failed to implement the provisions of the Public Finance Management Act and the Article 228 of the Constitution.

Lastly, the Petitioner urged that this Court has jurisdiction to hear and determine the Application and the Petition herein. Reliance was placed on the decisions in **Richard Bwogo Birir vs Narok County Government & 3 Others[2014] eKLR, Judicial Service Commission vs Speaker of the National Assembly & Anor [2013] e KLR** and **Michael Osundwa Sakwa vs Chief Justice and President Of Supreme Court Of Kenya & Anor, Constitutional Petition No. 167 Of 2016(Nairobi)** for the position that the new Constitution gives the court wide and unrestricted powers and allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises under Article 165(3).

On the powers of the Court being ousted by Senate and the County Assembly, the Petitioner urged that that the Senate has no role to play in the denial of the funds already approved for disbursement by the 1<sup>st</sup> to 4<sup>th</sup> Respondents as it has already performed its duty under Article 96 of the Constitution, and that the citation of the Standing Orders and the Provisions of Article 195 of the Constitution are misplaced. In addition that the correspondence between the parties demonstrated that the Petitioner has done all it could in exhausting the internal mechanisms herein. Finally, that the 1st and 2nd Respondents' Notice of Preliminary Objection dated 18<sup>th</sup> December, 2017 did not meet the threshold in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (Supra)**.

### **On the Application**

The Petitioner's application was supported by an affidavit sworn on 4th December 2017 by Felix Gitari Mbiuki, the Clerk and the Accounting Officer of the County Assembly of Machakos. In summary, the Petitioner averred that it prepared its budget for the current Financial Year, and the same were considered and approved by the Budget and Appropriation Committee of the First Assembly, and debated and approved by the Petitioner as contained in the Approved Machakos County Appropriation Act, 2017. Further, that based on the Appropriation Act, the 4th Respondent has been approving the Petitioner's requisitions, based on the itemized budget estimates arrived at after negotiations with the Commission on Revenue Allocation.

According to the Petitioner, it in liaison with the County Treasury agreed on a monthly disbursement of Kshs 60,164,202.00 to the Petitioner for recurrent expenditure, however that the 1st and 2nd Respondents have not released any monies for the months of September, 2017 and November, 2017 and the outstanding amount is now Kshs. 165,183,979.00, an action that has prejudiced the operations of the County inter alia; payment of salaries and allowances to the new members and also undertaking of adequate training.

The Petitioner states that on the 2nd November, 2017, its representatives met the 2nd Respondent in his office and among other issues discussed was timely disbursement of funds to the Petitioner to enable it operate efficiently. Further that on the 8th November, 2017, the Petitioner forwarded the following requisitions to the County Treasury for processing :-

Recurrent expenditure requisition - Kshs 63,248,046.00

Development expenditure requisition - Kshs 16,006,613.00

Other transfers(loans) requisition - Kshs 60,000,000.00

The Petitioner averred that the above requisitions were approved by the County Treasury and were subsequently forwarded to the office of the 4th Respondent on the 11th November, 2017, who approved items (i) and (ii) on the 13th November, 2017. However, that despite the said approval by the 4th Respondent, the 1st and 2nd Respondents have failed, declined and or refused to sign necessary forms namely Form C's to authorize withdrawal of the funds from the County Revenue Fund.

It is contended that this action that has gravely affected the operations of the Petitioner in that the Petitioner is unable to carry out its key duties to the prejudice of the residents of Machakos as outlined in section 8 of the County Governments Act and Articles 1 and 185 of the Constitution.

The 1st and 2nd Respondents' responses to the Petition and application are in replying affidavits sworn on 18th December 2017 by Francis Wambua Maliti, the Deputy Governor and Acting Executive Committee Member of the 2nd Respondent in charge of Department of Finance and Revenue Management. Specifically with respect to the application, the 1st and 2nd Respondents contended that the orders sought cannot be issued by this court in an interlocutory application, as it would amount to pre-empting the hearing and determination of the petition without the benefit of the true facts; it would ground the operations of all the branches and departments of the 2nd Respondent to the detriment of the sovereign people of Machakos County; and that the Court does not have jurisdiction to issue conservatory orders whose import is to injunct withdrawals from the County Revenue fund or County Exchequer account, as the Controller of Budget is the only body authorized to approve withdrawals within set down constitutional and statutory framework under Articles 207 as read together with Article 228 (4) to (6) of the Constitution.

