Hassan v Senate of the Republic of Kenya & 3 others; Council of County Governors (Interested Party) (Petition E006 of 2024) [2025] KEHC 2814 (KLR) (Civ) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2814 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CIVIL

PETITION E006 OF 2024

HM NYAGA, J

MARCH 6, 2025

BETWEEN

HON ABDI IBRAHIM HASSAN ..... PETITIONER

AND

THE SENATE OF THE REPUBLIC OF KENYA ..... 1ST RESPONDENT

THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 4TH RESPONDENT

AND

COUNCIL OF COUNTY GOVERNORS ..... INTERESTED PARTY

RULING

1. Before me is an application dated 11th June, 2024 seeking the following orders.

    a. That this application be certified urgent, service be dispensed with and be heard ex-parte in the 1st instance.

    b. That the Honourable court be pleased to issue a Conservatory Orders restraining the Respondent and/or particularly the 3rd and 4th Respondents either by themselves or their agents, employees and/or servants from proceeding with and/or acting upon the recommendation by the Senate Standing Committee on Health made on 10th June, 2024 recommending arrest and prosecution of the Petitioner for alleged disobedience of the summons dated 30th May, 2024 or in any manner interfering with the Petitioner's liberty pending the hearing and determination of the Application filed herewith.

c. That the Honourable Court be pleased to issue a Conservatory Orders restraining the Respondents and in particular the 3rd and 4th Respondents either by themselves or their agents, employees and/or servants from conducting any investigations in regard to the recommendations and/or Resolution made by Senate Standing Committee on Health on 10th June, 2024 directing the Inspector General of Police and the DPP the 3rd and 4th Respondents herein to investigate and recommend prosecution of the Petitioner pending the hearing and determination of the Application filed herein.

d. That the Honourable court to please to issue a Conservatory Orders restraining the Respondents and/or particularly the 3rd and 4th Respondents either by themselves or their agents, employees and/or servants from proceedings with and/or acting upon the recommendation by the Senate Standing Committee on Health made on 10th June, 2024 recommending arrest and prosecution of the Petitioner for alleged disobedience of the Summons dated 30th may, 2024 or in any manner interfering with the Petitioner's liberty pending the hearing and determination of the petition.

e. That the Honourable court be pleased to issue a Conservatory Orders restraining the Respondents and in particular the 3rd and 4th Respondents either by themselves or their agents, employees and/or servants from conducting any investigations in regard to the recommendation and/or Resolution made by Senate Standing Committee on Health on 10th June, 2024 directing the Inspector General of police and the DPP the 3rd and 4th Respondents herein to investigate and recommend prosecution of the petitioner pending the hearing and determination of the petition filed herein.

f. That the Honourable court be pleased to issue Conservatory Orderss suspending Application of section of the parliamentary, powers and privileges Act, Cap 6 [Revised Edition, 2022] pending the hearing and determination of the application and petition filed herewith.

g. That costs of the application be borne by the Respondents.

2. The Application is supported by the grounds set out on its face and the supporting affidavit of the Applicant sworn on even date.

3. In a nutshell the applicant states Thathe is the Governor, Isiolo County. Thaton 10th June 2024 the Senate Standing Committee on Health (Committee) made a resolution of the house recommending Thatthe Inspector General of Police to arrest him and surrender him for prosecution by the Director of Public Prosecution (DPP) on the allegation of disobedience of lawful summons requiring his utterance before the said Committee. Thatthe said Committee found him guilty of disobedience of lawful summons and fined him Ksh 500,000/- without affording him an opportunity to be heard contrary to the tenets of Articles 25(2), 27, 47, 48 and 50 of *the Constitution* of Kenya, 2010, which embody the principles of fair trial, equality before the law, for reasonable and lawful administrative action, access to justice and fair hearing.

4. The Applicant further depones Thatthe Committee's resolution to punish him was not arrived at on the basis of reasonable lawful and relevant consideration rather it was actuated by malice.

5. The Applicant further avers Thathis failure to appear before the said Committee was not out of disrespect but was occasioned by other urgent matters in the County Government of Isiolo and Thathe had already submitted a response to the Committee.

