



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

THE NATIONAL ASSEMBLY OF KENYA.....1ST RESPONDENT

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

CABINET SECRETARY OF THE NATIONAL TREASURY.....3RD RESPONDENT

AFFIRMATIVE ACTION SOCIAL DEVELOPMENT FUND BOARD....4TH RESPONDENT

RULING

Introduction

1. The ruling concerns the application dated 21st October 2015. The application which was filed simultaneously with the Petition of even date sought the following orders:
 - i. *That, pending the hearing of this Petition, the Cabinet Secretary of National Treasury be stopped from releasing money to any institution created under the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015.*
 - ii. *That, pending the hearing of this Petition, all the accounts created pursuant to Regulation 24 of the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015 be frozen to stop any further activity with the funds already disbursed.*
 - iii. *That, the court issue injunctive orders stopping the Affirmative Action Social Development Board and the Affirmative Action Social Development Country Committee from transacting any business until this Petition is heard and determined.*
2. The Petitioners are Kenyan citizens and officials/trustees of the Institute for Social Accountability, also erroneously described in the Petition as the Petitioner. The Petitioners have brought the action pursuant to Articles 3 and 258 of the Constitution.
3. Five Respondents are named. They include both houses of Parliament and the Cabinet Secretary

for National Treasury as well as the Attorney General of the Republic of Kenya who has been sued under Article 156 of the Constitution of Kenya. Named as the 5th Respondent is the Affirmative Action Social Development Fund Board.

4. The Petition as well as the application was prompted by certain subsidiary legislation made by the 3rd Respondent on 11th March 2015. The subsidiary legislation (“Impugned Regulations”) in question is the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015.

Petitioners’ case

5. Being aggrieved by the Impugned Regulations, the Petitioners seek a declaration that the Impugned Regulation are unconstitutional. The Petitioner also seeks a declaration that the 3rd Respondent acted in excess of his powers and in abuse of his office in promulgating the Impugned Regulations.
6. The Petitioners case can be easily gathered from the Petition and the Supporting Affidavit thereof sworn by Wanjiru Gikonyo. The affidavits sworn in support of the application for conservatory or intermediary orders basically replicates the affidavit sworn in support of the Petition.
7. The Petitioners contend that the Impugned Regulations are unconstitutional as they offend the principles of public finance as well as division and separation of powers. The Petitioners further contend that the Impugned Regulations are to be disbursed and administered in the manner that the Constituency Development Fund (CDF) is disbursed and administered yet the High Court has already declared the Constituency Development Fund (CDF) Act as unconstitutional for violating the doctrine of separation of powers and division of functions as provided for under the Constitution.
8. The Petitioners contend that the Impugned Regulations undermine the judgment of the court and further that the Impugned Regulations will result in the expenditure of public resources for unconstitutional purposes. According to the Petitioners, some of the functions to be undertaken through the Fund established via the Impugned Regulations are functions constitutionally assigned to the county Governments.
9. The Petitioners also state that the 3rd Respondent did not, contrary to the provisions of Article 118 of the Constitution consult or involve the public prior to formulation and promulgation of the Impugned Regulations.
10. The Petitioners are particularly critical of the appointment of and role of County Women Representatives to the fund committees established under the Impugned Regulations. The Petitioners state that the appointment of and role of County Women Representatives violate the doctrine of separation of powers. Further, their role and functions also seek to usurp a role constitutionally assigned to county executive committees.
11. Finally, the Petitioners contend that the Impugned Regulations duplicate the role of the National Social Authority which sponsors, develops and operates social services and that amounts to an imprudent use of public resources.

