



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.540 OF 2015**

**BETWEEN**

**HON. BENSON MUTURA.....PETITIONER**

**AND**

**COUNTY GOVERNMENT OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**NAIROBI COUNTY EXECUTIVE COMMITTEE MEMBER**

**FOR FINANCE AND ECONOMIC PLANNING.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY TREASURY, NAIROBI CITY COUNCIL.....3<sup>RD</sup> RESPONDENT**

**THE GOVERNOR, NAIROBI COUNTY.....4<sup>TH</sup> RESPONDENT**

**THE CONTROLLER OF BUDGET.....5<sup>TH</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTER OF FINANCE.....6<sup>TH</sup> RESPONDENT**

**HON.ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**AND**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION....INTERESTED PARTY**

**RULING**

**Introduction**

1. On 3<sup>rd</sup> December 2015, the Petitioner who is the Member of Parliament for Makadara Constituency in Nairobi County filed this Petition seeking declarations relating to the 1<sup>st</sup> Respondent’s alleged failure to manage the County Revenue Fund (CRF) within the expectations of the **Constitution** and the **Public Finance Management Act, 2012 (PFMA)**.

2. Together with the Petition, he also filed an Application seeking the following orders:

**“1) ....**

**2. THAT pending the hearing and determination of this application/petition a conservatory order of injunction be issued to restrain the 1<sup>st</sup> – 4<sup>th</sup> respondents from spending at source any of the revenue or monies raised or received by or on behalf of the County Government of Nairobi.**

**3. THAT pending the hearing and determination of this application/petition a conservatory order of injunction be issued to restrain the 1<sup>st</sup> – 4<sup>th</sup> respondents from depositing any of the revenue, money raised or received by or on behalf of the County Government of Nairobi in any bank account besides the account for the County Revenue Fund established under Article 207 of the Constitution.**

**4. THAT pending the hearing and determination of this application/petition a conservatory order of injunction be issued to compel the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to pay all monies raised or received by or on behalf of the County Government of Nairobi into the County Revenue Fund established for Nairobi City County under Article 207 of the Constitution.**

**5. THAT pending the hearing and determination of this application/petition a conservatory order of injunction be issued to compel the Controller of Budget- the 5<sup>th</sup> respondent herein- to ensure that she approves all withdrawals from the County Revenue Fund for the Nairobi County in accordance with Article 228 of the Constitution and Section 109 of the Public Finance Management Act, 2012.**

**6. THAT pending the hearing and determination of this application/petition a conservatory order of injunction be issued to compel the Controller of Budget and the Cabinet Secretary for Finance to ensure that the revenue, monies raised or received by or behalf of the County Government of Nairobi is paid in to the County Revenue Fund for the Nairobi City County established under Article 207 of the Constitution.**

**7. THAT pending the hearing and determination of this application/petition a conservatory order of injunction be issued to compel the Ethics and Anti-Corruption Commission - the interested party herein - to confirm whether or not all the money/revenue received by the Nairobi County government have not been corruptly used.**

### **Applicant’s Case**

3. The Petitioner/Applicant in support of the Application filed, no Affidavit but relies on the following grounds:

*a) The 1<sup>st</sup> – 4<sup>th</sup> Respondents are legally enjoined by Article 207 of the Constitution to ensure that all money raised or received by or on behalf of the County Government of Nairobi is paid into the relevant Revenue Fund.*

*b) There is uncontroverted evidence that since March, 2013 to May, 2015 the 1<sup>st</sup> – 4<sup>th</sup> Respondents have been spending revenue at source and without the approval of the Controller of Budget.*

*c) Despite being aware of the illegal expenditure and withdrawal of public funds by the County Government of Nairobi, the Controller of Budget and the Cabinet Secretary for Finance have not taken any effective measures or steps to stop the illegality or redress the problem.*

*d) The approval, refusal, neglect or failure by the Controller of Budget by feigning helplessness in the wake of the repeated violation of Article 207 of the Constitution and Section 109 of the PFM Act amounts to tacit approval of the unlawful expenditure of public funds and illegal withdrawal*

thereof or alternatively she has condoned, aided and abetted the said illegal decisions, actions and omissions.

