



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 453 OF 2015

WANJIRU GIKONYO.....1ST PETITIONER

PAUL KEMUNCHE MASESE.....2ND PETITIONER

EDWIN MUTEMI KIAMA.....3RD PETITIONER

VERSUS

NATIONAL ASSEMBLY OF KENYA1ST RESPONDENT

THE SENATE OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

CABINET SECRETARY FOR NATIONAL

TREASURY.....3RD RESPONDENT

THE HON ATTORNEY GENERAL.....4TH RESPONDENT

AFFIRMATIVE ACTION SOCIAL

DEVELOPMENT FUND BOARD.....5TH RESPONDENT

RULING

Introduction

1. The 1st Respondent moved the Court by way of motion to have the Court review and vacate its orders made on 14 December, 2015.
2. The impugned Order, as extracted by the 1st Respondent, read as follows;

(a) That pending the hearing of this petition, the Cabinet Secretary for National Treasury be and is hereby stopped from releasing money to any institution under the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015.

(b) That an injunction be and is hereby issued stopping the Affirmative Action Development Board and the Affirmative Action Social Development County Committees from transacting any business until this petition is heard and determined.

(c) The costs of the application will abide the ultimate outcome of the petition.

3. The application was opposed by the Petitioners.

The application and the parties' cases

4. The application was pegged on Articles 43, 53, 54, 55 and 56 of the Constitution and Sections 3, 3A & 80 of the Civil Procedure Act as well Order 45 of the Civil Procedure Rules. It sought orders;

(a) ...(spent)

(b) ...(spent)

(c) ...(spent)

(d) That pending the hearing and determination of [sic] substantive petition in this matter, this Honourable Court does review and lift the conservatory orders issued on 14th December, 2015 in HC Petition 453 of 2015; Wanjiru Gikonyo & 2 others vs. The National Assembly & Others.

(e) That this Honourable Court do grant such other and consequential orders that this Honourable Court deems fit and just to grant in the circumstances.

(f) That costs of this application be awarded to the applicant.

5. In support of the application was an affidavit sworn by Mary Seneta, the County Women Representative for Kajiado County. A supplementary affidavit was also sworn by the same deponent on 24 December, 2015.

6. The 3rd, 4th and 5th Respondents supported the application and caused an affidavit to be sworn on 7 January, 2016 by Zeinab W. Hussein, the Principal Secretary, Ministry of Public Service Youth and Gender Affairs. All the affidavits in support of the application were rather prolix as were the grounds in support as stated on the face of the application.

7. I would state that from the grounds as well as the affidavits in support of the application, the impugned order is sought to be reviewed, varied and or vacated on the following major grounds, namely;

(i) That the impugned order was based on an error apparent on the face of the record.

(ii) That many citizens were set to benefit or are already benefiting from the Affirmative Action Social Development Fund (“AASDF”) and there will be a violation of their socio-economic rights and further they will suffer unnecessary prejudice.

(iii) That the public is likely to suffer as public funds may have to be used in defending or settling claims against the Government for breach of contract.

(iv) That the balance of convenience lay in favour of the projects under the AASDF being allowed to continue.

8. The Petitioners' brief response can be gleaned from the two Replying Affidavits of Wanjiru Gikonyo and Edwin Kiama. Both affidavits were sworn on 13th January, 2016. Both affidavits were to the effect that the Court had no legal basis to review the impugned order. Secondly, that the grounds advanced for

review were flimsy and the Court could not be blamed for making the impugned Order.

The Arguments

9. The Applicant argues that there is a mistake and error occasioned by Counsel who appeared for the Respondents during the hearing of the application as, not all the facts were placed by the said Counsel before the Court. Counsel, it is stated, had submitted to the Court that the AASDF funds had not been disbursed and that the AASDF itself was not operational while the true position was that, the funds had indeed been disbursed and the AASDF structures were very operational. It is consequently argued that, there exists an error on the face of the record when the court states that the funds had not been disbursed.

10. Further, it is stated that the Court in its impugned ruling found that the Respondents had not challenged the High Court decision in **The Institute for Social Accountability & Another v The National Assembly & 3 Others NKR HCCP No 16 of 2013** (“the CDF case”) by way of an appeal to the Court of Appeal. Yet, there is on record a duly filed appeal being Civil Appeal No. 92 of 2015. The appeal was filed in April, 2015. It is pointed out that this also amounts to an error on the face of the record.

11. The Respondents also argued that the circumstances of the case dictate that the impugned order which effectively immobilized the AASDF, be reviewed. The reasoning is that in the absence of such review many citizens, whether belonging to the disadvantaged groups or not, are likely to be prejudiced and are indeed already prejudiced. Further, it is urged that a review is merited as the Government is likely to face a myriad of civil claims for breach of contract. In this regard, the Respondents pointed out that staff have been employed and engaged, goods have been ordered supplied and delivered, leased premises have been occupied, motor vehicles have been ordered and committed.

12. Finally, it was submitted that the disbursed funds have generally been committed.

13. The Respondents also urged the Court to consider the fact that the AASDF was established under Section 24 of the Public Finance Management Act, (Cap 412 C) and is therefore not related to the now defunct Constituency Development Fund.

14. On the flipside, Mr. S. Lempaa who urged the Petitioners’ case submitted that the Court had no legal basis to review its Orders. Additionally, Counsel submitted that there was no error apparent on the face of the record. Counsel stated that the Respondents had no excuse for their failure to avail all the relevant and material evidence to the Court earlier. Mr. Lempaa added that there was an absolute lack of diligence on the part of the Respondents in the run in to the hearing of the application.

15. The Petitioners also contended that there was no misapprehension of fact or law in the impugned ruling of 14th December, 2015 as the determination was made on the basis of facts and law availed to the Court. Accordingly, the application for review was vexatious, scandalous and an abuse of the Court process.

Discussion and determination

16. The application was stated to have been brought under Section 80 of the Civil Procedure Act, Cap 21 as read together with Order 45 of the Civil Procedure Rules. While the Petitioners stated that the Court had no legal basis to review its Orders, Mr. Thande Kuria who appeared together with Ms. J. Gitiri for the 3rd, 4th and 5th Respondents stated that the jurisdiction of the Court was founded under Section 80 and Order 45 of the Civil Procedure Act and Civil Procedure Rules respectively. Mr. Kuria also underlined the inherent power of the court as the basis of the review.

17. Constitutional petitions and judicial review applications are *sue generis* proceedings. They invite special jurisdictions which are neither civil nor criminal: see **Commissioner of Lands -v- Kunste Hotels Limited [1995-98] 1 EA** and **Sanghani Investments Limited -v- Officer In-charge of Nairobi Remand And Allocation Prison [2007] 1 EA 354**. The Civil Procedure Act, which under its preamble is

stated to be an ‘Act of Parliament to make provision for procedure in civil courts’, will not apply to such constitutional petitions and judicial review applications: see **In Re National Hospital Insurance Fund Act & Central Organization of Trade Unions [2006] 1 EA 47**. Article 22(3) of the Constitution, for example, has dictated that the Chief Justice of Kenya makes rules providing for court proceedings brought under the Constitution. Such rules have been made and are known as the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (“**the Mutunga Rules**”).

18. Neither the Constitution nor the Mutunga Rules, however, has any specific provision for an application for review of orders or decrees in Constitutional Petitions.

19. Admittedly, the power to review orders or decrees is ordinarily the creation of statute. It has to be conferred by law specifically or by necessary implication. However, there is the principle that law should ordinarily not stand in the way of administration of justice and that, ‘law has [occasionally] to bend before justice’. This has often led to the conclusion that the court, notwithstanding the absence of statutory provisions, always retains an inherent jurisdiction to ensure that there is no miscarriage of justice or failure of justice or abuse of the judicial process.