6. The Applicant states Thatwhile he appreciates the powers of the Senate and its role in the implementation of *the Constitution*, the powers of the Senate under Article 93(3) of *the Constitution* should not be exercised arbitrarily and capriciously.

7. The Applicant avers Thathe has been summoned to almost all the Senate Committees without lawful justification under the influence of Hon Adan Dullo Fatuma the Senator, Isiolo County who is intent on settling scores with him.

8. Thatin acting in a quasi-jurisdiction role, the Senate ought not to act in bad faith or consider extraneous factors. Thatthe pressure exerted by Senator Fatuma vitiates the Senate's exercise of tits oversight role.

9. Thatthe Committee's decision recommending his arrest and prosecution and suspension of disbursement of fund to Isiolo County without affording him an opportunity to be heard was unlawful, unreasonable and procedurally unfair and the intended action flies in the face of Article 157, 49, 39, 29, 25, 27, 24 and 19 of *the Constitution*.

10. The Applicant further depones Thatunder Article 20 of *the Constitution* every state organ, body and person are bound to apply and interpret *the Constitution* in a manner Thatserves the public interest.

11. It is the Applicant's case Thatthe Committee's decision to prosecute him flies in the face of the provisions of article 20(2) of *the Constitution*.

12. It is also deponed Thatthis court has powers, under Article 23 as read with Article 165 of *the Constitution*, to hear and determine an application for redress for denial, violations, infringement of or threat to a right as fundamental freedom in the Bill of Rights.

13. In response, the 1st Respondent file a replying affidavit sworn by Jeremiah Nyegenye, C.B.S who is its Clerk and Secretary to the Parliamentary Service Commission.

14. In a nutshell it is averred Thatthe 1st Respondent is established under Article 93 of *the Constitution* and under Sub-Article (3) thereof, the Senate is bestowed the powers to inter alia, determine the allocation of revenue to the counties and exercise oversight over national revenue allocated to County Governments. Thatunder Article 125 of *the Constitution*, the Senate is empowered to:-

    a. Enforce the attendance of witnesses and examine them on oath, affirmation or otherwise.

    b. Counsel the production of documents and

    c. Issue a commission as request to examine witnesses abroad.

15. It is further averred Thatunder the Parliamentary Power and Privileges Act (the Act) at Section 18,19 and 27, the 1st Respondent or its Committee is empowered to impose such fine, not exceeding Ksh 500,000/- to any witness who is duly summoned and fails to appear and fails to satisfy the relevant house or Committee on the reasons for the absence.

16. It is further deponed Thatthe petitioner/applicant was duly served with a letter dated 6th March 2024 in which he was requested to submit a response to the Committee on Health issues raised by the senator for Isiolo Hon Fatuma Dullo. Thatby a letter dated 13th March 2024, the said Committee invited the Petitioner to appear in person before it on 21st May 2024 to respond to the issues raised. Thaton 20th May 2024, the Petitioner, under a letter dated 20th may 2024, and addressed to the Clerk of the Committee, requested for a rescheduling of the meeting due to the short notice and prior engagements. Thaton 21st May 2024, the Committee noting the failure by the Governor to comply with its invitation and noting the weight and urgency of the matter, resolved to summon the Petitioner on 28th May 2024.

Thatthe petitioner was duly summoned but failed to honour the summons and Thaton 28th May 2024 the Committee resolved to summon the petitioner on 10th June 2024. Thatthe petitioner again failed to honour the summons. Thatunder its powers under section 19 (1) and (3) of the Act the Committee can find the petitioner guilty of an offence under the said Act and impose the penalty prescribed by the law.

17. It is further deponed Thatcontrary to the Petitioner assertions, the Committee was yet to take action against the Petitioner and no fine had been imposed upon him. It is further averred Thatthe allegations of influence by Hon Dullo are not supported by any evidence and the court cannot rely on reports appearing in daily newspapers Thatpurported to state Thatthere were warrants of arrest against the Petitioner.

18. It is also deponed Thatthe 1st Respondent has acted within its mandate and the onus is on the Petitioner to justify his absence before the Committee.

19. It is also submitted Thata suspension of the powers of the 1st Respondent under section 19 of the Act would be tantamount to infringement of the independence of Parliament.

