



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VIHIGA**

**CONSTITUTIONAL PETITION NO. E0008 OF 2021**

**FRANCIS ANGUEYAH OMINDE.....1<sup>ST</sup> PETITIONER**

**JOSEPH MUKUNA SIMEKHA.....2<sup>ND</sup> PETITIONER**

**AND**

**VIHIGA COUNTY EXECUTIVE COMMITTEE MEMBERS FINANCE**

**AND ECONOMIC PLANNING AND 3 OTHERS.....RESPONDENTS**

**THE CONTROLLER OF BUDGET**

**AND 10 OTHERS.....INTERESTED PARTIES**

**RULING**

1. The petition, dated 28<sup>th</sup> June 2021, was brought at the instance of Francis Angueyah Ominde and Joseph Mukuna Simekha, to be known hereafter as the petitioners, citing several violations of the Constitution, with respect to the approval of budget estimates for the Vihiga County Government for the financial year 2021/2022.

2. The factual background to the matter, as set out in the petition, and the affidavit sworn in support, is that the 1<sup>st</sup> respondent submitted, on 30<sup>th</sup> April 2021, to the County Assembly of Vihiga, the Vihiga County Annual Budget Estimates, in accordance with section 129(2) of the Public Finance Management Act, No. of 18 of 2012. On 3<sup>rd</sup> May 2021, the 2<sup>nd</sup> interested party, the Deputy Governor of Vihiga County, wrote to the 2<sup>nd</sup> respondent, the Governor of Vihiga County, raising concern that the Annual Budget Estimates had not been submitted to the County Executive Committee for approval in accordance with section 129(1) of the Public Finance Management Act, and a draft of the enabling legislation for the County Budget had also not been discussed or approved by the County Executive Committee. He stated that the Budget Estimates and Appropriation Bill presented to the County Assembly had, therefore, been improperly placed before the County Assembly for approval. On 21<sup>st</sup> June 2021, the County Secretary, on prompting from the 4<sup>th</sup> respondent, wrote to the 2<sup>nd</sup> interested party saying that the 1<sup>st</sup> respondent bore the responsibility of ensuring compliance with the Public Finance Management Act. The County Assembly was said to be processing the Annual Budget Estimates without full compliance with the law, and that the Annual Budget Estimates were before the County Assembly before they were discussed and approved by the Vihiga County Executive.

3. It is submitted that the 1<sup>st</sup> respondent had violated Article 179 of the Constitution, which proves that the executive authority of the County Government vested in and was exercised through the County Executive Committee. He is also said to have violated section 129(1) of the Public Finance Management Act, by failing to submit the estimates to the County Executive Committee for approval before submission to the County Assembly. It is submitted that the 2<sup>nd</sup> respondent had failed in leadership by failing to cause the County Executive Committee to discuss and approve the Annual Budget Estimates before their submission to the County Assembly, and had acted contrary to Article 179 of the Constitution and section 30(3) of the County Governments Act, No. 17 of 2012. The 3<sup>rd</sup> and 4<sup>th</sup> respondents are blamed for failing to take remedial action, in the face of the violations, and had, therefore, failed to exercise oversight and violated Article 185(3) of the Constitution, and their conduct was repugnant to Article 73 of the Constitution.

4. The petitioners cite section 38(1) of the Public Finance Management (County Governments) Regulations, 2015, which allows the 1<sup>st</sup> interested party, where the budget estimates submitted to the County Assembly have not been approved or are unlikely to be approved by the County Assembly, to authorise withdrawals of up to 50% from the County Revenue Fund, based on the last approved budget by the County Assembly, for the purpose of meeting expenditure of the County Government for the financial year. They submit that that provision ought to apply to the Vihiga County. They seek declarations that the budget making process is unlawful and unconstitutional; the bill for 2021 is unconstitutional, unprocedural, null and void; the respondents have violated the Constitution; 2<sup>nd</sup> respondent has failed in leadership and is unfit to hold office; and that the expenditure for Vihiga County for the financial year 2021-2022 be as per section 38(1) of the Public Finance Management (County Governments) Regulations, among others.

5. The petition and Motion, dated 28<sup>th</sup> June 2021, were placed before the court, on 29<sup>th</sup> June 2021, under certificate of urgency. Directions were given, for service and *inter partes* hearing. Conservatory orders were also given, in terms of prayer 2 of the Motion, to last till the date of the *inter partes* hearing. The effect of the interim order was that it stayed or suspended the execution or implementation of the Vihiga County Annual Budget for the financial year 2021-2022. When the matter came up for *inter partes* hearing, on 6<sup>th</sup> July 2021, the court extended the interim orders to the next session, on 15<sup>th</sup> July 2021, when the matter was due for mention to confirm filing of submissions with respect to a preliminary objection.

