



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO. 5 OF 2017 AND 9 OF 2017(CONSOLIDATED)

HASSAN AHMED IBRAHIM.....1ST PETITIONER
IBRAHIM YUSUF NUR.....2ND PETITIONER
MOHAMED IBRAHIM ALIO.....3RD PETITIONER
IBRAHIM MOHAMUD IBRAHIM.....4TH PETHIONER
ISSACK DAHIR.....5TH PETITIONER
HASSAN NOOR MOHAMED.....6TH PETITIONER
SAAD SHEIKH AHMED.....7TH PETITIONER
MOHAMED IBRAHIM ABDULLAHI.....8TH PETITIONER
SHABAN MOHAMED ALI.....9TH PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MANDERA.....1ST RESPONDENT
CABINET SECRETARY, FINANCE,
NATIONAL TREASURY.....2ND RESPONDENT
CABINET SECRETARY, TRANSPORT AND
INFRASTRUCTURE.....3RD RESPONDENT
CABINET SECRETARY, DEVOLUTION & PLANNING.....4TH RESPONDENT
CABINET SECRETARY, WATER AND IRRIGATION.....5TH RESPONDENT
KENYA RURAL ROADS AUTHORITY.....6TH RESPONDENT
THE ATTORNEY GENERAL.....7TH RESPONDENT
NORTHERN WATER SERVICE BOARD.....8TH RESPONDENT

JUDGEMENT

1. These are two petitions, Petition No. 5 of 2017 and Petition No. 9 of 2017 , were consolidated and as such the list of petitioners and respondents are accepted by counsel, as some parties are repeated in the petitions.

2. The petitions were filed under several Articles of the Constitution of Kenya 2010, that is Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 35, 43, 47, 48, 46, and 204. It is alleged in the petitions that the Constitutional rights of the petitioners and the general public in Mandera were violated by the respondents. The petitioners have thus asked for the following orders under Petition No. 5 of 2017:-

- (a) A declaration do issue that the respondents failed to involve, consult and inform the petitioners on the intended use of Equalization Fund in Mandera County in line with the Constitution of Kenya 2010.**
- (b) A declaration be issued directed at the respondents that any use of the Equalization fund in non-compliance with the law is null and void abinitio and unconstitutional.**
- (c) An order do issue preventing, stopping or discontinuing any acts, or omission by the respondents over Equalization Funds use for the year 2013 to 2017 until the petitioners are fully involved.**
- (d) An order do issue directing the respondents to recall, rescind and or set aside any tenders, programs and plans for Mandera County equalization fund for the FY 2013 to 2017 until the communities rights and freedoms are upheld.**
- (e) A declaration do issue that the 1st, 2nd, 3rd, 4th and 5th respondents shall not commence any tenders, works or sign any contracts for the utilization of the allocated fund for Mandera county until the respondents involve the community in the manner to utilize the allocated equalization fund.**
- (f) General damages for infringement of petitioners rights and freedoms to be borne by the respondents jointly and severally.**
- (g) Costs and interests.**
- (h) Any other relief in favour of the petitioners.**

This petition was filed on 12th April 2017 by Nzili and Co. Advocates.

3. Constitutional Petition No. 9 of 2017 was filed on 5th June 2017 by Laichena Mugambi & Co. Advocates. The petitioners also brought the petition on their own behalf and on behalf of the general public of the people of Mandera County, claiming that their constitutional rights were violated and asked for several orders as follows:

- (a) A declaration that the process adopted by the respondents to identify the proposed projects by failing to involve, consult and inform the petitioners and members of their respective communities on the use, distribution and appropriation of the equalization fund in Mandera County was illegal, unlawful and unconstitutional.**
- (b) A declaration do issue that any purported use and utilization of the equalization funds by the respondents in a manner that is in consistent with the law and Constitution to the detriment of the marginalized communities in Mandera is illegal, null and void.**
- (c) That an order of prohibition do issue prohibiting the 1st and 2nd respondents either by themselves, their representatives, assigns, agents, employees or whomsoever acting on their behalf from releasing the equalization funds towards the implementation of the said projects in the tender Notice No. MWI/SDI/OT/019/2016-2017 advertised on 9th May 2017 in the Daily Nation Newspaper.**
- (d) An order do issue directing 1st respondents to recall, rescind and or cancel any tenders, tender notice for the Mandera County Water Project on the Equalization Fund for the FY 2013-2017 until full compliance with the Constitutional requirements of public participation.**
- (e) That an order of prohibition do issue prohibiting the respondents ether by themselves, their representatives, assigns, agents, employees or whomsoever acting on their behalf from awarding any tenders/contracts or commencing any constructions for the proposed water projects on the equalization fund for the Mandera County until full compliance with the mandatory Constitutional requirement of public participation in the utilization of the appropriated Equalization Fund.**
- (f) General damages for the deliberate and willful infringement of the petitioners Constitutional rights and freedoms.**
- (g) An order do issue compelling the respondents to disclose the budget, the source of funds and to account for all the money/funds used by the Task Force Committee during their tenure in office.**

