



**Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & 5 others; United Disabled Persons of Kenya & another (Interested Parties) (Constitutional Petition 155 A of 2011) [2011] KEHC 4270 (KLR) (Constitutional and Human Rights) (28 October 2011) (Ruling)**

*KENYA SOCIETY FOR THE MENTALLY HANDICAPPED  
v ATTORNEY GENERAL & 5 Others [2011] eKLR*

Neutral citation: [2011] KEHC 4270 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION 155 A OF 2011**

**DAS MAJANJA, J**

**OCTOBER 28, 2011**

**BETWEEN**

**KENYA SOCIETY FOR THE MENTALLY HANDICAPPED  
(KSMH) ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES .... 2<sup>ND</sup>  
RESPONDENT**

**THE MINISTER FOR EDUCATION ..... 3<sup>RD</sup> RESPONDENT**

**THE MINISTER FOR HEALTH ..... 4<sup>TH</sup> RESPONDENT**

**THE MINISTER FOR MEDICAL SERVICES ..... 5<sup>TH</sup> RESPONDENT**

**THE MINISTER FOR GENDER, CHILDREN & SOCIAL  
DEVELOPMENT ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**UNITED DISABLED PERSONS OF KENYA ..... INTERESTED PARTY**

**KENYA PARAPLEGIC ORGANISATION ..... INTERESTED PARTY**



## **High Court declines to issue an injunction stopping disbursement of budgetary allocation for persons with disabilities pending the determination of a petition**

*The petitioner sought various orders including conservatory orders in the nature of an injunction to stop the disbursement of Kshs. 385,000,000 being the budgetary allocation for persons with disabilities for the fiscal year 2011/2012 pending the hearing and determination of the petition. The court highlighted the requirements to be demonstrated by a party seeking conservatory orders. The court found that the general principle was that a mandatory injunction should not be issued except in exceptional circumstances. The court further found that coercive orders of the court should only be used to enforce article 35 of the Constitution where a request for information had been made and such request was denied.*

Reported by Kakai Toili

**Civil Practice and Procedure** – orders – conservatory orders - requirements to be demonstrated by a party seeking conservatory orders - when could a mandatory injunction be issued.

**Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right of access to information - whether coercive orders could be issued to enforce the right to access information under article 35 of the where a request for the information had not been made and denied - of Kenya, 2010, article 35.

**Constitutional Law** – alternative dispute resolution (ADR) mechanisms -matters amenable to ADR mechanisms - whether a claim involving the formulation of policies, establishment of legal frameworks and implementation of programs promoting the rights and welfare of persons with mental and intellectual disabilities was amenable to alternative dispute resolution mechanisms.

### **Brief facts**

The petitioner accused the State and its organs of violating the rights of persons with mental and intellectual disability by discriminating against them in the provision of support and services. The petitioner claimed that the 2<sup>nd</sup> respondent, the National Council for Persons with Disabilities, had been slow to formulate and develop measures and implement policies designed to achieve equal opportunities for persons with mental and intellectual disabilities to obtain education and employment, to recommend measures to prevent discrimination against person with disabilities. The petitioner further claimed that the 3<sup>rd</sup> respondent had ignored, neglected or declined to establish a sound legal policy framework governing education of the mentally and intellectually disabled children.

The petitioner also claimed that the 4<sup>th</sup> respondent had discriminated against persons with mental and intellectual disabilities by not establishing sufficient, reliable and comprehensive structures to promote adequate provision of mental health care in public health institutions. Together with the petition, the petitioner filed a chamber summons application seeking various orders including conservatory orders in the nature of an injunction to restrain the 2<sup>nd</sup> and 6<sup>th</sup> respondents from disbursing Kshs 385,000,000 being the budgetary allocation for persons with disabilities for the fiscal year 2011/2012 pending the hearing and determination of the petition. The court granted among other orders, interim orders restraining the 2<sup>nd</sup> and 6<sup>th</sup> respondents from disbursing the Kshs 385,000,000 for 14 days. Aggrieved, the 1<sup>st</sup> interested party filed an application seeking to set aside the interim orders.

### **Issues**

- i. What were the requirements to be demonstrated by a party seeking conservatory orders?
- ii. When could a mandatory injunction be issued?
- iii. Whether coercive orders could be issued to enforce the right to access information under article 35 of the where a request for the information had not been made and denied.



