



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL PETITION NO 74 OF 2014**

**INTERNATIONAL LEGAL CONSULTANCY GROUP.....PETITIONER**

**VERSUS**

**THE SENATE.....1<sup>ST</sup> RESPONDENT**

**CLERK OF THE SENATE.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The petitioner has filed this petition challenging the decision of the Senate to summon 9 County Governors to appear before it and produce various documents pertaining to the financial management within the said counties. The summons are said to be issued pursuant to the provisions of Article 125 of the Constitution.

2. Together with the petition, the petitioner filed an application by way of Chamber Summons dated 17<sup>th</sup> February 2014 supported by the affidavit of Mr. **Kipkoech Tanui** in which it seeks the following orders:

1. ....

*2. Pending the hearing of this petition, this Honourable Court issues a temporary injunction restraining the respondents from summoning the following Governors to appear before it to answer questions on county government finances.*

*a. Kenneth Lusaka of Bongoma County*

*b. Issa Ruto of Bomet County*

*c. William Kabogo of Kiambu County*

*d. Julius Malombe of Kitui County*

*e. Jack Ranguma of Kisumu County*

*f. Kinuthia Mbugua of Nakuru County*

*g. Samuel Tunai of narok County*

*h. Hussein Dado of Tana River County and*

*i. Ahmed Abdullahi of Wajir County*

*3. Pending the hearing of this petition, this Honourable Court issues a temporary injunction restraining the respondents from summoning County Executive Committee members responsible for finance to appear before it to answer questions on county government finances.*

*4. Pending the hearing of this petition, this Honourable Court issues an order suspending the summons dated 8<sup>th</sup> February 2014*

*issued by the respondents to for the following Governors and County Executive Committees Members to appear before it to answer questions on County finances:-*

*a. Kenneth Lusaka of Bongoma County*

*b. Issa Ruto of Bomet County*

*c. William Kabogo of Kiambu County*

*d. Julius Malombe of Kitui County*

*e. Jack Ranguma of Kisumu County*

*f. Kinuthia Mbugua of Nakuru County*

*g. Samuel Tunai of Narok County*

*h. Hussein Dado of Tana River County and*

*i. Ahmed Abdullahi of Wajir County*

*j. County Executive Committee Members responsible for Finance*

**5. There be no order as to costs.**

3. The application is based on the grounds, *inter alia*, that the 1<sup>st</sup> respondent, the Senate and its Standing Committee on Finance, Commerce and Economic Affairs has, through the Clerk to the Senate, issued witness summons dated 8<sup>th</sup> February 2014 to the Governors named in the application and County Executive Committee members for finance to appear before it on diverse dates from 19<sup>th</sup> February 2014 to answer questions on county financial management; and that the said summons contravene Article 226(2) of the Constitution.

4. When the matter came up before me on 17<sup>th</sup> February 2014, I directed the petitioner to serve both the Senate and the Clerk to the Senate. The Affidavit of Service filed in Court indicates that the application and petition were served on the Senate on the 17<sup>th</sup> of February 2014. Neither the Clerk nor the Senate condescended to enter appearance before the Court in order for the matter to be heard *inter partes*. Consequently, Counsel for the petitioner, Mr. Ahmednasir Abdullahi, assisted by Mr. Issa and Mr. Wanyama, presented the petitioner's application *ex parte* on 18<sup>th</sup> February 2014.

5. It is the petitioner's contention that the petition raises a fundamental issue not only for the interplay between the county government and Senate, but also as to whether this country is governed by the rule of law. Counsel argued that the summons from the Senate require production of documents by Governors which are not the business of the Senate. According to the petitioner, Article 226(2) states that an accounting officer in the County is accountable to the county assembly, not to the Senate; and that it is not for the Senate to ask for the documents it demands the Governors produce, such as approved budgets. The petitioner contends that the Senate is not only usurping the powers of the County Governments, but is also acting in violation of the Constitution.

6. The petitioner relied on the provisions of Article 2(2) which state that no person may claim any authority or exercise any power not granted by the Constitution, and Article 3 which imposes an obligation on everyone to respect and uphold the Constitution. Counsel emphasized the provisions of Article 6 (2) on the relationship between the governments at national and county levels, which require governments to conduct their relations on the basis of consultation and co-operation. For the Senate to summon the Governors as it has done is, in the petitioner's view, a failure to act on the dictates of the Constitution with regard to the need for consultation and co-operation.