e) *The wilful refusal, neglect and failure to pay all the money raised by or on behalf of the 1<sup>st</sup> Respondent is an express violation of Article 207 of the Constitution.*

f) *The failure to deposit all the moneys into the CRF coupled with the attendant expenditure of relevant funds without approval of the Controller of Budget amounts to violation of the principles of public finance set out in Article 201(a), (d) and (e) of the Constitution.*

g) *The impugned decisions, actions and omissions of the 2<sup>nd</sup> Respondent violates Sections 104, 107 and 109 of the PFM Act.*

h) *The impugned decisions, actions and omissions of the 2<sup>nd</sup> Respondent constitute a negation and subversion of accountability sought to be achieved by Article 228(4) of the Constitution.*

i) *The Controller of Budget has not demonstrated any or sufficient independence, competence and passion to decisively and meaningfully take corrective measures to ensure that the County Government of Nairobi and its officials manage public funds responsibly, accountably, prudently and lawfully.*

j) *The Governor of Nairobi has failed in ensuring that public funds are used in a lawful, responsible, accountable and prudent manner as required by Articles 201, 207 and 228 of the Constitution and the relevant provisions of the PFM Act.*

k) *In each of the two financial years the moneys or revenue that have been used at source and without approval of the Controller of Budget amount to over 10 Billion shillings.*

l) *This Honourable Court has a duty to ensure that public funds belonging to the Nairobi City County are used in accordance with the Constitution and other laws and to further ensure that all constitutional and statutory office holders discharge their respective duties competently, faithfully, independently and in accordance with Chapter Six of the Constitution.*

m) *The Honourable Court should direct that this matter be heard and determined expeditiously as part of the contribution of the Judiciary to seal the loopholes and inaction being deployed by corrupt public officials and their networks to steal and misappropriate public funds belonging to the people of Nairobi City County and elsewhere in Kenya.*

4. Counsel for the Applicant, Mr. Kibe Mungai also filed skeletal submissions on 22<sup>nd</sup> January 2016 and stated that the gist of the Petition and the Application is that whereas over the years, the County Government of Nairobi has been generating revenue to the tune of over Ten Billion Kenya Shillings, it has also been spending that money at source in an unconstitutional manner. That the said action is contrary to constitutional dictates because **Article 205** of the **Constitution** requires that each County Government ought to establish a County Revenue Fund into which all revenues and monies due to it must be paid. And that all withdrawals from the said Fund can and should only be made with the approval of the Controller of Budget.

5. According to the Applicant, the 1<sup>st</sup> Respondent having established its County Revenue Fund nonetheless has, over the last two financial years, continued to withdraw and use funds from the said Fund without the requisite approval or authorisation of the Controller of Budget.

6. As regards the 1<sup>st</sup> – 4<sup>th</sup> Respondents, it was Mr. Mungai's submission that they are all enjoined by **Article 207** of the **Constitution** to ensure that the 1<sup>st</sup> Respondent complies with the law as stated above. That despite being aware of the 1<sup>st</sup> Respondent's illegal expenditures from the County Revenue Fund, they have taken no effective measures or steps to stop the illegality or redress the problem.

7. Specifically, it was Counsel's submission that the 2<sup>nd</sup> Respondent as the office obligated to ensure compliance with the law in regard to finances at Nairobi County, violated **Sections 104, 107 and 109** of the **PFMA** and its actions and omissions are also a negation and subversion of the principle of accountability sought to be achieved through and by **Article 228(4)** of the **Constitution**.

8. In response to the 4<sup>th</sup> Respondent's answer to the Application, Counsel stated that while the former denies that any revenue or other monies collected is spent at source, in the Report of the Controller of Budget issued in November 2013, for the first Quarter of the Financial Year 2013-2014, it was stated that **"Kshs.2.2 Billion was spent directly at source without approval by the Controller of Budget contrary to Section 109(6) of the PFM Act"**.

9. In addition to the above, Counsel submitted that the County Government's Implementation Review Report issued in February 2015 for Half Year FY 2014/2015, it was noted that **"although the County reported development expenditure of Kshs.527.44 Million during the period under review, there were no funds that had been released for development expenditure by OCOB" (i.e. Office of Controller of Budget"**.

10. Lastly, that whereas the 1<sup>st</sup> – 4<sup>th</sup> Respondent's have claimed that the County Government is authorised to retain a reasonable amount of money to cater for urgent expenses and other contingencies, there is no indication as to how much money was withheld for that reason. That on the contrary, the bulk of revenue collected is actually withheld and only a small part of it is paid into the Revenue Fund.

