



**REPUBLIC OF KENYA**

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

**PETITION NUMBER 565 OF 2014**

**IN THE MATTER OF**

**MAKUENI COUNTY ASSEMBLY..... PETITIONER/APPLICANT**

**AND**

**COUNTY EXECUTIVE COMMITTEE MEMBER OF FINANCE,**

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

**MAKUENI COUNTY TREASURY.....2<sup>ND</sup> RESPONDENT**

**CONTROLLER OF BUDGET.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. The petitioner/applicant is the **County Assembly of Makueni County** established under the provisions of Article 177 (1) of the Constitution and which came into being following the 2013 general elections. It has filed the present petition alleging violation of the Constitution by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
2. The 1<sup>st</sup> respondent is the County Executive Committee Member of Finance of the County Government of Makueni appointed under Article 179 (2) (b) of the Constitution, while the 2<sup>nd</sup> respondent is the Makueni County Treasury established under Article 228 of the Constitution. It is chiefly against the 1<sup>st</sup> and 2<sup>nd</sup> respondent that the petitioner complains, aggrieved by the decision of the 1<sup>st</sup> respondent to freeze its bank accounts and his failure to requisition certain funds from the 3<sup>rd</sup> respondent.
3. The 3<sup>rd</sup> respondent is the Controller of Budget whose office is established under Article 228 of the Constitution while the 4<sup>th</sup> respondent is the Honourable Attorney General of the Republic of Kenya and the Chief Legal Advisor of the Government of Kenya, and he is enjoined to these proceedings pursuant to Article 156 of the Constitution.
4. By an application dated 14<sup>th</sup> November 2014 brought under Certificate of Urgency, the petitioner

sought, among others, certain orders at the ex parte stage which were mandatory in nature. The court certified the matter urgent but directed the petitioner to serve the respondents so that the application could be canvassed inter partes. This ruling pertains to the application for orders 6-11 of the application dated 14<sup>th</sup> November 2014, prayers 1-4 having been concerned with orders at the ex parte stage, and are therefore spent. The subsisting substantive orders are as follows:

6. *That pending hearing and determination of the Petition herein, the court be pleased to issue an interim order staying the order freezing all the bank accounts of the petitioner contained in the 1<sup>st</sup> respondent's letter dated 11<sup>th</sup> November 2014.*
  7. *That pending hearing and determination of the Petition herein, the court be pleased to issue an interim order compelling the 1<sup>st</sup> respondent to submit to the 3<sup>rd</sup> respondent the petitioner's bi-monthly requisition for funds for the months of November and December 2014.*
  8. *That pending the hearing and determination of the Petition herein, the court be pleased to issue an interim order compelling the 1<sup>st</sup> respondent to submit to the 3<sup>rd</sup> respondent the petitioner's requisition for funds for car loans as requested vide letter dated 2<sup>nd</sup> September 2014.*
  9. *That pending hearing and determination of the Petition herein, the court be pleased to issue an interim order compelling the 3<sup>rd</sup> respondent to release to the petitioner funds as requisitioned in its bi-monthly requisition for funds for the months of November and December 2014.*
5. The petitioner also prayed for any other relief that the court may consider appropriate, and for the costs of the application.

### **The Submissions**

6. Prof. Tom Ojienda presented the case for the petitioner/applicant set out in its Notice of Motion dated 14<sup>th</sup> November 2014. The application is supported by an affidavit sworn by Mr. Edward Libendi, the Clerk to the Assembly on the same date. The petitioner also filed submissions dated 24<sup>th</sup> November 2014.
7. The petitioner's case is that the 1<sup>st</sup> respondent has unreasonably, illegally, arbitrarily and ultra vires issued an order to all Makeni County Government bankers to freeze all accounts held and operated by the petitioner. As a result, the petitioner is unable to access any of its funds for its daily operations from its bankers. It is its contention that the acts of the 1<sup>st</sup> respondent are in breach of the mandatory principle of devolved government under **Articles 175 (b) and 189 (1) of the Constitution**.
8. The petitioner submits that its employees, contractors, service providers, suppliers and other beneficiaries stand to lose their salaries, payments, wages and other facilities causing unnecessary hardship to them and the entire County Assembly; that if the situation persists, the entire operations of the petitioner will come to a grinding halt at the risk of industrial claims, civil suits for breach of contracts and other legal consequences which will eventually cause the petitioner to incur unnecessary costs.
9. It is also its contention that the instructions freezing its accounts are unlawful, irregular and not within the ambit or purview of the 1<sup>st</sup> respondent. It contends that such action can only be taken by the Controller of Budget and the Cabinet Secretary responsible for finance; that the 1<sup>st</sup> respondent's mandate is limited to stoppage of funds to a County Government entity; that a County Assembly is not a County Government entity as **Section 2 of the Public Finance Management Act** defines a county government entity to mean "any department or agency of a county government, and any authority, body or other entity declared to be a county government under **Section 5 (1)**; and that a County Government entity under the Act refers to a County

Corporation or departments within a County Government.