20. It is thus deponed Thatthe Petition and the Application are incompetent, misconceived and an abuse of the court process. Thathaving failed to demonstrate why the court's discretion should be exercised in his favour, the Application and Petition should be dismissed with costs.

21. The 2nd and 3rd Respondents filed grounds of opposition dated 18th October 2024. The grounds set out are as follows

    a. Thatneither the application not the petition raised a constitutional question.

    b. Thatthe Senate under Article 95(3) and 125 of *the Constitution* as read with section 18(1) of the *Parliamentary Powers and Privileges Act* and section 30 of the County Government Act has powers to summon Governors.

    c. Thatthe Petitioner seeks to challenge a duly enacted procedure under statute.

    d. Thatthere is a presumption of legality of all enacted statutes.

    e. Thatthe application and petition herein are an abuse of the court process in Thatthe petitioner after violating several summons by the Senate as required under statute, now seeks protection under the same laws has been previously violating.

    f. Thatthe application and petitioner are bad in law.

22. When the matter came up directions and the parties were directed to file their respective submissions which I will not rehash word for word. It suffices to state ThatI have duly considered them and will, where necessary, address shortly.

23. It is noteworthy Thatthis court gave clear directions Thatthe Conservatory Orderss Thathad been issued herein did not impede the 1st Respondent summoning the petitioner/applicant as provided by laws.

Analysis and Determination

24. Having considered the application, the affidavit in support and the responses to it, I opine Thatthe issues Thatarise for determination are:-

    a. Whether the Petition raises a constitutional issue or not.

b. Whether section 19 of the Act is unconstitutional

c. Whether the Senate has powers to summon the petitioner and take action for failure to honour summons.

d. Whether the applicant has demonstrated a prima facie case with a likelihood of success

e. Who should bear the costs of this application.

25. The question of whether this petition raises a constitutional issue can be assessed against the principles set out in Anarita Karimi Njeri v Republic [1979] eKLR where it was held Thata Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.

26. This principle was later reaffirmed by the Court of Appeal in the case of Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR when the Court at paragraph 87(3) of the judgment stated as follows: -

> " It is our finding Thatthe petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, Thatthey did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act*, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.

27. The court in Peter Michobo Muiru v Barclays Bank of Kenya Ltd & another [2016] eKLR while discussing the Principles enunciated in Anarita Karimi Njeru's case observed as follows: -

> " The principle, as this court has previously stated, does not however equate absolute precision. There is no need for absolute and artificial specificity: see Kevin Turunga Ithagi v Hon. Justice Fred Ochieng & 5 Others (No.1) HCCP No.442 of 2015 [2015] eKLR. The general approach should be Thateach case must be independently viewed and understood by the court and where the court as well as the Respondent can painlessly identify and understand the petitioner's case as well as the constitutional trajectory the case takes, then the merits of the case ought to be ventured into. Stalling the case through the technicality of want of formal competence will take a back seat. As was stated in the case of Donovan Earl Hamilton v Ian Hayles (Claim No. 2009 HCV 04623) by the Supreme Court of Judicature in Jamaica, the striking out of pleadings in constitutional petitions should be done only in the clearest of cases.
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> The principle established in the Anarita Karimi Njeru's case should thus not be applied line hook and sinker and the court must always be cautious to avoid impeding the course of justice by denying a party access to the court: see Samuel Gunja Sode & Another v The County Assembly of Marsabit & 2 others [2016] eKLR, Nation Media Group Ltd v Attorney General [2007] 1 EA 261 as well as the Court of Appeal decision in Peter M. Kariuki v Attorney General [2014] eKLR."

28. It is thus well settled law Thatin a constitutional petition therefore, a party is not supposed to merely cite constitutional provisions. He/she must with some reasonable degree of precision identify the constitutional provisions Thatare alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation and state some particulars of alleged infringement to enable the respondent to be able to respond to each allegation accordingly.

29. In short, to succeed, the petitioner must be precise in addressing the rights Thatare violated or threatened.

30. From the Petition, the Applicant was categorical Thathis rights under Articles 10, 19,20(1)(2), 22, 24,25,22 and 29 were violated when the 1st Respondent's Committee imposed a fine against him in his absence.

