

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO. 3 OF 2015

ALI AHMED & 3 OTHERS.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MANDERARESPONDENT

RULING

A petition was filed 8th March 2015 seeking two declarations and costs. The first declaration sought is that the respondents infringed the petitioners rights to public participation under Article 196 (1) (a) (b) of the Constitution. The second declaration sought is that the Mandera Finance Act 2014 violated the Constitution and was null and void. The petitioners also seek costs.

Together with the petition was filed a Notice of Motion under certificate of urgency dated 6th March 2015 for temporary injunctive orders. This is the application for which the present ruling relates. The relevant prayers in the Notice of Motion are prayers 3 and 4 as follows:-

3. That pending the hearing and determination of this suit, an order of injunction do issue against the respondent its agents, officers or persons acting under their instruction from collecting cess from the traders of Mandera county.

4. That costs of this application be provided for.

The application has grounds on the face of the Notice of Motion. The grounds are that on 3rd October 2014 the respondent enacted the Mandera County Finance Act 2014 which required the petitioners and other traders in Mandera County to pay very high fees; that the people of Mandera County were not involved in the enactment of the Act as required under Article 196 (1) (a) (b) of the Constitution of Kenya; that the fees being collected was a heavy burden for the traders to carry; that the traders would not be able to sustain their business and would close down; and that in the interests of fairness and justice the court should stop the collection of the cess for the sake of the economic livelihood of the people of Mandera County.

The application was filed with a supporting affidavit sworn by Ali Mohamed the 1st petitioner. It was deponed that the County Government of Mandera enacted the Act imposing a charge of Kshs. 15,000/= per miraa truck taken to the market.

The application is opposed. A replying affidavit sworn by Ibrahim Barrow Hassan the County Executive in charge of Finance on 18th March 2015 was filed. It was deponed inter alia that the suit herein did not disclose any Constitutional violation. That the miraa trade in Mandera was thriving and that the respondent found it fit to charge a modest cess to raise money and supplement its budget. That the respondent reviewed the cess previously chargeable on miraa traders. That is involved the resident of Mandera County in the county budget process, by holding several stake holder forums and adopting their views. That the amount chargeable would not drive out existing and future traders from business.

Learned counsel for the parties, Mr. Chege for the petitioners and Mr. Yunis for the respondent addressed the court at length on behalf of their clients.

This is an application for an interlocutory injunction. The parameters for grant of such an injunction

were clearly set out in the case of ***Giella Vs. Cosman Brown Ltd [1973] EA***. An applicant has to show a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss if the injunctive orders are not granted. Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

In my view, the applicants have demonstrated a prima facie case. A prima facie case is a case that may or may not succeed. It is an arguable case.

The applicants have also complained that the charges are very exorbitant. Counsel for the applicants said in submissions that traders previously paid Kshs. 6,500/= per pick up before the same was raised to Kshs. 15,000/=, which is certainly more than twice. In my view, the applicants will suffer irreparable loss if the temporary injunction is not granted. The respondents have not stated what charges they levied between 2010 to 2015. Mine for the time being, is to issue an injunction to suspend the operation of the new charges of Kshs. 15,000/= till hearing and determination of the petition. In case there existed lawful charges before then, the respondents are not hereby injuncted from levying the same.

The balance of convenience is also in favour of the applicants/petitioners as they are the ones bearing the burden with the charges and feeling the pinch of the new charges.

Consequently, I allow the application and grant prayer 3. Costs will be in the cause.

Dated and delivered at Garissa this 27th day of April, 2015

GEORGE DULU

JUDGE