10. The petitioner further argues that County Government entities are creatures of Gazette Declarations approved by County Executive Committee and County Assemblies and a County Assembly is not a creature of a Gazette Notice for it is a constitutional organ expressly created in **Article 176 (1) of the Constitution**, with its mandate expressed in **Articles 185, 210 and 212 of the Constitution**.
11. The petitioner submits further that the 1<sup>st</sup> respondent is only responsible for designating Accounting Officers for County Government entities, not the County Assembly as **Section 148 (3) of the Public Finance Management Act** is to the effect that a County Executive Committee Member for Finance shall ensure that each County Government entity has an accounting officer in accordance with **Article 226 of the Constitution**. It contends, further, that the Accounting Officer for a County Government is neither the 1<sup>st</sup> respondent nor an officer designated by the 1<sup>st</sup> respondent, but the Clerk of the County Assembly in accordance with **Section 148 (4) of the Public Finance Management Act**. It is its contention that the Clerk of the County Assembly is accountable to the Auditor General in monitoring, evaluating and overseeing the management of public finances by the County Assembly in terms of **Article 229 (5) of the Constitution** and not to the 1<sup>st</sup> respondent.
12. The petitioner submits that the sums that are contained in its accounts are funds which have already been approved and allocated for various purposes and the 1<sup>st</sup> respondent cannot therefore purport to freeze them having participated in the process of their approval and disbursement by the 2<sup>nd</sup> respondent; and that in any event, if the 1<sup>st</sup> respondent had powers to act as he purports, which the petitioner contends he does not, then such powers would be limited to stopping transfer of funds to the petitioner but not freezing of funds already held by the petitioner.
13. In his submissions on behalf of the petitioner, its Learned Counsel, Prof. Ojienda submitted that the applicant was asking the court to grant conservatory orders to compel the 1<sup>st</sup> respondent to submit to the Controller of Budget the bi-monthly requisition of funds for November and December 2014 and a requisition for funds for car loans for members of the County Assembly approved by the Assembly. Prof. Ojienda referred to a letter dated 11<sup>th</sup> November by which the 1<sup>st</sup> respondent ordered the freezing of all bank accounts held and operated by Makueni County Assembly.
14. It was his submission that this action was in breach of Article 175 of the Constitution which enjoins county government to have reliable sources of income. According to the petitioner, the actions of the 1<sup>st</sup> respondent violates the provision of Article 189 as he has exercised power in a manner that violates the integrity and independence of the County Government of Makueni. Prof. Ojienda contended that the 1<sup>st</sup> respondent was an appointee of the petitioner, appointed under the provisions of sections 39-41 of the County Government Act, and that one man was threatening the operations of one unit of government, the County of Makueni; and that by refusing to submit the budgeted requisition to the 3<sup>rd</sup> respondent, the 1<sup>st</sup> respondent is refusing to perform his statutory role under, and acting in violation of, Article 189. It is the petitioner's case that there is no provision in the Public Finance Management Act that allows the County Executive Committee Member for finance to freeze the accounts of an organ of the county government.
15. The petitioner has made reference to correspondence and meetings between itself, the Governor of Makueni and the County Executive, and to various provisions of law regarding the powers and functions of the County Executive and the County Assembly Clerk which I need not go into at this stage as they tend to go into the merits of the petition.
16. It contends that without the intervention of the court, the operations of the County Assembly will grind to a halt; and therefore taking into account the public interest involved, the court should grant the mandatory conservatory orders that it seeks. The petitioner relies on the decision of the