31. It is further stated Thatsection 19 of *Parliamentary Powers and Privileges Act* is unconstitutional in Thatit curtails the powers of the Director of Public Prosecution (DPP) to make independent and impartial prosecutorial decisions, contrary to Article 157 of *the Constitution*.

32. It is further stated That1st Respondent cannot exercise its powers under Article 96 of *the Constitution* in a manner Thatcripples the oversight of the County Assemby of Isiolo and other organs, in violation of Article C(21 and 189 (1) of *the Constitution*.

33. Looking at the material before me, it is my finding Thatthe petition raises valid questions on alleged violation of the petitioner's rights, the power of the 1st Respondent vis –a- vis the powers of the DPP and the Applicant's right to a fair process.

34. Thus, the petition as drawn meets the threshold set out in Anarita Karimi Case (supra). Whether the facts of this matter support the allegations made in the petition are to be considered in this Ruling. I will revisit the issue later.

35. The 1st Respondent's argument is Thatthe prayers sought by the petitioner and the grant of the Conservatory Orderss are an infringement of the independence of Parliament.

36. It is well settled now Thatthe powers of this court under Article 23 of *the Constitution* are not limited in any sense and when there is proof of violation of any fundamental right, by any institution, this court has a duty to step in.

37. It is thus a false argument ThatParliament is supreme and immune from reach of this court, when a question of violation of fundamental rights arises.

38. The courts powers to grant Conservatory Orderss are anchored on Article 23 of *the Constitution* which provides as follows:-

Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) 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 Orders;

(d) a declaration of invalidity of any law Thatdenies, 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

39. The law on the question of Conservatory Orderss is now well settled and is backed by myriads of authorities for instance, in Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017] eKLR the Court held that:-

> " A party who moves the court seeking Conservatory Orderss must show to the satisfaction of the Court Thathis or her rights are under threat of violation; are being violated or will be violated and Thatsuch violation, or threatened violation is likely to continue unless a Conservatory Orders is granted. This is so because the purpose of granting a Conservatory Orders is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition."

40. The principles in regard to the granting of interim or Conservatory Orderss were also outlined by the Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Application NO. 5 of 2014 [2014] eKLR, where the Court held that:-

> " These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, Conservatory Orderss and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes Thatno party nor interested individual or entity is to take action until the Court has given the green light.
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> "Conservatory Orderss" 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 Orderss, 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 Orderss, 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."

41. Therefore, if this court is to find Thatthe petitioner has established a prima facie case, Thatthere was violation of fundamental rights, then it is entitled to issue the Conservatory Orderss sought.

42. It is conceded by the petitioner Thatthe1st Respondent under section 18 of the *Parliamentary Powers and Privileges Act*, has powers to invite or summon any person in exercise of its functions under *the Constitution* and statute.

43. It is also not in dispute Thatthe Petitioner was duly served with the notices Thatrequired him to appear before the Committee on several occasions. There are affidavits of service sworn by one Tagaya Ogasso a process server to confirm this. It is also not in dispute Thatthe Petitioner, upon receipt of the letter of invitation dated 13th May 2024, requested for rescheduling of the intended meeting. The request was acceded to and from the affidavits of the Clerk to the Senate, further dates were given, but the petitioner did not show up.

44. The petitioner has not tendered evidence Thatwould explain his absence before the Committee on 28th May 2024 and on 10th June 2024, despite having been served with summons.

45. Consequently, the 1st Respondent was entitled to take any action and specifically under section 19 of the Act which provides as follows:-

Procedure if witness fails to appear

(1) Where a witness summoned does not appear, or appears but fails to satisfy the relevant House of Parliament or committee, the relevant House or Committee may impose upon the witness such fine, not exceeding five hundred thousand shillings, having regard to the witness' condition in life and all the circumstances of the case.

(2) A person may pay the fine under subsection (1) to the Clerk of the relevant House.

(3) Parliament or its committee may order the arrest of a person who fails to honour a summons.

46. The Applicant has also sought the suspension of the said section terming it as unconstitutional in Thatsubsections (1) and (2) create a strict liability offence which then usurps the powers of the National Police Service and the Director of Public Prosecutions to investigate and prosecute the offence respectively.