11. For the above reasons, the Applicant prays that the Prayers elsewhere set out above should be granted.

#### **1<sup>st</sup> – 4<sup>th</sup> Respondent's Case**

12. By a Replying Affidavit sworn on 16<sup>th</sup> December 2015 and submissions by Mr. Makokha, the above Respondents opposed the Petition and Application stated categorically that no money is spent at source by the 1<sup>st</sup> Respondent. However, they also admit that the office of Controller of Budget had raised questions about certain expenditures and in answer, they have engaged the said office in a bid to explain the transitional issues affecting the 1<sup>st</sup> Respondent and the inaccuracies contained in its Reports on that subject.

13. It is also their case that the 1<sup>st</sup> Respondent inherited many debts from the City Council of Nairobi and is grappling with numerous warrants of arrests from Courts as a result of non-payment of those debts. That therefore it is forced to fulfil its obligations by having contingent funds at its disposal.

14. Further, that pursuant to **Article 207** of the **Constitution**, not all monies raised or received on behalf of the County Government must be paid into the Revenue Fund and that under the same **Article**, such a Government can retain a reasonable amount of money to cater for urgent matters and contingencies.

15. Lastly, the above Respondents contend that the orders sought in the Application are final in nature and that the Applicant has in any event not demonstrated a *prima facie* case with a likelihood of success, and that based on the decisions in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, Benjamin Ndiithi v AG J.R Misc. Appl. No.279 of 2008**, as well as **Anarita Karimi Njeru v Republic (No.1) (1979) 1 KLR 154**, the Application is misguided and ought to be dismissed with costs.

#### **4<sup>th</sup> Respondent's Case**

16. In response to the Application, the 5<sup>th</sup> Respondent filed the following Grounds of Opposition which Ms. Ocharo adopted wholly in her oral submissions:

***"The Application/Petition does not show that the Interested Party herein has failed, refused and or neglected to exercise its jurisdiction in respect of the allegations therein."***

## **5<sup>th</sup> Respondent's Case**

17. The 5<sup>th</sup> Respondent's case is contained in the Affidavit of Mr. Waweru Tuti, head of its Legal Department as well as in submissions by its advocate, Mr. Arwa.

18. Its case is that in discharging the mandate of the office of the Office of Controller of the Budget, the Constitution and specifically the principles contained in **Article 201** of the **Constitution** as well as the PFMA are its guides. That mandate includes the authorisation of withdrawals from County Revenue Funds under **Article 207** of the **Constitution** and overseeing and superintending compliance with budgetary procedures by National and County Governments.

19. Regarding instances of failures by the said Governments to comply with the Constitution and the PFMA, it is the 5<sup>th</sup> Respondent's case that it has no mechanism to ensure compliance save that it can:

i. Advise them to strictly comply with the law and;

ii. Prepare a report to the National Assembly, the Senate and County Assemblies which have separate mandates including sanctioning non-compliant Governments. Further, that in the case of the 1<sup>st</sup> Respondent, she has faithfully executed its mandate and has made appropriate recommendations to both the Senate and National Assembly.

20. Specifically, regarding **Article 207** of the **Constitution** and **Section 109** of the **PFMA**, it is urged that they create no obligation upon the 5<sup>th</sup> Respondent to oversee the collection and deposit of such funds.

21. On the mandate to approve withdrawals of funds deposited in the County Revenue Funds, it is the 5<sup>th</sup> Respondent's case that, within its mandate, it can only do so on the basis of the **Appropriations Act, Vote on Account and Supplementary Appropriation Act** of the Nairobi City County.

22. Within that mandate it has raised questions and concerns about the City County Governments expenditure of revenue at source and has also received explanations from the former regarding the reasons why it had to do so. That explanation notwithstanding, it advised the said Government to sweep all revenues into the County Revenue Fund and then pay its creditors on a weekly basis after obtaining authority from the 5<sup>th</sup> Respondent to withdraw the said funds.

23. Further, that the County Government accepted the advise and re-negotiated with some of its creditors but the oversight role in case of any breaches thereof lay with the Senate and the National Assembly and not the 5<sup>th</sup> Respondent. That the County Budget Implementation Review Reports are a testimony to the fact which reports have also been sent to the Auditor General, the Ethics and Anti-Corruption Commission for them to act within their respective mandates. The Public has also been allowed access to the Reports.

