



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISCELLANEOUS CIVIL CASE NO. 22 OF 2018

SILVER M. R. NCURAI.....1ST APPLICANT

JUSTUS NJAGI KANAMPIU.....2ND APPLICANT

VERSUS

COUNTY GOVERNMENT THARAKA NITHI.....1ST RESPONDENT

COUNTY ASSEMBLY THARAKA NITHI.....2ND RESPONDENT

RULING

1. SILVESTER M. R. NCURAI and JUSTUS NJAGI KANAMPIU, the exparte applicants herein have moved this court through chamber summons dated 17th July, 2018 brought under **Section 8** of the **Law Reform Act**, **Order 53 Rules 1, 2 and 3** of the **Civil Procedure Rule** and **Section 3 A** of **Civil Procedure Act** for the following orders namely:-

- (i) *That this honourable court be pleased to certify this application urgent (prayer spent).*
- (ii) *That this honourable court be pleased to grant leave to the applicants to apply for an order of Certiorari to bring into this honourable court for the purposes of being quashed the decision of the 1st and 2nd Respondents of developing and approving Tharaka Nithi Development Budget for the year 2018/19 without following, complying and/or adhering to the substantive and procedural constitutional and legal requirements.*
- (iii) *That this honourable court be pleased to grant leave to the applicants to apply for order of Prohibition to prohibit the 1st and 2nd Respondents by themselves agents or whomsoever from enacting the County Appropriation Bill to give effect to the said budget.*
- (iv) *That this honourable court be pleased to grant leave to the applicants to apply for an order of Prohibition to prohibit the 1st and 2nd Respondents by themselves agents or whomsoever from implementing the said budget.*
- (v) *That this honourable court be pleased to grant leave to the applicants to apply for an order of Mandamus to direct the 1st Respondent to commence de novo and undertake a budgetary and budget making/development process that follows, complies and/or adheres to the substantive and procedural, constitutional and legal requirements.*
- (vi) *That this honorable court be pleased to grant leave to the applicants to apply for an order*

of Mandamus to direct the 2nd Respondent to only approve a budget that has been subjected to a budgetary and budget/development process that has followed, complied and/or adhered to the substantive and procedural, constitutional and legal requirements.

(vii) That this honourable court be pleased to grant leave to the applicant to apply for an order of Mandamus to direct the 1st Respondent to only implement a budget that has been subjected to a budgeting and budget, making/development process that has followed, complied and/or adhered to the substantive and procedural constitutional and legal requirements.

(viii) That the grant of leave do operate as a stay of the 1st and 2nd Respondents' decision of developing and approving the Tharaka Nithi County Development Budget for the financial year 2018/19 without following, complying and/or adhering to the substantive and procedural requirements.

(ix) That costs be provided for.

2. The grounds upon which this application has been brought as listed on the face of the application are as follows namely:-

a) That the Tharaka Nithi County, Development Budget for the financial year 2018/19 was made/developed without following, complying and/or adhering to the substantive and procedural, constitutional and legal requirements.

b) That the said budget did not comply with the constitutional and legal requirements of public participation, openness, accountability, equity and participation of a county budget and economic forum in the budget making process;

c) That as a consequence of these constitutional and legal violations, the budget in question is not only illegal, irregular and skewed but glaringly discriminatory of certain regions.

d) That the budget was approved by the 2nd Respondent on 26/6/2018 and the 1st and 2nd Respondents are in the process of enacting a County Appropriation Bill to give the effect to the impugned budget;

e) That the said budget was approved by the 2nd Respondent on 26/6/2018 and is on the verge of being implemented by the 1st Respondent.

f) That the said budget has aroused regional/sectional/communal tensions and if it is implemented as it is, it will cause disunity in the County.

g) That if the said budget is implemented by the 1st Respondent as it is, it will aggravate regional/sectional/communal tensions, cause disunity in County, propagate the culture of impunity and certain sections of the county will be greatly prejudiced.

h) That even if the orders sought are granted they will not in any way affect the operations of the county because the budget being impugned is the Development Budget and not the Recurrent Budget.

i) That is therefore imperative for the foregoing reasons, that this application certified as urgent and be heard ex parte at first instance.

j) That the Applicants have prima facie case with high chances and probability of success.

k) That the Applicants are citizens of Kenya, born, raised and living in Tharaka Nithi County and they therefore have sufficient interest and have the requisite *locus standi* to make this application. as they are directly affected by the impugned budget;

3. The grounds upon which the application are as follows namely:-

(i) That Respondents came up with a budget and approved it without County Budget and Economic Forum or public participation and that the action is illegal, ultra vires unreasonable, in bad faith, in breach of rules of natural justice, an abuse of power, discretion and in breach of legitimate expectation that they would adhere to be laid down requirements of the law as stipulated under Section 7(2) of Fair Administration Action, Section 137 of the Public Finance Act and Section 87 of the County Government Act.