Supreme Court in the case of **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji and 2 Others, SC Application No 5 of 2014**, in support of its argument that the orders that they seek are merited and are in the public interest.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed Grounds of Opposition dated 19<sup>th</sup> November 2014 and an affidavit sworn by **Mr. Alidan Maithya Mbinda**, the Makueni County Assembly Executive Committee Member for Finance, sworn on 24<sup>th</sup> November 2014. Their case was presented by their Learned Counsel, Mr. Nyamu.
18. The respondents oppose the petitioner's application substantially on the grounds that the petitioner seeks to challenge powers bestowed on the 1<sup>st</sup> respondent by **Articles 225 and 226 of the Constitution and Section 105 of the Public Finance Management Act**; that the petition is premised on the determination by the petitioner to resist adherence to financial controls imposed by both Statute and the Constitution; and that both the application and petition are an affront to **Section 103, 105, 119** and other provisions of the **Public Finance Management Act** and to the powers and authority of the Controller of Budget conferred by **Article 228 of the Constitution**.
19. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the County Government of Makueni has one Treasury, established pursuant to **Section 103 of the Public Finance Management Act** and that this sole Treasury serves both the County Executive and the County Assembly; that the County Treasury comprises the Executive Committee Member for Finance and Socio-economic Planning, the Chief Officer, and the directors responsible for Budget, Financial Accounting, Internal Audit, Socio-Economic Planning and Revenue Collection. It is also their submission that the law is explicit that the Executive Committee Member for Finance is the Head of the Treasury.
20. The respondents submit further that the County of Makueni is currently operating on a vote on account, which denotes that funds are only released by the Controller of Budget for the purpose of meeting expenditure essential for the running of the County Government.
21. The respondents concede that the petitioner did, by a letter dated 7<sup>th</sup> August 2014 through its Accounting Officer, the Clerk, request for **Kshs 112,297,978/=** which request had included foreign travel and other non-essential expenditure, and that the request was rejected by the 3<sup>rd</sup> respondent, the Controller of Budget, who directed that foreign travel and other non-essential expenditure be removed, as a result of which the requisition was revised to **Kshs 74,831,086**, and was approved.
22. The respondents contend that at a meeting of the County Treasury held on 27<sup>th</sup> October 2014, it was reported that members of the County Assembly had been travelling abroad, yet there were no funds requisitioned for that purpose nor had any request for re-allocation been made to the County Treasury as required under **Section 154 (2) of the Public Finance Management Act**; that the Committee observed that there were indeed no allocations for foreign travel; and consequently, the Executive Committee Member for Finance and Socio-economic Planning was mandated by the County Treasury to seek an explanation from the accounting officer County Assembly on the expenditure of foreign trips; that he wrote to the accounting officer detailing the concern of the County Treasury and seeking an explanation of the expenditure on foreign trips, setting out the legal implications of failure to respond sufficiently to the concerns.
23. According to the respondents, the Clerk to the Assembly responded that the County Assembly was not a County Government entity and was therefore not answerable to the County Treasury on matters of public finance management; that as a result, the County Treasury met again on 10<sup>th</sup> November 2014 and took the decision to invoke **Section 105 (b) of the Public Finance Management Act** and stop funds to the County Assembly in order to compel the Assembly to comply with the requirements of the Public Finance Management Act. The respondents state that the 1<sup>st</sup> respondent thereafter wrote to the relevant banks and asked them to freeze the accounts

held by the Assembly and also wrote to the Clerk to the Assembly on 11<sup>th</sup> November 2014, reiterating the statutory position and informing them that the County Treasury had ordered the freezing of the bank accounts operated by the Assembly until he had complied with the requirements of the law. The respondents aver therefore that the stoppage of the funds to the County Assembly was informed by statute and was done as a last resort after the County Assembly failed to comply with the requirements of the law.

24. The respondents contend that the County Assembly is a County entity and must comply with the requirements of the Public Finance Management Act, and that it has done so in the past as illustrated by, among other things, the County Assembly submitting its accounts through its accounting officer, the Clerk, in accordance with **Section 147** of the **Public Finance Management Act**, to the Auditor General with a copy to the County Treasury as required under **Section 164 (1) and (3)** of the **Public Finance Management Act**; the opening of a single account at Central Bank upon the establishment of the County Government of Makueni as provided under **Section 119 (2)** of the **Public Finance Management Act** through which all funds for the various county government entities are channeled, and which account is operated by the County Treasury; and the fact that under **Section 119 (1)** of the **Public Finance Management Act**, the County Treasury is responsible for authorizing the opening, operation and closing of bank accounts for County Government entities.
25. It is the respondents' contention that the crux of the present dispute is whether or not the County Assembly is a County Government entity as envisaged under the Public Finance Management Act, and whether the Clerk as the accounting officer of the Assembly is required by law to provide information to the County Treasury in accordance with the provisions of **Section 105** of the Public Finance Management Act. It is their averment that the way to get the accounts operated by the petitioner running is for the Clerk to the County Assembly to comply with the law and respond to the queries raised by the County Treasury.
26. With regard to the prayers sought by the petitioner, the respondents submit that the petitioner has not established a prima facie case nor satisfied the conditions upon which conservatory orders may be issued; and that they are seeking orders which are mandatory in nature and cannot be granted at the interlocutory stage as that will mean that the petition is spent. They therefore ask that the application be dismissed and the County Assembly Clerk be required to comply with the law and account for the funds entrusted to the County Assembly.

