



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. E001 OF 2021

MWANIKI GACHUBA.....1ST PETITIONER/APPLICANT

GEOFFREY KARIUKI KIRINGA RUKU.....2ND PETITIONER/APPLICANT

JOAB NJERU NGAI.....3RD PETITIONER/APPLICANT

PATRICK NGARI NJERU.....4TH PETITIONER/APPLICANT

NICHOLAS NJAGI NJERU.....5TH PETITIONER/APPLICANT

JOSEPH MWANIKI NYAGA.....6TH PETITIONER/APPLICANT

ELIAS NJERU KATHIGA.....7TH PETITIONER/APPLICANT

NICHOLAS N. IRERI WAKENDA.....8TH PETITIONER/APPLICANT

LINET MURUGI MWANGANGI.....9TH PETITIONER/APPLICANT

SILAS PETER MUCHIRI MUNYI.....10TH PETITIONER/APPLICANT

KEVIN MWENDA WILLIAM.....11TH PETITIONER/APPLICANT

VERSUS

COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY OF EMBU.....2ND RESPONDENT

PUBLIC PROCUREMENT REGULATORY AUTHORITY.....3RD RESPONDENT

RULING

1. The petitioners/applicants herein filed a petition dated 6.01.2021 contemporaneously with a notice of motion and which notice of motion is seeking interim orders and substantially an order of stay of implementation of item Nos. 260500 and 3110400 of the Budget Estimates for the Revenue and Expenditure of Embu County Government for the year 2020/ 2021 dated 22nd July, 2020 and the Tender Notice dated 23rd December 2020 pending the hearing and determination of the petition. The petitioners/ applicants further prayed for the costs of the application.

2. The application is premised on the grounds on the face of it and further on the affidavit sworn by the petitioners/ applicants but in a nutshell, it is their case that the 1st and 2nd respondents herein appropriated funds (Kshs. 1,137,320,879) and out of which the Governor's home sub-county took the lion's share. That under item number 3110400 of the budget estimates, the 1st and 2nd respondents appropriated Kshs. 240,000,000.00 for tarmacking of County roads and on 23.12.2020, the 1st respondent advertised a Tender Notice for the procurement of road works wherein all the roads earmarked for upgrading to bitumen standards are in Runyenjes sub-county and identification of which roads was not subjected to public participation and thus the Mbeere community and the residents of Mbeere did not approve the same. Further that the 1st and 2nd respondents also refused to reserve a minimum twenty per cent (20%) of the budgetary allocation for resident tenderers of Embu County and did not act in the best interests of Mbeere community and the residents of Mbeere. They deposed further that

the 3rd respondent refused to monitor, assess and review the subject procurement to ensure that the respondents had complied with the procurement law and procedures and hence the need for court's intervention to protect the needs of the marginalized Mbeere community and areas. They averred that the entire process was self-serving, personal aggrandisement, discriminatory, unfair, unequitable, opaque and malicious.

3. The 1st respondent upon being served with the ex-parte orders pursuant to the application herein, filed an application dated 19.01.2021 under certificate of urgency wherein it seeks that the said interim orders be discharged, set aside and/or vacated and the petition and the notice of motion be struck out with costs. The grounds in support of the said application are dated 6/01/2021 that; the said orders were obtained on the basis of false depositions and material misrepresentation to the court as to the nature of the projects to be undertaken, source of funding and the budget approval in relation to the same; that the petition is premature and an abuse of the court process as the petitioners did not petition the County Assembly to raise the issues raised in their petition as required by Sections 15 and 88 of the County Government Act; that there was public participation in all the sub-counties in respect of the projects subject of the petition, in compliance with the provisions of Section 10(1) of the Public Finance Management Act of 2012 and the budget processes for the funding of the said projects was approved after the said public participation; and that the applicants failed to disclose to the court that most of the said projects have been ongoing for more than two years and there had been no objections to the said projects in the said financial years. It was deposed further that the procurement proceedings for the said projects had been terminated and thus the substratum of the petition has been overtaken by events. The said grounds were reiterated in the affidavit in support of the application which was sworn by Johnson Nyaga- the County Secretary for the 1st respondent.

