



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 163 OF 2016

BETWEEN

HON. WAMATANGI KIMANI PAUL.....PETITIONER

AND

COMMISSION ON REVENUE ALLOCATION.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. Prior to the 2010 Constitution the fiscal structure that ran with the Government was simple. The national government planned, budget, collected or sourced revenue and expended on development of the country. Kenyans then in 2010 adopted a dual system of governance. The devolved system was part of it. Functions and powers were partially devolved from the national government to the 47 County governments. The country's development strategy had to be revised as finances too had to be devolved to help meet the purposes of devolution.
2. Questions about the process and in particular was the question as to what mechanisms and processes were to be followed to ensure the equitable distribution to the devolved counties of revenue raised nationally.
3. The Petitioner partially seeks through the current Petition an answer to the foregoing question as to equitable distribution of part of the national revenue.

Background facts

4. The Petitioner is an elected Member of the Senate. He is the Senator of Kiambu County. He filed the Petition both on his own behalf and on behalf of his constituents- the residents of Kiambu County.
5. The 1st Respondent is a constitutional commission. It is established under Article 215(1) of

the Constitution. Its principal function is to create the formula for the equitable sharing of revenue raised nationally between the counties and national government and then among the counties themselves. It is regulated and operates under the Commission on Revenue Allocation Act 2011. The 1st Respondent also makes recommendations on ways to enhance revenue for the counties and on fiscal discipline by the counties.

6. The 2nd Respondent is the chief legal advisor to the Government and is impleaded pursuant to Article 156 of the Constitution.
7. Pursuant to Article 217 of the Constitution which provided for the determination of the basis of the division of revenue among counties to be made, the 1st Respondent in the year 2012 developed the criteria for allocation of revenue. Then in November 2014 with a view to meeting a Constitutional timeline of three years provided for under Section 16 of the Sixth Schedule to the Constitution, the 1st Respondent set to develop the second determination of the basis of the division of revenue.
8. A second revenue sharing formula was duly developed by the 1st Respondent and submitted to the Senate in December 2015. The Senate thereafter debated the second revenue sharing formula and proceeded to pass a resolution approving of and adopting the report on the second basis for equitable sharing of revenue among county governments on 20th April 2016.
9. The adoption of the report prompted the Petitioner to move to court. By then, the report had been transmitted to the National Assembly pursuant to Article 217(3) of the Constitution for consideration.

Petitioner's case

10. It is the Petitioner's case that contrary to the express constitutional provisions, the 1st Respondent abdicated its duties and obligations to prepare and submit a recommendation to the Senate or other State organs as required under Article 216(5) of the Constitution.
11. According to the Petitioner, it was the Senate and not the 1st Respondent who developed the recommendation on the second revenue sharing formula. The 1st Respondent simply rubber stamped the recommendation. In particular the Petitioner pointed out that the recommendations had been prepared by the Senate's Finance Commerce and Budget Committee. The Report on the second basis for equitable sharing of revenue among county governments tabled by the senate committee recommended the following basis for equitable sharing of revenue.

No	Parameter	Recommendation
1.	Population	45%
2.	Basic Equal share	26%
3.	Poverty	18%
4.	Land Area	
5.	Fiscal Responsibilities	2%
6.	Development Factor	1%

12. The Petitioner contended that the 1st Respondent was duty bound to give effect to the criteria set out in Article 203(1) of the constitution as well as Article 216(3) to avoid the narrow general and skewed sharing experienced through the first revenue sharing formula which had failed to comply with the provisions of the two Articles.
13. The Petitioner further stated that despite involving various stakeholders in the preparation of the second revenue sharing formula, the 1st Respondent did not take into account the stakeholders views leading to the complete rejection by the Senate of the 1st Respondent's recommendation on 26th February 2015.
14. The Petitioner with a view to illustrating that the Senate usurped the 1st Respondent's mandate then quoted extensively from the report by the Committee on Finance Commerce and Budgeting. The report which was dated March 2016, stated that the committee held consultative and consensus- building meetings with the 1st Respondent in October 2015 during which the 1st Respondent "was tasked with considering proposals and amending its first recommendation following the consultations held with the Senate, National Treasury & Parliamentary Budget Office". Additionally, the Petitioner stated that ultimately the Senate resolved to adopt, during a retreat with the 1st Respondent in March 2016, a revised formula for sharing revenue with the following parameters; population, basic equal share, poverty, land area, fiscal responsibility and development factor.
15. It was the Petitioner's case that the 1st Respondent had not submitted to the Senate any recommendations but rather the recommendations were the "handiwork" of the Senate itself in total contravention of Articles 216 and 217 of the Constitution. Accordingly, the Petitioner concluded, the Senate was prohibited from passing a resolution to determine the second revenue sharing formula on the basis of the committees' report of March 2016 and that the Senate's resolution was void *ab initio*.
16. The Petitioner further contended that it was necessary for the court to intervene to ensure that the people of Kenya are not deprived of the protection afforded by Articles 216 and 217 of the Constitution. As a result the Petitioner sought the Court's intervention at this interlocutory stage through the issuance of conservatory orders that:
- i. ***THAT*** pending hearing and determination of this Application / Petition the Honourable Court be pleased to issue an order of stay of the process under Article 217 and Section 16 of the Sixth Schedule of the Constitution to determine the second basis (formula) for allocating among the Counties the share of national revenue that is annually allocated to the county level of government.
 - ii. ***THAT*** an order of mandatory injunction be issued to compel the commission on Revenue Allocation to commence the process of formulating Recommendations under Articles 216(3) and 217(2) of the Constitution to determine the Second Basis (Formula) for allocating among the counties the share of national revenue that is annually allocated to the county level of government.
 - iii. ***THAT*** the costs of this application be provided for.

Respondents' case

17. The Respondents' case may be retrieved from the Replying Affidavit filed on 5th May 2016. It was sworn by George Ooko, the Chief Executive Officer of the 1st Respondent.
18. The Respondents deny that the Senate usurped the 1st Respondent's mandate under Article 216(5) in making recommendations on sharing of revenue among county governments. The

1st Respondent states that it did so vide its letter of 14th March 2016 and the recommendations were forwarded to the Senate. The Respondents add that after making the recommendations the 1st Respondent had no other role to play.

19. The Respondents accuse the Petitioner of failing to participate and raise the issues now raised in the floor of the Senate. The Respondents also state that the court ought only intervene where there is a blatant breach of the law

Arguments in court

20. Mr. Kibe Mungai argued the Petitioner's case for conservatory orders while the Respondents' case was urged by Ms. Anne Mwangi, a state counsel.

Petitioner's submissions

21. In his oral submissions, Mr. Kibe Mungai for the Petitioners pointed out to Articles 216 and 217 and stated that the Senate could only act under these Articles after the 1st Respondent had acted and presented the Revenue sharing formula. Counsel added that in the instant case the 1st Respondent had not acted. Counsel pointed to the fact that after a recommendation on Revenue sharing formula had been rejected by the Senate in February 2015, it was the Senate's Committee on Finance, Commerce and Budgeting that proceeded to prepare the recommendation on revenue sharing formula instead of the 1st Respondent going back to the drawing board.

22. According to counsel, the process of approving and adopting a recommendation in revenue sharing was illegal and unconstitutional as the 1st Respondent did not participate or act as anticipated under the Constitution, firstly; by reason that it is the Senate that prepared the recommendation. Secondly, the recommendation was not shared with or submitted to the organs mentioned in Article 216 (5) of the Constitution. Thirdly, there was no stakeholder participation as the Senate did not consult with the county governors, cabinet secretary (finance) and the public at large.

23. Counsel submitted that prima facie there was evidently a violation the Constitution. Further it was submitted that the public interest dictated that the process be perfect as the 1st formula was decided even before devolution took shape. Lessons, according to counsel, had since been learnt yet the impugned formula preserved 99% of the previous formula which was unfair. The result had been that areas geographically larger received more money than areas inhabited by more poor Kenyans, leading to a clamor for more funds by the counties.

The Respondents' submissions

24. Ms. Mwangi contested the application on behalf of the Respondents.

25. Ms. Mwangi submitted that the 1st Respondent had duly discharged its constitutional mandate as was evident from the letter to the Senate dated 14th March 2016 and which forms part of the annexures to the Replying Affidavit of George Ooko sworn on behalf of the Respondents. Additionally, Ms. Mwangi submitted that the Senate had duly debated the recommendations prior to adopting the same and the Petitioner, himself a Senator, skipped the debate yet the appropriate forum to raise the issue was before the Senate.

26. Accordingly, counsel concluded, the Petitioner had failed to establish a prima facie case with any likelihood of success.

