



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CONSTITUTIONAL PETITION NO.8 OF 2018

IN THE MATTER OF: ARTICLES 22(1) & (2) (C), 50 (1), AND 258 (1) & (2) (C) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ALLEGED THREAT TO OR CONTRAVENTION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1 (1), 2(1), (2) & (3), 3(1), 10(2), 73, 75, 232 (1) (A), (B), (C), (D), (E), (F) & 2 (A), (B), 249 AND 259 (1) & (3) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: ALLEGED THREAT TO OR VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 35 & 47 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF SECTIONS 2, 3, 4 & 5 OF FAIR ADMINISTRATIVE ACTION ACT 2015 AND SECTIONS 3, 4, 7, 8, 9, 10, 11, 12, 13, 16, 32 AND 52 (1) OF THE LEADERSHIP AND INTEGRITY ACT 2012

IN THE MATTER OF: THE ALLEGED MISAPPROPRIATION OF PUBLIC FUNDS, INCOMPETENCE AND OUTRIGHT CORRUPTION BY VARIOUS CHIEF OFFICERS IN THE COUNTY GOVERNMENT OF HOMA BAY

IN THE MATTER OF: RIGHT OF ACCESS TO INFORMATION HELD BY PUBLIC OFFICERS

BETWEEN

EVANCE OTIENO OLOO.....1ST PETITIONER

WYCLIFFE ODHIAMBO OKEYO.....2ND PETITIONER

VERSUS

CEC MEMBER FINANCE ECONOMIC

PLANNING HOMA BAY.....1ST RESPONDENT

CHIEF OFFICER ECONOMIC,

PLANNING & FINANCE.....2ND RESPONDENT

THE CONTROLLER OF BUDGET

LIAISON OFFICE.....3RD RESPONDENT

THE COUNTY CLERK

ASSEMBLY OF HOMA BAY.....4TH RESPONDENT

THE OFFICE OF THE GOVERNOR

HOMA BAY COUNTY.....5TH RESPONDENT

CHIEF OFFICER TRANSPORT AND

PUBLIC WORKS HOMA BAY.....6TH RESPONDENT

CHIEF OFFICER YOUTHS,

SPORTS TOURISM HOMA BAY.....7TH RESPONDENT

CHIEF OFFICER AGRICULTURE

AND FOOD SECURITY.....8TH RESPONDENT

CHIEF OFFICER LIVESTOCK

AND FISHERIES HOMA BAY.....9TH RESPONDENT

CHIEF OFFICER WATER

AND ENVIRONMENT HOMA BAY.....10TH RESPONDENT

CHIEF OFFICER ENERGY &

MINING HOMA BAY COUNTY.....11TH RESPONDENT

CHIEF OFFICER LAND &

HOUSING HOMA BAY COUNTY.....12TH RESPONDENT

CHIEF OFFICER EDUCATION &

ICT HOMA BAY COUNTY.....13TH RESPONDENT

CHIEF OFFICER TRADE & INDUSTRIALIZATION

HOMA BAY COUNTY.....14TH RESPONDENT

CHIEF OFFICER HEALTH SERVICES

HOMA BAY COUNTY.....15TH RESPONDENT

CEO/SECRETARY PUBLIC SERVICE

BOARD HOMA BAY COUNTY.....16TH RESPONDENT

RULING

[1] This is a petition by **EVANCE OTIENO OLOO** and **WYCLIFFE ODHIAMBO OKEYO**, in their capacity as members of a group known as “**Interface Community Help Desk C.B.O** based in Homa Bay. It was filed in court on 8th October 2018 seeking declaratory orders against the sixteen (16) respondents and in particular that the respondents be declared unfit to hold any public office by their failure to utilize public finances in accordance with the law and by failing to provide the petitioners with information required for purposes of protecting their rights.

[2] In brief, the facts giving rise to the petition are that on the 17th July 2018, the National Treasury and Planning published a public statement on various status of payments made cumulatively and per person to the County Governments. As part of the public, the applicants/petitioners took it upon themselves to venture into a fact finding mission. This they did, by allegedly writing to the various departments in the County of Homa Bay requesting information on the departments’ expenditure for the financial year 2017/2018 and on how the controller of budget accepted the funding for the County Government of Homa Bay by providing the details submitted by the County Treasury, dates when the payments were made and the copied detail that was forwarded by the County Treasury for approval. However, on receipt of the petitioners’ requests, the respondents as chief officers of the County Government of Homa Bay failed to promptly respond even though during the 2017/2018 financial year the County Government received Kshs.6, 987, 739,413/= from the National Treasury from the equitable share of revenue based on **Article 219** of the **Constitution** read with the **County Revenue Allocation Act, 2017**.

[3] The petitioners believe that a huge amount of public money has been spent on non-existent (ghost) works as nothing is reflected on the ground particularly with regard to the development and re-current expenditures and having written to the chief officers of the County

Government of Homa Bay without receiving any response from them it would follow that the County Government is not communicating with its citizenry contrary to the spirit of devolution and the principles of good governance.

The petitioners also believe that the respondents have been squandering public funds and/or misusing them thereby abusing the powers vested on them by the public as no projects can be seen in the Homa Bay financial strategy paper tabled by the budget and appropriation committee of the county assembly and which was actually acknowledged by the county assembly of Homa Bay.

[4] The petitioners' apprehension is that most county projects would be compromised or even abandoned under the watch of the County's Chief Officers none of whom would be held responsible for the "ghost" projects purportedly carried out. In the circumstances, the people of Homa Bay County would continue to suffer as money meant for development ends in the pockets of individuals.

It is the petitioners' contention that the failure by the respondents to provide the information required by them amounts to a threat of the constitutional right of access to information and to fair administrative action and therefore, this court is enjoined to protect constitutionalism and the rule of law by declaring the respondents unfit to hold public office and having them interdicted and made to uphold, protect and defend the constitution otherwise this country's legal framework concerning obedience of the constitution, due process, rule of law and constitutionalism would be overthrown.

[5] The petitioners have alleged breach and/or violation of various constitutional provisions on the part of the respondents but prominent among them and which form the gist of this petition are **Articles 35 and 47** which provides for the rights of access to information held by the state and by another person and which is required for the exercise or protection of any right or fundamental freedom and the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

It is mostly on the basis of these two provisions of the constitution and by extension the provisions of the County Government Act and Fair Administrative Action Act, that the petitioners seek declaratory orders against the respondents and in particular that the respondents are unfit to hold any public office by their failure to use public finances as required by law and their failure to provide the petitioners with information required to protect their rights as members of the public.

[6] A Notice of Motion was contemporaneously filed with the petition seeking basic orders that pending the hearing and determination of the application and/or the petition, the respondents be compelled to provide the petitioners with the information requested from various chief officers within Homa Bay County (i.e. Respondents 1-2, 4-16) and that the third (3) respondent (i.e. Controller of Budget) be restrained from utilizing the approved estimates for the year 2018/2019.

[7] The grounds for the application are in the body of the motion and the supporting affidavit dated 8th October 2018, deposed by the first petitioner/applicant, **EVANCE OTIENO OLOO**, on his own behalf and that of the second petitioner/applicant, **WYCLIFFE ODHIAMBO OKEYO**.

The alleged violation by the respondents of the constitutional rights to access information under **Article 35** and the right to public participation seemingly under **Article 10 and 118**, appear to be the basis of this application which is essentially for issuance of both compelling and restraining interim or interlocutory injunctive orders against the respondents in favour of the applicants.

[8] None of those articles are invoked for the purposes of this application although they are cited in the main petition as the enabling provisions for the grant of the ultimate orders sought against the respondents by the petitioners. It would therefore appear that this application is misconceived in so far as it seeks to obtain final orders against the respondents yet it is interlocutory in nature. It could also be that the petitioners are on a "Fishing expedition" to obtain evidence in this application and use it to advance and/or adequately prosecute the main petition. This would be nothing short of an abuse of the court process.

On these grounds alone, the application would not at all merit the orders sought in the appropriate notice of motion.

[9] Be that as it may, apart from the third respondent, the rest of the respondents appear not to have filed any response in opposition to the application which was nonetheless heard inter-parties by way of written submissions which were filed by the applicants on the 21st January 2019 and 25th March 2019. The third respondent filed its submission through **Selina Iseme**, advocate, while the bulk of the respondents filed theirs through **Nyauke & Co. Advocates**. It was only the 4th and 16th respondents who did not file any submissions and neither did they appear for the hearing of the application on any of the scheduled dates. However, the return of service filed by the applicants does not indicate that they were served with the necessary hearing notice. It only indicates that the respondents were served with unspecified court documents which most likely than not were the main petition and the present notice of motion.