The 4th Respondent in its response to the application stated that the Office of Controller of Budget is established under Article 228 of the Constitution, and that Article 207 and 228(4) of the Constitution of Kenya as read together with Section 109 of the Public Finance Management requires that the Controller of Budget must authorize withdrawals from the County Revenue Fund, if satisfied that the withdrawal is in accordance with the law. Further that the Controller of Budget has at all times exercised her power expeditiously by authorizing the release of funds whenever requisitions have been submitted by the County Treasury, and therefore that the orders sought do not meet the threshold for the grant of injunctive and conservatory orders.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. There are two issues for determination, the first is whether the Respondents' preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. The second issue is the issue for determination is whether the Petitioner has shown a *prima facie* case with a likelihood of success, so as to be granted the mandatory and conservatory orders it seeks in terms of release of approved funds and/or the use of the said funds.

The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

**“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

In the present objection, the facts that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have raised as regards the formation of a People's Assembly by the County Assembly of Machakos are subject to proof as regards their authenticity. Furthermore, they are also subject to legal argument as regards their legal effect, which paradoxically the 1<sup>st</sup> and 2<sup>nd</sup> Respondent asks this Court which they claim has no jurisdiction in this matter to determine.

Likewise, the allegations as regards the functions of the 1<sup>st</sup> Respondent and the said Respondent being non-suited in this matter will certainly require further evidence and argument to establish their veracity or otherwise. It is thus my finding that these two grounds for the preliminary objection do not raise any question of law, and will have to await further argument during the hearing and/or upon the relevant applications being made.

The only question of law raised in the Preliminary Objection is that of this Court's jurisdiction, with the argument made by the Respondents that this Court has no jurisdiction on account of the Senate and County Assemblies being the appropriate bodies to determine the dispute herein on account of the doctrine of separation of powers.

Jurisdiction is always granted by law or other like legal instrument, as was held by the Court of Appeal in **The Owners of the Motor Vessel "Lilian S" -VS- Caltex (Kenya) Ltd [1989] KLR 1**. The Court stated as follows:-

**“By jurisdiction is meant the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by the stature, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or**

**as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”**

The Petitioner has in this respect argued that the Constitution does give this Court jurisdiction to hear and determine her claim as to infringement of her rights, and more specifically cited various Articles that give this Court jurisdiction, including Article 165 of the Constitution, which gives this Court unlimited original jurisdiction in criminal and civil matters; and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and to hear any question respecting the interpretation of the Constitution including the determination of the following issues:

- (i) the question whether any law is inconsistent with or in contravention of the Constitution;
- (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) a question relating to conflict of laws

The issue of the financial powers given by the Constitution to the Petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as organs of county government, and the relationship between these organs and other levels of government in this regard thus fall within the ambit of Article 165 of the Constitution and is within the jurisdiction of this Court.

As seen from the holding in **The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [supra]**, any limitation as to the jurisdiction of a court must also by law be granted. There is no provision in the cited Articles or any law that provides that the jurisdiction granted to the High Court is limited as regards the actions of County Assemblies or any other constitutional or statutory bodies.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this respect relied on Article 96 of the Constitution as the provision that gives the Senate jurisdiction in this Petition. The said Article provides as follows:

- “ (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.**
- (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.**
- (3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.**
- (4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.”**

Oversight is the review, monitoring, and supervision of government agencies, programs, activities, and policy implementation. Oversight functions consist of a wide array of activities and systems that are put in place to examine the effectiveness, efficiency and adequacy of the administration of a government organ, department or agency. When it comes to public finance, the oversight extends to powers given to Parliament and County Assemblies to authorization all government expenditure and the auditing of public accounts.

Therefore, the question of whether the Court in exercising its jurisdiction will be offending the doctrine of separation of powers and oversight powers of the Senate and County Assemblies and is one that can only be decided upon after the parties have canvassed their respective positions, upon which the Court can then make a decision one way or another as to whether the dispute is one that can be resolved by way of judicial processes or by other processes. In other words, an objection as to infringement of the doctrine of separation of powers is not a jurisdictional issue, but a substantive and factual issue to be determined upon hearing of evidence and opinion.