7. In asking the Court to grant prayers 2, 3 and 4 of the petitioner's application, Counsel drew the Court's attention to the provisions of Article 165(3)(d)(i) (ii) and (iii) with respect to the jurisdiction of the Court to mediate in disputes relating to constitutional powers of state organs in respect of county governments and the constitutional relationship between levels of government. The petitioner therefore asked the Court to grant the prayers in the application, and a declaration that the country is governed by the Constitution, not by whims of individuals or institutions.

#### **Determination**

8. This is a heady time in our history. We have a new Constitution, promulgated barely four years ago, which has established different levels of government, and set out new rules of engagement very different from what we were used to under the former Constitution. If properly implemented, it carries great promise for the people of Kenya, and it offers the country a chance to transform society for all citizens.

9. Under the Constitution, all sovereign power belongs to the people of Kenya, who, under Article 1(3) of the Constitution, have delegated their sovereign power to the National Executive, Parliament and the Judiciary. At Article 2, the Constitution states that:

***“(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of***

government.

***(2) No person may claim or exercise State authority except as authorised under this Constitution.***” (Emphasis added)

10. As a nation, we can choose to abide by the dictates of the Constitution, or to disregard it, or to apply it selectively, picking only those of its provisions that suit our immediate purposes, and disregarding those that we consider inconvenient. In the short term, this may suit some limited, individual or institutional interests, but it does not augur well for the people of Kenya.

11. The petition before me presents one of those instances. The petitioner claims that by summoning the County Governors and demanding that they produce certain documents, the Senate is in breach of Article 226(2) which provides that

***(2) The accounting officer of a national public entity is accountable to the National Assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.*** (Emphasis added)

12. As the Senate has not deemed it necessary to appear before this Court to deal with the contentions made by the petitioner despite being served, this Court has not had benefit of its response. Consequently, aside from the summons signed by the Clerk to the Senate, the Court has no material before it on the basis of which it can determine under what powers the Senate exercised the mandate to summon the Governors and to demand production of the documents that it seeks produced. The summons, copies of which are annexed to the affidavit of Mr. Kipkoech Tanui, only state that the Senate and any of its committees is empowered by Article 125 of the Constitution and sections 14 and 15 of the National Assembly (Powers and Privileges) Act (Cap 6) read together with section 7 of the Sixth Schedule to the Constitution, to summon any person to appear before it for the purpose of giving evidence or providing information.

13. In the said summons, the Standing Committee on Finance, Commerce and Economic Affairs requires that the Governors produce in respect of their counties:

***1. A written response to the issues raised by the Controller of Budget in the County Budget Implementation Review Report for the First Quarter of the Fiscal Year 2013/14.***

***2. Approved Budget Estimates for the Fiscal year 2013/14;***

***3. Approved Supplementary Estimates for the Fiscal year 2013/14; and***

***4. All other relevant documentation in (their) possession.***

14. The Court appreciates that the Senate has an important role to play in the implementation of the Constitution, particularly so with regard to devolved government. However, just like all other state organs, it is bound by the Constitution, and it cannot arrogate to itself powers that it has not been given under the Constitution. On the material before me, and taking into account the provisions of Article 226(2), the Senate may have overstepped its mandate in purporting to summon the Governors and the County Finance Committees. While it does have power under Article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily and in isolation. Put differently, the provisions of Article 125 cannot be read in isolation, but must be read in conjunction with other provisions of the Constitution which allocate functions and powers to the various organs created by the Constitution.

15. It must be emphasized that this finding is not an endorsement of what Governors do, or fail to do, nor does it have any connection with the propriety or otherwise of financial management in the counties. Those matters will doubtless be deliberated upon and determined by those in whom the Court ultimately finds the Constitution vests oversight authority. The mandate of the Court at this interlocutory stage is to determine whether temporary restraining orders should be issued to allow for ventilation before the Court and resolution of the issues in dispute in accordance with the Constitution, which under Article 159 vests judicial authority in the Judiciary.

