



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CONSTITUTIONAL PETITION NO. 13 OF 2020

ABDULLAHI ABDIKADIR SHURIYE.....1ST PETITIONER/APPLICANT

HUSSEIN MOHAMED YARROW.....2ND PETITIONER/APPLICANT

ISSA YUSSUF MOHAMED.....3RD PETITIONER/APPLICANT

VERSUS

THE CABINET SECRETARY,

NATIONAL TREASURY AND PLANNING.....1ST RESPONDENT

CONTROLLER OF BUDGET.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF MANDERA.....3RD RESPONDENT

H.E. GOVERNOR ALI ROBA.....4TH RESPONDENT

COUNTY ASSEMBLY OF MANDERA.....5TH RESPONDENT

THE SENATOR MANDERA.....6TH RESPONDENT

ATTORNEY GENERAL.....7TH RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

RULING

1. By a petition dated 18th September 2020, the petitioners Abdullahi Abdikadir Shuriye, Hussein Mohamed Yarrow and Issa Yussuf Mohamed petitioned the court alleging contravention of rights and freedoms under the Constitution, violation of the County Government Act and the Public Finance Management Act.

2. The petition was predicated on two main grounds, skewed and discriminatory distribution of county resources which marginalized three Sub-Counties of Mandera County; Lafey, Mandera North and Banisa. Secondly funding of National projects by the County Government to the detriment of the three counties.

3. The Petitioners sought in the petition for various declarations and orders. Pending hearing and determination of the Petition, a notice of motion of even date was filed seeking for orders as follows:

a) Spent

b) Spent

c) That pending hearing and determination of the application, this honourable court be and is hereby pleased to issue a conservatory order against the 5th Respondent from passing the proposed budget and budgetary estimates thereof for the financial year 2020-2021.

d) That pending hearing and determination of the petition this honourable court be and is hereby pleased to issue a conservatory order against the 5th Respondent from passing the proposed budget and budgetary estimates thereof for the financial year 2020-2021.

e) That pending hearing and determination of the application court be and is hereby pleased to issue conservatory orders freezing the expenditure of development funds, utilization; drawing or dealing with the development budget of Mandera County in any way.

f) That pending hearing and determination of the petition this honourable court be and is hereby pleased to issue a conservatory order freezing expenditure of development funds, utilization, drawing or dealing with the development budget of Mandera County in any way.

4. The application is based on grounds that the proposed budget marginalized three sub-counties and further there is allocation of funds towards National projects that ought to be financed by the National Government which will be detrimental to the Mandera County

5. The 1st to the 5th Respondents all objected variously to the application on grounds of misinformation on the part of the Applicants; that some of the prayers have been taken over by events; failure of the Applicants in participating in the long and rigorous budget making process and raising concerns therein; the Applicants have not met the necessary threshold to be granted a conservatory order; such an order would go against the grain of public interest and failure by the Applicants to demonstrate the prejudice likely to be suffered should the court decline the prayer sought.

6. There is consensus that prayer c and d have been taken over by events and the only issue for determination is whether or not to grant a conservatory order freezing the expenditure, utilization, drawings and dealing with the development funds for Mandera County pending hearing and determination of the Petition.

7. Rival parties have cited several authorities in canvassing their petitions. Cases cited include **Centre for Rights Education and Awareness (Creaw) & 7 Others vs A.G [2011] eKLR**, **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, **Anarita Karimi v Republic [1979] KLR**, **Mumo Matemo & Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, **Platinum Distillers Limited vs Kenya Revenue Authority [2019] eKLR**, **Kenya Small Scale Farmers Forum vs Cabinet Secretary, Ministry of Education, Science & Technology & 5 Others (2015)eKLR**.

8. The Late **Onguto J** in the case of **Kenya Small Scale Farmers Forum vs Cabinet Secretary Ministry of Education Science & Technology & 5 Others (supra)** summarized with precision the principles to be applied when faced with an application for conservatory orders as follows:

“For the grant of conservatory orders under Article 23(3) of the Constitution as read together with Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 the court ought to consider certain pertinent factors. A series of cases may be stated to have laid down the proper guidelines applicable. I would state the principles which govern a court considering an application for interim or conservatory relief to be the following:

The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.

The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.

If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.

Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.

The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.”

9. The court agrees with the Respondents that prima facie the Applicants have failed to demonstrate how their constitutional right have been violated to warrant the freezing of the County of Mandera development funds.

10. Secondly the Petitioners failed to demonstrate the prejudice they are likely to suffer should the orders not be granted. To the contrary freezing the utilization of the development funds at the tail end of the financial year will mean that county financed projects will be affected, third parties not involved in this feud will be affected as well due to none payment, the public and residence of Mandera County will equally

be denied enjoyment the facilities under consideration and these considerations militates against granting of such an order in the public interest.

11. Lastly from the pleadings the court is of the view that the substram of the petition will not be rendered nugatory as such, in the absence of such an order.

12. Consequently, the prayer for conservatory orders pending hearing and determination of the petition is hereby declined.

13. Costs will abide the outcome of the main petition.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 10TH DAY OF JUNE, 2021.

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ALI-ARONI

JUDGE