4. The applicants have filed supported this application through Verifying Affidavits sworn on 17th July 2018 respectively. The facts relied on in this application majorly hinge on the accusation by the applicants that in the budget making process, the Respondents breached the law by excluding the views of the applicants and other residents who would have actively participated had the Respondents among other steps established a forum for consultation as stipulated under **Section 137** of the **Public Finance Management Act** and that the Budget was passed without the input of public participation.

5. In their written submissions done through counsel **M/s KIMAKIA MAGARA & PARTNERS ADVOCATE** the applicants have submitted that at this stage where they are seeking leave, they are needed only to establish three grounds;

(i) *That the application disclauses a prima facie case as decided in the following cases.*

a) *Hirji Transport Services -vs- Republic (1961) EA 88.*

b) *Wamwere -vs- Attorney General [2004] eKLR &*

c) *George M. Wekuto -vs- L.S.K & Another [2005] eKLR.*

(ii) *That the applicants have locus standi on this they rely on the following authorities;*

a) *Lawrence Nginyo Kariuki -vs- County Council of Kiambu and Another (unreported)*

b) *Kitiumwiri Farmers Co. Ltd -vs- The Registrar General [2003] eKLR.*

(iii) *That the application filed within six months from the time impugned decision or action is made.*

6. On the first ground, the applicants have submitted that they have an arguable case with reasonable chances of success and have urged this court to look at the application and see if on the face of it, it reveals that the Respondent has failed to discharge their duties even without delving into the finer details and establish it the acts complained of constitutes those action whose remedies are available in Judicial Review. The applicant has reiterated that the budget was developed and approved in utter violation of the law and process as there was a mockery of public participation due to absence of County Budget and Economic Forum.

7. On locus standi, the applicant submits they have sufficient interests in the affairs of the county with the 1st applicant stating that he comes from Tharaka Constituency, while the 2nd applicant states that he is a resident of Maara Constituency.

8. On time, the applicants submits that the budget was approved on 26th June 2018 and that this application was filed in this court on 18th July, 2018 which date was within the stipulated time under the law.

9. They have also urged this court to order that the leave do operate as a stay the whole process pending the determination of the substantive application. They have contended through submissions that the

impugned budget is only the development budget and not recurrent expenditure therefore in their view fears of paralyzing the operation of the County Government cannot arise.

10. The Respondents have opposed this application through grounds of opposition dated 23rd July, 2018 and the written submissions dated 25th July, 2018 made through Ms Kamau Kuria & Co. Advocate. Both the grounds of opposition and the written submissions were adopted by the 2nd Respondent herein.

11. The Respondent have contended that this application is incurably defective as the Verifying Affidavits in support of the application offend the provisions of **Order 19 Rule 3** of the **Civil Procedure Rule** because in their view the verifying affidavit consists of general and unsubstantiated allegations without documentary evidence in support. They have cited the decision of *Commissioner General of K.R.A - VS- S.O. WAKI C.A NO. 45 of 2000 at NAIROBI* to buttress their contention.

12. The Respondents have also contended that the exparte applicants have not discharged the burden of proof in respect of the alleged want of public participation in budget making process on a prima facie basis and have cited the unreported decision where this court sitting in *Kitui (Misc. 1/2016)* held that the Petitioner were duty bound to prove their allegations. They have further relied on *O'Reilly -vs- Mackman & Others (1982) 3 Allied 1124* which they contend observed that the rationale for applying for leave was to prevent parties from making frivolous applications that would waste judicial time. The case of *KANU -VS- MWAI KIBAKI & 6 OTHERS [2005] eKLR* has also been cited to buttress their argument that that the object of leave was to *"protect decision making statutory tribunal or public authority like the Respondent against which the remedy of certiorari was sought against claims which it was not in the public interest for courts to entertain and that public interest in good administration of justice requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary to the person affected by the decision. Such an affidavit was also required to satisfy the requirement of uberrima fides (most abundance of faith) with the result that failure to make on oath a full and candid disclosure of material facts was itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit."*

The Respondents have argued that a Verifying Affidavit is required in an application for leave because a party making the affidavit exposes himself/herself to perjury if he makes a false affidavit. They have contended that the verifying affidavit in supports of this application fails the test of good faith or *uberrima fides* because what they have deponed is not what they know but information obtained from newspapers and online articles containing opinions regarding the quality of the budget.