6. The application that I am determining by way of this ruling, was made orally by Mr. Musiega for the 3<sup>rd</sup> and 4<sup>th</sup> respondents. He stated that the 1<sup>st</sup> interested party had declined to allow the County Government withdraw monies to pay salaries for the County Executive and the County Assembly, which had affected some 2000 employees of the County Government. It was argued that under Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which are also referred to as Mutunga Rules, the court had power to vacate or vary conservatory orders where it was established to be necessary in law. He submitted that the conservatory orders had been made *ex parte*, and the respondents had not been accorded an opportunity to be heard. It was submitted that Regulation 38 of the Public Finance Management (County Governments) Regulations, 2015, allowed the 1<sup>st</sup> interested party to release up to 50% of the amounts required to finance its expenditures on the basis of the budget for the previous year. He submitted that the conservatory order was putting the County Government through challenges, and its operations were likely to come to a halt. He asked that the 1<sup>st</sup> interested party be given leave to approve release of up to 50% of the budget.

7. The oral application was opposed by Mr. Sore, for the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> petitioner and Mr. Malenya, for the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 12<sup>th</sup> interested parties. They submitted that the *ex parte* orders made on 29<sup>th</sup> June 2021 were confirmed on 6<sup>th</sup> July 2021 after the court had heard representations from both sides, and, therefore, the orders were no longer *ex parte*, and since the orders had become *inter partes*, they submitted, the 3<sup>rd</sup> and 4<sup>th</sup> respondents required to have filed a formal application. It was submitted that the matter had come up for mention, on 15<sup>th</sup> July 2021, and not for hearing, and in any event, the 1<sup>st</sup> interested party ought to have been given an opportunity to respond to the application. It was said that salaries had already been paid based on the previous budget, and that salaries for some of the workers represented in the suit had not been factored in the Annual Budget Estimates.

8. In response, Mr Musiega submitted that the application was well within the law, and requiring the filing of a formal application was likely to delay the matter further. He further argued that the issue of salaries, being not factored, was a matter of evidence, and added that in budgets salary payments was a blanket provision. He stated that the budget in question had been approved, and that the court, on 6<sup>th</sup> July 2021, only gave directions on the preliminary objection, and did not deal with substantive matters.

9. Let me start by considering the matter as to whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents ought to have filed a formal application. The making of conservatory or interim orders is provided for under 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and, under Rule 24(2) of the same Rules, the application for such orders may be made orally, and reduced into writing by the court. Under Rule 25, there is power and discretion on the part of the court to discharge, vary or set aside such orders, either on its own motion or on an application by a party dissatisfied with the order. It follows that if the conservatory orders can be made on the basis of an oral application, they can equally be varied or discharged or set aside on the similar basis, by way of an oral application. Furthermore, the court may similarly discharge, vary or set aside the conservatory orders on its own motion, meaning without a formal application, leave alone one made orally.

10. The issues in the oral application raised go to the core of the matter. The entire case is founded on the claim that the budget estimates were not handled properly by the County Executive Committee prior to their placement before the County Assembly. The budget is at the core of the matter, and the ideal situation ought to be that any party wishing to obtain orders that would require the expenditure of funds the subject of that budget should file a formal application, where all the parties interested would then have opportunity to be heard. The funds, the subject of these proceedings, are meant for the people of the County of Vihiga. There are critical functions that cannot run without funding, and the withholding of the funds will cripple them. It is for such reasons that the law, through regulation 38(1) of Public Finance Management (County Governments) Regulations, allows for release of some of the funds, pending resolution of whatever outstanding issues. In certain circumstances, dependent on the exigencies of the moment, there may be room for the court to make orders based on an oral application, so long as the same is well grounded in law. In the circumstances, I am of the persuasion that the court can quite properly entertain an oral application, where the law is quite clear on the subject of the application. In this case, the law does allow the 1<sup>st</sup> interested party to approve release of funds where the budget is not approved or is unlikely to be approved. Release of such funds would not, in any event, prejudice the petitioners, for it is something that they have expressly pleaded in their petition, at paragraphs 40, 61 and 66.