### **Submissions for the 3<sup>rd</sup> Respondent**

27. Counsel for the Controller of Budget, Mr Moimbo, associated himself with the submissions made on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondent and opposed the issuance of conservatory orders.
28. He submitted that Article 228 establishes the office of the Controller of budget, while Article 228(5) provides that the Controller of Budget shall not authorize the withdrawal from a public fund unless satisfied that the withdrawal is authorized by law. It is the 3<sup>rd</sup> respondent's submission that the petitioner's request for funds does not conform to the law; and that the Controller of Budget's role is to either approve or reject a budget in strict compliance with the law.

### **Determination**

29. From the pleadings filed in this matter and the submissions of the parties, I note that the core issues for determination in the petition will revolve around the question whether a County Assembly is a County Government Entity and therefore subject to the financial management and control of the County Treasury under the provisions of the **Public Finance Management Act**, and secondly, whether the 1<sup>st</sup> respondent has the power to freeze the accounts of the County Assembly; and if not, if the 1<sup>st</sup> respondent acted ultra-vires and unlawfully in purporting to freeze the petitioner's bank accounts.

30. In considering the application before me therefore, I will not venture into an inquiry into the whether or not the petitioner is a county entity and the powers of the 1<sup>st</sup> respondent vis a vis the petitioner, which should be left to determination after hearing the parties fully on the merits. I will confine myself to the question whether I should grant the mandatory orders sought by the petitioner pending the hearing and determination of the petition. In so doing, I will consider whether the petitioner has satisfied, first, the conditions for grant of conservatory relief and secondly, the conditions for grant of mandatory conservatory orders or injunctions.

31. The principles that a court considers in determining whether or not to grant a conservatory order are fairly well settled. In the case of **Philip K Tunoi and Another vs Judicial Service Commission and Another Petition 244 of 2014**, the court quoted with approval the decision of the Privy Council in **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286** where Braithwaite J.A. expressed himself as follows:

*“Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has come 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...”* (Emphasis added)

32. In **Centre For Rights Education and Awareness (CREAW) & 7 Others Petition No. 16 of 2011**, Musinga J (as he then was) stated as follows with regard to the grant of conservatory orders:

*“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”* (Emphasis added)

33. Similarly, in the case of **Judicial Service Commission -vs- Speaker of the National Assembly & Another Petition No. 518 of 2013**, the court stated as follows:

*“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.”*

34. Finally, in the case of **Martin Nyaga Wambora -vs- Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014**, the court pointed out that:

*[59] In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or*

*threatened violation of the Constitution”*

*[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.*

*[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.*

35. At paragraph 62 of its decision, the court cited with approval the words of the Supreme Court in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Githinji & 2 Others** relied on by the petitioner in this case, and stated as follows:

*[62]”The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that:*

*“[86] ‘conservancy orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the 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 supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes” (Emphasis added)*

36. In the present case, the petitioner is not just seeking a conservatory order to maintain the status quo, or a certain set of facts, in place. As observed by the respondents, the petitioner is seeking orders that are mandatory in nature, and which would effectively mean that the petition is spent, if granted. I must therefore bear in mind the principles governing the grant of mandatory interim orders before making a determination in this matter.

37. In the case of **Ahmed Ibrahim Suleiman and Another –vs- Noor Khamisi Surur High Court ELC Civil Suit No 501 of 2013**, the court, (Mutungi J) when considering whether or not to grant a mandatory injunction sought by the plaintiff in the matter, expressed itself as follows:

*“The test for granting a mandatory injunction is on a higher threshold than in the case of prohibitive injunctions and the Court of Appeal in the case (of) **Kenya Breweries Ltd -vs- Washington Okeyo (2002) I EA 109** had occasion to discuss and consider the principles that govern the granting of mandatory injunctions. The court of Appeal held that the test for grant of a mandatory injunction was correctly stated in **Vol. 24 Halsbury Laws of England, 4<sup>th</sup> Edition para 948** that provides:-  
“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the Plaintiff, a mandatory injunction will be granted on an interlocutory application.”*

38. The Learned Judge went on to cite the decision in the English case of **Locabail International Finance Ltd –vs- Agro- Export & Anr [1986] I ALL ER 901** in which the court stated as follows:

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction.”***

39. In the present case, I must consider not only whether the petitioner has met the criteria for grant of a conservatory order that would maintain the status in existence without either party seeking to enforce any of its perceived rights, but go a step further and consider whether the petitioner has met the more stringent criteria for grant of a mandatory order that would effectively bring the petition to an end.