- iv. Whether a claim involving the formulation of policies, establishment of legal frameworks and implementation of programs promoting the rights and welfare of persons with mental and intellectual disabilities was amenable to alternative dispute resolution mechanisms.

### **Held**

1. The court would not delve into a detailed analysis of facts and law. A party seeking a conservatory order was only required to demonstrate that he had a *prima facie* case with a likelihood of success and that unless the court issued a conservatory order there was real danger that he would suffer prejudice as a result of the violation or threatened violation.
2. The petition raised weighty issues concerning the rights of persons with disabilities. It was one that deserved ventilation in court. On the material placed before the court, there were serious issues of law and fact for consideration by the court but they must await trial.
3. The money constituted the entire direct allocation for persons with disabilities for the financial year from the State. The monies were disbursed to a whole class of persons with disabilities including the petitioner. Not only were the disbursements meant for projects, programmes and organisations that provided valuable service to persons with disabilities, the beneficiaries were persons with different forms of disability with varying needs spread all over Kenya. The injunctions sought would cause substantial hardship to them. For most beneficiaries, the financial disbursement through the 2<sup>nd</sup> and 6<sup>th</sup> respondent was the only source of livelihood particularly in harsh economic times.
4. The orders of injunction as sought had no bearing on the final prayers sought in the petition. It was highly unlikely that even if the petition was successful, the petitioner would be entitled to the total budgetary allocation of the 6<sup>th</sup> respondent. Further, if the court were to be convinced that the petitioner and the persons it represented were entitled to damages or money of any kind, the court had jurisdiction to make such an award and the respondents would be in a position to comply with such an order. Conversely, it had not been demonstrated that the respondents would not be in a position to comply with such an order.
5. Prayers 8 and 9 were in the nature of mandatory injunction. The general principle was that a mandatory injunction should not be issued except in exceptional circumstances. The orders sought would of necessity require a determination of the petition at an interlocutory stage. There were no exceptional circumstances that required the court to make such orders.
6. The basis for prayers 8 and 9 was that the petitioner was entitled to information and list of all persons with mental and intellectual disabilities together with aggregated information. The request was grounded on the right of access to information under article 35 of the . The court was not inclined to grant prayers 8 and 9 of the application as the petitioner had not requested the information from the State or State agency concerned and such a request had not been rejected.
7. Coercive orders of the court should only be used to enforce article 35 of the where a request had been made to the State or its agency and such request had been denied. Where the request was denied, the court would interrogate the reasons and evaluate whether the reasons accorded with the . Where the request had been neglected, then the State organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order. The petitioner did not make the request for information to the respondents.
8. If the court granted the injunctions sought, the petitioner would not receive cash that would assist its members. Persons who were mentally and intellectually challenged would not receive their money. The suit raised complex issues of the rights of persons with disability and socio-economic rights and may take some time to resolve. An injunction would interfere with the respondents' plans and programs and ultimately the budget cycle, all to the detriment of persons with disabilities. The court was called upon to balance the parties' respective positions. The wider interests of the persons with disability community would be served by rejecting the petitioner's application for conservatory orders.



9. In his affidavit, the Chairman of the 2<sup>nd</sup> respondent stated that the 6<sup>th</sup> respondent was ready to have any issues settled through alternative dispute resolution (ADR) mechanisms. The dispute put one group of persons with disability against the others and also against the State and State agencies concerned with the interests of persons with disability. The chief executive of the petitioner was a member of the 2<sup>nd</sup> respondent Board where she was the chair of the public relations advocacy committee and therefore instrumental in making some of the policies that the petition sought to impugn. With her credentials she would be in a position to agitate and influence the 2<sup>nd</sup> respondent and the other State agencies to adopt an agenda that promoted the interests of her organisations members.
10. The court was mandated by article 159(2)(c) of the to promote ADR. The petitioner's claim was one that involved the formulation of policies, establishment of legal frameworks and implementation of programs that promoted the rights and welfare of persons with mental and intellectual disabilities. Ordinarily, such activities involved multi-stakeholder consultations and public participation, a task that the court was not particularly well suited.
11. The petitioner's claim was the kind of dispute that was amenable to ADR. That was not to say that the court was powerless or unable to meet the challenge thrust upon it by the and the people of Kenya. It was only a realisation that judicial resources were not infinite and justice could be achieved in many other ways through Kenya's system of Government underpinned by the values enshrined in the . Progress, particularly for persons with disability could only be achieved through building consensus amongst the group of persons with disability. Only by achieving such unity of purpose could voice of persons with disability be strengthened to enable the community achieve its objectives.