Lastly, it must be emphasized that the supervisory jurisdiction of the High Court granted by Article 165 of the Constitution is an exclusive one in terms of making definitive and binding decisions on the processes and actions whose legality and constitutionality is disputed. *Article 96* of the *Constitution* that has been relied by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot therefore be interpreted as a clauses that oust the supervisory jurisdiction of the High Court, or limit the power of the High Court to interpret *the Constitution*, nor can they be construed as provisions that prohibit the right of a citizen to access a court of law where there is an allegation of infringement of a constitutional right.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s Preliminary Objection therefore fails for the foregoing reasons, and the said Respondents shall bear the costs of the same.

Coming to the second issue and the orders sought in the application, the Petitioner submissions were that the it had met the standards set for the grant of an interlocutory injunction application as articulated in **Giella vs Cassman Brown (1973)EA 358**. Further, that the court ought to grant the mandatory prayer for the release of funds as the 4th Respondent had already approved the funds to be released to the Petitioner and which the 1st and 2nd Respondent are holding illegally.

Reliance was placed in this regard on the holding **Michael Osundwa Sakwa vs Chief Justice and President of Supreme Court of Kenya & Anor.(Supra)**, that conservatory orders bear a public law connotation to facilitate ordered functioning within public agencies, as well as uphold the adjudicatory authority of the Court, in the public interest. That it is thus in the interest of justice that this e Court grants the prayers sought since the Petitioner and the people of Machakos County in general stand to suffer grave injustice and irreparable loss and damage if the orders are not granted

The 1st and 2nd Respondents on their part submitted that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner, and that the Court must exercise restraint to avoid determining a suit at interlocutory stage as it may ultimately find that there was no basis after full hearing. Reliance was placed on the decision by the Court of Appeal in **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** that at the interlocutory stage, the case has to be unusually strong and clear before a mandatory injunction will be granted, and that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted.

In addition, that the Petitioner claims similar orders of mandatory injunction in the Petition as is in the application, and granting the orders sought at this stage would amount to granting final orders without granting the 1st and 2nd Respondents a chance to be heard. Further, that there are no special circumstances at this stage warranting the grant of the orders sought and the Petitioner has admitted that it received a substantial funds from the County Revenue Fund.

Lastly, that since filing of the Petition, the 1st and 2nd Respondents have not in any way sought to change the alleged cause of action, and it would be against public interest if the court grants the orders sought then it turns out, after full hearing, that such funds were not available to the Petitioner.

The 4th Respondent's submissions were that under Article 228 of the Constitution, the mandate of the Controller of Budget is inter alia to oversee implementation of the budgets of the national and county governments, approve withdrawals from public funds and report to Parliament on Budget Implementation, and that Article 228(5) makes it clear that the Controller of Budget has discretion to decline to authorize withdrawal of funds where such withdrawal is based on an illegality or is contrary to the law.

The 4th Respondent detailed the process for requisition for withdrawal of funds, and submitted that it has at all times adhered to the law in exercise of her mandate to authorize withdrawal of funds and has already performed her duty and approved the withdrawal of funds. Further, that the contention is that the County Treasury has failed to issue instructions to the Central Bank to transfer the funds approved by the Controller of Budget to the operations account from where the funds can be utilized, and that the inaction of the County Treasury should not be construed as a fault of the 4th Respondent.

Reliance was placed on the test for the granting of conservatory orders as enunciated in **Justice Phillip Tunoi & Anor vs The Judicial Service Commission & Anor, Petition No. 244 of 2014**, and the 4th Respondent urged that the Petitioner has failed to demonstrate that they have a prima facie case with a likelihood of success, as no action resulting in violation of the Constitution has been attributed to the 4th Respondent. Further, that the Controller of Budget is under a duty to ensure all requisitions for withdrawal of funds are in compliance with the law, and the coaching of the prayers in the application in essence means an automatic authorization for release of funds which would be unconstitutional as it usurps its role and duty under Article 228 (5) of the Constitution.

The principles for the grant of mandatory injunctions are settled. The principles were set out by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. The Court held as follows in this regard:

***“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.”***

The first question I must answer is whether the Petitioner has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

***“a prima facie case 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 latter.”***

The averments and evidence by the Petitioner as to the processes of appropriation and approval of withdrawal of funds have in this respect not been rebutted by the 1st and 2nd Respondents.. The applicable procedure in this regards as described by the 4th Respondent is that in accordance with Section 109(6) of the Public Finance Management Act, 2012, the County Treasury makes a written request for authority to withdraw funds from the County Revenue Fund. The Controller of Budget then reviews the requisition for conformity with the law in accordance with Article 228(5) of the Constitution and Section 109(6) of the Public Finance Management Act, 2012. If satisfied that the requisition complies with the law, the Controller of Budget in accordance with Article 207 and 228(4) approves the withdrawal of funds. Once authority for the withdrawal of funds is given, the County Treasury prepares instructions to the Bank (Central Bank) to transfer the funds from the County Revenue Fund (Exchequer Account) to the operations Account.