Respondents’ case

12. Despite service being affected upon all the Respondents, only the 1st Respondent filed a formal response to the application.
13. Grounds of objection and a Replying Affidavit sworn by Mary Seneta were filed on behalf of the 1st Respondent on 10th November 2015.
14. While confirming that the Impugned Regulations were promulgated on 11th March 2015, 1st Respondent contends that the Impugned Regulations were enacted to give life to the principle of affirmative action. In particular the 1st Respondent points to Regulation 6 of the Impugned Regulations and states that the purpose of the Impugned Regulations is to protect the rights of marginalized and minority groups including women, children, youth and persons with disabilities (per paragraph 9 of the Replying Affidavit).
15. The 1st Respondent also points to Regulation 4 of the Impugned Regulations with a view to demonstrating that the Fund established by the Impugned Regulations is different from the

Constituency Development Fund (CDF). The 1st Respondent also contends that, with the knowledge and participation of the Petitioners, there is already a task force to align the Constituency Development Fund (CDF) to the Constitution.

16. For completeness, the 1st Respondent states that the public interest lies in allowing the Fund established by Impugned Regulations to help promote the socio economic rights of affirmative action groups. The 1st Respondent asks the court to exercise restraint as the balance of convenience lies with the Respondents and the entire country as beneficiaries while no prejudice or harm will be suffered if the intermediary orders now sought are not granted.

Arguments

17. The Petitioners argued their case through Mr. Suiyanka Lempaa while Ms. Thanje appeared for the 1st Respondent and Mr. Mohammed urged the 3rd, 4th & 5th Respondents' case.

Petitioners' Submissions

18. Reiterating basically the facts as contained in the affidavit of the 1st Petitioner, Mr. Lempaa submitted that the intention behind the Impugned Regulations was to defeat the court's judgment in the case of **Institute of Social Accountability –v- Attorney General & 4 Others HCCP No. 71 of 2013**. The Petitioners submitted that the court in that case had declared the CDF Act unconstitutional yet the 3rd Respondent had now formulated similar Regulations. In particular, counsel for the Petitioners pinpointed regulation 6 which states that the fund established by the Impugned Regulations was to supplement the CDF.

19. Counsel further submitted that in so far as there is no evidence that the Impugned Regulations met the approval of both the National Assembly and the Senate simply means that the Impugned Regulations are unconstitutional.

20. The Petitioners also asserted that contrary to all fiscal and monetary principles even the source of the funding is not revealed by the Regulations which simply state that Parliament is to allocate the funds. Yet, in the 2014 and 2015 financial years, the 3rd Respondent already allocated Kshs. 2.03 billion and Kshs. 2.1 billion respectively. To the Petitioners this amounted to an illegality.

21. The Petitioners finally argued that most of the twenty nine Impugned Regulations sought to take over and perform functions of either the national or the county governments.

22. The Petitioners referred the court to the cases of **Coalition for Reform and Democracy (CORD) & Another –v- Republic of Kenya & Another HCCP No. 628 and 630 of 2014 [2015] eKLR** consolidated as well as the case of **Nancy Rotich & 6 Others –v- The Speaker of County Assembly of Bomet HCCP No. 2 of 2015** both for the proposition that the court has powers to stay Impugned legislation pending determination of a Petition. Counsel also referred the court to the case of **Steve Ferguson, Ishwar –v- The Attorney General of Trinidad & Tobago & Another; Claim no. CV 2009-00639 High Court of Justice, Trinidad and Tobago**.

1st Respondent's submissions

23. It was argued on behalf of the 1st Respondent by Ms. Thanje that the Petition as well as the application was premature as the decision in **Institute for Social Accountability –v- Attorney General & 4 Others HCCP No. 71 of 2013** had been suspended for a period of one year, which meant the CDF could and was still operational.

24. Mr. Thanje also submitted that the Petitioner had failed to establish a single principle to warrant the issuance of a conservatory order. Counsel added that public interest dictated that the fund established by the Impugned Regulations be allowed to be administered as it assisted and benefited the public besides assisting in engineering Article 43 of the Constitution.

25. Counsel also submitted that there is an ongoing legislative process, seeking to align both the Impugned Regulations as well as the CDF Act with the Constitution. Consequently, it was not right for the court to interfere with the process. The court, counsel continued, ought to exercise judicial restraint.