*The petitioner's application dated August 30, 2011, dismissed; the interim orders issued on September 1, 2011 and extended from time to time were discharged by allowing the 1<sup>st</sup> interested party's chamber summons dated September 29, 2011; no order as to costs.*

## **Citations**

### **Cases**

#### **Kenya**

1. *Centre for Rights Awareness & 7 others v Attorney General & others* Petition 16 of 2011; [2011] eKLR - (Explained)
2. *Okoth, James Ombere v East African Building Society & others* Civil Appeal 209 of 1995; [1995] eKLR - (Mentioned)
3. *Shah v Shah* Civil Case 1981 of 1979; [1980] KEHC 9 (KLR); [1981] KLR 374 - (Mentioned)

#### **Regional Court**

*Giella v Cassman Brown* (1973) EA 358 - (Explained)

### **Statutes**

#### **Kenya**

1. Constitution of Kenya, 2010 articles 2, 21(3); 27(1),(6),(7); 28; 35; 47; 54; 159(2)(c) - (Interpreted)
2. Persons with Disabilities Act, 2003 (Act No 14 of 2003) In general - (Cited)

### **International Instruments**

1. Convention on the Rights of Persons with Disabilities (CRPD), 2006 - In general

### **Advocates**

*Mr Oyieko* for the Petitioner

*Mr Onyiso* for the Respondents

*Mr Chigiti* for the 2nd interested party

*Mr Ongoya* for the 1st Interested Party



## RULING

### Introduction

1. This matter is about the enforcement of the rights of persons with disabilities. It is a case between the Kenya Society for the Mentally Handicapped, a society that represents persons who are mentally and intellectually challenged. On the other side as the respondents are the government ministries and the National Council for Persons with Disabilities (NCPD), the state implementing agency for matters concerning persons with disabilities established under the *Persons with Disabilities Act, 2003*.
2. There are two interested parties. The 1<sup>st</sup> interested party is United Disabled Persons of Kenya, an umbrella organisation of organisations dealing with people with various types of disabilities including mental disabilities. The 2<sup>nd</sup> interested party is the Kenya Paraplegic Organisation, an organisation representing paraplegics.
3. These parties have locked horns and I am required to make a decision that will affect all the parties in one way or another. The *Constitution*, which we gave ourselves on August 27, 2010, recognises the special place for persons with disabilities within our legal system. Persons with disabilities have long been marginalised and our *Constitution* now recognises that they too are Kenyans and should be afforded the opportunity to contribute effectively to nation building. This suit is testimony to the fact that the rights and freedoms of persons with disabilities can be enforced through the court.

### The Petition

4. The petitioner, in summary, accuses the state and its organs of violating the rights of persons with mental and intellectual disability by discriminating against them in the provision of support and services. These acts of violation of *Constitution* are set out in a detailed 55 paragraph petition and include the following:-
  - i. The 2<sup>nd</sup> Respondent has been slow to formulate and develop measures and implementing policies designed to achieve equal opportunities for persons with mental and intellectual disabilities to obtain education and employment, to recommend measures to prevent discrimination against person with disabilities contrary to articles 21(3), 28 and 27(1) of the *Constitution*.
  - ii. The 2<sup>nd</sup> respondent has failed to formulate policies that seek to protect people with mental and intellectual disability from being discriminated against when they seek admission to learning institutions contrary to article 47, 27(6), 27(7) and 54 of the *Constitution*.
  - iii. The 2<sup>nd</sup> respondent has intentionally failed to fulfil its mandate which demands implementation of various policies under the national health programme under the Ministry of Health with the purpose of preventing disability, early identification of disability of persons with mental or intellectual disability contrary to articles 21(3), 43, 47, 27(6), 27(7).
  - iv. The 3<sup>rd</sup> respondent has ignored, neglected or declined to establish a sound legal policy framework governing education for the Constitution of the mentally and intellectually disabled children contrary to articles 21(3), 27 and 28 of the *Constitution*.



- v. The 4<sup>th</sup> respondent has discriminated against persons with mental and intellectual disabilities by not establishing any sufficient, reliable and comprehensive structures to promote adequate provision of mental health care in public health institutions contrary to article 27(6), 27(7), 43 and 47 of the Constitution.
- vi. The 5<sup>th</sup> respondent has violated its mandate of providing quality mental health care as the mental health care institutions are understaffed, has poor and deplorable infrastructure and finance restricted violating articles 27(6), 26(7), 43 and 47 of the Constitution.
- vii. The 6<sup>th</sup> respondent is keen to disburse Kshs 365,000,000/= (read three hundred and sixty five million only) that had been allocated to disabled persons in the 2011/2012 financial year on a basis and manner that would be in violation of human rights in violation of articles 21(3), 12(1), 47, 43, 27(6), 27(7), 73 and 75 of the Constitution. The Petition seeks the following reliefs:-
  - a. A declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents have discriminated against persons with mental and intellectual disabilities in the provision of support and services and violated the Constitution of Kenya.
  - b. A mandatory order to compel the 2<sup>nd</sup> respondent to account for all the funds allocated to them by the 6<sup>th</sup> respondent.
  - c. A mandatory order to compel the 3<sup>rd</sup> respondent to establish a sound legal policy framework governing education that adequately addresses the peculiar needs for persons with mental and intellectual disability.
  - d. A declaration that persons with mental and intellectual disabilities are entitled Free and Compulsory Primary Education as citizens of the Republic of Kenya under the Constitution.
  - (e) A mandatory order to compel the 3<sup>rd</sup> respondent to provide interventions and other rehabilitative facilities to aid in educating of children with mental and intellectual disability.
  - (f) A mandatory order to compel the 3<sup>rd</sup> respondent increase resource allocation to schools for children with mental and intellectual disabilities to meet their peculiar needs such as hiring of support staff and teachers aides as well as provision of the necessary equipment necessary for their education.
  - g. A mandatory order to compel the 3<sup>rd</sup> respondent facilitate an all inclusive education system where hiring children with mental and intellectual disability



can seek admission in “ordinary schools” and such admissions be accepted.

- h. A mandatory order that the 3<sup>rd</sup> respondent do abolish the functional based curriculum for children with mental and intellectual disability and the academic based curriculum for children free of mental and intellectual disability and implement a curriculum that is both functional and academic for both children with mental and intellectual disability and those free of mental and intellectual disability thus wiping out discrimination.
- (i) A declaration that the Cash Transfer Programme for people with severe disabilities is discriminatory in the sense that it discriminates against persons with mental and intellectual disabilities who need disability-specific intensive lifelong support.
- (j) A mandatory order to compel the 6<sup>th</sup> respondent to implement a mechanism for the disbursement of the funds to the people with mental and intellectual disabilities.
- (k) Any other orders that this honourable court may be pleased to issue.
- l. That the costs of this petition be borne jointly and severally by the respondents.

5. In so far as the matters for consideration in this decision are concerned, the petitioner has stated as follows;

"34. The 6<sup>th</sup> respondent has irregularly disbursed Kshs 365,000,000/= (read three hundred and sixty five million only) that had been allocated to the people with disabilities in the 2011/2012 financial year; in a manner that is suspicious as no single person with mental and intellectual disability can be identified as having been a recipient of funds.

35. The 6<sup>th</sup> respondent has also applied funds allocated to persons with mental and intellectual disabilities for the fiscal years 2009/2010 in a discriminatory and unconstitutional manner especially in ignoring, neglecting and refusing to provide intensive care and need – specific support to persons with mental and intellectual disabilities. Application for conservatory orders"

### **Application for Conservatory Orders**

6. Together with the petition, the petitioner filed a chamber summons seeking conservatory orders in the nature of an injunction as follows;

- 2. That this honourable court be pleased to issue temporary injunction, restraining the 2<sup>nd</sup> and 6<sup>th</sup> respondents, their agents, or servants from disbursing Kshs 385,000,000/= (read three hundred and eighty five million



only) being the budgetary allocation for persons with disabilities for the Fiscal year 2011/2012 pending the hearing and determination of the petition.

3. That this Honourable court be pleased to issue a temporary injunction, restraining the 2<sup>nd</sup> and 6<sup>th</sup> respondents, their agents and or servants from disbursing Kshs 385,000,000/= (read three hundred and eighty five million shillings only) being the budgetary allocation for persons with disabilities in the Fiscal year 2011/2012 pending the hearing and determination of the petition.
4. That this honourable court be pleased to issue a temporary injunction, restraining the 2<sup>nd</sup> and 6<sup>th</sup> respondents, their agents and or servants from disbursing Kshs 250,000,000/= (read two hundred and fifty million shillings only) being the budgetary allocation to business revolving funds for persons with disabilities in the Fiscal Year 2011/2012, pending hearing and determination of this application.
5. That this honourable court be pleased to issue a temporary injunction, restraining the 2<sup>nd</sup> and 6<sup>th</sup> respondents, their agents and or servants from disbursing Kshs 250,000,000/= (read two hundred and fifty million shillings only) being the budgetary allocation to business revolving funds for persons with disabilities in the Fiscal Year 2011/2012, pending hearing and determination of the petition.
6. That this honourable court be pleased to issue a temporary injunction restraining the 6<sup>th</sup> respondent, its employees, servants and/or agents or otherwise be restrained from disbursing any funds under the Cash Transfer Programme for Persons with Severe Disabilities launched on June 24, 2011 pending the hearing and determination of this application.
7. That this honourable court be pleased to issue a temporary injunction restraining the 6<sup>th</sup> respondent, its employees, servants and/or from disbursing any funds under the Cash Transfer Programme for persons with Severe Disabilities launched on 24<sup>th</sup> June 2011 pending the hearing and determination of the Petition.
8. That this honourable court be pleased to issue a temporary injunction restraining the 2<sup>nd</sup> Respondent be compelled to produce a list of all persons with mental and intellectual disabilities that have been identified in each constituency in Kenya indicating what cash transfer, family interventions, informed therapeutic supports and consensual rehabilitation and habilitation services each person has received in the financial years 2009/2010 and 2010/2011 respectively at the inter partes hearing.
9. That this honourable court be pleased to issue an order compelling the 2<sup>nd</sup> respondent to produce a list of all persons with mental and intellectual disabilities over the age of 65 in Kenya indicating what cash transfer, life-long supports and services each elderly person with mental and intellectual disabilities has received in the financial years 2009/2010 and 2010/2011 respectively at the inter parties hearing.



10. That the costs of this application be awarded to the petitioners/applicants.
7. The application was supported by the affidavit of Edah Maina, the Chief Executive Officer of the petitioner and also the Vice President of the United Nations Committee of Experts on the Rights of Persons with Disabilities. She contends that the Constitution is being sabotaged or violated with regard to the inhuman and discriminatory manner in which persons with mental and intellectual disabilities are being treated.
8. In her deposition, she has set out in detail how the state has failed in several respects to implement a programme for cash disbursement for persons with mental and intellectual disabilities who were supposed to be beneficiaries despite funds being available. She depones that by failure to provide a plan or conceptualize a program that caters for the needs of the mentally and intellectually disabled; the state has aggravated and perpetuated the violations of the Constitution.
9. The petitioner states that the 2<sup>nd</sup> and 6<sup>th</sup> respondents have failed to adhere to the salient provisions of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the Constitution of Kenya as the living conditions of persons with mental and intellectual disabilities continue to deteriorate due to state neglect.
10. The petitioner accuses the 6<sup>th</sup> respondent of failing to implement the cash transfer for persons with mental and intellectual disabilities yet it had received Kshs 200 million from the Ministry of Finance in the Financial Year 2009/2010 and Kshs 530 million in 2010/2011 for both the elderly and for persons with disabilities. So far only the programme for the elderly has been implemented.
11. The petitioner alleges that the 6<sup>th</sup> respondent has converted funds that had been allocated to be utilized as a revolving fund by people with disabilities to projects such as paying for school fees which should be free, funding special units that promote isolation therefore violating the rights or freedoms of persons with mental and intellectual disability.
12. The petitioner also avers that, by virtue of the right of access to information, it is entitled to a list from the 2<sup>nd</sup> and 6<sup>th</sup> respondents detailing all the people with mental and intellectual disabilities, if any, who are beneficiaries of state allocated funds and the degree of assistance that includes informal therapeutic support and access to rehabilitation services that ought to be offered by the state.

### **The exparte Conservatory Orders**

13. On September 1, 2011, the petitioner's advocate appeared before Justice Mbogholi Msagha who granted interim relief exparte on the following terms;
  1. That the application be and is hereby certified as urgent and be heard during the court vacation.
  2. That interim orders do issue restraining the 2<sup>nd</sup> and 6<sup>th</sup> respondent, their agents and or servants from disbursing Kshs 385,000,000/00 being the budgetary allocation for persons with disabilities in the fiscal year 2010/2011 for 14 days.
  3. That interim orders do issue restraining the 2<sup>nd</sup> and 6<sup>th</sup> respondents, their agents and or servants from disbursing Kshs 250,000,000/00 being the budgetary allocation to business revolving funds for persons with disabilities in the fiscal year 2011/2012 for 14 days.
  4. That interim orders do issue restraining the 6<sup>th</sup> respondents, its employees, servants and/or agents or otherwise be restrained from disbursing any funds



under the cash transfer programme for persons with severe disabilities launched on June 24, 2011 for 14 days.

14. As this order was made during the High Court vacation, it was extended by consent on September 14, 2011 and September 21, 2011 to enable parties to file their replying affidavits and written submissions.
15. On September 30, 2011, the 1<sup>st</sup> interested party filed the chamber summons dated September 29, 2011 seeking to set aside the interim orders that had been granted on September 1, 2011. I certified the matter as urgent and fixed the matter for directions on October 13, 2011. On that date I gave the following directions;

“I have had regard to the fact that there are interim orders in place that have had the effecting of holding the entire budget of Kshs 385,000,000/00. This is in my view injurious since it constitutes the entire budget for the financial year. I will therefore take submissions on the chamber summons dated September 29, 2011 on October 20, 2011 at 2.30 pm. The application for discharge of the injunction shall be deemed to be the response to the chamber summons dated August 30, 2011. The interim orders in force are extended to that date. Costs in the cause”.

### **The Application to Discharge Conservatory Orders**

16. The chamber summons dated September 29, 2011 seeks to set aside the interim conservatory orders. It is supported by an affidavit sworn on September 20, 2011 by Hellen Mudora. The corpus of her deposition is that the National Fund for Persons with Disabilities has had significant challenges in establishing mechanisms for administration and management particularly at the Provincial and District level in a manner that would facilitate effective engagement with beneficiaries at the grass root level but has under the limited means and resources provided funding to organisations, projects and individuals.
17. She further depones that due to these challenges it has not been possible to make disbursements to specific individuals as anticipated by the petitioner through organisations and projects for the disabled including the mentally and intellectually challenged have benefitted.
18. Apart from other factual issues, the deponent avers that indeed in the year 2011/2012, the Minister for Finance allocated a sum of Kshs 385 million for disabled persons under the social protection programme and in view of this the National Council of Persons with Disabilities has prepared, in addition to a work plan, a clear budget of how the money spent is to be applied. In her view, these plans have been held in abeyance due to the conservatory orders in force.
19. In relation to the Chief Executive of the petitioner, Ms Mudora deponed that she was a member of the 6<sup>th</sup> respondent Council where she was the Chairperson of the Public Relations Advocacy Committee when the plans for the Council were developed.

### **Replying Affidavits**

20. A replying affidavit has also been filed on behalf of the respondents by John Boru Sosso Halake, the Chairman of the 6<sup>th</sup> respondent. He confirms that the first disbursement to the fund by the Government was in year 2009 and it was Kshs 200 million. This money was disbursed to various organisations including the petitioner.
21. He also depones that the petitioner’s Chief Executive was a member of the NCPD Board and was duly appointed on October 24, 2007 *vide* gazette Notice No 10239 with effect from November 1, 2007



for a three year term which expired. In this respect she actively participated in the programmes of the Board and knew about the beneficiaries of the fund. In his view, this application manifests bad faith on her part.

22. Mr Halake further depones that restraining the 6<sup>th</sup> respondent from making disbursements from the Disability Fund in the present financial year is causing untold suffering to the disabled who need those funds. He also depones that the 2<sup>nd</sup> respondent is willing to resolve any issues through alternative dispute resolution.
23. On behalf of the 2<sup>nd</sup> interested party, was filed a replying affidavit sworn by Timothy Wanyonyi Wetangula. In the main, he is opposed to the interim injunction as such an injunction would have the effect of freezing all funds meant for persons with disabilities. It has the adverse effect of condemning and punishing all persons living with disabilities.

### Submissions

24. The parties filed written submissions and adopted the same during oral arguments.
25. Mr Oyioko, who appeared for the petitioner argued that the interim orders in force were extended from time to time hence the interested party's application to set aside interim orders was an afterthought. It was also an implicit admission that the petitioner's had made out a *prima facie* case with a probability of success.
26. He further argued that the petition was clearly anchored in the Constitution articles 27 and 28, the right to equality and freedom from discrimination and the right to human dignity which have been violated by the state and state agencies. These facts before the court, he submits, have not been challenged. The state, he asserts, has also failed to meet its obligations under the United Nations Convention on the Rights of Persons with Disabilities which is part of Kenyan law by dint of article 2 of the Constitution.
27. In his view, the principles of Giella v Cassman Brown & Co Ltd (1973) EA 358 have been satisfied as the petitioner has a *prima facie* case with a probability of success in view of the demonstrable violations. Damages are not an adequate to remedy in view of the grave constitutional violations alleged and the balance of convenience tilts in favour of the petitioners.
28. Mr Onyiso, for the respondents, was of the view that the dispute relates to resource allocation and the executive branch of the government had made an allocation of funds to alleviate the conditions of persons of disability. The allocation of those funds he submitted is not a matter for the courts but for the respondents to decide.
29. He further submitted that the balance of convenience tilts in favour of the larger group persons with disabilities. These persons and organisations had funds disbursed to them last year and are still in need of funds but for the interim orders in force they should have received the funds.
30. In his view the application is made in bad faith as the petitioner and some of its members were beneficiaries of the funds that were disbursed.
31. Mr Ongoya assisted by Ms Ashioya for the first interested party, submitted that no case had been made out for the grant of an injunction of any kind. He argued that the consent orders were merely interim in nature and intended to preserve the status quo pending inter parties hearing of the application for injunction. In any event the interested party filed an application to discharge the interim orders which the court has directed be heard.
32. He further submitted that there is no *prima facie* case in respect of the orders of injunction sought as the interim orders do not stand a chance of being confirmed in the event the petition is successful.



The petition does not have any prayer confirming the interim orders in respect of the disbursement of sums subject of the interim injunction.

33. Mr Ongoya drew the court's attention to instances of material non disclosure of facts which, he submitted would disentitle the petitioner to the orders of injunction. Firstly, Edah Maina, the Chief Executive of the petitioner, has been a member of the 6<sup>th</sup> respondent Council for the years 2007 and 2010 and was party to all the decisions made and which are now being questioned. Secondly, the application for conservatory orders has created an impression that persons with mental and intellectual disability have been neglected but the material before the court show that they have been beneficiaries.
34. Mr Ongoya is of the view that the orders in force continue to harm all persons with disability including people with mental and intellectual disabilities who are the people in need and it would be proper for this court to dismiss the application for conservatory orders and discharge the injunction as these orders do not aid the petitioners in any way to enforce fundamental rights and freedoms of persons of disability.
35. Mr Chigiti for the 2<sup>nd</sup> interested party supported the respondent's position. He was of the view that the temporary injunction cannot be granted in vacuo given that the petitioner has not sought the injunction in the petition. He relied on the case of *James Ombere Okoth v East Africa Building Society and others* Nairobi Civil Appeal No 209 of 1995 (Unreported) and *Shah v Shah* [1981] KLR 374. He was of the view that the freezing of the said account was tantamount to violation of the right to life of the petitioners and all disabled persons would also be subjected to violations of their constitutional rights. According to him socio-economic rights can only be enjoyed if there are resources and the freezing of the entire government allocation to persons with disabilities would in itself be a violation of the fundamental rights of the person with disabilities.

## Findings

36. The petitioner has filed an application seeking conservatory orders. In considering the matter, i will adopt the *dictum* of Justice Musinga in *Centre for Rights Awareness & 7 others v AG & others* Nairobi Petition No 16 of 2011 (unreported) where he stated;

"It is important to point out that the arguments that were advanced by the counsel and i will take into account in this ruling to the prayer for conservatory order ..... 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 issues a conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation."
37. In my view, the petition raises weighty issues concerning the rights of persons with disabilities. It is one that deserves ventilation in court. I am satisfied that on the material placed before me that there are serious issues of law and fact for consideration by this court but the they must await trial.
38. Prayers 2, 3, 4, 5, 6 and 7 of the chamber summons dated August 30, 2011 seek to restrain the disbursement or dealing with the sum allocated to the 2<sup>nd</sup> respondent for the Financial year 2011/2012 and the 6<sup>th</sup> respondent from dealing with or disbursing cash transfer programme. It is common ground that the money constitutes the entire direct allocation for persons with disabilities for the financial year from the state.
39. I find that the said monies are disbursed to a whole class of persons with disabilities including the petitioner. Not only are the disbursements meant for projects, programmes and organisations that provide valuable service to persons with disabilities, the beneficiaries are persons with different forms



of disability with varying needs spread all over the Republic of Kenya. The injunctions sought will cause substantial hardship to them. For most beneficiaries, the financial disbursement through the 2<sup>nd</sup> and 6<sup>th</sup> respondent is the only source of livelihood particularly in these harsh economic times.