11. The court, in *Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & 5 others* [2016] eKLR (Odunga J), said that conservatory orders bear a public connotation, to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in public interest. Public interest is paramount in cases of this nature. There is need to balance the same, to ensure that public entities function effectively, even as the litigation rages, so that at the end of it no one suffers, on account of any conservatory orders made for preservation of the subject-matter. It would not be in public interest to allow the operations of the County Government to grind to a halt during the pendency of these proceedings. Public interest would allow tinkering with any subsisting conservatory orders, to the extent of permitting limited access, as may be allowed by the law, to facilitate continued functioning of the County Government, during the pendency of this matter. See *County Government of Machakos vs. Governor, Machakos County & 4 others* [2018] eKLR (Nyamweya J).

12. There were arguments about salaries of certain categories of County Government workers not being factored in the budget, and suggesting that allowing a partial withdrawal could prejudice their case. That is could be a formidable argument. The withdrawal could prejudice certain categories of workers if their needs are not catered for in the Annual Budget Estimates. But then again the withdrawal sought is partial, meant to address only the most pressing needs, as the rest of the issues are thrashed out in the pending litigation. There was the issue of the 1<sup>st</sup> interested party being given a chance to respond to the motion on withdrawal of budget funds. I note that the core of the fight is between agencies and players within Vihiga County, the 1<sup>st</sup> interested party is roped in merely because she controls the funds. She has no interest beyond that. The 1<sup>st</sup> interested party is a neutral, nominal party. After all, once the court grants leave to the 1<sup>st</sup> interested party

to allow withdrawal of the funds, it would be left at the discretion of the 1<sup>st</sup> interested party to determine how much is to be withdrawn, and under what circumstances. I do not believe that affording the 1<sup>st</sup> interested party a chance to respond, to issue raised by Mr. Musiega, would assist one way or the other.

13. On the matter of the conservatory order being either *ex parte* or *inter partes*, it should be clear that the order was made *ex parte* initially, and was confirmed when the matter came up for *inter partes* hearing. It is true that the court was, on 15<sup>th</sup> July 2021, not hearing arguments on the substantive matter, but gave directions as part of case management of the business before the court. However, the matter was up for *inter partes* hearing on that day, the parties did address the court, at length, on the matters in controversy, before the decision to confirm the orders was made. The confirmation of the orders had the effect of reducing the same to *inter partes* orders. No application, whether oral or in writing, was made, in that session, for review or variation or setting aside of the orders. That of itself, however, should not tie the hands of the court, so as to restrain it from exercising discretion, to allow the 1<sup>st</sup> interested party to act under regulation 38(1) of Public Finance Management (County Governments) Regulations, to meet the wider interests of justice.

14. Another issue came up after the session of 15<sup>th</sup> July 2021. An application, dated 15<sup>th</sup> July 2021, was filed, on 16<sup>th</sup> July 2021, which seeks orders with respect to the involvement of Mr. Musiega in the matter. The applicant, in that application, the 3<sup>rd</sup> interested party herein, seeks that the ruling to be delivered, on the oral application made by Mr. Musiega, be arrested, or that the court considers the application, dated 15<sup>th</sup> July 2021, in this ruling, together with the oral application. It also seeks that all the pleadings filed by Mr. Musiega be expunged from the record. Mr. Malenya, the advocate who signed the certificate of urgency, to support that application, was in court on 6<sup>th</sup> July 2021, and did not raise the issue then. I note that that was not the first time that Mr. Musiega was appearing in the matter. I shall not venture to address the issues raised in the application, dated 15<sup>th</sup> July 2021, in this ruling, for they ought to have been raised when Mr. Malenya got his chance to respond to Mr Musiega's oral application. Whether the pleadings Mr Musiega has filed herein, for the parties that he represents, ought to be expunged from the record, should be argued *inter partes*, after the application, dated 15<sup>th</sup> July 2021, has been duly served on all affected by it, and directions given on its disposal. I reiterate rules 23, 24 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, with respect to oral applications on conservatory orders, and the power of the court to discharge, vary or set aside such orders on its own motion.

15. In the end, in the wider interests of justice, to avoid hardship being suffered, by total lack of funding, due to the conservatory order, I do hereby allow the oral application by Mr. Musiega, to the limited extent of permitting the 1<sup>st</sup> interested party to approve release of up to 30% of the budget for the year 2020/2021, to cater for the immediate needs of the County Government, pending further orders and directions of the court. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21<sup>st</sup> DAY OF July, .2021**

**W MUSYOKA**

**JUDGE**