



**Ddaiddo & 2 others v Tana River County Ward Bursary Fund Board & 2 others
(Constitutional Petition E006 of 2023) [2024] KEHC 8833 (KLR) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CONSTITUTIONAL PETITION E006 OF 2023**

SM GITHINJI, J

JULY 15, 2024

BETWEEN

**FRANKHEART J DDAIDDO 1ST PETITIONER
JAMES M ONCHAGA 2ND PETITIONER
YUSUF I BORU 3RD PETITIONER**

AND

**TANA RIVER COUNTY WARD BURSARY FUND BOARD . 1ST RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER 2ND RESPONDENT
THE OFFICE OF THE GOVERNOR, TANA RIVER
COUNTY 3RD RESPONDENT**

RULING

1. Before me are two applications dated 21/11/2023 and 17/5/2024. The former substantively brought under Articles 10, 47, 48, 73, 165 (1) (d), 201, 258 and 259 of the *Constitution* of Kenya and all other enabling provisions of the law. The orders sought therein are tailored as follows: -
 1. Spent.
 2. That pending the hearing and determination of the application herein inter-partes, this honourable court be pleased to grant an order of temporary injunction restraining the 1st Respondent whether by themselves, their agents or any person acting on their instruction from conducting any business or activities of the ward fund committee.
 3. That the court be pleased to grant an order restraining all MCAs from convening, sitting or carrying out and/or undertaking any of the functions of the 1st Respondent.



4. That this honourable court be pleaded to grant orders declaring section 13 (3) and (4) of the Tana River County Ward Bursary Fund Administration Act, No. 2 of 2014 unconstitutional and accordingly stands struck from the statute.
 5. That this honourable court be pleased to declare section 13 (3) and (4) of the Tana River County Ward Bursary Fund Administration Act No. 2 of 2014 inconsistent with the Constitution 2010 and therefore void and invalid in terms of Article 174 (i), 175 (a), 185 (3) and 201 (a) of the Constitution, 2010.
 6. That this honorable court be pleased to declare section 13 (3) and (4) of the Tana River County Ward Bursary Fund Administration Act No. 2 of 2014 inconsistent with the county government Act, 2012 and therefore void and invalid in terms of section 9 (2) (a) and (b) of the County Government Act, 2012.
 7. That this honourable court be pleased to issue an order restraining the 1st Respondent, its employees, agents or any person working under its authority, from releasing or disbursing funds or issuing cheques in respect to Ward Bursary Fund.
 8. That this honourable court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.
 9. Costs of this application be provided for.
2. The application is premised on the grounds set out on its face and those in the supporting affidavit sworn by the 1st Petitioner who stated that he is the chairman/secretary of Tana River County Society Network Organization. He deposed that the Tana River County Ward Fund Committee established in 2014 (the Committee), constitutes an area MCA who sits as a patron and is obligated to convene the first meeting as stipulated under section 13 (3) and (4) of the Tana River County Ward Bursary Fund Administration Act, 2014.
 3. That by sitting in the Committee, a conflict of interest arises since the MCAs cannot effectively oversight the fund. To him, this has caused a massive loss of ward bursary funds and misappropriation of the same. The 1st Petitioner further deposed that despite the Petitioners petitioning the 2nd Respondent to amend section 13 (3) and (4) of the Tana River County Ward Bursary Fund Administration Act, 2014, the latter has refused and neglected to do so thereby continuing with violation of the Constitution. He added that the Petitioners have equally on several occasions written to the 3rd Respondent informing him of the illegality of the Committee and misappropriation and loss of public funds under the patronage of the MCAs; however, no action has since been taken.
 4. On 30/4/2024, this court granted the following interim orders: -
 1. That injunction do issue restraining the 1st Respondent whether by themselves, their agents or any person acting on their instruction from conducting any transactions or activities of the Ward Fund Committee and also from receiving or disbursing funds or issuing cheques in respect to ward bursary fund, pending hearing of this application inter-partes.
 2. That the Respondent should file their response within 7 days and serve.
 3. That mention for further directions on 16/5/2024.
 5. In response thereto, the Respondents filed replying affidavits. For the 1st and 3rd Respondents, affidavit sworn on 31/5/2024 by Kofa Fredrick Bungulu was filed on 11/6/2024. According to Mr. Kofa, the Petitioner's application is misguided, bad in law and an abuse of the court process intended to forestall,



halt and prevent the implementation of the Tana River County Ward Bursary Administration Act and the 1st Respondent from carrying out its mandate. He added that as much as there is need to interrogate the issues raised by the Petitioners, the court must also ensure that the 1st Respondent is not restricted from carrying out its mandate, that is, issuance of bursaries to needy students.