Service of court documents and service of a hearing notice are two different things. So, without the appearance in court of the 4th and 16th respondents and without proof of service of the hearing notice upon them, no court of justice would condemn them unheard by issuing orders sought against them in the present application.

[10] On itself, the application essentially comes under the purview of **Article 23** of the **Constitution** and in particular, **Article 23 (3)** which provides that:-

"In any proceedings brought under Article 22, a court may grant appropriate relief, including –

a) A declaration of rights

b) An injunction

c) **A conservatory order**

d)

e)

f)

Apart from an injunction or a conservatory order, such reliefs would mostly be final in nature as opposed to being interim or temporary.

Article 22, provides for the right to institute court proceedings where an applicant claims that a freedom or right in the Bill of Rights has been denied, violated or infringed or is threatened. The right to access information under **Article 35** and the right to fair administrative action under **Article 47** as well as the constitutional values under **Article 10** are the factors in issue in the main petition and by extension this application.

[11] This court must therefore be very careful not to make orders in this application which might turn out to be final orders contemplated by the applicants in the main petition given that **Article 23 (3)** of the **Constitution** empowers the court to grant appropriate relief to an aggrieved party in the form of an injunction or conservatory order “**inter alia**”.

A temporary injunction such as that sought by the applicants in this application may serve the purpose for which a conservatory order is intended.

Inasmuch as it seeks to have the respondents compelled to provide information requested for by the applicants, prayer (2) of the application essentially seeks for a mandatory injunction which must be established on a standard of proof higher than that in a temporary or interlocutory injunction.

Whereas an injunction is a private law remedy, a conservatory order is more of a public law remedy.

Basically, an injunction is a legal and equitable remedy. It is a special court order that compels a party to do or refrain from doing specific acts. In that regard, the court directs the conduct of a party with the backing of its coercive powers.

[12] Grounds 6, 7 and 8 of the application invites this court at this interlocutory stage to find that the respondents have violated the constitution and continue to do so thereby occasioning the applicants and the people of Kenya, great loss. That, the respondents have been acting “**ultra-vires**” by misleading the members of the county assembly through the assembly’s committees and that the respondents’ failure to provide the applicants with information requested undermines the rule of law.

Ground 9 of the application indicates that the information sought by the applicants relate to data and records on the use of public funds by the pundit chief officers of the County Government.

[13] To arrive at a proper finding or conclusion on the aforementioned issues a court must be satisfied that an applicant has demonstrated a loss to the petitioners/applicant and the general public by the unlawful and un-constitutional acts of a respondent. Such loss could not be demonstrated by the material availed in this application by the applicants. The best forum for such demonstration would be at the hearing of the petition which contains several relevant annexures that may provide important documentary evidence relating to allegations made against all the respondents.

This application was in devoid of relevant annexures to provide a “**prima facie**” good case against the respondent and show the propable loss that the applicants may suffer. Their attempt made through their submissions to specify the information required from the respondents and annex the relevant documentary evidence was improper and an ambush against the respondents.

[14] Besides, although the applicants allege that they made requests for information from the respondents, their supporting affidavit does not contain any annexures to establish the fact. It was only the third (3rd) respondent who indicated that a request was made to them by the applicants. This was done in their (3rd respondent’s) replying affidavit dated 10th December 2018, where it was indicated that the information required by the applicants was supplied and could in any event, be obtained from any of the Country’s Huduma Centre as it was public information which could easily be accessed by any member of the public. This fact was also buttressed in the third respondent’s submissions and to an extent those of the other respondents.

[15] It is clear from all the foregoing that none of the conditions for the grant of a temporary injunction set out in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD [1975] EA 358**, was herein established by the applicants. They have not shown a “**prima facie**” case with a probability of success, neither have they demonstrated that they shall suffer substantial or irreparable loss/injury if an order of injunction is not granted. Even on a balance of convenience, the same would not tilt in their favour but the respondent public entities.

It would therefore follow that the applicants have also failed to establish cogent grounds for a conservatory order to issue against the respondents or any one of them.

As was held by the Supreme Court of Kenya (SCOK) in **GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI & OTHERS (2014) e KLR –**

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the 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 a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes”.