20. Thus in **Benjoh Amalgamated Limited & Anor -v- Kenya Commercial Bank Limited [2014] eKLR**, the Court of Appeal itself a creature of the Constitution deriving its powers from both the Constitution and statute law but without express powers of review, stated as follows:

‘[57]Jurisprudence that emerges...shows that notwithstanding that it[the court] has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to [sic]correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection.

.....

[61] ...This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.”(emphasis mine)

21. The Court of Appeal in holding that the court had powers of review where the court was the last appellate court or where statute did not expressly provide for such jurisdiction, lay emphasis on the promotion of public interest and the enhancement of public confidence in the rule of law and overall justice. These apparently are principles and values which can be easily implied or read-in from Article 159 of the Constitution. The approach of the Court in **Benjoh Amalgamated Limited & Another -v- Kenya Commercial Bank Limited (supra)** was followed by the Court in **Michael Mungai -v- Ford Kenya Elections and Nominations Board & 2 others [2013] eKLR** as well as by Mumbi Ngugi J., in **Multiple Haulers EA Limited -v- Attorney General & 3 others [2015] eKLR** with regard to applications for review fetched on decisions or orders made in Constitutional Petitions.

22. In **Wananchi Group Limited vs. Communications Commission of Kenya & Others [2013] eKLR**, Mumbi Ngugi J., citing with approval the case of **Anders Bruel T/A Queen Cross Aviation vs. Kenya Civil Aviation Authority & Another [2013] eKLR**, held that even in the absence of express statutory powers of review the court may when sufficient reason is shown review its decision. Mumbi Ngugi J stated as :

“[17.] It is indeed true that the court held in the Anders Bruel case that even though there are no provisions directly providing for review of decisions in constitutional petitions, on the basis of the provisions of Article 22 and 159(2)(d), the court is duty bound, should sufficient reasons be

established, to review its decision.” (emphasis mine)

23. The Court in the authorities cited and reviewed above, adopted and approved of the approach that where there is sufficient reason shown the Court may invoke its inherent powers to review its decision to ensure that, ‘it does not result in a miscarriage of justice’: See **Mulla, *The Code of Civil Procedure, 16th Ed, Vol. 4 pg 4105.***

24. I would adopt the same approach. For one to succeed and have an order reviewed in Constitutional petitions, he must demonstrate sufficient reason.

25. It is practically impossible to itemize what would be ‘sufficient reason’ for purposes of review under the courts’ ‘residual jurisdiction’ or inherent powers. The exceptional instances when obvious injustice would be worked by a strict adherence to the terms of the order or decree as originally passed are copious.

26. However, given that a review application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, ‘sufficient reason’ ought to include, in my view, the statutory grounds for review as outlined in the Civil Procedure Rules. That ought to be the starting point and a fine guideline.

27. The statutory grounds are that, first, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made. Thirdly, that there is sufficient reason to occasion the review.

28. To the statutory grounds, may also be added instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see **Serengeti Road Services -v- CRBD Bank Limited [2011] 2 EA 395**. Also to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (supra)**.

29. I conclude that the law is now settled that orders and decrees emanating from constitutional petitions may be reviewed by the court if sufficient reason is shown. The matter before me can consequently be the subject of review if facts support such position. The question then would be whether the Respondents have established sufficient reason.

30. The reasons advanced for the review sought herein, have been recapitulated elsewhere, [7], in this ruling. Counsel for the Respondents went to great lengths to try establishing various factual and legal hypotheses. However, I must state from the on-set that in an application for review that should never be the case. I must limit myself to the grounds as stated to avoid the temptation of sitting on appeal over my own decision. It is consequently not out of impudence that I have avoided a minute dissection of facts and new points of law referred to by the Respondents.

Mistake or Error apparent on the face of the record

31. This constituted the first ground for the review.

32. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, the Court of Appeal described an error apparent on the face of the record as follows:

“ In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face

of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”(emphasis mine)

33. The Court accorded no particular definition stating that it would vary with each particular case.

34. Earlier in **Chandrakant Joshibhai Patel -v- R [2004] TLR, 218** it had been held that an error stated to be apparent on the face of the record:

‘...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.’