4. Directions were given that the two applications be heard together.

5. The 1st respondent in opposition of the petitioners application relied on the replying affidavit sworn by Johnson N. Nyaga, the first respondent's Secretary in which he reiterated the depositions in the affidavit in support of the 1st respondent's application dated 19.01.2021.

6. The 2nd respondent (Josiah Muriithi Thiriku) in opposition to the said application deposed that the issues raised in the application arise out of a constitutional and legal duty carried out by the 1st respondent as mandated under the County Government Act and the Constitution and in execution of which mandate the County Assembly of Embu received budget estimates for revenue and expenditure for the year 2020/2021 and after due process and subjecting the proposed budget to public participation, the assembly duly approved the same and which approval process is not being challenged/ questioned by the applicants. Further that the said approval was carried out by the entire assembly and not the 2nd respondent and neither is the 2nd respondent or the county assembly involved in the advertisement of tenders. That the county assembly became *fuctus officio* after approving the budget estimates and has no legal mandate on the implementation of the approved budget or any stake in the priorities, and considerations that the County government makes before, during or after implementation and as such, it is mischievous and uncalled for on the part of the applicants to sue the 2nd respondent or to enjoin him.

7. The 3rd respondent on its part opposed the petitioners' application vide a replying affidavit sworn by Pauline Opiyo, its acting Director General in which she deposed that the 3rd respondent has never received any request to monitor, assess and/ or review the procurement, the subject of the application either from the applicants or any other person despite its statutory mandate being that of undertaking investigations into the procurement or disposal proceedings or contracts with respect to a procurement or disposal in state organs or public entities for the purposes of determining whether there has been breach of the Act or regulations. That it has never received any complaint from the applicants or any other person with reference to the subject procurement, for investigation or any irregularities pertaining to the said procurement and if any complaint had been raised, it would have been addressed appropriately and as such it is wrong to mislead this court that the 3rd respondent refused to monitor, assess and review the subject procurement. That as such, it is eminent that the applicants do not have any case against the 3rd respondents and the 3rd respondent's presence in the matter herein is not necessary for the court to adjudicate the constitutional claim between the applicants and the 1st and 2nd respondents herein.

8. The petitioners/applicants opposed the 1st respondent's application dated 19.01.2021 vide the replying affidavit sworn by themselves and wherein they basically denied the depositions and averments in the said application.

9. The applications were canvassed by way of written submissions which the parties highlighted in court.

Issues for determination

10. I have considered the two applications, the replies to each of them and both the oral and written submissions made by the parties. The petitioners' application sought for orders of stay of implementation of item Nos. 260500 and 3110400 of the Budget Estimates for the Revenue and Expenditure of Embu County Government for the year 2020/ 2021 dated 22nd July, 2020 and the Tender Notice dated 23rd December 2020 pending the hearing and determination of the petition. On the other hand, the 1st respondent's applications seek to have the interim orders issued in favour of the petitioners discharged, set aside and/or vacated and the petition and the notice of motion struck out with costs. As I have already noted, the two applications were heard together. It is my considered view that the issue which this court is invited to determine is whether this court ought to issue the orders of stay and in alternative whether the interim orders earlier issued ought to be varied and/or set aside.

11. At the preliminary, I note that the 1st respondent's application dated 12.01.2021 seeks for orders that the petitioner' application be struck out with costs. The grounds are that the same is an abuse of the court process and has been brought without recourse to the provisions of the law in that Sections 15 and 88 of the County Government Act provides for petitioning by a member of public to the County Assemblies regarding the projects being undertaken by the 1st respondent. As such, it was submitted, the two sections oust the jurisdiction of this court. The said issue was raised by the 1st respondent in its replying affidavit to the application dated 6.01.2021 and also in its submissions. What is clear is that the 1st respondent challenges the jurisdiction of this court to determine the petition and/ or the application herein and which issue ought to be determined *in limine* as it is trite law that jurisdiction is everything and without it a court of law acts in vain. {See **Kakuta**

Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR and **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** }

12. It is now settled that where a legislation provides for dispute resolution mechanism, a party must exhaust all those available dispute resolution mechanisms provided by the law before filing a dispute in court. (See **Secretary, County Public Service Board & another –v- Hulbhai Gedi Abdille [2017] eKLR, Kenya Revenue Authority & 2 others –vs- Darasa Investments Ltd [2018] eKLR**). This is called the doctrine of exhaustion.