Discussion and Determination

Issues

27. The core question at this stage of the proceedings is whether the Petitioner is entitled to the conservatory orders sought on the facts and in the circumstances of this case.
28. Through the oral submissions by Ms. Ann Mwangi, the Respondents also raised issue as to the court's jurisdiction to intervene.

Of jurisdiction

29. I did not witness any conviction on the part of the Respondents' counsel that this court lacks the necessary jurisdiction to adjudicate over the dispute herein. Indeed, at paragraph 10 of the Replying Affidavit, it is deponed as follows:

“10. THAT I am advised by the state counsel on record which information, I verily believe to be true that the law is very clear on the role of each arm of government and the courts can only intervene when there is blatant breach of the law” [emphasis mine]

30. The clear admission that the court can intervene is adequate to resolve the corollary issue as to jurisdiction. The court evidently has the requisite jurisdiction to intervene.
31. I may perhaps also add that by virtue of the provisions of Articles 2, 3 and 165(3)(d)(ii) of the Constitution, Parliament is not immune to judicial scrutiny and any submissions invoking the doctrine of Separation of Powers to deny the court the necessary remit are not well founded. Article 2 enjoins persons to exercise state authority only as authorized by the Constitution. Article 2 also proclaims the Constitution as the supreme law which binds all parties. Article 3 of the Constitution obligates every person, including state organs, to respect uphold and defend the Constitution. Finally, Article 165(3)(d)(ii) expressly confers this court with jurisdiction to determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.
32. The Petitioner has moved to defend an alleged violation of the Constitution. The Petitioner contends that the Senate has not respected the Constitution and has usurped the 1st Respondent's functions. The Petitioner also contends that the 1st Respondent has not only abdicated its duties but has also failed to observe constitutional provisions, where it has purported to act in the performance of its functions.
33. I am satisfied that the court has the necessary remit of course whilst also observing the principle that the court should ordinarily not interfere with processes as well as mandates of other Constitutional organs save in clearly exceptional cases: see **Smith vs. Mukasa [1990] LRC 87** and **Martin Nyaga Wambora vs. Speaker County Assembly of Embu & 2 Others HCCP No. 7 of 2014 [2014]eKLR** .

Of conservatory orders

34. The principles which ought to guide a court when dealing with an application for conservatory orders are now well settled. In the case of **Jeniffer Shamalla vs. Law Society of Kenya & 12 Others HCCP No. 85 of 2016 [2016]eKLR** , I stated as follows:

“[57] It is to be noted that much more is required of a Petitioner who seeks conservatory orders. The principles for the grant of a conservatory order have been well laid out in a series of cases. They were well summarized by this court in the case of Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education Science and Technology & 5 Others HCCP No 399 of 2015[2015]eKLR. There will be little benefit to be derived in rehashing the same here in detail. The criteria are clear. In short, the Petitioner needs to

demonstrate a prima facie with a likelihood of success and not merely a potentially arguable case while also showing that he will suffer prejudice and the petition rendered nugatory if the orders are not granted. There is also need to establish whether granting the orders would enhance constitutional values and objects specific to the rights or freedoms sought to be protected. Finally, the court in exercising its discretion must consider the wider public interest and also invite the doctrine of proportionality where appropriate.”

35. The principles have been laid down by a series of cases decided by both the Supreme Court as well as this court: see for example **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others SCK Petition no. 2 of 2013** and **Martin Nyaga Wambora vs. Speaker of the County Assembly of Embu & 2 Others (supra)**. However, not every single principle need be catalogued and proven. The totality of the facts should assist in guiding the court’s discretion.

36. It is also to be noted that at the interlocutory stage the court is not expected to and, neither should it, make any definitive or final findings of fact or law. The court need only review the facts and make findings on whether a prima facie case with a likelihood of success is shown.

37. In the instant case, the Petitioner’s case is that the 1st Respondent abdicated its role and duty. That it surrendered the role and duty of making a recommendation on the revenue sharing formula to the Senate. The Respondents deny this happened.

38. The Petitioner relied copiously, on the actions and behavior of the Senate’s Committee on Finance Commerce and Budgeting to illustrate the abdication of duty and usurpation of powers. The Petitioner admits that the 1st Respondent had indeed submitted a recommendation on the second criteria for sharing revenue. This was submitted to the Senate which instead urged for consultation and consensus. It is then the Petitioner’s case that the 1st Respondent ought to have started the process all over again and not merely reviewed its original recommendations internally. Instead the Petitioner accuses the Senate of holding retreats, bench marking visits and consultative meetings to develop its own criteria for revenue sharing, giving it to and receiving the same from the 1st Respondent before finally tabling the same for approval and adoption by the same Senate.

39. There is little doubt that the principal functions to be undertaken by the 1st Respondent and which is at the core of the dispute herein is critical to governance and especially county financing. The 1st Respondent is expected to determine not just the equitable share of revenue for each level of government but also for each county. Consequently, it is expected of the 1st Respondent that in the performance of its duties it will be faithful to the Constitution. The 1st Respondent is also expected not to be under the direction and control of any person or authority: see **Article 249(2)(a) & (b)** of the Constitution. Where therefore questions are raised as to lack of independence or non-observance of the Constitution, a thorough interrogation ought to be made by the court and by any other authority that may be concerned.

40. The 1st Respondent has stated that it did not abdicate its duties nor surrender the same to the Senate. Reliance was placed on the letter dated 14th March 2016 which reads, in part, as follows:

“.....

In accordance with Article 216(5), the Commission on Revenue Allocation is mandated to make recommendations concerning the basis for the equitable sharing of revenue raised by national government between national and county governments

Article 216(5) requires the Commission to submit its recommendations to the Senate, National Assembly, the National Executive, County Assemblies and County Executives accordingly.

Following extensive consultations with various stakeholders, the commission hereby submits its revised recommendation on the second basis for equitable sharing of Revenue among the County Governments.

.....”

41. Like the Petitioner, the 1st Respondent does not deny that the recommendation submitted to the Senate was being made a second time. Unlike the Petitioner though the 1st Respondent claims ownership and copyrights to the Recommendation save for the rider that the revised recommendation was made following “*extensive consultation with various stakeholders*”.
42. I have been unable to find any clear evidence on the record which may contradict the 1st Respondent’s position that the recommendation on the second criteria for sharing revenue among counties was originated, developed, prepared and compiled by the 1st Respondent without any direction and control of the Senate or the Finance, Commerce and Budgeting Committee of the Senate. The affidavit evidence reflects that there was consultation with various stakeholders, including Senators. It would in my view be inappropriate to fault the 1st Respondent for engaging stakeholders including Senators given the provisions of Articles 1 and 10 as well 118 of the Constitution which advocate for public participation in matters governance.
43. I am consequently not convinced that the Petitioner has made a prima facie case with a likelihood of success that the 1st Respondent abdicated its duties and which duties were usurped by the Senate on the basis of the evidence before me which evidence called consistently for conjecture and inferences.
44. The Petitioner also stated that the 1st Respondent did not comply with the Constitution in engaging the stakeholders as well as in observing and being guided by the Constitutional criteria set out in Article 203 of the Constitution.
45. The concept of public participation is now well enshrined in our laws. It is indeed a universally and internationally acceptable principle that the public also participates in matters governance: see for example **The Universal Declaration of Human Rights of 1948** proclaims in **Article 21** that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. **The International Covenant on Civil and Political Rights (ICCPR)** affirms the same principle at **Article 25**. The idea behind public participation and more particularly consultation with stakeholders is to ensure that there is some sense of ownership and acceptance of the process, decisions and laws by the public.
46. The running theme is that public authorities ought to facilitate public participation. The principle of public participation has been well captured in many local cases. In **Association of Gaming Operators-Kenya & 41 Others vs Attorney General & 4 Others**[2014]eKLR , Majanja J stated thus:
- “Public participation as a national value is an expression of the sovereignty of the people articulated in Article 1 of the Constitution. The golden thread running through the Constitution is one of the sovereignty of the people of Kenya and Article 10 that makes public participation a national value is a form of expression of that sovereignty.”***
47. Various local as well as international cases have also expressed similar sentiments. See for

example the cases of **Commission for the Implementation of the Constitution vs. Parliament of Kenya & 5 Others [2013] eKLR**, **Robert N. Gakuru & Others vs. Governor, Kiambu County [2014]eKLR**, **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others [2013]eKLR**, **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11**, **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2), (CCT73/05A) [2006] ZACC 12**; **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10**; **Minister of Health and Another NO vs New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)** and **Hugh Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6**.

48. On the material currently before me it is apparent and indeed not denied that before the 1st Respondent submitted the first recommendation on the second revenue sharing criteria various players were engaged. They included mainly the key players in the county public financial management. The national treasury was also consulted. Others consulted and engaged included the Kenya Institute of Public Policy Research Analysis (KIPPRA) the Kenya National Bureau of Statistics (KNBS), public and private Universities, the now defunct Committee on Implementation of the Constitution, the Law Society of Kenya, the Kenya Tax payers Association and the Kenya Association of Manufactures. There certainly appear to have been facilitated a meaningful public participation.
49. Such engagement and participation of members of the public is not in controversy but the Petitioner contends that after the Senate urged for a revision, of the recommendation presented, the revised recommendation ought to have been subjected to another round of public participation.
50. I take the preliminary view that though public participation and stakeholder engagement was necessary, it was not necessary to start the entire process again simply because comments collected from some of the stakeholders, including even the Senate, were necessary. The substance of the report after revision apparently remained largely constant.
51. At this stage of the proceedings, the Petitioner has not demonstrated to the court that the substance of the second revenue sharing formula as developed a second time so substantially differed from the original version as to warrant an inference that it was not the same document that had been subjected to public participation.
52. The final assault made by the Petitioner on the resolution was that the 1st Respondent had failed to take into consideration the constitutional criteria set out in Article 203 of the Constitution.
53. Article 203 of the Constitution, sets out the criteria which is to be taken into account in determining the equitable distribution of national revenue. The factors indexed are :
- a. The national interest;
 - b. The public debt and other national obligations;
 - c. Needs of the national government to be determined by objective criteria;
 - d. Need to ensure county governments are able to perform their duties;
 - e. The fiscal capacity and efficiency of county governments;
 - f. Developmental and other needs of counties;

- g. Economic disparities within and among counties;
- h. Need for affirmative action in respect of disadvantaged areas or groups;
- i. Need for economic optimization of each county;
- j. The desirability of stable and predictable allocations; and
- k. The need for flexible response to emergencies and temporary needs.

54. It is evident from the recommendation which was adopted by the Senate that the 1st Respondent relied on the various provisions of Article 203. Perhaps, I may point out that in the applications of the criteria set out under Article 203 the 1st Respondent ought to be objective to ensure that the needs of the national government is also objectively determined. Such objectivity may not lead to the entire criteria under Article 203 being catalogued by the 1st Respondent and it may very well be possible that a criterion is left out.

55. Having read the recommendation, I am satisfied on a prima facie basis that the 1st Respondent was conscious of and applied to a large extent the criteria under Article 203 of the Constitution.

56. In my view, I am not consequently satisfied that the Petitioner has made out a prima facie case with a likelihood of success that the guidelines under Article 203 were not “taken into consideration” by the 1st Respondent.

57. I must also hasten to add that the process of approving and adopting the Recommendations on the second revenue sharing formula runs not only through the Senate but also through National Assembly. The latter may actually for genuine and good reason amend or reject the Senate’s resolution. The National Assembly in executing its mandate under Article 217(4) of the Constitution must also observe the provisions of Article 10 and 118 of the Constitution as to public participation.

58. A quick reading of Article 217(8) of the Constitution would also suggest that even after an approval by the National Assembly, the Senate may still amend the resolution if a motion to like effect garners the support of at least two –thirds of the members of Senate. Effectively, all is not lost for the Petitioner as had been sought to be shown that once the National Assembly adopts the resolution then the die is cast and the Petition is itself rendered nugatory.

59. Finally, there is the issue of public interest.

60. Devolution even with its challenges which centre mainly on fiscal discipline and management has brought smiles to many a Kenyan household or face. The smiles, which have emerged due to the devolved functions and the now apparent development, are depended on the funds being available. To grant any prohibitory conservatory order would not be in the interest of the public. If the Petitioner is ultimately vindicated after the hearing of the Petition, nothing should stand in the Petitioners way in prompting even the Senate under Article 217(8) of the Constitution. The need for funding of the counties leads me to the conclusion that it would be inappropriate to grant the conservatory orders sought. It would not be in the interest of the public and neither would it promote constitutional values and principles which seek to promote devolution.

Disposition

61. I return the verdict that no prima facie case with a likelihood of success has been shown that

the 1st Respondent abdicated its duties or was derelict in the performance of its duties. Neither am I satisfied that the Petition will be rendered nugatory if no orders are issued in the interim and as sought by the Petitioner. Instead I am satisfied that the public interest would be better served if the process was allowed to proceed and the Counties access the funds.

62. I would consequently dismiss the application but with no order as to costs.

63. The application dated 22nd April 2016 is hereby dismissed. Each party shall however bear its own cost of the application

Dated, signed and delivered at Nairobi this 31st day of May 2016

J.L.ONGUTO

JUDGE