[16] Even if conservatory orders cannot be viewed on the same prism as injunctive orders, this application should have been but was not for the said orders and even if it was, it was not supported by substantial grounds for the issuance of the orders at this juncture. In any event, such orders merely denote injunctive or stay orders directed at non-private parties who are in the course of discharging their own respective mandates based on the constitution or on statute law.

It would not be in the public interest to suspend such mandates specially without good and credible cause. Conservative orders if issued would have the effect of staying constitutional functions and this go against the general public interest. They are therefore not for granting where no effect is to stay the due discharge of clear constitutional functions such as that pinpointed in prayer (3) of the application.

[17] It is the duty of a public officer to do what is constitutionally ordained and this in the public interest which must always be protected and guarded against being hijacked by self-seeking members of the public for it is about the well-being of the general public and is something which is beneficial to a large section of society.

Although a public agency does not have to provide information if it is already readily available to the public through Huduma Centres or government web-sites or gazette notices, it must be active in ensuring that important information is available to the public. It is also the duty of a public agency/body to be pro-active in putting out information as spelled out in relevant statutes and ideally any request for information should be dealt with by a designated office for each public body rather than any general office. So, given the fact that in the present circumstances the information allegedly being sought by the applicants involves expenditure of public funds by county government, the orders being sought ought to have been directed only to the County Executive Committee member for Finance & Economic Planning Homa Bay (i.e. 1st Respondent) and perhaps the County Clerk - Homa Bay County Assembly (i.e. 4th respondent) and the office of the Governor Homa Bay (i.e. 5th respondent). The inclusion of all the other respondents was largely pedestrian.

[18] Notwithstanding all the foregoing, injunctions against Government is limited by dint of **Section 16** of the **Government Proceedings Act** which stipulates that:-

“(1) In any civil proceedings by or against the Government the Court shall, subject to the provisions of this Act, have powers to make all such orders as it has power to make in proceedings between subjects and otherwise give such appropriate relief as the case may require:

(i) Where in any proceedings against the Government any such relief is sought as might in proceeding between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties

(ii)

.....

(2) The court shall not in any civil proceedings grant an injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.”

[19] Quite clearly, the foregoing provision places the Government in a different category from ordinary parties in a civil suit in the manner of dealing with injunctive orders. The issues herein revolve mostly around the County Government of Homa Bay and its officer. The involvement of the National Government is basically incidental.

Divergent views have arisen in our courts as to whether the word **“Government”** includes both the National and County Governments in order to determine whether **Section 16** of the **Government Proceedings Act** applies to both level of Government or the National Government only. (See, **LAWRENCE OGARO ONYIEGO & ANOTHER –VS- SAMWEL MINIKA & ANOTHER (2017) e KLR**, **JAMES MUIGAI IRUNGU –VS- COUNTY GOVERNMENT OF TRANS-NZOIA & OTHERS (2015) e KLR** and **JOSEPHAT GATHEE KIBUCHI –VS- KIRINYAGA COUNTY GOVERNMENT (2015) e KLR**.)

[20] In terms of **Article 1** of the **Constitution**, all sovereign power belongs to the people of Kenya and shall be, exercised only in accordance with the Constitution either directly or through the peoples’ democratically elected representatives. Such sovereign power is delegated to parliament and the legislative assemblies in the County Government, the National Executive and the executive structures in the County Government and the judiciary and independent tribunals which are all expected to perform their functions in accordance with the constitution. The power is thus exercised at the national and county levels.

Therefore, in the opinion of this court the word **“Government”** in the current constitution dispensation relates to both the National and County Government and as such, both fall within the ambit of **Section 16** of the **Government Proceedings Act**. They are both a creation of the Kenya Constitution 2010 but distinct and inter-dependent and are expected to conduct their mutual relations on the basis of consultation and co-operation (see **Article 6 (2)** of the **Constitution**).

[21] This application was therefore ill-advised and ought to have been relegated by the applicants in favour of the petition.

In sum, the orders sought herein against all the respondents cannot be granted at this interlocutory stage.

The application thus stands dismissed with each party bearing their own costs.

It is accordingly ordered.

J.R. KARANJAH

JUDGE

09.04.2019

[Read and signed this 9TH day of APRIL, 2019].