13. Section 15 of the County Government Act No.17 of 2012 provides that a person has a right to petition a county assembly to consider **any matter within its authority, including enacting, amending or repealing any of its legislation**. The said section clothes each county assembly with the powers to prescribe a procedure for exercising the right under sub-section 1 of the said section. Section 88 on the other hand bestows on the citizens a right to petition the county government on any matter under the responsibility of the county government and such petitions shall be made in writing to the county government.

14. But in my considered view, Sections 15 and 88 of the County Government Act do not create a dispute resolution method or mechanism which can be said to be the first port of call for any litigant who would wish to challenge acts and/or omissions on the part of a county government in regards to its duties under the law. The duty of the county assembly to debate an issue presented before it as a petition by a member of the public, in my view, does not amount to the same performing judicial function akin to that of a court, tribunal or a judicial body. At the end of the debate, the assembly does not issue orders which are capable of being enforced in the same way the court does.

15. The County Government Act does not create a dispute resolution avenue or forum which can be said to have the effect of ousting the jurisdiction of this court. There is nowhere in the Act where it provides the remedies which the County Assembly can grant for instance upon handling the petition once it's brought before it. This is different from other Acts of parliament which clearly provides for the procedure of resolving a dispute and the remedies which are available. The Act does not contain sufficient and adequate avenue or forum within the meaning contemplated by the Learned Judges in **Secretary, County Public Service Board & another –v- Hulbhai Gedi Abdille (supra)**. It is my view therefore, that this court has jurisdiction to entertain the instant petition and the application.

16. Further, Section 15(2) requires that each county assembly prescribes a procedure for exercising the right under subsection (1). The court was not told whether the 1st respondent has prescribed the procedure as required under that sub-section.

17. I now proceed to consider the substantive issues herein.

(i) Whether this court ought to issue the orders of stay and in alternative whether the interim orders earlier issued ought to be varied and/ or set aside.

18. From the face of the petitioners' application, is clear that the same is brought under article 23(3) and 165(6) and (7) of the Constitution. Article 23(3) provides for reliefs which this court can grant in a matter brought under article 22 (seeking redress for denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights). The reliefs include a declaration of rights, injunctions and conservatory orders amongst other reliefs. The orders of stay sought herein are conservatory orders as contemplated under article 23 of the constitution.

19. **Conservatory orders bear a more decided public law connotation: for these are orders to facilitate orders functioning within public agencies, as well as to uphold 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 granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes. (See Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR).**

20. The applicable principles for the grant of a conservatory order were detailed by Onguto J. in **Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 Others [2015] eKLR**. In summary, the principles are that the applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order. (See also **Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR**).

21. The question therefore is whether the petitioners have satisfied the above conditions.

22. As to whether the petitioners have demonstrated an arguable *prima facie* case with a likelihood of success and the prejudice they are likely to suffer in the absence of the conservatory orders, it is trite that a *prima facie* case is not a case which must succeed at the hearing of the main case but nonetheless, it is not a case which is frivolous but should be one that discloses arguable issues (in this case arguable constitutional issues). Further, *in an application for a conservatory order, this Court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order and whether all the conditions for grant of conservatory orders have been satisfied. (See Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 others [2020] eKLR).* Nonetheless, the petitioners have a duty to demonstrate how their rights and those of the residents of Mbeere region have been impeded or put at risk.