40. I also find substantial merit in the argument that the orders of injunction sought have no bearing on the final prayers sought in the petition. It is highly unlikely that even if the petition was successful, the petitioner would be entitled to the total budgetary allocation of the 6<sup>th</sup> respondent. Further, if the court were to be convinced that the petitioner and the persons it represents were entitled to damages or money of any kind, this court has jurisdiction make such award and it is not in doubt that the respondents would be in a position to comply with such an order. Conversely, it has not been demonstrated that the respondents would not be in a position to comply with such an order.
41. Prayers 8 and 9 are in the nature of mandatory injunction. The general principle is that a mandatory injunction should not be issued except in exceptional circumstances. The orders sought would of necessity require a determination of the petition at an interlocutory stage. There are no exceptional circumstances that require me to make such orders.
42. The basis for prayers 8 and 9 is that the petitioner is entitled to information and list of all persons with mental and intellectual disabilities together with aggregated information. The request is grounded on the right of access to information under article 35 of the *Constitution*. Article 35 provides that,
- “Every citizen has the right of access to (a) information held by the State and (b) information held by another person and requested for the exercise or protection of any right or fundamental freedom”
43. I am not inclined to grant prayers 8 and 9 of the application as the petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the *Constitution*. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order. I find that the petitioner did not make the request for information to the respondents hence I dismiss this request.
44. The replying affidavit of Mr Halake contains several lists of moneys disbursed to organisations, funded projects, and persons suffering from severe disabilities and beneficiaries of the Cash Transfer Program. This information may not be adequate but I believe that the petitioner has a chance to further interrogate the lists and perhaps frame a request for consideration by the respondents.
45. What about the rights of the petitioner? If I grant the injunctions sought, the petitioner will not receive cash that will assist its members. Persons who are mentally and intellectually challenged will not receive their money. This suit raises complex issues of the rights of persons with disability and socio-economic rights and may take some time to resolve. An injunction will interfere with the respondents’ plans and programs and ultimately the budget cycle, all to the detriment of persons with disabilities.
46. What I am called upon to do is to balance the parties’ respective positions and I have come to the conclusion that the wider interests of the persons with disability community will be served by rejecting the Petitioner’s application for conservatory orders.



## **Alternative Dispute Resolution**

47. In his affidavit, Mr Halake, the Chairman of the NCPD stated that the 6<sup>th</sup> respondent is ready to have any issues settled through alternative dispute resolution (ADR) mechanisms. This dispute puts one group of persons with disability against the others and also against the state and state agencies concerned with the interests of persons with disability. I note that the Chief Executive of the petitioner was a member of the NCPD Board where she was the Chair of the Public Relations Advocacy Committee and therefore instrumental in making some of the policies that the petition seeks to impugn. With her credentials she would be in a position to agitate and influence the Council and the other state agencies to adopt an agenda that promotes the interests of her organisations members.
48. This court is mandated by article 159(2)(c) of the Constitution to promote alternative dispute resolution. The petitioner's claim is one that involves the formulation of policies, establishment of legal frameworks and implementation of programs that promote the rights and welfare of persons with mental and intellectual disabilities. Ordinarily, such activities involve multi- stakeholder consultations and public participation, a task that the court is not particularly well suited. This is the kind of dispute that is amenable to ADR. I would welcome suggestions from the counsel's before me on how this could be achieved.
49. This is not to say that this court is powerless or unable to meet the challenge thrust upon it by the Constitution and the people of Kenya. It is only a realisation that judicial resources are not infinite and justice can be achieved in many other ways through our system of government underpinned by the values enshrined in our Constitution. Progress, particularly for persons with disability can only be achieved through building consensus amongst the group of persons with disability. Only by achieving such unity of purpose can voice of person with disability be strengthened to enable the community achieve its objectives.

## **Conclusion**

50. The net result of what i have considered is that i dismiss the petitioner's chamber summons dated August 30, 2011. As the application is dismissed it follows that the interim orders issued on September 1, 2011 and extended from time to time are discharged by allowing the 1<sup>st</sup> interested party's chamber summons dated September 29, 2011. Given the nature of the matter, I make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2011.**

**D.S. MAJANJA**

**JUDGE**