35. The Respondents, firstly, contend that there is an error on the face of the record in so far as the Court stated that there has been no appeal preferred by the Respondents from the decision of the court in the case of **The Institute for Social Accountability & Another -v- The National Assembly & 3 Others NKR HCCP No 16 of 2013** (“the CDF case”). There has now been exhibited a Record of Appeal No. 92 of 2015. The record includes the Memorandum of Appeal. It was filed on 16 April 2015. The decision in the CDF case has been challenged. The appeal is however yet to be heard.

36. It is indisputable that there exists an appeal. There is no doubt that in so far as the Court stated that there is no appeal, there is an error. It is obvious that an appeal did exist even as the impugned order was being made on 14 December 2015. Both parties are in agreement on this one. It is to be noted however that neither party drew the Court’s attention to this obvious fact at the hearing of the application. Instead, the parties concentrated on the fact that there was pending a ruling in the CDF case before the High Court, on an application which sought to extend time to enable the National Assembly bring the then impugned statute(the Constituencies Development Fund Act, No 30 of 2013) in line with the Constitution.

37. In any event, it is to be noted that in the course of their submissions whilst urging the current application for review, by one remove the Respondents contended that the existence of the appeal is relevant and by another remove contended that the AASDF has no relationship with the CDF and consequently decisions made by any court affecting the CDF ought not be relied upon in determining this dispute. In my view, the Court may be constrained to correct the error of fact apparent on the face of the record and state that an appeal existed but it is unlikely to affect the earlier decision or orders of the Court of 14 December 2015 especially in view of the fact that the appeal is yet to be heard and determined.

38. Secondly, the Respondents also contended that there is an error on the face of the record in so far as the Court held that the funds under the AASDF had not been appropriated and disbursed by the national Government to the respective county AASDF Boards. In the ruling rendered on 14 December 2015 the Court stated as follows:

‘[65]...In any event, the Respondents were in agreement that thus far no funds have been disbursed.’

39. The above statement was informed by the submissions made by the parties. The Respondents’ Counsel, Mr. Mohamed was then very positive in his submissions as well as in his responses to questions by the Court, that no funds had been disbursed. Apparently, he was mistaken.

40. The Respondents now state that Mr. Mohamed had not been ‘solidly instructed’ hence his assertions that the funds had not been disbursed when indeed the disbursements had been made. The Respondents state further, that it was out of sheer inadvertence that the information was not availed in time to both the Court as well as counsel: see Paragraph 10 of the Supplementary Affidavit of Mary Seneta sworn on

behalf of the Respondents. The reason given is that all attempts to obtain the evidence from the National Treasury and the Central Bank of Kenya took too long.

41. I would not agree that the mistake of counsel in stating that the funds in question had not been disbursed would amount to error or mistake apparent on the face of the record. Firstly, I do not accept the submission that attempts to obtain the evidence as to the disbursements of the funds and to avail such evidence were fruitless. True, the red-carpet bureaucracy in most public bodies and institutions are long and tend to shackle many processes. The litigation history of this matter however dictates otherwise.

42. The Petition was filed on 27 October 2015. The parties attended before me on 5 November 2015. An adjournment was sought by the Respondents' counsel to enable them get instructions and also file an affidavit in reply to the application for conservatory orders. Despite opposition by the Petitioners, I allowed the adjournment. On 10 November 2015, a response was filed. The parties were then to appear before me on the same date. However, the cause was inadvertently not listed by the registry for hearing. Then on 23 November 2015, the parties finally attended before me and the hearing proceeded. It is evident that the thirty (30) days in between was adequate or would have been adequate for any party exercising due diligence to obtain all the requisite evidence. The evidence was not to be retrieved by the 1st and or the 5th Respondents only. All the Respondents were responsible for any relevant evidence. The National Treasury through the 3rd Respondent is a party to these proceedings. The evidence as to disbursement should have been easily available to the Respondents as of the hearing date.