Each of the petitions was supported by an affidavit sworn by the petitioners. The record shows that in Petition 5 of 2017 the witness was only the 1st petitioner, and the supporting affidavit in Petition No. 9 of 2017 from Hassan Noor Mohamed, was commissioned but not signed by the deponent, though no objection was raised to the same.

4. In response to the petitions, the respondents filed a number of documents. With regard to Petition No. 5 of 2017 the 1st respondent, County Government of Mandera filed grounds of opposition on 22nd June 2017, which were also adopted in Petition No. 7 of 2017. The grounds were that the petitioners had not demonstrated a breach of the Constitution or any law by the respondents. Secondly that it was in the public interest for the roll out of the equalization fund to be effected through tenders, programs and plans for Mandera for financial years 2013 to

2017, and that the 1st and 2nd respondents as well as the 6th respondents acted within the law and that there was no demonstration by the petitioners that the respondents acted illegally, irrationally, and without due compliance with law. It was contended also that the orders sought were unjustified and that the petitions had prayers therein were premature and the same be dismissed.

5. The 2nd, 3rd, 4th, 5th, 6th and 7th respondents also filed grounds of opposition dated 18th July 2017 against both Petition No. 5 of 2017 and No. 9 of 2017.

The grounds in summary are that the respondents acted in accordance with the Constitution and the Public Finance Management Act 2012, the Equalization Fund Appropriation Act 2017 and the Equalization Fund Guideline/Regulations 2015. It was contended that the petitioners failed to sufficiently demonstrate the manner in which any of the respondents violated the Constitution, Public Finance Management Act 2012 or any other written law with regard to the Equalization Fund within Mandera County. It was also contended that the jurisdiction of this court under Article 22 and 23 of the Constitution were invoked prematurely because the petitioners merely wanted support to interfere with institutional independence of implementing agencies of the equalization fund.

6. It was contended that the petitioners failed to demonstrate violation of Article 204, 35, 47 and 48 of the Constitution as well as the provisions of the Fair Administrative Action Act of 2015, and that the petitioners had also not shown that members of the public were not involved in the decision making process. It was stated also that the petition was ambiguous and full of unnecessary speculations.

7. Northern Water Services Board (8th respondent) also filed grounds of opposition. The grounds were that the petitioners failed to demonstrate what the 8th respondent wrongfully did or failed to do or did in excess of its mandate, and failed to demonstrate the special rights or interests the petitioners had beyond the rights and interests of other residents of Mandera. It was contended that there was exhaustive stake holder invitation, involvement, and participation prior to project identification, approval and commencement of implementation and that the process was open, transparent, and inclusive. It was further contended that the petitioners were mischievous and conveniently ignored the fact that the process of identification of marginalized areas was rooted in public policy documents. It was lastly, a ground that there was unreasonable delay by the petitioners in bringing the matter in court, as they did not raise any objection since the process started in the year 2016.

8. The Attorney General for 2nd to 7th respondents also filed a replying affidavit sworn on 28th September 2017 by Dr. Kamau Thugge the Principal Secretary of the National Treasury, which listed the 14 Counties which were identified as marginalized which were Turkana, Mandera, Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Kwale, Garissa, Kilifi, Taita Taveta, Isiolo, and Lamu.

9. It was deponed that the National Treasury did an initial press statement on marginalized Counties consultations on projects in Daily Nation and Standard newspapers on Saturday 26th November, 2016 and Monday 28th November 2016, in which key stakeholders were invited, which applied to Mandera County. A second press statement for consultations was done in the Nation and Standard Newspapers on Saturday 3rd December 2016 and Sunday 4th December 2016 rescheduling the date of consultations and Governors of the subject Counties, County Commissioners, and other stake holders were invited and a consultative forum was held in Mandera County Hall on 8th December 2016.

10. Thereafter as envisaged under Article 204 and 221 of the Constitution of Kenya 2010, the National Assembly approved the Equalization Fund Appropriation Act No 8 of 2017 and tenders were then floated and awarded. As such, the petitioners should have moved to the Public Procurement Administrative Review Board before approaching this court, and thus this court lacked jurisdiction and the proceedings herein were premature, baseless and grounded on unfounded legal issues, and should be dismissed.

