



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CONSTITUTIONAL PETITION NO. 7 OF 2016**

**IN THE MATTER OF: CHAPTER 12 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF: BUDGETS AND SPENDING OF PUBLIC FUNDS**

**AND**

**IN THE MATTER OF: CONTROL OF PUBLIC MONEY**

**AND**

**IN THE MATTER OF: PROCUREMENT OF PUBLIC SERVICES**

**AND**

**IN THE MATTER OF: COUNTY ASSEMBLY SERVICE BOARD – KISII**

**AND**

**IN THE MATTER OF: FUNCTIONS OF THE MEMBERS OF COUNTY ASSEMBLY**

**BETWEEN**

**HON. EVANS MOKORO & 32 MEMBERS OF THE**

**COUNTY ASSEMBLY OF KISII.....PETITIONERS**

**VERSUS**

**KISII COUNTY ASSEMBLY SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**KISII COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**AND**

**JETTA BUILDERS LIMITED.....INTERESTED PARTY**

## RULING

### Background

1. Through a petition dated 20<sup>th</sup> December 2016, the petitioners herein who describe themselves as members of the County Assembly of Kisii, filed a petition against the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, who are the Kisii County Assembly Service Board and Kisii County Government respectively seeking the following order:

**i. A declaration that the actions of the respondents for seeking to undertake an infrastructural development project of renovation of the county assembly offices, with a view to creating more offices at a magnitude cost of more than Kshs. 10,000,000/= without the approval of the county assembly and that avoids the statutory requirements on open procurement process is unconstitutional, therefore the project is null and void. Consequently, the court is pleased to nullify the intended project by issuing a mandatory order of injunction to compel the respondents to halt the project until all the legal processes sanctioning it are strictly adhered to and followed.**

**ii. Costs of the petition be provided for.**

2. The petitioner's claim was that on 19<sup>th</sup> December 2016, an undisclosed contractor stormed their offices situate at the county assembly and began evacuating their furniture and documents while claiming that they had been awarded a tender for the renovation of the said offices at a cost of 40,000,000/= which expenditure had not been approved. The petitioners contend that the procurement of the contractor was done secretly by the respondents who did not advertise the tender or subject the contractor to competitive bidding. They contend that they are apprehensive that the respondents have set out to violate the constitution by embarking on a project that was clearly designed to embezzle public funds.

3. The petition was supported by the joint affidavit of all the petitioners wherein they have expounded on the grounds set out in the petition.

4. At the time of filing the petition, the petitioners also filed an application under **Articles 3, 22 (3), 23 and 159 of the Constitution** seeking conservatory orders to restrain the respondents and their contractors or agents from commencing, undertaking or proceedings with the construction works at the county assembly offices pending the hearing and determination of the application interpartes and subsequently, pending the hearing of the petition.

5. On 9<sup>th</sup> January 2017, the 2<sup>nd</sup> respondent filed Grounds of Opposition to the application wherein it listed the following grounds:

**1. That the 2<sup>nd</sup> Respondent is wrongly sued as she has no control over the acts of the 1<sup>st</sup> Respondent.**

**2. That the 1<sup>st</sup> Respondent is a legal entity capable of suing and being sued hence if there is any action on its activities the 2<sup>nd</sup> Respondent should not be dragged into the same.**

**3. That there is no evidence of any construction works or any works complained of.**

**4. There is no evidence that there is no budgetary allocation for the works being carried out, if any.**

**5. That there is no evidence that the contract was singly sourced secretly by the Respondents and in particular the 1<sup>st</sup> Respondent or any role of the 1<sup>st</sup> Respondent.**

**6. That there is no evidence that the alleged project has not been approved by NEMA, NCA**

**and all other statutory bodies.**

**7. That if indeed the purpose of renovating is with a view to creating more offices then that is a noble cause.**

**8. There is no evidence of violation of any provisions of the constitution and the Public Finance Management Act or the Budgeting and Spending of the public finances.**

**9. There is no evidence that public funds will be embezzled in any manner whatsoever.**

**10. That there is no evidence that indeed there is no need for the works alleged to be carried on.**

**11. There is no evidence of any authority by the alleged 32 other members of the County Assembly of Kisii authorizing the Petitioner (Hon. Evans Mokoro) to institute this suit on their behalf and from the pleadings the alleged 32 members of the County Assembly of Kisii are not disclosed.**

**12. That the entire Petition and application is mere hearsay and cannot stand the test of time.**

**13. The entire application and Petition is bad in law and ought to be dismissed with costs.**

6. On 20<sup>th</sup> February 2017, the 2<sup>nd</sup> respondent filed a Notice of Preliminary Objection to the petition wherein it outlined the following grounds.

**1. That the 1<sup>st</sup> Respondent is a legal entity established by statute under Section 12 of the County Government Act and the 2<sup>nd</sup> Respondent cannot be sued on the acts committed or omitted by the 1<sup>st</sup> Respondent.**

**2. That the 1<sup>st</sup> Respondent under Section 12 (7) (c) is responsible for preparing annual estimates of expenditure of the County Assembly Service and submitting them to the County Assembly for approval, and exercising budgetary control over the service and therefore has its own financial independence.**

**3. The suit is fatally defective as it purports to be a representative suit of non-petitioners.**

7. When the application came up for hearing on 15<sup>th</sup> February 2017, Mr. Onsembe for the 2<sup>nd</sup> respondent informed the court that he wished to canvass the preliminary objection first after which parties agreed to file their written submissions on the issues raised in the notice of preliminary objection filed on 20<sup>th</sup> February 2017 within 7 days. On 11<sup>th</sup> April 2017, when the matter came up for further mention, only the respondents had filed their written submission and the matter was then listed for ruling on 21<sup>st</sup> June 2017.