16. The Court is alive to the doctrine of separation of powers so clearly enunciated by the Supreme Court in **Re Matter of the Interim Independent Electoral Commission, SCK Constitutional Application No. 2 of 2011 [2011]eKLR** and by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others CA Civil Appeal No. 290 of 2012 [2013]eKLR**. The doctrine of separation of powers is, however, not an end in itself but a system of checks and balances. The Court, as the final arbiter under the Constitution is obliged to adjudicate any dispute between various arms of state and determine the contours of separation having regard to the constitutional functions of each organ.

17. This matter is one that clearly falls within the ambit of the Court’s jurisdiction under Article 165(3)(d), which vests specific authority in the High Court with regard to the interpretation of the Constitution by providing that the High Court has:

***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***

***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***

***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***

***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;...*** (Emphasis added)

18. In the circumstances of this case, I take the view that in order to allow for a considered determination of the question of the role of the Senate in matters of County finances, the orders prayed for are merited. In the circumstances, I grant orders as follows:

***a. Pending the hearing and determination of this petition, a temporary injunction be and is hereby issued restraining the respondents from summoning the following Governors to appear before it to answer questions on county government finances:***

***i. Kenneth Lusaka of Bungoma County***

***ii. Issac Ruto of Bomet County***

***iii. William Kabogo of Kiambu County***

***iv. Julius Malombe of Kitui County***

***v. Jack Ranguma of Kisumu County***

***vi. Kinuthia Mbugua of Nakuru County***

***vii. Samuel Tunai of Narok County***

***viii. Hussein Dado of Tana River County and***

***ix. Ahmed Abdullahi of Wajir County***

***b. Pending the hearing and determination of this petition, a temporary injunction be and is hereby issued restraining the respondents from summoning County Executive Committee members responsible for finance to appear before it to answer questions on county government finances.***

***c. Pending the hearing and determination of this petition, an order be and is hereby issued suspending the summons dated 8<sup>th</sup> February 2014 issued by the respondents to the following Governors and County Executive Committees Members to appear before it to answer questions on County finances:-***

***i. Kenneth Lusaka of Bungoma County***

***ii. Issac Ruto of Bomet County***

***iii. William Kabogo of Kiambu County***

***iv. Julius Malombe of Kitui County***

***v. Jack Ranguma of Kisumu County***

***vi. Kinuthia Mbugua of Nakuru County***

***vii. Samuel Tunai of Narok County***

***viii. Hussein Dado of Tana River County and***

***ix. Ahmed Abdullahi of Wajir County***

***x. County Executive Committee Members responsible for Finance.***

***d. The Costs of this application shall await the hearing and determination of this petition.***

19. In closing, the Court takes judicial notice of, and observes with regret, the recalcitrance of the legislative arm of government with regard to the exercise of judicial authority by the Courts. While both the Clerk to the Senate and the Senate as an institution were served with the application now before the Court, they have not deemed it necessary to appear before the Court.

20. It appears that there is a trend, regrettable and likely, if unchecked, to have tragic consequences for the nation, in certain state organs disregarding the Constitution with impunity, particularly with regard to the exercise of judicial authority, while claiming to exercise powers under the same Constitution. As stated earlier, such conduct may have short term psychological or other benefits for individuals or members of some of the State organs who seem intent on riding roughshod over the Constitution. It does not, however, bode well for the people of Kenya, on whose benefit state power is supposed to be exercised under the Constitution.

21. Be that as it may, this Court will continue to exercise the judicial authority vested in it by the people of Kenya. In this regard, it deems the issues raised by this petition, which fall within the jurisdiction of the Court under Article 165(3)(d), as raising a critical and substantial

question of law with regard to the powers of the Senate vis a vis Governors and oversight over County finances to merit hearing and determination by an uneven number of judges as provided under Article 165(4) of the Constitution.

22. One would have hoped, in the spirit of the Constitution, particularly Article 10 thereof on the national values and principles, and Article 6, which requires that relations between different levels of government should be on the basis of mutual respect and co-operation, that sobriety and sanity would prevail in the management of affairs of state for the betterment of the people of Kenya. This is particularly so with regard to the Senate and Governors, who would be expected to co-operate in the interests of the counties that they represent or manage.

23. At any rate, this matter is hereby referred to the Chief Justice in accordance with the provisions of Article 165(4) of the Constitution to constitute a Bench of an uneven number of judges to hear and determine.

**Dated, Delivered and Signed at Nairobi this 19<sup>th</sup> day of February 2014**

**MUMBI NGUGI**

**JUDGE**