The affidavit annexes a number of documents as exhibits.

11. In response to the affidavit from Dr. Kamau Thugge, the petitioners counsel filed an affidavit sworn on 31st October 2017 by Nadufa Ibrahim Musa who was not a petitioner herein. She deponed to be a chairperson of Business Women Association with a membership of over 100 people and stated that no meeting was held to discuss Equalization Fund projects in Mandera County. Another supplementary affidavit on behalf of the petitioner sworn on the same date by Mohamed Noor Maalim was filed in which the deponent said that he was an opinion leader in Tabaka where he was not involved in consultations over the Equalization Funds in Mandera. Another supplementary affidavit sworn by Hassan Ahmed Ibrahim on the same date was also filed, in which the 1st petitioner denied that public consultations were conducted and contended that the documents annexed to the affidavits of Dr. Kamau Thuge were misleading.

12. It was agreed by consent of counsel that the petition would proceed by way of filing written submissions.

13. The Petitioners counsel Nzili &Co. Advocates filed written submissions on 7th November, 2017, while Laichena Mugambi &Co. Advocates filled their written submissions on 19th July 2017 on petition 7 of 2017.

14. The 1st respondents counsel Yunis Mohamed & Associates filed their written submissions on 19th July 2017. The Attorney General for the 2nd to 7th respondents filed written submissions after making oral submissions in court. Counsel for the parties including Mr. Onono for the 8th respondent made oral submissions in court.

15. Mr. Nzili for the petitioners relied on the contents of affidavits in the Petitions and also on written submissions dated 19th July 2017 and other submissions dated 7th November 2017.

16. According to counsel the Equalization Fund was not operationalized in accordance with the law as the relevant Act did not pass through the Senate. As such, since the Senate and a Committee of Parliament were responsible for holding public hearings on the same, such law enacted without such public participation was unconstitutional.

17. Mr. Nzili also took issue with the fact that the Attorney General did not swear any affidavit in this matter, which according to him was mischievous and spoke volumes. Counsel also argued that the Constitution did not talk of marginalized Counties but marginalized areas, therefore it should not be interpreted to mean that projects could be implemented for Mandera County.
18. In addition according to counsel, the attempt by the Attorney General to demonstrate public participation herein failed to explain the criteria used and how the funds would be rolled out. As none of the petitioners was involved in the alleged public participation, the petitioners had proved their claims.
19. Counsel relied on a number of court cases including the case of Martin Wambora –vs- County Assembly of Embu (2015) eKLR, Communication Commission of Kenya –vs- Royal Media Services (2014) eKLR as well as case of Speaker of the Senate –vs- Attorney General Advisory Opinion No. 2 of 2013, and Speaker Nakuru County Assembly –vs- Commission on Revenue Allocation (2015)eKLR.
20. Counsel also submitted that the annexures to the affidavit of Dr. Kamau Thugge did not demonstrate adequate public participation and relied on the case of Cord –vs- Republic (2015) eKLR where sections of the Security Amendments Act were found by the court to be unconstitutional.
21. Counsel concluded by stating that the Equalization fund being a new fund required Parliament to operationalize the same through an enabling Act under the written law which was not done, and complained that this important fund was being implemented without any legal framework, and as such unconstitutional.
22. Mr. Muthoka for the 1st respondent relied on written submissions filed, and stated that under Article 204 (2) of the Constitution, it was the National Government to implement the equalization fund. Counsel submitted that though public participation was a requirement such could only be conducted by National and not County Government, and that the criteria herein was correctly determined by the Equalization Commission, a national government organ.
23. According to counsel, as the petitions were not challenging the law applicable but the implementation of tender projects, it was wrong for the counsel of petitioners to suggest that the laws applicable were unconstitutional. Counsel submitted also that since the petitioners did not dispute that the projects were National Government projects, it was not clear why the County Government for Mandera was joined as a party herein, and asked that the case be dismissed with costs to the 1st respondent.
24. Mr. Ogosso for the 2nd to 7th respondents relied on Grounds of Opposition dated 18th July 2017 and the replying affidavit of Dr. Kamau Thugge sworn on 29th September 2017, and stated that he would file written submissions after making oral submissions, which written submissions were filed on 18th December, 2017.
25. Counsel submitted that the petitioner had not understood their own petition and were arguing a case which was totally different from the petition.
26. According to counsel, though Mr. Nzili wanted laws to be declared unconstitutional, that request had not been pleaded in the petition, nor did he state which specific laws were to be declared unconstitutional.
27. Counsel suggested three issues of determination, firstly, whether there was public participation in the process leading to identification of equalization fund projects, secondly, whether the jurisdiction of this court had been properly invoked as tenders had already awarded for implementation of projects in Mandera County, and thirdly, what appropriate reliefs should be granted by this court.
28. With regard to public participation counsel relied on Article 204 of Constitution which required that the equalization funds be established by the National Government for certain specified services to marginalized areas. According to him the Revenue Allocation Commission identified the marginalized areas and it was clear from the affidavit of Dr. Kamau Thugge how the Counties were identified and the criteria used therein had not been challenged in this court. Counsel explained that the Counties including Mandera County were asked to identify the projects and advertisements were made in the Nation and Standard newspapers for the public, civil society and leadership of the Mandera County to participate in such discussions. There was also a letter dispatched from the Cabinet Secretary National Treasury to Governors, and County Commissioners of the 14 counties, which confirmed the participation of the public and list of participants. According to counsel, what occurred was adequate participation as it was not possible to force anybody to attend the public forum.
29. According to counsel, monies were then allocated for projects for 14 Counties including Mandera by the Treasury and thereafter the Equalization Fund Appropriation Act was enacted by Parliament and as such there was no gap in the legal framework for the equalization fund.
30. Counsel relied on the case of Robert Gakuru –vs- Kiambu County Governor –Petition No. 532 of 2013 as well as the case of Moses Munyendo –vs- Attorney General as well as Koffec –vs- Public Service Commission Petition No. 263 of 2013 and the case of Nairobi Metropolitan PSV Sacco –vs- County Government of Nairobi Petition No. 486 of 2013. According to counsel, in the last case the court said that there was only need for reasonable level of participation.
31. With regard to jurisdiction of this court , counsel argued that tenders had already been awarded, as such under the Public Procurement and Disposal Act 2015, any aggrieved person had first to approach the Public Procurement Review Board before coming to this court, and stated that it was wrong for the petitioners to have come to this court directly for quashing the award of tenders.
32. Counsel argued that it was not true that the petitioners were denied the right to information, and argued that the petitioners had not demonstrated that there was a violation of the Access to Information Act 2016 by any of the respondents. The petitioners had also not demonstrated that there was a violation of Fair Administrative Action Act 2016.