23. I have perused the materials before me and all the annexures and it is clear that the dispute herein relates to budgetary allocation for the financial year 2020/2021 and wherein the petitioners aver that there was no public participation, that the residents of Mbeere Sub-county were discriminated and that the same were in favour of Runyenjes sub-county (the home area of the Governor), that the 1st and 2nd respondents did not reserve a minimum twenty percent (20%) of budgetary allocation for resident tenderers of Embu County. The petitioners made reference to various articles of the constitution and sections of the law which were apparently violated. Though there is no response to the petition as yet, from the replying affidavits filed herein and the oral submissions made on the day of hearing of the application, it is clear that the petition will finally culminate into issues revolving around lack of public participation and discrimination which are weighty and arguable constitutional issues which needs adjudication and scrutiny through the eyes of constitutional provisions. Without saying more, it is clear that this petition discloses *prima facie* arguable issues for trial. In other words, it cannot be said that the petition is frivolous or unarguable. There are real questions which need further interrogation. As such, it is my view that the applicants have satisfied the 1st limb of the 1st condition.

24. However, as I have noted, the petitioners did not only have a duty to prove that they have a *prima facie* case but also that they stand to suffer prejudice if the orders are not granted. The court in **Centre for Rights Education and Awareness (CREAW) & another –vs- Speaker of the National Assembly & 2 others (2017) eKLR** emphasized on the duty of a party who moves the court seeking conservatory orders to show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted since the purpose of granting a conservatory order 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. Such a party has a duty to demonstrate that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. (**Centre for Rights Education and Awareness (CREAW) & 7 others –vs- Attorney General, Nairobi High Court Petition No. 16 of 2011; {2011} eKLR**). What amounts to real danger was dealt with by **Mwongo J in Martin Nyaga Wambora –vs- Speaker of The County Assembly of Embu & 3 others {2014} eKLR**, where the Learned Judge held that *the danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. An allegedly threatened violation that is remote and unlikely will not attract the court’s attention.*

25. However, I have perused through the pleadings herein and the submissions made before this court and it is clear that the petitioners despite making lengthy submissions only concentrated on the issues touching on the merits of the petition. From both oral and written submissions, the Counsel did not lead this court as to the issue on the prejudice to be suffered if the orders are not made. Neither are there any depositions in the supporting affidavit alluding or indicative of the prejudice which the applicants would suffer if the orders are not granted. The counsel ought to have addressed himself as to the conditions for grant of conservatory orders but he proceeded to argue the merits of the petition and which was premature. In my view, this court cannot be left to fill in the gaps left by the counsel in prosecuting his or her matter otherwise the court would be venturing into the arena of litigation and which is not its role. This court only works with evidence and submissions tendered before it and does not work on assumptions.

26. It is my view that the general public interest consideration favours the denial of the orders sought by the applicants. It is deposed by the respondents that the projects in question were commenced approximately two years ago and which depositions were never controverted by way of a further affidavit. The question which comes to my mind is; what will be the effect of staying the implementation of the items impugned in the budget on the general public in the areas where they are to be implemented? It is my view that it will not be for the general good and in the interest of the residents of the County to have the projects stall. In fact, it will lead to wastage of public resources. It is my view therefore that, the public interests of the residents of the whole county indeed frown against the issuance of the orders sought herein. Budgetary allocation is an annual event and the allocations are made based on the needs of the areas and considering a number of factors. Staying the implementation of the budget items impugned herein is not a guarantee that the monies allocated to such projects will be diverted to the projects in the areas where the applicants deposed to have been discriminated.

27. The applicants having failed to demonstrate that they are likely to be prejudiced if the orders are not granted, have therefore also failed to satisfy the condition for the grant of conservatory orders as set in **Board of Management of Uhuru Secondary School –vs- City County Director of Education (supra)**, their application dated 6.01.2021 fails.

28. This therefore means that the interim orders made on the 21st January, 2021 are hereby vacated.

29. Considering that this is a public interest case, each party shall bear its own costs of the application.

Delivered, dated and signed at Embu this 3rd day of March, 2021.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondents