



County Assemblies’ Forum v Attorney General & others; Council of Governors & 54 others (Interested Parties) (Constitutional Petition E001 of 2025) [2025] KEHC 3282 (KLR) (18 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E001 OF 2025**

DO CHEPKWONY, J

MARCH 18, 2025

IN THE MATTER OF: ARTICLES 10(2), 96(1)(2) AND (3), 118, 174, 175(B), 185, 201, 202(1) AND 203(1) OF THE CONSTITUTION OF KENYA, 2010, THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013, AND ALL ENABLING PROVISIONS OF LAW.

AND

IN THE MATTER OF: THE CONTRAVENTION AND THREATENED CONTRAVENTION OF ARTICLES 10(2), 118, 174, 175, 185, 202, 202(1) AND 203(1) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: DEVOLUTION AND REENUE SHARING BETWEEN THE NATIONAL GOVERNMENT AND COUNTY GOVERNMENTS.

AND

IN THE MATTER OF: THE VIOLATION, INFRINGEMENT, AND THREATENED CONTRAVENTION OF THE PRINCIPLES OF GOVERNANCE SUCH AS SHARING AND DEVOLUTION OF POWER, PARTICIPATION OF THE PEOPLE, GOOD GOVERNANCE, INTEGRITY, TRANSPARENCY, AND EQUITABLES SHARING OF NATIONAL REVENUE

AND

IN THE MATTER OF: IMPLEMENTATION OF THE COUNTY ALLOCATION OF REVENUE ACT, 2024 AND DIVISION OF REVENUE ACT, 2024.

BETWEEN

COUNTY ASSEMBLIES’ FORUM PETITIONER

AND

ATTORNEY GENERAL & OTHERS RESPONDENT



AND

COUNCIL OF GOVERNORS INTERESTED PARTY

COUNTY GOVERNMENT OF WAJIR INTERESTED PARTY

COUNTY GOVERNMENT OF BARINGO & 52 OTHERS INTERESTED PARTY

RULING

1. Vide a Notice of Motion application dated 6th January, 2025, the Petitioner has sought for orders that:-
 - a. Spent.
 - b. That pending hearing and determination of this application, this Honourable Court be pleased to grant interim conservatory order of stay of the application and operation of Section 5 of the County Allocation of Revenue Act, 2024, as read together with Second Schedule thereof to the extent that it reduces the budget ceilings for recurrent expenditure of all County Assemblies in the Republic of Kenya.
 - c. That prayer No.(b) be granted pending the hearing and determination of this Petition.
 - d. That costs of this application be granted to the Petitioners.
2. The application is premised on the grounds set out on its face and Supporting Affidavit sworn by Hon. Chege Mwaura together with the annexures attached thereon.
3. It is the Petitioners case that County Assemblies established as constituents arms of County Governments, under Article 177 of the *Constitution of Kenya*, undertake their constitutional and statutory mandate of representation, legislation and oversight as provided for under Article 185 of the *Constitution*. And Article 175(b) of the *Constitution* guarantees reliable sources of revenue to enable them to govern and deliver services effectively. County Assemblies then fully rely on their budget provided from the equitable share appropriate to County Governments from the National Government.
4. The equitable allocation of revenue raised nationally among all the forty seven (47) County Governments and the allocation of such revenue as between the County Executives and County Assemblies with the various County Governments, is governed by the *County Allocation of Revenue Act*, which is passed by the National Assembly every financial year. The amounts allocated are then used to facilitate the operations and discharge of constitutional mandate and roles of oversight, legislation and representation by the County Assemblies.
5. This then means that the County Assemblies prepare their own budgets and appropriate funds for their salaries, operations, procurement and other expenses required for their effective functioning.
6. That in this financial year, 2024 – 2025, in the County Allocation of Revenue Act, 2024 passed on 6th December, 2024, the allocations to the County Assemblies have been reduced from Kshs.40,612,656.492.00 to Kshs.36,369,242,228.00, which is a reduction of about Kshs.4 Billion, unilaterally and without any explanation or justification.
7. According to the Petitioner, the enactment of County Allocation of Revenue Act, 2024 which has provided for a reduction in the recurrent budget ceilings for the County Assemblies is unconstitutional



and consequently a nullity ab initio since it was passed without public participation on the part of the County Assemblies and has created disparity in budgetary allocations which unfairly disadvantages the County Assemblies and could lead to the effective functioning between the County Assemblies and the County Governments being frustrated contrary to the provisions of Article 175 (b) of the *Constitution*. The Petitioner contends that the reduction of the financial resources to the County Assemblies, compromises their ability to effectively legislate and oversee the County Executive and represents the interests of the people as required under Article 185(3) of the *Constitution*.

8. The application was first placed before this Court on 9th January, 2025, whereby it was being certified urgent and conservatory orders suspending the implementation of Section 5 of County Allocation of Revenue Act, 2024 pending the hearing of the application interparties were issued.
9. The Counsel of Governors sought and were enjoined in these proceedings on 21st January, 2025 as the 1st Interested Parties and opposed the said application. They then filed a Notice of Motion application and Replying Affidavit, both dated 31st January, 2025 seeking to have the said conservatory orders set aside.
10. On 10th March, 2025, upon allowing other Proposed Interested Parties to be enjoined in the matter, the court directed that the Notice of Motion and Replying Affidavit both dated 31st January, 2025, be treated as responses to the application of 6th January, 2025 and parties to canvass the same by way of written submissions.
11. Thereafter, Kisii County Assembly and 5th Interested Party (County Assembly of Turkana) and Tana River County Assembly filed their Replying Affidavits on 11th March, 2025, while Migori County Assembly, Makueni County Assembly, Council of Governors, Tana River County Assembly and Kisii County Assembly filed their submissions on 13th March, 2025. The Petitioner, County Assemblies Forum and the 5th Interested Party filed their submission on 14th March, 2025.
12. From their respective responses and written submissions, the parties opposed the issuance of the conservatory orders on 9th January, 2025, alleging that this has effectively halted the disbursement of funds to County Governments and denied them access to their budgets to enable them proceed with planned expenditure, thereby leading to a disruption in service delivery and governance, which is in contravention of Article 43 of the *Constitution* that guarantees its citizens the right to essential services. In support of their request, the 1st Interested Party has advanced the following grounds:-
 - a. That the 2024/2025 budgeting process was significantly disrupted by the Gen Z protests, which led to the withdrawal of the Finance Bill 2024/2025. This disruption negatively impacted on revenue collection, thereby necessitating a downward revision of the equitable share allocated to County Governments from Kshs.400 billion to Kshs.387 billion.
 - b. That budget ceilings for both the County Executives and the County Assemblies are determined by the Senate pursuant to County Allocation of Revenue Act. In response to the reduced equitable share, the Senate proportionally adjusted the budgetary ceilings of both entities in compliance with constitutional and statutory guidelines.
13. Having carefully reviewed the grounds in support of the application and the grounds raised in the respective responses together with the submissions presented by all parties, this Court is now tasked with determining:-
 - a. Whether or not to vacate the conservatory orders issued on 9th January, 2022 and or;



- b. Whether the reduction in budget allocations was undertaken in a manner that is procedurally fair, substantively justifiable, and constitutionally sound without conclusively determining the same.
14. Under Article 23(3) of the Constitution, a party alleging a violation or threat of constitutional right or fundamental freedom can urge the court for any relief, including temporary relief. It states:-

“In any proceedings brought under Article 22, a court may grant appropriate relief, including-

 - a. A declaration of rights;
 - b. An injunction;
 - c. A conservatory order;
 - d. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - e. An order for compensation; and
 - f. An order of judicial review”
15. In determining the two issues, the court will also be guided with the legal principles that require to be taken into account in granting a conservatory order. In the case of *Wilson Kaberia Nkunja v The Magistrates and Judges Vetting Board & Others*, Nairobi High Court Constitutional Petition No.154 of 2016[2016]eKLR, the court set out three main principles for consideration on whether or not to grant conservatory orders as follows:-
 - a. 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 a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
 - b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c. The public interests must be considered before grant of a conservatory order.
16. However, in the case of *Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, SCK Petition No.2 of 2013, the Supreme Court had the following to say on the issue of conservatory orders:-

“Conservatory orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold 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 Applicant’s case for orders of stay. Conservatory orders, consequently, should be constitutional values, and the proportionate magnitudes, and priority levels attributed to the relevant courses.”
17. In view of the foregoing, it is important to point out the provisions of Article 201 of the Constitution which enshrines the principles of prudence, responsibility and sustainable financial management in the application or use of public resources. As such, this Court has taken into consideration the arguments



by the Respondent, and which have not been rebutted by the opposing parties, that the reduction in the equitable share, as well as the subsequent challenges arising from the withdrawal of the Finance Bill 2024/2025. It is the Respondent's case that the Senate lawfully undertook the budgetary adjustments in accordance with these prevailing financial constraints pursuant to its constitutional mandate under Article 217 of the Constitution which provides as follows:-

“Division of revenue.

217(1) Once every five years, the Senate shall, by resolution, determine the basis for allocating among the counties the share of national revenue that is annually allocated to the county level of government.

18. Further, the court has taken note of the arguments that the conservatory orders have effectively resulted into financial paralysis, thus preventing County Governments from accessing their equitable share of revenue. This has in turn disrupted operations and delivery of essential services by County Governments, which includes, but not limited to healthcare, education, infrastructure, road works and county administration, thereby violating the socio-economic rights guaranteed under Article 43 of the Constitution. It is therefore imperative that smooth fiscal operations are assured.
19. In the case of *Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 Others*[2014]eKLR, the Supreme Court emphasized that conservatory orders should only be granted where the court is convinced that the public interest will not be prejudiced. In this case, it is beyond peradventure that the continued operation of the conservatory orders has, and is highly likely to lead to a financial crisis at county level, hence threaten the stability of devolved governance. In such circumstances, the court must therefore be called upon to exercise its discretion in a manner that safeguards public welfare and interest as it addresses the questions of whether suspending the operation of the County Allocation of Revenue Act, 2024 will prejudice either parties operations and duties and whether the budgetary allocation was constitutionally, fairly and equitably distributed or considered and to what extent have the parties been affected by the said allocation.
20. This Court is further persuaded by the South African case of *Economic Freedom Fighters v Speaker of the National Assembly and Others* [2016]ZACC 11, where the Court underscored that in cases where judicial intervention affects budgetary allocations, courts must exercise extreme caution to prevent unintended financial and governance crises. Thus, it is urged that Courts should only intervene in exceptional circumstances where there is clear and manifest constitutional violation. Such was also the view in the case of *Speaker of the Senate & Another v Attorney General & 4 Others* [2013] eKLR, where the Supreme Court held that courts should be reluctant to interfere with the budget-making process unless there is an outright contravention of constitutional provisions.
21. Thus, at this stage in the instant case, since nothing has been placed before the court to show that by adjusting the budget ceilings, the Senate and National Assembly acted unlawfully as opposed to having responded to economic hiccups in the Country. Also, this Court, being mindful of the strict constitutional timelines underpinning County Allocation Revenue Act, 2024 as enshrined under Article 218 (a) of the Constitution, is persuaded that it is in the greater public good and interest that the conservatory orders issued herein be set aside as the consequences that may arise out of the suspension of the said Act may be far-reaching.
22. However, setting aside of the said conservatory orders should not be taken to mean that the Petitioner's concerns as raised in the Petition will not be addressed. If the Petition succeeds, the court reserves the liberty to issue appropriate reliefs to remedy any constitutional violations, including retrospective budgetary adjustments or compensatory measures. Therefore, the Court finds that the Petitioner



is unlikely to suffer irreparable harm that cannot be addressed through a substantive hearing and appropriate and or deserving remedy provided.

23. In arriving at this conclusion, this Court is guided by the decision in the case of *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR, where the Court held that interim relief should not result in the paralysis of government operations unless there is a compelling reason to do so. In the present case, public interest and welfare calls for the discharge of the conservatory orders to enable the County Governments to function effectively.
24. Accordingly, and for avoidance of doubt, the Court makes the following orders:-
- a. The conservatory orders issued on 9th January, 2025 be and are hereby set aside.”
 - b. For expeditious disposal of this matter, the parties are directed to proceed with the main Petition alongside the various responses and applications filed by either party.
 - c. As such, the Respondent and any other party who is opposed to the Petition shall have three (3) days from the date hereof to file and serve their respective responses to the main Petition.
 - d. Thereafter, the parties shall canvass the Petition by way of written submissions.
 - e. The Petitioner is granted seven (7) days from the date of service of respective responses to file and serve a further affidavit, if need be, alongside written submissions.
 - f. The other opposing parties to file and serve their respective written submissions.
 - g. The submissions shall be limited to five (5) pages.
 - h. Mention on 7th April, 2025 to confirm compliance and to fix a Judgement date.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 18TH DAY OF MARCH, 2025.

D. O. CHEPKWONY

JUDGE