13. The Respondents have faulted the applicant for not laying the factual and legal basis for leave in the Verifying Affidavit and instead putting the same on the statement of facts and relied on the cited case of *KANU -VS- MWAI KIBAKI & 6 OTHERS [2005] eKLR* and *Commissioner General of K.R.A -VS- S.O. OWAKI*. They have submitted that the law in those two cases were laid out and the same was to the effect that the Verifying Affidavit is of evidential value in an application for Judicial Review not the statement. The Respondents have contended that the 6 & 7 paragraph affidavit by the applicant do not contain any allegation that reveal want of public participation in the budget making process. The Respondents submits that the applicants have no such evidence and since this court can only act on evidence, there is no basis to grant leave to applicants to apply for the prerogative orders sought in this application.

14. The Respondents have further submitted that the budget making process as per **Section 125** of **Public Finance Management Act, 2012** has nine stages and that the applicants have not indicated if any of the stages were either skipped or were inadequate before the approval was given. It is also submitted that the applicants have not demonstrated that the acts complained of were *ultra vires* done in excess of jurisdiction to warrant an order of *certiorari* and the Respondent have pointed out that the Verifying Affidavits have not faulted the Respondents for either non performance of statutory task or illegal performance and that they cannot claim to have established a *prima facie* case in the absence of those two important ingredients in their application. In their view the applicants should be stopped from

using the court process to vex public bodies like the Respondents without factual foundations in their complaints. The Respondents contend that the applicants have not pinpointed what the Respondents were supposed to do and failed to or did so incompetently. They have reiterated that they had a duty to present facts which they failed to do.

15. The Respondents have faulted the prayers sought under prayer 7 & 8. It is submitted **Section 60(1) (a)** of the **Public Finance Management Act** mandates the court to take judicial notice of the legality of the laws passed by the County Assembly and that since Tharaka Nithi Appropriation Act No. 4 of 2016 was assented to on 29th June, 2018, the horse has already bolted and that a court cannot stay what has already taken place and a court cannot quash an action taken at an interlocutory stage. In their view the only relief available to the applicant is to seek to invalidate the Tharaka Nithi Appropriation Act No.4 of 2018. The Respondents contend that a grant of stay will lead to chaos and have cited the decision of ***Kipkalya Kiprono Kones -vs- Republic & 6 Others [2006] eKLR*** in their contention that the applicants want to simply stop all the operation of the County Government of Tharaka Nithi by using the name of public whose services they want stopped.

16. This court has considered this application and submissions from both sides. The application before this court although so much has been put both in support and in opposition simply raises 2 issues basically;

(i) Whether the applicant has established a prima facie case for leave to apply for orders of *Certiorari*, *Prohibition* and *Mandamus* challenging budget making process, approval and implementation of that budget.

(ii) Whether leave if granted should operate as a state.

This court cannot at this be invited to substantially make a finding on the merits or demerits of the challenge of the exercise of statutory and constitutional mandates given to the Respondents. That can only be canvassed and interrogated at the substantive stage. I will therefore limit myself to the issues framed above because matterS brought under **Order 53 of the Civil Procedure Rule** has two stages. The first stage is interlocutory normally ex parte and it is about leave and whether that leave should operate as a stay and the second stage is the substantive one where the complainants or issues raised are canvassed interrogated inter partes and determined.

This court exercised its discretion pursuant to the provisions of **Order 53 Civil Procedure Rule** and directed the applicants to serve the Respondents with a view to granting them chance to air their views in view of the orders sought by the applicants and effect of prayer 8 of their application.

17. On the question of prima facie case, the parties to this application are all in agreement that for a party to be granted leave to apply for any prerogative under **Order 53 of Civil Procedure Rule** (Judicial Review), he/she must disclose a sufficient cause or a prima facie case besides *locus standi*. The question of locus and time is not contested here. What is highly contested is the question of prima facie case with the applicants holding that they have a prima facie case against the statutory and constitutional actions undertaken by the Respondents while the Respondents on the other hand have reiterated that the applicants have not disclosed factual or legal basis. The Respondent in the first limb has faulted the verifying affidavit of the applicants on grounds that the same is defective for want of substance and that the same offend. **Order 19 Rule 3 of the Civil Procedure Rule**. I have perused through both the affidavits of the applicants and I am not persuaded that there are any defect in either form or substance. **Order 19 Rule 3** provides as follows:-

“3(1) Affidavit shall be confined to such facts on the deponent is able of his own knowledge to prove. Provided that in interlocutory proceedings, or by leave of the court, an Affidavit may contain statement of information and believe showing the sources and grounds thereof ”.

As I have observed this application is at the interlocutory stage and the rules allow a party to rely on affidavit containing statements of information and sources of that information. In the verifying affidavits

herein the applicants have vouched for the correctness of their application and the statement of facts accompanying the application and to that extent this court finds the same are in line with the cited provisions of **Order 19** of the **Civil Procedure Rule**. The Respondents at this stage have no basis to fault the same on grounds of competency. I am also minded about the provisions of **Order 19 Rule 7** of the **Civil Procedure Rule** and **Section 10** of the **Fair Administrative Act** that provides that affidavit cannot merely be inadmissible or incompetent for want of form or any other procedural technicality.

19. Secondly on the question of whether the verifying affidavits on their own reveal any factual or legal basis for grant of leave, this court has gone through the statement setting out the grounds upon which the applicants have filed this application and the verifying affidavits. The provisions of **Order 53 Rule 1(2)** provides as follows:-

“ An application for such leave as aforesaid shall be made ex parteand shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

The rules contrary to what to the contention by the Respondents really does not require an applicant to swear an Affidavit laying out the factual basis for the application for leave. The verifying affidavits in this application have laid out legal basis upon which the application has been brought. The legal basis is clearly provided in the rule I have cited and quoted above. The applicants have set out facts upon which they have moved this court and in paragraph 4 and 6 of the 1st applicant’s affidavit and paragraph 3 and 5 of 2nd applicant’s affidavit they have in my view met the threshold in so far as the requirement of a verifying affidavit under **Order 53 Civil Procedure Rule** is concerned.

20. Having delve on the verifying affidavit, the next question is whether the applicant’s have disclosed a prima facie case to warrant them being granted the leave as sought. The applicant herein has faulted the budget making process that was adopted by the Respondents in developing and approving Tharaka Nithi County Development Budget for the year 2018/19 on 26th June, 2018 contending that **Section 125** and **137** of the **Public Finance Management Act** was not adhered to and in specifically the Respondents are faulted for not carrying out proper consultations and given public participation a chance in the budget making process. This court finds that no county official has come out to swear affidavit to deny the allegations and positively state that all the legal steps in the budget making process as provided under Public Finance Management Act and specifically creating a forum for public participation was done. The Respondents have only opposed this application on the ground that the applicants have not tendered cogent evidence to establish or prove their allegations and that exhibiting newspaper writings and online information have failed to test of abundance of faith as held in **K.A.N.U –vs- MWAI KIBAKI & 6 OTHERS [2005] eKLR**. The Respondents have however not sworn an affidavit disputing the information as reported in the newspaper cuttings or obtained through online medium and that is where the problem is. The question in my view should be whether what is reported is true or not and it is not insufficient to discredit a source of information without first contesting their veracity through an affidavit.

21. The applicants have in my view demonstrated that they have a legitimate right to question the processes leading to the decision made by the Respondents both in the budget making process and the approval by the 2nd Respondent. The rights cited by the applicants are both statutory and constitutional and cannot be disregarded without substantial interrogation.

22. In the new constitutional dispensation the National Government, County Government and public bodies are open to scrutiny and cannot act in disregard to the law or the constitution with impunity like in the past because the landscape has changed for real with enactment of the new constitution. Every decision made on behalf of the people and for the people must be consultative and inclusive. The applicants have stated that there was no public participation and I am not persuaded by the Respondents’ contention that the applicants have not specified in details what stages in the budget making process was skipped because that is an issue to be canvassed at a substantive stage. At this interlocutory stage, the applicants are required to show that on the face of the concerns expressed, a prima facie basis is established to interrogate those concerns substantively in order to establish the merits or demerits. That in

my view is the standard applicable. The authorities cited by the Respondents relate to the 2nd stage of substantive of t Judicial Review which is the substantive stage.

23. In the premises based on the evidence placed before me I am persuaded that the applicants have established prima facie case to warrant leave being granted in terms of prayer 2, 3, 4, and 5 of the application on the other hand I am not persuaded that the applicant has established basis for prayer 6 and 7 on this I agree with the Respondents that a statutory body and the legislature are presumed to be lawful and the legislation passed are lawful unless contrary is proved. The burden is on the one who alleges that the laws passed are *ultra vires* or anullity. A party cannot seek a compelling order to direct a statutory body to carry out only legal activities or statutory functions because they are presumed by law to do just that. So one cannot be expected to apply for prerogative order to compel a legislative body to enact and approve only constitutional bills because it is absurd. The purpose for which legislature or any statutory body exist is simply to do just that. It is expected or presumed that the statutes passed or enacted by statutory bodies are lawful and constitutional but if a party feels that the expectation is not met then I agree with the Respondents' counsel that remedy lies elsewhere through a constitutional challenge vide a petition to the court.