33. On the third issue of the orders to be issued by this court, counsel submitted that the two petitions were for dismissal. According to counsel the petitions were an abuse of process of the court and were meant to defeat benefits which were constitutionally conferred on marginalized Counties and public interest, and should thus be dismissed with costs.

34. Mr. Onono for the 8th respondent aligned himself with the points raised by Mr. Ogosso. Secondly Mr. Onono stated that their position was that the petitioners had not demonstrated any special rights which they had over and other residents of Mandera to qualify for the reliefs sought.

35. According to counsel, the affidavit of Dr. Kamau Thugge adequately explained the issues herein, since the government advertised for public participation in the matters under contest and could not force anybody to attend and participate in those discussions and drew an analogy to the recent occurrence where some voters publicly chose not to participate in the repeat Presidential Elections.

36. Counsel lastly submitted that the process challenged herein was not an exclusive process for Mandera County but applied to several other marginalized Counties. According to counsel, these proceedings were unnecessary and not based on any objective approach, as they ignored existing legislative requirements which were skipped and were thus for dismissal with costs.

37. In response, Mr. Nzili stated that Article 204 of the Constitution referred to marginalized areas which had to be identified before the money was channeled through Counties. According to counsel, the petitioners did not have to challenge the Equalization Funds Appropriation Act as they pleaded violation of several Articles of the Constitution and made appropriate prayers in the petition. Counsel denied that the petitioners were busy bodies.

38. I have considered the two petitions, documents filed by all parties, submissions both written and oral and the authorities cited to me.

39. I will start by stating that before hearing the two petitions, counsel for the parties agreed that the status quo be maintained, and all pending applications were abandoned, and following that consensus two petitions were consolidated and proceeded to hearing. The court thus ordered maintenance of the status quo.

40. I have already reproduced all the prayers sought in the two petitions earlier in this judgment for clarity. It is obvious that though the counsel for the petitioners has stated in submissions that the law on the Equalization Fund passed by the National Assembly be declared unconstitutional as it was not approved by the Senate, there is no such prayer in the petition. Therefore, in my view, counsel was being mischievous by bringing such an issue in submissions. I cannot give such relief in these proceedings as same was not prayed for by the petitioners. I dismiss that request to declare the law unconstitutional.

41. The petitioners appear to be challenging the process adopted by both the National Government and the County Government of Mandera in implementing the Equalization Fund for Mandera County and the projects arising there from. They claim that there was no public participation in determining the projects and funding as such the actions so far taken were unconstitutional null and void.