26. In counsel's view, the Petition was unlikely to be rendered nugatory if the conservatory orders

sought were not granted. Counsel concluded by stating that the Petitioners had not established a prima facie case with a likelihood of success and that in any event the doctrine of proportionality did not favour the issuance of the orders sought.

3rd, 4th and 5th Respondents' submissions

27. Mr. Mohammed urged the 3rd, 4th and 5th Respondents' case.

28. Mr. Mohammed, whilst confirming that no monies had been disbursed pursuant to the Impugned Regulations stated that the Fund established under the Impugned Regulations was in existence long before the court's decision in the case of **Institute for Social Accountability –v- Attorney General & 4 Others (Supra)**. Counsel urged the court to let the issue be resolved politically through Parliamentary legislation which was already underway.

Petitioners' rejoinder

29. In a brief rejoinder, Mr. Lempaa reiterated that the Petitioners had a prima facie case. Counsel stated further that the Petitioners were not opposed to the fund being established under the Impugned legislation but were resisting on behalf of all Kenyans the utilization and channeling of public funds through unconstitutional mechanisms.

Analysis and Determination

30. The only question the court is currently faced with is whether the Petitioners are entitled to the conservatory orders sought.

Conservatory orders

31. The principles to be followed by the court when dealing with an application for conservatory orders are now relatively well settled. Counsel for the 1st Respondent Ms. Thanje drew the court's attention to this court's decision in the case of **Mwangi Wa Iria & Others –v- Speaker Muranga County Assembly & Others HCCP No. 458 of 2015 [2015]eKLR** where the court stated as follows:

“In the case of Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education NRB HCCP No. 399 of 2015 [2015]eKLR the principles set by a series of cases and which ought to guide a court dealing with an application for conservatory orders were duly summarised. The court stated the guidelines and principles applicable as follows:

‘[30].....:

- **The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.***
- **The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.***
- **If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.***
- **The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya's decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014]***

eKLR.

- *The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.’*

32. The court in **Mwangi Wa Iria & Others –v- Speaker Muranga County Assembly & Others (supra)** then continued as follows:

“Noting that the above principles though relatively clear are not absolutely exhaustive, I am constrained to add that in the exercise of discretion the court may also invite the proportionality dogma. As was stated by Odunga J. in the case of Kevin K. Mwiti and 2 Others –v- Kenya School of Law and 2 Others [2015] eKLR:

[14]In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role. As was stated by Ojwang, AJ (as he then was) in Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589 the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

“...Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant”

33. I have no doubt that those are the principles. The principles, I must add, are not to be applied in a categorized form. As was stated in the case of **Kemboi Koech –v- Halake Waqo & 2 Others HCCP No. 456 of 2015[2015]eKLR.**

“Not every single element of the principles need be proven. Rather the totality of the facts should guide the court. Of course, once there is a demonstration of a prima facie case with a likelihood of success, the principles should emerge then with ease and even where a prima facie case is not shown the court would still be possessed with the discretion. As was stated by Ojwang J (as he then was) in Suleiman v Amboseli Resort Limited [2004] 2 KLR 589, the court should always opt for a lower risk of injustice rather than a higher one especially where factors appear even.”

34. Without even a consideration of the principles, both the Respondents’ counsel Ms. Thanje and Mr. Mohammed argued, the court ought not entertain the application. Firstly, the Respondents stated that a political process is underway as there is a task force already appointed and in place seeking to ensure that the Petitioners’ grievances are addressed. The Respondents stated that the task forces’ recommendations would lead to a legislative process and as this was the reclusé of Parliament, the court by virtue of the doctrine of separation of powers was not to intervene. The Respondents also argued that the Petitioners claim did not fall within the ambit of Article 22 to warrant a call on Article 23(c) of the Constitution.