24. Having granted leave in terms of prayer 2, 3, 4, and 5 of the application herein the remaining issue is whether the leave so granted should operate as a stay. The provisions of **Order 53 Rule 4** provides as follows:-

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Judge so directs, operate a stay of proceedings in question until the determination of the application or until the Judge orders otherwise.”

An order of stay is discretionary based on circumstances and is not automatic or granted capriciously.

25. The guidelines of the exercise of that discretion is drawn from the above rules and trends that have developed over time in our courts is that courts have been leaning to where circumstances so demand, to preserve the subject of litigation to restrain an administrator from continuing in any such manner that is prejudicial to the legal rights of the applicant. The purpose of to give temporary or interlocutory relief to an oppressed party pending the final determination of the cause and prevent situations where the continued impugned actions would render the Judicial Review proceedings futile.

In the case of Republic –vs- National Assembly & Another Exparte coalition for Reform and Democracy (CORD) [2016] eKLR the court (Judge Odunga) citing R (H)- VS-ASHWORTH HOSPITAL AUTHORITY [2003] WLR 127 restated the purpose for granting stay thus;

“The purpose of a stay in a Judicial Review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the Judicial Review process and make it moré effective. It will ensure, so far as possible that if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In the "AVON" Glidewell LY said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the Judicial Review jurisdiction. A narrow interpretation such as that which appealed to the privy council in "Vehicle and Supplies." would appeal to deny jurisdiction even in case A. That would indeed be regrettable and, if correct would expose a serious shortcoming in the armonry of powers available to the court when granting permission to apply for Judicial Review thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect or fully carried into effect.” This position was held by Maraga J. (as he then was) in Taib A. Taib -vs- the Minister for Local Government & others (MSA HC MISC APPEAL NO. 158 OF 2006) who held as follows:-

"As injunctions are not available against the government and Public officers, stay is a very

important aspect of the Judicial Review jurisdiction in Judicial Review applications the court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose limited..... the purpose of stay order in Judicial Review proceedings is to prevent the decision matter from continuing with the decision making process if the decision has not been made and it is not limited to Judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a Local Authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act..... as stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

26. In this application the applicant seeks that the grant of leave do operate as a stay of the 1st and 2nd Respondent decision of developing and approving the Tharaka Nithi County Development Budget for the Financial 2018/19 without following procedural requirement. In my view granting such an equivocal order of stay would create problems or some sort of chaos the Respondents have suggested in their response. They have also submitted that a stay order will likely paralyze operations of the County Government and though no affidavit have been sworn to show how paralysis can be occasioned, I am inclined to agree that granting an amorphous order as couched in prayer 8 of this application is likely to lead to problems as different interpretations are likely to arise. It is not clear whether the applicants inadvertently framed the prayer in such a manner or there is a hidden mischief but what has come out from the applicants' submissions is the fact, that perhaps the change of the prayer to limit stay to only development budget and not recurrent budget is informed by either that inadvertence or the realization that the stay sought in their application is too general to be granted. Whatever the case parties should always be bound by their pleadings when approaching the court for whatever relief party should always be clear in his mind and the pleadings what he wants the court to do. A party cannot come to court asking for a certain relief only to change midstream and without leave ask for something totally different. The applicants have in their pleadings couched their prayer for a stay in a manner that is equivocal because the prayer for stay seems to be predicated upon adherence to the legal requirements by the Respondents rather than the pendency of determination of the substantive application upon which leave is being sought. Such a prayer for stay as observed in Taib A. Taib authority cant be granted. The applicants should have been candid in their prayer for stay to enable this court make an informed determination on what is it that is being stayed. Having said that the applicants still have sufficient remedies available to them if they at the substantive stage convinces this court that have legitimate ground to quash or stop the impugned actions or process adopted by the Respondents in making and approving Tharaka Nithi County Development Budget in the Financial year 2018/19.

27. In the end for the reasons advanced this court to some extent finds merit in the application dated 17th July 2018. The application is hereby allowed only in terms of prayer 2, 3, 4 and 5 in the said application. They are 21 days from the date of this ruling to file and serve substantive motion in respect to the prayers granted.

Costs shall be in the main cause.

Dated, signed and delivered at Chuka this 31st day of July, 2018.

R.K. LIMO

JUDGE

31/7/2018

Ruling signed, dated and delivered in open court in the presence of Kirimakia for the Applicant, Karanja Munyori for 1st Respondent and Kaburu for 2nd Respondent.

R.K. LIMO

JUDGE

31/7/2018