42. Article 204 of the Constitution provides for the establishment of an equalization fund by the National Government. It states that Parliament has to approve that establishment. Under Article 204 (7) Parliament may enact legislation suspending the effects of clause 6 therein, which fixes the period for the operation of the Article to 20 years after the date of promulgation of the Constitution.

43. I see no requirement in that Article of the Constitution which requires Parliament to pass legislation to establish the Equalization Fund. Therefore in my view, the National Government was only required to make presentation to the National Assembly on the establishment of the fund for approval of the National Assembly.

44. From what has been put before me, and which is not disputed by the petitioners, proposals were made by the National Government to the National Assembly and the same were approved through the passage of the Equalization Fund Appropriation Act. In my view therefore there is nothing irregular or illegal about what the Treasury and the National Assembly did in relation to internal procedures and legal framework for the approval of the Equalization Fund.

45. The petitioners claim that public participation did not take place before the identification of the areas and the projects in Mandera County.

46. Public participation under the Constitution of Kenya 2010 is a Constitutional imperative. It is clear from Article 1 of the Constitution that the people are sovereign and have sovereign power. It is echoed or emphasized in Article 2 of the Constitution where it is provided that the sovereign power of the people can be exercised either directly or indirectly through elected representatives, but always the people reserve their direct right to exercise sovereignty.

47. Public participation in decision making in matters that affect the public or any section of the public is also echoed under Article 10 of the Constitution which lists the national values and principles of governance. Therefore it is undeniable that public participation has to be complied with.

48. Several court cases have been decided on what constitutes public participation in decision making by public authorities. In my view it will suffice if I cited only the case of Robert N. Gakuru & others –vs- The Governor Kiambu County & 3 others –Petition 535 of 2013 in which the High Court stated as follows:-

“75. In my view public participation ought to be real and not illusory and ought to be treated as a mere formality for the purpose of fulfillment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who case to scavenge for it.”

49. From what has been placed before me, I find that the responsibility to have conducted that public participation was for the National Government. They advertised in the newspapers as has been stated, which was not disputed. Meetings were held in 2016 December in Mandera, notes of what transpired in the meetings were recorded. They have been filed in the affidavit of Dr. Kamau Thugge the contents of which have not been challenged as being fake or fraudulent. Petition No. 5 of 2017 was filed on 12th April, four months after those meetings.

50. In my view, if indeed the petitioners thought that there was no public participation or that they themselves did not participate in public forums, they should have followed it up with Treasury and notified the County Government about that default before coming to this court. There is no record that the petitioners raised any complaint in written form to the Treasury or the County Government of Mandera to seek explanations as to what happened and why there were excluded. They have not even complained that the public notices were short or that they were not aware of the convening of the meetings.

51. I hold that the petitioners have not demonstrated that there was no public participation in identifying the projects in Mandera County.

52. The petitioners have also directly come to the Constitutional Court after projects were awarded. In my view, they should have exhausted the process of challenging the awards through the procurement law first. They did not do so and their petitions will fail.

53. I turn to the issue whether it was area or Counties to be declared as marginalized. Having perused the Constitution and the laws applicable there is no provision that a County cannot be declared to be marginalized. A marginalized area in my view could be a part of a County, whole County, or even more than a County. Obviously within each County some areas could be marginalized and other areas not necessarily marginalized. I note that Article 204 is operational for only a period of 20 years from August 2010 when the Constitution was promulgated. In my view, if the petitioners think that their particular area was not covered in the current projects they should put their claim to Revenue Allocation Commission and Treasury that their respective areas be covered, which can be done within the window of the period of 20 years allowed by the Constitution, and if they see that they are being ignored or discriminated then, that can then institute legal action. As it is now, these two petitions are premature and are for dismissal.

54. With regard to the orders this court should grant, I decline to grant any of the orders sought and instead dismiss the two consolidated petitions.

55. As for costs, in my view this is still a period of learning and implementation of the new Constitution which was promulgated in 2010. The petitioners appear to be ordinary citizens, and all the respondents are public institutions who also have a duty to uphold, protect, and properly interpret the Constitution. Since I have found that it is still within the period of the learning of the new Constitution, and that the petitioners are ordinarily residents of Mandera, and respondents are public bodies, I will order that each of the parties bear their respective costs of the petitions.

56. I thus order as follows:

- 1. The two petitions herein consolidated are hereby dismissed.**
- 2. Each party will bear their respective costs of the petitions.**
- 3. Any interim orders granted by this court are hereby vacated forthwith**

It is so ordered.

Dated and delivered at Garissa on 20th December, 2017

George Dulu

JUDGE