35. The Petitioners’ response was brusque. The court has jurisdiction to grant conservatory orders to ensure and secure the enforcement of the provisions of the Constitution. In these respects, the Petitioners referred to the decision of Odunga J in **Coalition for Reform and Democracy (CORD) & Another –v- Republic of Kenya & Another [2015]eKLR.**

36. I would agree with the Petitioners.

37. The court truly has jurisdiction to grant conservatory or interim orders in any Constitutional litigation not only to secure the enforcement of Constitutional provisions but also to assist in upholding the adjudicatory authority of the court. This position is clearer when one understands the nature of conservatory orders.

38. The Supreme Court of Kenya in **Gitirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others, SCP No. 2 of 2013 [2014] e KLR** stated as follows:

“ ‘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.”

39. Away from our jurisdiction in the Privy Council opinion in **Attorney General –v- Sumair Bansraj [1985] 38 WIR 286, Braithwaite JA** expressed himself as follows in re conservatory orders.

“Now to the formula..... The only judicial remedy is that of what has become to be known as the “Conservatory Order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High court to “give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions” of the Constitution...In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) “subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have ... the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too ... The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.”

40. It is clear that when a court sits as a Constitutional court, it must be ready to and has jurisdiction to make appropriate orders or grant remedies as the situation demands and as the need arises : see also **Nancy Makokha Baraza –v- Judicial Service Commission & 9 Others [2012] eKLR**. It should not matter that the court must only be faced with a Petition under Article 22. The adjudicatory authority of the court especially where public interest is at stake would dictate that the court balances all factors and acts as appropriate instead of divesting itself of jurisdiction *in limine*.

41. The Constitution under Article 165(3) (d) grants the High Court powers to hear and determine questions concerning the interpretation of the Constitution. The court under the said Article has powers to determine whether any law is inconsistent with or in contravention of the Constitution. The court is also to interrogate 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. The court also has adjudicatory authority in any matter relating to Constitutional powers of state organs and any matter relating to Constitutional relationship between levels of Government.

42. With such remit, the court too always has inherent powers to ensure that its adjudicatory authority is never exercised in vain. The court will act to ensure that its adjudicatory powers are respected. It will do so before and after it has made a final determination on the matter. If the scales of justice dictate an immediate intervention, the court will interfere. In my view consequently conservatory

- orders are not limited to only where a party claims breaches of his fundamental rights or freedoms under Article 22 of the Constitution.
43. With the necessary remit to grant conservatory orders, the court must likewise respect the role of the Executive as well as of Parliament. The court must ask itself when it is appropriate to interfere with the process or decision of Parliament. In my view and as was held by this court in the case of **Narok County Government –v- The Senate and another HCCP No. 424 of 205 [2015] eKLR** the court must exercise extra caution especially whilst considering whether to issue conservatory orders against other arms of the Government. See also **Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 2 Others HCCP No. 7 of 2014 [2014]eKLR**.
 44. The court will sparingly exercise its discretion when it comes to the mandate of other Constitutional organs. There ought, especially at the interim or interlocutory stage exceptional circumstances established to warrant such exercise of jurisdiction.
 45. I now turn to whether the Petitioners’ have made out a case for the issuance of conservatory orders.
 46. Certain facts are not in dispute. It is not disputed that the court in the case of the **Institute of Social Accountability and Another –v- The National Assembly & 4 Others HCCP No. 71 of 2013 [2015] eKLR** found and held that the Constituency Development Fund Act 2013 is unconstitutional and thus invalid. That was on 20th February 2015.
 47. The invalidity was however suspended for a period of twelve (12) months to enable the National Government to take remedial action. It is also not in dispute that the 1st Respondent as well as the 2nd and 4th Respondents herein who were also Respondents in the **Institute of Social Accountability & Another –v- The National Assembly & 4 Others (Supra) (“ the CDF Case”)** have not appealed that decision. Instead, the Respondents are engaged in ensuring that remedial action is undertaken and the CDF Act is made constitutionally compliant. There is indeed no controversy that the matter of the CDF is before a task force and the Petitioners, the court has been told, have themselves made submissions before the task force.
 48. Controversy however emerges when the Petitioners complain the Impugned Regulations were promulgated with a view to defeating the court’s judgment in the CDF case. It is also the Petitioners’ case that the Impugned Regulations were never subjected to public participation and further that the Impugned Regulations have never met with the approval of the Senate, even though they affect the counties. The Respondents have resisted the contention that the Impugned Regulations were intended to slight and snub the courts’ judgment in the CDF case. I did not however hear the Respondents’ contest the allegations that the Impugned Regulations were not subjected to public participation. Neither did I hear the Respondents contest the allegation that the Senate has never approved of the Impugned Regulations, even though they rank affect and concern counties in so far as the Impugned Regulations are county specific.
 49. Admittedly, the Respondents are aware of the court’s decision in the CDF case. This is amply demonstrated when the Respondents state that there is already an all involving process to help align the Constituency Development Funds Act, 2013 with the provisions of the Constitution. Admittedly too the Respondents are aware of the effect of the decision in the CDF Case. This too, is amply demonstrated when the parties are in concurrence that an application to review the time for compliance from the period of twelve (12) months to thirty six (36) months has been made to court.
 50. Controversy also emerges when the Petitioners contend that the Impugned Regulations are unconstitutional and the Respondents retort that there is a presumption of Constitutionality of laws.
 51. There is no doubt that there is a general presumption that laws and Regulations passed as Acts of Parliament or under Acts of Parliament are Constitutional. The burden of proof if there is an allegation of unconstitutionality lies on the person who alleges otherwise: see **Ndyanabo –v- Attorney General of Tanzania [2001] EA 495**.
 52. On no less than four fronts the Petitioners sought to demonstrate the unconstitutionality of the Impugned Regulations. The Petitioners point out that the Fund established under the Impugned Regulations is being administered and controlled by a member of Parliament in the County Women Representative, in so far as the County Women Representative is the patron of the Fund at the County level under Regulation 16 (12) and is also a member of the County Affirmative Action Social Development Committee under Regulation 16(3) (f). Yet as a legislator the County Women

