



REPUBLIC OF KENYA



KENYA LAW
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**Oloo v County Government of Homa Bay & 2 others (Constitutional
Petition E003 of 2022) [2023] KEHC 610 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CONSTITUTIONAL PETITION E003 OF 2022**

KW KIARIE, J

FEBRUARY 9, 2023

BETWEEN

EVANS OTIENO OLOO PETITIONER

AND

THE COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT

THE HOMA BAY COUNTY SECRETARY 2ND RESPONDENT

SAFARICOM LIMITED 3RD RESPONDENT

RULING

1. The petitioner herein moved the court by way of Notice of Motion dated November 8, 2022 under Articles 2, 3, 10 22, 35, 47, 174, 196, 209 258 & 259 of the Constitution, sections 87, 91 & 104 of the County Government Act, sections 125(2) & 207 of the Public Finance Act. He is seeking the following orders:
 - a) That this matter be certified urgent and preservative order herein be granted *ex parte*. [spent]
 - b) That pending the hearing of this application the honorable court be pleased to grant an order of temporary injunction prohibiting and/or restraining orders against the respondents either by themselves, their agents, servants and/or employees, workers and/or any board from demanding any levies, tax, permits or any other monies in respect of business permits or revenue collection from any Homa Bay County traders and/or from victimizing any business persons from the respondents directive to pay revenue via 3rd respondent's pay bill No 684587/0434343 until this application is heard and concluded.
 - c) That pending the hearing and determination of the application the honorable court be pleased to grant an interim order of mandatory injunction directing the respondents either by themselves, agents, servants and/or employees workers, assigns from implementing the



Hon Nderitu's task force recommendations with a view to executing collecting revenues and demanding levies, tax, charges and/or business permits payments to be paid via the 3rd respondent's pay bill no 684587/0434343 by the residents to Homa Bay County particularly traders until this application is heard and concluded.

- d) That pending the hearing and determination of the instant application inter-partes the respondents be compelled by this honourable court within 14 days or as the court may direct produce, file and serve petitioner with the information on how they advertised the public participation and when it was done by which criteria used and the minutes thereof pertaining to the Hon. Nderitu's task force recommendations and subsequent implementation thereof to wit; the use of the 3rd respondent as the sole network service provider in payments of revenue and the total money budgeted for in facilitating the whole process and to audit and publicly declare all amounts illegally collected/received via 3rd respondent's pay bill No 684587/0434343 and for an immediate refund of the same to the people/vendors/traders of and within Homa Bay county who had made payments through the same system.
- e) That after hearing of this application, an order be issued staying the effect of the Notice by the respondent's either by themselves, agents, servants and/or employees workers, assigns from implementing, further implementing, administering, application and/or enforcement of the Hon Nderitu's task force recommendations with a view to executing, collecting revenues and demanding levies, tax, charges and/or business permits payments to be done via the 3rd respondent's Pay bill No 684587/0434343 by the residents of Homa Bay county particularly traders Until the substantive petition is heard and determined.

2. The application was premised on the following grounds:

- a) That the basis and rule of fundamental freedom has been threatened and/or violated and the public is likely to suffer irreparable loss if the illegality is not stopped and/or further reviewed.
- b) That whereas taxation by the National or county government is necessary for the life of a nation as it sustains the public welfare and public good. Nevertheless, the power to tax and/or raise revenue is a very delicate issue, vulnerable to abuse by those in authority; therefore the [*Constitution of Kenya, 2010*](#) imposes safeguards to protect against such abuse.
- c) That an illegal, unconstitutional, un-procedural introduction of mode of revenue collection has been effected by the respondents subject to a task force recommendations which came up with such recommendations to wit; payments of revenue via 3rd respondent's pay bill number.
- d) That the process of forming the task force which came up with recommendations on the ways of collecting revenues within the county of Homa Bay was not participatory and consultative as espoused under Articles 10 and 232 of the [*Constitution of Kenya, 2010*](#), the Homa Bay County Finance Act, 2010 and the [*Public Finance Management Act, 2012*](#) as herein below:
 - i. A 15 day tax holiday was given to the members of the County government of Homa Bay and a Task force formed to evaluate the challenges in revenue collection and why the county cannot meet its targets in revenue collection with a view to propose alternative approaches and/or ways that would increase the County's revenue targets.
 - ii. After the task force had completed their mandate as given a press was released by the 1st Respondent indicating that going forward the county of Homa Bay traders and/or the general public will be required to henceforth pay their revenues via the 3rd respondent's pay bill number 684587/0434343 provided by the county.



- iii. The said directive did not account for the poverty and literacy levels of all merchants as many of the traders do not own phones and/or cannot utilize them efficiently.
 - iv. The same was contrary to the *Public Finance Management Act, 2012* and the *Homa Bay County Finance Act 2020*.
 - v. The respondents assumed that all traders within the county of Homa Bay possess 3rd respondent's lines and should secure the same as a mandatory trading tool within the county.
 - vi. The respondents did not consider the violations the traders will go through in transferring the said revenues via the said 3rd respondent's line and pay bill number 684587/0434343.
- e) That the effect of implementing the task force recommendations in revenue collection threatens the petitioner and many other traders within the County of Homa Bay with real and imminent enforcement of what is unconstitutional, unlawful and devastating further expenses in paying revenue via the Pay bill No 684587/0434343 which if allowed to be imposed/implanted will without an iota of doubt lead to absolute annihilation of the petitioner's business along with a majority of small and medium businesses struggling to earn an income in the already abysmal economy.
 - f) That if the process and/or implementation of the task force recommendations are not stayed upon this matter being certified as urgent, the various recommendations by the Hon. Nderitu led task force are likely to be fully thus convoluting the proceedings with third party interest that may turn out expensive for the tax payers.
 - g) That public funds have been spent and are likely to be further spent in an illegal process that may lead to further petitions and waste of public resources.
 - h) That the respondents have embarked on implementing various recommendations by eh task force handpicked illegally contrary to the due process of the law.
 - i) That out of the purported reconditions, it is not clear whether special groups and persons with disability have been considered on the use of network service provider in regards to the collection of revenue and relevant laws and provisions of the constitution.
 - j) That the said directive to pay revenue via the 3rd respondent pay bill number 684587/0434343 is in betrayal of the principles of public participation which are important virtues envisaged under the constitution of Kenya.
 - k) That the purported appointments of the task force and implementations of the task force recommendations are both procedurally and substantively illegal as the same has been executed contrary to the *Constitution*, the *Homa Bay County Finance Act, 2020* and more strangely without a substantive existence of *Homa Bay County Finance Act, 2022*.
 - l) That in light of above, the applicant is apprehensive that if the conservatory orders sought herein are not granted as a matter of urgency, the petitioner and a majority of traders within Homa Bay County will fatally suffer from the imposition of illegal and unconstitutional tax payment mode. As a matter of fact, the petitioner and several other merchants have been forced to make revenue payments via the said Pay bill number contrary to the law.



3. The respondents filed response to the application. They contended that the application is an abuse of the court process.
4. Upon my perusal of the application and the supporting affidavit, I find that the petitioner's application and petition raise matters of public concern. I accordingly grant the orders sought in the application pending the hearing and determination of the petition. Costs will abide with the outcome of the petition.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF FEBRUARY, 2023

KIARIE WAWERU KIARIE

JUDGE.