24. On stoppage of funds to any State entity including the City county Government, it is the 5<sup>th</sup> Respondent's case that it can only advise resort to such a drastic action with caution and sparingly. In any event, such an action is reserved for the Cabinet Secretary responsible for Finance and public interest should always be taken into account when taking such an action.

25. Lastly, the 5<sup>th</sup> Respondent prays that the Application before me ought to be dismissed with costs.

## **6<sup>th</sup> and 7<sup>th</sup> Respondent's Case**

26. The above Respondents filed the following Grounds of Opposition which Mr. Sekwe also adopted wholly in his oral submissions:

***"1) The Petitioners have not demonstrated in any manner whatsoever how the 6<sup>th</sup> and 7<sup>th</sup>***

*Respondents have violated his Constitutional rights under the Constitution.*

*2) The Petitioner is making a baseless claim alleging omission on the part of the 6<sup>th</sup> Respondent without any evidence.*

*3) That the Petitioner's interpretation of the Constitution is misleading, misconceived and self-serving.*

*4) The Petition is presumptive and an abuse of the Court process and should be dismissed with costs.*

*5) The grounds set out in support of the Petition do not raise any Constitutional issue either for enforcement of fundamental rights or interpretation of the Constitution."*

### **Analysis and Determination**

27. In my perusal of the Petition and the Application before me, it is clear to my mind that the only issue in contest in the Application is whether the 1<sup>st</sup> – 4<sup>th</sup> Respondents have adhered to the expectations of **Article 207** of the **Constitution** in regard to the alleged expenditure of revenue at source by the 1<sup>st</sup> Respondent and therefore whether conservatory orders should be granted as prayed. As a corollary to that question is the issue whether the 5<sup>th</sup> – 7<sup>th</sup> Respondents have failed in their duty to ensure that the said Respondents adhere to the dictates *inter alia* of **Article 207** aforesaid. For avoidance of doubt, that Article provides thus:

***“(1) There shall be established a Revenue Fund for each County Government, into which shall be paid all money raised or received by or on behalf of the County Government, except money reasonably excluded by an Act of Parliament.***

***(2) Money may be withdrawn from the Revenue Fund of a County Government only—***

***a. as a charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the county; or***

***b. as authorised by an appropriation legislation of the County.***

***(3) Money shall not be withdrawn from a Revenue Fund unless the Controller of Budget has approved the withdrawal.***

***(4) An Act of Parliament may—***

***a. make further provision for the withdrawal of funds from a county Revenue Fund; and***

***b. provide for the establishment of other funds by counties and the management of those funds.*** (Emphasis added)

25. From the outlet, it is clear to my mind that, whether there was/is any breach of the above **Article** is a matter to be substantively determined after the hearing of the Petition but in the meantime, I note that Prayers 5 and 7 of the Application were abandoned and for purposes of this Ruling, only Prayers 2, 3, 4 and 6, all for conservatory orders require determination.

26. In that context, one of the issues raised by the 1<sup>st</sup> -4<sup>th</sup> Respondents and which requires quick resolution is that the said orders are final in nature and cannot be granted at the interlocutory stage. In summary, the orders are to the effect that pending the hearing and determination of the Petition;

a. The 1<sup>st</sup> – 4<sup>th</sup> Respondents should be restrained from spending at source any revenue or any other

monies raised or received by or on behalf of the 1<sup>st</sup> Respondent.

b. The 1<sup>st</sup> – 4<sup>th</sup> Respondents should be restrained from depositing such monies in any bank account other than the County Revenue Fund.

c. The 5<sup>th</sup> – 6<sup>th</sup> Respondents should be compelled to ensure that all such monies are deposited in the County Revenue Fund.

30. Can such orders be said to be conservatory orders or are they final orders? As I understand it, conservatory orders are such orders issued under **Article 23(3)(c)** of the **Constitution** to keep the subject matter of dispute *in situ* pending resolution of a constitutional Petition or other final proceeding. That is why I am in agreement with the holding in **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR** where the Learned Judge stated thus:

*“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”*

31. The Supreme Court was also emphatic that conservatory orders are not in the manner of the usual injunctive reliefs as known to private civil law and stated thus in **Gatirau Peter Munya v Dickson Mwenda Kithinji [2014] eKLR**.