- Representative should be exercising an oversight role on how development funds are expended by both national and county Governments.
53. The Petitioners also point out that most of the functions of the Fund are to be undertaken by the committee established under the Impugned Regulations yet the functions are constitutionally reserved for the National and County Governments.
54. I would tend to agree with the Petitioners.
55. The court in the CDF case made clear delineations. The court was clear that national funds ought to be shared only as provided for under the Constitution's Articles 201 and 202. Constituencies, the court stated could not benefit from national funds directly as such. It was the duty of the national government to fund the devolved units, so stated the court. The court in the CDF case also stated that any law which introduces ambiguity into how revenue raised by the national government is to be divided or shared needed deeper interrogation.
56. The Impugned Regulations have established a fund known as the Affirmative Action Social Development Fund ("AASDF"). The AASDF, under Regulation 4 of the Impugned Regulations, is to consist of
- a. Such moneys as may be appropriated by the National Assembly from time to time.
 - b. *Grants and donations*
 - c. *Money generated from proceeds of the Fund.*
 - d. *Any moneys accruing to or received by the Fund from any other source" (emphasis).*
57. The Petitioners state that the money is to come from national revenue as is already evident from the budgetary allotments of the fiscal year 2014/2015 and 2015/2016. The amount allotted in the year 2014/2015 was kshs. 2.03 billion while for the year 2015/2016 it was kshs. 2.1 billion. This money is from the national revenue, no doubt. This appears to run counter to what the court in the CDF case found and held.
58. The Petitioners, thirdly, also contended that the Impugned Regulations violate the division of functions in so far as they seek to provide for the performance of functions reserved for the national government and the county Government and consequently duplicative. To the Petitioners this violates the principle of prudent use of resources as well as of good governance. The Respondents reply was that the Fund as established seeks to assist the national as well as the county government in the constitutional goal of realizing affirmative action and also help give life to the rights under Article 43 of the Constitution. To the Respondents the Fund is intended to assist the public and ought to be left to hold.
59. I did not hear the Petitioners to assert this point with any vigor. I also did not hear the Petitioners elaborating on the infringement of the principle of division of functions and how it was unconstitutional if one arm or organ supplements another. I also indeed did not hear the Petitioners state that the Fund should not exist at all.
60. The point pressed home by the Petitioners was simple: if the Fund has to exist let it have a Constitutional fortitude as already directed by the court in the CDF Case. I would therefore not place much emphasis on the issue of division of functions at this stage of the proceedings, suffice only to point out that the Constitution at Article 1(3) lists the three arms of government and states that they shall perform their functions in accordance with the Constitutions. In detail the Constitution then outlines the tasks and functions. Fidelity to the same would thus be critical. Cross-functioning, for example where the building works foreman also becomes the mason, where may lead to unnecessary confusion. The three arms of government should always endeavor to avoid that.
61. The totality of the foregoing would lead me to conclude that the Petitioners have established a prima facie case with chances of success. The involvement of the County Women Representative, the disbursement of funds from the national revenue as well as the execution of local projects by the Fund would lead one to easily conclude, on a prima facie basis, that the architecture and design of the Affirmative Action Social Development Fund (AASDF) is similar to that of the Constituency Development Fund (CDF) which the court has already declared unconstitutional.
62. It was argued that the decision in the CDF Case is currently under suspension and consequently not in force. It would be appropriate to point out that the court simply granted time to Parliament to remedy the defects. The principles behind the decision as well as the ratio still stand in good