### **Respondent's Submissions**

8. Through their advocates M/s Onserio Ondimu and Kennedy Chweya Onsembe, the respondents submitted that the 2<sup>nd</sup> respondent is by operation of law, distinct and autonomous from the 1<sup>st</sup> respondent which is a body corporate and therefore, the 2<sup>nd</sup> respondent cannot be sued for acts or omissions of the 1<sup>st</sup> respondent.

9. The 1<sup>st</sup> respondent cited the case of **Agricultural Finance Corporation vs Lengetia Ltd [1985] KLR 765** wherein it was held inter alia that a contract affects only the parties to it and cannot be enforced by or against a person who is not a party to the said contract.

10. The respondents reiterated that the 2<sup>nd</sup> respondent has no control over the functions of the 1<sup>st</sup>

respondent as there exists a clear separation of powers between the County executive and the County assembly in the devolved system of governance as contemplated by the constitution.

11. On whether the instant petition is a representative suit, the respondents submitted that the petitioners had not complied with Order 1 Rule 8 of the Civil Procedure Rules which requires that notice by way of personal service, of the suit be given to all persons on whose behalf or for whose benefit a suit is instituted or defended. While citing the **Ugandan case of Ibrahim Ruwembo, Emmanuel Sserunjogi, Zubairi Muwanika for and on behalf of 800 Others vs Utoda Ltd HCCS No. 664 of 2003**, the 1<sup>st</sup> respondent stated that the suit was fatally defective for want of personal service or service by public advertisement.

12. It was the respondents' contention that the entire suit was a non-starter since the 'other' purported petitioners were not named in the petition to give effect to a representative suit.

13. I have considered the pleadings herein, the preliminary objection raised by the 2<sup>nd</sup> respondent together with the respondents written submissions. I note that the issue for determination is whether the preliminary objection should be allowed.

14. As was stated by Law J.A. and Sir Charles Newbold P. in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors (1969) EA 696 at page 700**,

**"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."**

15. In this case, the preliminary objection relates to the following issues:

- a. **Whether the 2<sup>nd</sup> respondent is a proper party to this suit.**
- b. **Whether the 2<sup>nd</sup> respondent has control over the functions of the 1<sup>st</sup> respondent and vice versa.**
- c. **Whether or not the suit is a representative suit.**

16. On the 1<sup>st</sup> issue of whether or not the 2<sup>nd</sup> respondent is a proper party to the suit, the respondents argued that there was no privity of contract between the 2<sup>nd</sup> respondent and the 3<sup>rd</sup> party who had been granted a contract to renovate the county offices. This first issue is also closely related to the 2<sup>nd</sup> issue of whether the 2<sup>nd</sup> respondent has control over the functions of the 1<sup>st</sup> respondent.

17. I have carefully perused the petition and the affidavit in its support and I note that nowhere in the said pleadings do the petitioners claim that 2<sup>nd</sup> respondent controlled the activities of the 1<sup>st</sup> respondent or that it is the 1<sup>st</sup> respondent who entered into a contract with the unnamed third party contractor who had been assigned the task of carrying out renovation at the county offices. In fact, a clear reading of the petitioners' pleadings shows that there is no clear cut lines on what role each of the respondents played in the acts or omissions that gave rise to the case at hand. I find that under those circumstances, it would not be possible for this court to determine, at this preliminary stage, if the 2<sup>nd</sup> respondent has been sued for the wrongs committed by the 1<sup>st</sup> respondent or if the 2<sup>nd</sup> respondent is a proper party in this case. It is my finding that these are issues of fact which can only be determined after the production of evidence to ascertain them.

18. Similarly, I find that the issue of whether or not the **Order 1 Rule 8 of the Civil Procedure Rules** was complied with by the petitioners by serving notices on the rest of the petitioners is also an issue of fact which can only be ascertained upon the production of evidence of such service. Furthermore, I find that

the instant petition is not a representative suit per se as at the heading of the petition, the petitioners are listed as; “Hon. Evans Mokoro & 32 members of the County Assembly of Kisii (See List overleaf).” My reading and understanding of the said heading is that instead of listing the names of all the 33 petitioners on the body of the petition, the petitioners opted to list only the 1<sup>st</sup> petitioner and provide a separate list of the other petitioners separately. Clearly therefore, the petition is not filed by the 1<sup>st</sup> petitioner, but by all the 33 petitioners save that the names of the 32 petitioners are contained in a separate list which they have all signed. I find nothing wrong with this form of listing even though the normal format would have been to list all the petitioners at the heading or on the body of the petition.

19. Courts have severally held that it is more desirable to sustain suits rather than dismiss them especially where justice would still be done despite the perceived flaws in the pleadings especially if the said flaws do not go to the jurisdiction of the case or prejudice the other party to the suit. It is on this basis that the makers of our constitution at Article 159 deemed it fit to make a provision that substantive justice be dispensed with without undue regard to procedural technicalities.

20. In the end, I decline to dismiss or strike the petition and disallow the preliminary objection raised for lacking in merit. I make no order as to costs of the preliminary objection as to petitioner did not make any submissions on it.

**Dated, signed and delivered in open court this 21<sup>st</sup> day of June, 2017**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the petitioner/Applicant
- Mr. Onserio for the 1<sup>st</sup> Respondent
- Omwoyo: court clerk