6. For the 2nd Respondent, Abdullahi Dayib Hussein, its clerk, swore a replying affidavit on 31/5/2024 stating that the ward bursary fund board attracts its membership from the county executive and the public and not the county assembly. That section 13 of the Tana River County Ward Bursary Fund Administration Act, 2014 as amended in 2018 establishes the Committee in respect of each ward. That the role of the ward representative (MCA) in the said committees is to convene the first meeting only. Thereafter, a chairman is elected in the first meeting and as a result the role of the MCA expires.
7. The clerk further deposed that the MCA does not sit in the committee meetings and is not directly or otherwise involved in the bursary application process or administration of the fund. He added that the role of the 2nd Respondent in the ward bursary fund is oversight as mandated by the Constitution under Article 185.
8. In addition, thereto, the 1st and 3rd Respondents filed the application dated 17/5/2024 for orders that:
 1. Spent.
 2. The honourable court be pleased to review, set aside, vacate, amend and/or substitute the orders issued herein on 30/4/2024 with prayer no. 2 of the Petitioner's Notice of Motion application dated 21/11/2023.
 3. Costs of this application be provided for.
9. The grounds in support of this application as set out on the face of the motion and in the supporting affidavit sworn by Kofa Fredrick Bungulu, the Tana River County Government's Legal Officer, are that the orders issued on 30/4/2024 depart from the orders sought in the Petitioner's application of 21/11/2023. That the honourable court erroneously issued the interim orders as it did, and that the same generally and blanketly restrain the 1st Respondent and the Committee from carrying out their mandate and operations. Mr. Kofa pointed out that the petition strictly relates to the Ward Fund Bursary and not the 1st Respondent, thus the need to review to enable the 1st Respondent issue bursaries and cheques to merited beneficiaries.
10. To oppose the motion dated 17/5/2024, the 2nd Respondent filed another replying affidavit sworn by the clerk on 31/5/2024, wherein he deposed that the import of section 5 and 7 of the Tana River County Ward Bursary Act, 2014 is that the 1st Respondent cannot operate without the Committee. As such, the effect of the order sought by the Petitioners is similar to the order granted by the court. The clerk added that the interim orders granted are in line with the orders sought by the Petitioners and are therefore not erroneous. To him, prayer 8 of the Petitioners' application gave the court discretion to issue any further orders as it would deem just. The Clerk therefore termed the application misconceived, frivolous, devoid of merit and a waste of judicial time.
11. On 30/5/2024, the court directed that the two applications be canvassed by way of written submissions that were to be filed within 7 days thereon. Unfortunately, as at the time of writing this ruling, only the 1st and 2nd Respondents had filed written submissions dated 14/6/2024 in support of their application. I have carefully considered them in my finding.

Issues for determination

12. ...



- i. Whether the orders granted on 30/4/2024 should be reviewed.
- ii. Whether the orders sought in the application dated 21/11/2023 may be granted at this stage.

Analysis and Determination

13. Section 80 of the *Civil Procedure Act* grants the court unfettered discretion to make such order as it may deem fit on sufficient reason being given for review of its decision. However, as it has been constantly stated this discretion should be exercised judiciously and not capriciously. In *National Bank of Kenya Limited v Ndungu Njau* (1997) eKLR the Court of Appeal held that:

" A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter."

14. That section reads: -

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

15. Order 45 rule 1 of the *Civil Procedure Rules* further provides: -

1. Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

16. The main grounds for review are therefore - discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

17. In the present case, the argument or basis for review advanced by the 1st and 3rd Respondents is that the court erroneously issued an order that was not pleaded. I have carefully looked at the prayers sought in the application dated 21/11/2023 and the orders issued by this court on 30/4/2024, I am not satisfied that there is any error apparent on the face of the record. The impugned order is in my view a reflection of prayer 2 and 7 sought in the Petitioners' application. The outcome is that the application dated 17/5/2024 is bereft of merit, it is hereby disallowed.



18. Turning to the Petitioners' application, I will start by looking at the merit or otherwise of prayer 3, 4, 5 and 6 therein. The substance of the said prayers is that the court is being implored to declare section 13 (3) and (4) of the Tana River County Ward Bursary Fund Administration Act No.2 of 2014, inconsistent with article 175 (a), 185 (3) and 201 (a) of the Constitution of Kenya and section 9 (2) (a) and (b) of the County Government Act, 2012; and to restrain all MCAs from undertaking functions of the 1st Respondent.
19. Article 165(3)(d)(ii) of the Constitution donates to the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. It is also trite that in considering an application for conservatory orders like the present one, the court is forbidden from making any definitive finding either of fact or law as that is the jurisdiction of the court that will ultimately hear the petition.
20. In Mombasa High Court Petition No 669 of 2009, Bishop Joseph Kimani & others v Attorney General & Others, Ibrahim, J (as he then was) pronounced himself as follows:

It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that "there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void." It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first."

21. Further, Majaja J in Susan Wambui Kaguru & ors v Attorney General & another [2012] eKLR expressed himself inter alia as follows:

I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."

22. The Petitioners have failed to demonstrate to this court that there are any cogent reasons to warrant the declarations sought at this interim stage. The orders sought are final in nature, and in the absence of the aforesaid, I am unable to intervene before hearing the Petition. In the foregoing, I equally dismiss the



application dated 21/11/2023. For clarity, the Orders granted on 30th April, 2024 are vacated. Costs shall abide the outcome of the Petition.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 15TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of: -

Mr Mureti for the Petitioner

Ms Tina for the 2nd Respondent

Mr Orina for the 1st and 3rd Respondents

Mention on 19th September, 2024.

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