40. The key prayers sought by the petitioner are for a mandatory order unfreezing its bank accounts; for an order compelling the 1<sup>st</sup> respondent to submit to the 3<sup>rd</sup> respondent the petitioner’s bi-monthly requisition for funds for the months of November and December 2014; and to compel the 3<sup>rd</sup> respondent to release the said funds; and further, that the 1<sup>st</sup> respondent be compelled to submit to the 3<sup>rd</sup> respondent the petitioner’s requisition for funds for car loans as requested vide letter dated 2<sup>nd</sup> September 2014.

41. I am not satisfied that the petitioner has met the criteria for grant of conservatory relief. It contends, for instance, with regard to the requisition for funds in respect of car loans for members of the Assembly, that it will suffer prejudice as a Bank Rafiki Micro Finance Bank with which it had entered into an agreement in respect of car loans may raise the interest rate if the mortgage funds are not released. The basis of this claim is not clear. If the amount in respect of car loans for the members was to come out of the funds budgeted by the County Assembly, then it is unclear how the Bank and a loan at the interest rate of 3% comes in.

42. With regard to the funds for the County Government functions, the petitioner contends that such functions may grind to a halt if the orders sought are not granted. However, it is noteworthy, as averred by the 1<sup>st</sup> and 2<sup>nd</sup> respondent, that

***“The County of Makueni is currently operating on a vote on account, which denotes that funds are only released by the Controller of Budget for the purpose of meeting expenditure essential for the running of the County Government.”***

43. The third consideration set by the case of **Gatirau Peter Munya** is the public interest, and in my view, this tilts against the petitioner. It appears to me that the release of funds for mortgages or the unfreezing of the accounts of Makueni County prior to the hearing of the substantive petition, and therefore prior to the determination of the question whether the County Executive is entitled to check the accounts and use of funds by the County Assembly, would not be in the public interest in general with regard to the proper use and management of public resources, or the interests of the people of Makueni County who have an interest in proper provision of services by the County.

44. The funds that the petitioner seeks are not, from the material currently before me, essential for the operations of the County Assembly; their release would not be for the benefit of the people of Makueni, but appear to be intended for the personal benefit of the Assembly Members, and should the Court ultimately find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have the statutory powers that they have

exercised, it may not be possible to recover the funds expended.

45. Further, the case before me is not one that can merit the grant of mandatory orders. To reiterate the words of the court in the *Locabail* case (*supra*), such orders should not be granted “***in the absence of special circumstances and then only in clear cases...***” There are no circumstances in this case, in my view, that would justify the grant of a mandatory order. The case is far from clear, and the question of whom, between the petitioner and the respondents, is acting or trying to act in violation of the Constitution and the Public Finance Management Act can only be determined by a careful analysis of the respective claims after hearing the petition on the merits.
46. In the circumstances, and taking into account the principles enunciated in the decisions of the court set out above, it is my view that the public interest and the interests of the County of Makueni are best served by the court not issuing the mandatory conservatory orders sought by the petitioner until the issues that this petition raises with regard to the powers of the County Treasury and County Executive Committee Member for Finance vis a vis the County Assembly and the County Clerk under the Public Finance Management Act are determined. Such funds as are essential for the running of the county can be released in the manner alluded to by the respondents.
47. It is also my view that a dispute of this nature ending up before the Court does not bode well for the future of the County of Makueni, or for its people. It is in the best interests of all parties concerned to resolve all the issues in dispute in this matter amicably, as ultimately, they are jointly responsible for the running of the county, and for the development of its people. If the County Assembly and the county Treasury cannot sit and amicably resolve the financial issues facing the county in an open, transparent and accountable manner, then serious problems lie ahead for the County and its people.
48. At any rate, on the submissions and averments before me, I am unable to grant the mandatory orders sought by the petitioner. The application dated 14<sup>th</sup> November 2014 is therefore dismissed. Costs shall await the outcome of the petition.

**Dated, Delivered and Signed at Nairobi this 11<sup>th</sup> day of December 2014**

**MUMBI NGUGI**

**JUDGE**

**Prof. Tom Ojienda instructed by the firm of Prof. Tom Ojienda & Associates Advocates for the Petitioner**

**Mr Nyamu instructed by the firm of Nyamu & Nyamu & Co. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondent**

**Mr Moimbo instructed by the State Law Office for the 3<sup>rd</sup> respondent**