- stead. The court was certainly conscious that monies had been allotted and or disbursed and to forestall everything would have meant a situation where the CDF would itself not be utilized and perhaps even ultimately accounted for.
63. It is therefore not reasonable to argue that as the court had suspended an illegality, though declared it so, it would be appropriate to perpetrate another illegality. Certainly there is need for fidelity to the rule of law. The CDF Case was relatively clear and rationalized. The Respondents are aware of the same and have appreciated the effect. It would be wrong to ignore the same.
64. Finally, the Respondents urged that the Impugned Regulations be allowed to run their course as Parliament sought to ensure alignment of both the CDF and the Impugned Regulations with the Constitution. The 1st Respondent in particular pointed out that the public stands to benefit.
65. I have looked at the Public Finance Management Act, 2012. Under Section 126 of the Act, there exists a rather highly structured and detailed system for the planning and funding of development projects within counties. There is certainly an alternate way of channeling any funds meant for affirmative action to the counties. The funds allocated under the Impugned Regulations may not necessarily be kept away from the public. In any event, the Respondents were in agreement that thus far no funds have been disbursed. If that be the position, why not channel the funds as per the dictates of the Public Finance Management Act, 2012 ?

Conclusion

66. I come to the now rather obvious conclusion that the Petitioners have made out a prima facie case with a likelihood of success.
67. I am now aware that the matter of the Impugned Regulations is under review by Parliament. Though so also submitted by the Respondents, no substantive documentary evidence was availed in support. The Petitioners however did not contest that submission and I have no reason to doubt the same. Even with the necessary caution exercised, I still come to the conclusion that the court should not hold back.
68. There are exceptional circumstances shown in this case. Exceptional circumstances have been demonstrated and established in the sense that the Respondents despite being aware of the court decision in the CDF Case have proceeded to lend support to subsidiary legislation which is apparently akin to condemned legislation. This is evident in the fact of the allotment of funds totaling Kshs. 2.1 billion after February 2015. I hold the view too that there is an exceptional circumstance when one considers that all the Respondents are state organs or arms which should take the lead in observing and upholding the rule of law. Respecting the law, including judge-made law, is one way of upholding and uplifting the rule of law. It is apparent that there is no such subservience herein.

Disposal

69. In the end, I find that the Petitioners have made out a case for conservatory orders sought. I issue orders in terms of prayers 2 and 4 of the Notice of Motion dated 21 October 2015.
70. The costs of the application will abide the ultimate outcome of the Petition.

Dated, signed and delivered at Nairobi this 14th day of December 2015

J.L. ONGUTO

JUDGE