43. All that Counsel stated on the hearing date was that the funds had not been released and the Court took Counsel's word on that. The Court cannot be faulted and it cannot be stated that the Court erred. The mistake was by counsel, and not by the Court. The mistake seems to have been prompted by languid clients. I would not even lay blame on the Counsel, Mr. Mohammed and Ms. Thanje , who appeared before me earlier.

44. Secondly, it is true that Counsel will often make mistakes. As was posited by Apaloo J (as he then was) in the case of **Phillip Chemwolo and Another -v- Augustine Kubende [1986-89] EA 74 at 81:**

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of his case being heard on merit. I think the broad equity to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

Where necessary and appropriate, counsel's mistake may be excused.

45. In the instant case, the mistake being alluded to is not Counsel's mistake. When on a review application a party invokes the ground of a mistake or error apparent on the face of the record, it is not the mistake of the party or Counsel that is being referred to, it is the inadvertent error or mistake of the Court that is being alluded to. Such that, it cannot be deemed to be error on the face of the record even though it is not true that when the Court made its determination on 14 December 2015 the funds had not been released. The Court made that determination based on the facts before it and on the basis of submissions by counsel.

46. I find it untenable and flawed when it is argued that where counsel has made a mistake, the Court too must be taken to have made a mistake in its findings. That is an argument that I am unable to accede to. Where counsel makes a mistake and on the basis of such mistake and oblivious of the mistake the court makes a finding it cannot then be said that there is an error on the face of the record.

47. I do not consequently find that there is any error on the face of the record, in this respect.

48. Besides, unless there is an admission , to ascertain whether or not the funds had been disbursed would entail an elaborate investigatory and reasoning process by the Court to arrive at the conclusion that the

funds had actually been disbursed as the parties argued their respective position before the impugned Order was made. To go along that route would be to give the Respondents a second bite at the cherry and that it is not what applications for review are all about.

49. The other ground by the Respondents in support of the application is that there is an error on the face of the record as the National Government Constituency Development Fund Act, 2015 has now been enacted. My pithy answer to this is simple. The ground as advanced suggests that the decision made by this court on 14 December 2015 was erroneous in law. It equates an error in law simpliciter and not a manifest error on the face of the record. That should only constitute a ground for appeal, where the intricacies as to time and impact of the enactment may be considered, but not for review.

Balance of convenience

50. The issue of balance of convenience, in my judgment, ought to have been argued substantively at the hearing of the application. It cannot and should never constitute a ground for review.

Sufficient reason and public interest

51. The Respondents also urged the court to consider the fact of public interest. In this respect, the Respondents urged that the funds had been disbursed. Secondly, it was argued that the decision of 14 December 2015 would cause misery and untold suffering to the beneficiaries of the fund and thirdly, that the decision if left undisturbed could also lead to various claims being filed against the Government which may prove costly to the public coffers.

52. The Petitioners retorted that the Respondents were not intending to facilitate the use of the funds for any other purpose other than to benefit a few 'women politicians'. On this, my view is also simple. Counsel of prudence would dictate that where possible, public finances likely to go to waste due to unnecessary litigation ought to be saved and salvaged.

53. Secondly, all the parties, least of all the Petitioners, have consistently stated in the cause of these proceedings that the novel purpose of the funds is not under contest. What has been and still is under contest is the architecture and design of the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015. The Petitioners contend that the regulations violate the Constitution and if not checked might help devour devolution.

54. Thirdly, I also appreciate that the Constitution has under Chapter 12 placed a great premium on accountability and transparency in the use of public funds. Any person abusing or misusing public funds is immediately to be brought to account through the appropriate state organs. I consequently will not lay much emphasis on the submissions by the Petitioners that the funds are being used for political purposes as such submissions also currently lack the necessary evidentiary foundation.