47. In my view and in agreement with the 1st Respondent, this court ought to refrain from the suspension of an Act of Parliament at an interlocutory state, before proper submissions are made before it. It is also noted Thatthe said Act was the subject of litigation in Apollo Mboya v Attorney General and 2 others [2018] eKLR, where the court only found sections 7 and 11 thereof to be unconstitutional. I am not aware of any other decision Thathas held to the contrary. As such the prayer to suspect section 19 of the Act is declined.

48. Did the 1st Respondent actually make the orders Thatare the subject of this Petition?

49. In answer to question, I will look at the evidence tendered by the petitioner. He had annexed extracts from social media, which are to the affect Thatthe 1st Respondent had directed the petitioners be arrested by the Inspector General and be prosecuted by the Director of Public Prosecution.

50. The Clerk to the 1st Respondent was categorical Thatno such directions were issued. The clerk questioned the probity value of evidence obtained from such sources of information.

51. There being a deposition on oath by Clerk to the Senate Thatno such action was ever undertaken, I am of the view Thatthe Applicant/Petitioner was acting on rumors and hearsay.

52. Even if the said rumors are true, the 2nd and 3rd Respondent are independent institutions/offices Thatare expected to make impartial decisions in execution of their functions.

53. Thus, I don't find any merit in Thatargument. The 1st Respondent has a constitutional duty to provide an oversight role over management of public funds at the county level. Thatrole cannot be downplayed and once a governor is summoned, he/she is obligated to attend such summons. Any absence without good cause may result in the 1st Respondent acting as prescribed by a statute.

54. Has the Petitioner demonstrated a prima facie case?

55. As stated earlier, the petitioner relied on extracts from various social media outlets to support his case. The 1st Respondent has denied ever issuing orders for the petitioner arrest.

56. With such a deposition on oath, countered against the social media news, I am not satisfied Thatthe 1st Respondent did order the asset of the Petitioner. In any case the 1st Respondent has conceded Thatit cannot direct independent offices on their exercise of their constitutional or statutory functions.

57. The 1st Respondent also admits Thatit has no powers to direct the stoppage of disbursement of funds to counties and specifically to Isiolo county.

58. It is thus my finding Thatthe applicant has not presented a prima facie case to warrant a grant of the orders sought.

59. As I conclude, I wish to state Thatfrom the evidence adduced vide the affidavits, the petitioner is the author of his own misery. He sought time to appear before the Committee and the latter agreed to accommodate him, twice, but come the 10th of June 2024, the petitioner were not present. There was no explanation given as to why he was absent.

60. It appears like the petitioner decided to put the blame on the Senator, Isiolo for his tribulations. From the material before me, there is nothing to suggest Thatthere was anything personal. The Petitioner were made aware of the sitting in writing, and what he was required to do. The personal invitations and summons were issue by a lawfully constituted Committee and not the senator. Therefore, the petitioner's argument on this issue cannot be entertained.

61. After analyzing the matter I find Thatthe applicant has not established Thatthere were orders issued by the 1st Respondent for his arrest. His apprehension is based on unreliable sources of information Thatdo not represent the actual position .

62. The application is thus premature.

63. Thatsaid, and in view of the concession by the 1st, 2nd and 3rd Respondents. I find that, in the event Thatindeed such orders were issued, the same cannot be lawful for the reasons given hereinabove.

64. Therefore, as regards this application I make these orders.

a. There is no evidence to support the averment Thatthe 1st Respondent issued the orders in question.

b. In the event Thatthe same were issued, then they are illegal as the 2nd and 3rd Respondent are independent institutions.

c. The 1st Respondent has power to summon the Applicant/Petitioner and exercise its authority in the event of non compliance.

d. The court declines to issue Conservatory Orderss in regard to section 19 of the *Parliamentary Powers and Privileges Act*.

e. Save for the above finding, the application is dismissed.

f. Costs will abide by the outcome of the petition.

DATED, SIGNED & DELIVERED AT MERU THIS 6TH DAY OF MARCH, 2025.

H.M. NYAGA

JUDGE