*“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”*

32. Flowing from the above and as to the principles to be applied when deciding whether or not to grant conservatory orders, it is my understanding that they are following:

*(a) An applicant must demonstrate that he has a prima facie case that unless the Court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.*

*(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and*

*(c) The public interest must be considered before grant of a conservatory order.*

33. In the above context, I note that an interpretation of **Article 207** aforesaid would include answering the following questions:

i. What monies must be paid into the County Revenue Fund? What monies are excluded therefrom?

ii. In what circumstances would such monies be withdrawn?

iii. What laws(s) authorises withdrawal of such monies?

iv. What is the role of the Controller of Budget in the withdrawal of funds from the County Revenue Fund?

34. In the specific context of the Petition before me and in addition to the above, there is also the question; in what circumstances, may the County Government expend revenue and other monies at source?

35. In the above context, elsewhere above I have summarised the prayers sought in the Application before me and it seems to me that if I grant orders that all revenue and other monies received by the City County Government should be deposited at the County Revenue Fund and that no such funds should be spent at source, I would have to answer all the pertinent questions above, a matter that ought to be left to the final determination of the Petition herein and by grant thereof, there would in fact be nothing to conserve as all that the Petitioner seeks would have been achieved at the interlocutory stage. That, with respect, is not the purpose of conservatory orders.

36. Having so said however, I am still obligated to apply the three principles above in determining the present Application. In that regard, has the Applicant made out of a *prima facie* case that there is or there may be a violation of the **Constitution** by the Respondents with regard to the issues in contest?

37. In answer thereto, I note that the Applicant is a member of Parliament representing Madaraka Constituency in Nairobi and has a legitimate expectation that funds collected from himself and other residents of Nairobi would be collected, deposited, withdrawn and spent within the dictates of the **Constitution** and relevant statutes. *Prima facie*, based on the responses by the 1<sup>st</sup> – 4<sup>th</sup> Respondents as well as the 5<sup>th</sup> Respondents, there would seem to be a problem in those processes. The Reports of the 5<sup>th</sup> Respondent including the County Budget Implementation Review Reports are quite telling in that regard.

38. Without saying more and without making any determinate findings at this stage, the Applicant has made out a *prima facie*, even if partly so.

39. On whether the Petition would be rendered nugatory should the conservatory orders not be granted, there is *prima facie* evidence before me that money collected by the Nairobi County Government is being spent at source. There is also evidence before me that, by law, there may be an exception to the rule that all monies should be paid into the County Revenue Fund. There is however no debate that pursuant to **Article 207(3)** no monies shall be withdrawn from the County Revenue Fund without the approval of the Controller of Budget. Negotiations have however been held between the County Government and the Controller of Budget to address existing problems in a bid to ensure compliance with **Article 207** aforesaid and it seems to me that by not granting the orders sought, the issues/questions requiring determination in the Petition would still remain live.

40. Conversely, to grant them, I reiterate, would mean that at the interlocutory stage, all these issues/questions would in effect be answered in favour of the Applicant which would be unprocedural.

41. Lastly, on the issue of public interest, both the County Government and the Controller of Budget appreciate and know the law with regard to the issues at hand. The anomalies detected in the impugned processes are being addressed and it would not be in the public interest to make final findings at this stage.

42. There are also other means, including the process at the Senate, National Assembly and the Ethics and Anti-Corruption Commission to ensure that there is accountability in how funds are collected, deposited, withdrawn and spent. Those processes, it has not been shown are not in place. The public interest including on provision of services by the Respondents would not therefore be served if the orders sought are granted.

### **Conclusion**

43. Because of what I have stated above, it would be best that the present Petition be disposed of

expeditiously so that all the important issues raised in it can be conclusively determined.

**Disposition**

44. For the above reasons, it is hereby ordered that the Application dated 3<sup>rd</sup> December 2015 be and is hereby dismissed.

45. Cost shall abide the outcome of the Petition.

46. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Mungai for Applicant

Mr. Sekwe for 3<sup>rd</sup> and 6<sup>th</sup> Respondents

Mr. Munyua holding brief for Mr. Arwa for 5<sup>th</sup> Respondent

Miss Lonyolo holding brief for Miss Ocharo for Interested Party

**Order**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

Submissions to be filed on the Petition for hearing on 4/8/2016.

**ISAAC LENAOLA**

**JUDGE**