55. The fact that the funds were appropriated and disbursed prior to the impugned Order being made is not disputed. The Petitioner only contests the fact that the Respondents have not revealed what happened to an amount of Kshs. 2,030,000,000/ which constituted a budgetary allocation in the fiscal year 2014/2015. There is however evidence that an amount of Kshs. 2,000,000,000/= has indeed been disbursed. Also, the fact that before the impugned Order was made, various projects under the AASDF had already been pushed through and monetary commitments made, is not disputed.

56. In the **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited** (*supra*), the Court of Appeal stated that review of a decision may be effected if it is to serve or promote public interest and enhance public confidence.

57. When the Respondents state that the fact of disbursement of funds should be a consideration in the matter of review, I tend to agree. I view that to constitute sufficient reason. The funds have been disbursed. There are commitments already made. Individuals who were to benefit from the funds are waiting. Entities who have supplied goods, services and lease-spaces are also waiting for payment. The

Respondents have exhibited evidence of disbursement as well as of commitment. It is also to be noted that some counties have already benefited from the funds released whilst others though holding the funds are yet to utilize the same. Counsel of prudence would dictate that I take all these into account in the interest of the public. I should also take into account the consequential prejudice that the same public may suffer in the form of the Government having to meet costs and decretal awards in the event of being sued for breach of various legal obligations. Ultimately, all these factors, if not considered, may result in a miscarriage of justice.

58. I hold the view that this is a suitable case where the power of review may be exercised in order to impart justice and in the public interest. The reasons advanced are sufficient in the circumstances to prompt a review of the impugned Orders of 14 December 2015 noting that the application for review was also filed without any delay.

Conclusion

59. The failure by or mistake of Counsel to point out to the Court in detail that the funds had actually been disbursed is not a mistake or error of the Court apparent on the face of the record. However, the fact that the funds had actually been disbursed prior to the orders of 14 December 2015 constitutes sufficient reason and, in the public interest, would prompt a review and variation of the orders of 14 December 2015.

60. Evidently, the Respondents should however bear the costs of the application for review and of the earlier application in view of the t admitted delinquency on the part of the Respondents.

Disposition in review

61. What would be the suitable orders-in-disposal in the circumstances of this case?

62. First, it must be appreciated that I already found that on a *prima facie* basis the Petitioners demonstrated and established that the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015 appear to or violate the Constitution. That *prima facie* finding has not changed. It may only change once the Petition is determined. Secondly, there is the fact that public funds have been disbursed and or committed but are now dormant somewhere. Then there is the factor of contingent liability on the various legal obligations on the part of the Respondents. This has been aptly demonstrated.

63. The Orders of 14 December 2015 if are to be retained as were issued would mean that the funds would lie idle and in dormant accounts, with only private organizations benefiting. The government may ultimately be left having to face various claims to be paid or settled from public funds. In the interest of the public, and given that the novel purpose of the funds has never been contested, it would be appropriate to vary the orders of 14 December 2015.

64. In the circumstances and balancing all the even factors, I find the following orders appropriate, in disposition:

a) The orders of this Court made on 14 December 2015 are hereby reviewed and vacated and in their stead, it is ordered as follows:

(i) That pending the hearing and final determination of the Petition, the Cabinet Secretary of the National Treasury is hereby stopped from releasing or disbursing further or additional money or funds to any institution under the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015 save for and excepting the amount of Kshs 2,000,000,000/= already disbursed by or through the Central Bank of Kenya to the various Counties through the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015 and which amount the 3rd Respondent may continue to disburse.

(ii) For the avoidance of any doubts and in view of (i) above, the injunction issued on 14 December 2015 against the Affirmative Action Social Development Board and the Affirmative Action Social Development County Committees prohibiting them from contracting and transacting any business pending the hearing of this Petition, is hereby vacated.

(iii) The Costs of this application and of the application dated 21st October 2015 are to be borne by the Respondents and to be paid to the Petitioners before the hearing of the Petition.

(iv) The Petition herein is to be heard and determined within the next ninety (90) days.

Dated, signed and delivered at Nairobi this 21st day January, 2016.

J.L.ONGUTO

JUDGE