Article 201 of the Constitution in this regard provides for the principles that shall guide public finance management including that there shall be openness and accountability, including public participation in financial matters, that public money shall be used in a prudent and responsible way, financial management shall be responsible, and fiscal reporting shall be clear.

In addition, section 107(1) of the Public Finance Management Act sets out the fiscal responsibility principles that the County Treasury is supposed to apply in its decision making on and management of the County Revenue Fund, including that the county government's recurrent expenditure shall not exceed the county government's total revenue; a minimum of thirty per cent of the county government's budget shall be allocated to the development expenditure and that the county government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the county government's total revenue as prescribed by the County Executive member for finance in regulations and approved by the County Assembly; Under section 109(6) of the Act, the County Treasury shall obtain the written approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of inter alia, an Act of the county assembly that appropriates money for a public purpose.

The Petitioner in this regard demonstrated that it had passed an Appropriations Act, and also obtained the necessary approval from the Controller of Budget for withdrawal of the sum of Kshs.63,248,046/= for the recurrent budget and kshs.16,006,613/= for the development budget requisitioned for by the Petitioner and approved by the 4th Respondent.

The 1st and 2nd Respondents on the other hand have not brought any evidence to show contravention of the applicable principles or law on the part of the Petitioner. It is noteworthy in this regard that the arguments raised on the effects of the passing of a motion on a People's Assembly particularly on the Petitioner's public finance expenditure are not shown, and in addition the said motion was also alleged to have been passed on 9th December 2017, after the requisition for funds had been made and the approval of withdrawal by the 4th Respondent given in November 2017, and cannot be validly raised as a reason that was existing as the time of the said requisition.

In the circumstances the Petitioner has not only established a prima facie case, but this is also a clear case that warrants a mandatory injunction particularly in light of the public interest in ensuring the Petitioner's continued operations in discharging its constitutional and statutory functions, but it is also the case that the 1st and 2nd Respondents are trying to steal a march on the Petitioner.

As regards the remaining prayers in the application, this Court is granted powers to issue conservatory orders in constitutional petitions under Article 23 (3)(c) of the Constitution, and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. The applicable principles for the grant of a conservatory were detailed by Onguto J. in **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** .

In summary, the principles are that the Applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.

The outstanding prayers in the application seek conservatory orders and a mandatory injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents from using withdrawing or transferring the appropriated funds in the County Revenue Fund which have not been remitted to the Petitioner. It is however notable that the applicable procedure described in the foregoing as to withdrawal of funds by the Petitioner has not been shown to have been complied with as regards these funds, particularly the approval required by the 4<sup>th</sup> Respondent. These prayers will therefore have to wait full hearing of the Petition to confirm if and when applicable procedures have been met.

Arising from the foregoing, I accordingly hereby order as follows:-

1. The Preliminary Objection dated 18<sup>th</sup> December 2017 and filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the same date is hereby found not to have merit and is dismissed with costs to the Petitioner.
2. The Notice of Motion dated 4<sup>th</sup> December 2017 and file on the same date by the Petitioner is hereby allowed only to the extent of the following orders:
  - a) A mandatory injunction is hereby issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally, their agents, or any person acting under their behest to within 14 days from today's date approve the withdrawal of, release, and/or remit a total sum of Kshs.79,254,659/= which consists of the sum of Kshs.63,248,046/= for the recurrent budget and kshs.16,006,613/= for the development budget requisitioned for by the Petitioner and approved by the 4<sup>th</sup> Respondent.
  - b) Prayer 3 of the Notice of Motion is denied.
  - c) Prayers 4 and 5 of the Notice of Motion shall be canvassed and determined together with the Petition filed herein on 4<sup>th</sup> December 2017.
3. The Costs of the Notice of Motion shall be in the cause.

Orders accordingly.

**Dated Signed and Delivered at Machakos this 16<sup>th</sup> day of January 2018**

**P. NYAMWEYA**

**JUDGE**