



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 195 OF 2018**

**PATRICK KABUNDU.....1<sup>ST</sup> PETITIONER**

**MUTUMA CALEB MWITI.....2<sup>ND</sup> PETITIONER**

**CHICHI KIMANI.....3<sup>RD</sup> PETITIONER**

***VERSUS***

**MOMBASA COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR MOMBASA COUNTY.....2<sup>ND</sup> RESPONDENT**

**MOMBASA COUNTY PUBLIC SERVICE BOARD.....3<sup>RD</sup> RESPONDENT**

**THE CLERK OF MOMBASA COUNTY ASSEMBLY..4<sup>TH</sup> RESPONDENT**

**THE MOMBASA COUNTY ASSEMBLY COMMITTEE**

**ON SECURITY AND ADMINISTRATION THROUGH**

**CHAIRPERSON.....5<sup>TH</sup> RESPONDENT**

**THE MOMBASA COUNTY ASSEMBLY COMMITTEE**

**ON JUSTICE AND LEGAL AFFAIRS THROUGH**

**CHAIRPERSON.....6<sup>TH</sup> RESPONDENT**

**MOHAMED AMIR**

**MOMBASA INSPECTORATE DIRECTOR.....7<sup>TH</sup> RESPONDENT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> INTERESTED PARTY**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> INTERESTED PARTY**

**THE CHIEF MAGISTRATE MOMBASA.....3<sup>RD</sup> INTERESTED PARTY**

**THE INSPECTOR GENERAL**

**NATIONAL POLICE SERVICE.....4<sup>TH</sup> INTERESTED PARTY**

RULING

1. By the Notice of Motion application dated 11<sup>th</sup> July, 2018, the Petitioners herein seeks the following orders:

*a) Spent*

*b) That this Honourable court certify this Petition raising substantial question of law hence be heard by an uneven number of judges.*

*c) That this court does issue temporary injunction order restraining the respondent jointly and severally either acting on their own or through its agent's employee's servants from collecting any revenue arising from out of violation of the county legislation until this application is heard and determined.*

*d) that this court does issue temporary injunction order restraining the 1<sup>st</sup> Respondent either acting on their own and or through its agents employees servants from collecting any revenue arising from out of violation of the county legislation until the hearing and determination of this petition.*

*e) That conservatory order be issued directing all revenue accruing from collection arising from violation of the county legislation to be paid to judiciary accounts and applied to the consolidated funds until the hearing and determination of this Application.*

*f) That conservatory order be issued directing all revenue accruing from collection arising from violation of the county legislation to be paid to judiciary accounts and applied to the consolidated funds until the hearing and determination of this petition.*

*g) That cost of this application be granted.*

2. The Application is premised on grounds set out there in and on the Further Affidavit in support of the motion dated 11th July 2018.

3. In response to the Application, the 1<sup>st</sup> to 4<sup>th</sup> Respondents filed Grounds of Opposition and Replying Affidavit both dated and filed on the 30th July 2018.

4. The 7<sup>th</sup> Respondent in response to the Petitioner's Application filed Grounds of Opposition dated 10th August 2018.

5. The parties were directed by this Court at a hearing held on 24<sup>th</sup> July 2018 to canvass the Application by way of written submissions. The 1st Petitioner who appears in person and also had the authority to plead on behalf of the 2nd Petitioner filed his Amended submissions dated 19th November 2018. The 1st to 4th Respondents filed their submissions on the 24th August 2018 and reply submissions to the 2nd Petitioner's submission on the 26th October 2018. The 7th Respondent filed his submissions on 15th October 2018. The 1-4th Interested Parties filed their submissions on 13th November 2018. The 5th Interested Party filed its submissions on 8th October 2018.

6. No evidence was led by the Petitioners in support of their prayer for empanelment of a bench of an uneven number of judges and it is this Courts view that this prayer was abandoned.

**Brief Background Facts**

7. The 1<sup>st</sup> Petitioner avers that he was arrested, charged and upon pleading not guilty he was released on a cash bail of **Kshs.5, 000/=** and issued with a cash bail receipt in the name of the 1st Respondent.

8. The 1<sup>st</sup> Petitioner avers that while preparing for trial, he filed his defence to the charge which was assessed at Kshs.75/= and he was instructed to pay via pay bill number **858355** Mombasa County which account, he came to realize is not linked to any commercial bank account and upon payment being confirmed he was issued with a receipt dated 19th July 2018 originating from Mombasa County.

9. The 1<sup>st</sup> Petitioner avers that after the repeal of the Local Government Act by the County Government Act of 2012, the Chief Registrar of the Judiciary as an Accounting Officer, directed all head of stations and Chief Magistrates to ensure that all revenue accruing from Court fines, bail and fees be collected by the

Judiciary and later on be applied to the consolidated fund.

10. The 1<sup>st</sup> Petitioner avers that the 1<sup>st</sup> Respondent has never complied with the directive and keeps on collecting revenue via M-pesa and Cash transactions in total disregard of the directive of the Chief Registrar of the Judiciary.

11. The 1<sup>st</sup> Petitioner went ahead and furnished this Court with revenue collection from Machakos County where Court fines recovered from offenders in breach of County Laws are paid into the Judiciary revenue account and not the Machakos County accounts.

12. The 1<sup>st</sup> to 4<sup>th</sup> Respondent in response to the Application averred that all monies collected by the County Treasury from the Courts are received at the County's banking hall and the same are taken and deposited in a commercial bank with an account designated for Court fines and cash bails and the money is not mixed. Once the money is deposited, there is no officer of the 1<sup>st</sup> Respondent who is authorized to make any withdrawal from the bank account. Also the 1<sup>st</sup> Respondent has no mandate to utilize the collected revenue as once the money is collected the commercial bank sweeps the revenue to the County revenue fund account which is maintained at the Central Bank.

13. The 1-4<sup>th</sup> Respondents aver that the allegations by the Petitioners are hollow as they do not even state who exactly is pocketing the said revenue.

14. On the issue of M-pesa deposits the 1<sup>st</sup>-4<sup>th</sup> Respondents submitted that the same was not raised in the Notice of Motion or in the 1<sup>st</sup> Petitioner's Supporting Affidavit and that the Petitioners M-pesa transactions allegations are unsubstantiated.

15. Counsel for the 1-4<sup>th</sup> Respondents submitted that the issue of the status of the County Courts is *res-judicata* as the High Court and the Court of Appeal have held that all Courts are under the control of the National Government and not the Counties.

### **The Law**

#### **Injunction in Constitutional Petitions**

16. Gikonyo j in **South Imenti Bar Owners S.H.G through its Chairman James Gikunda Ntaragwi v County Government of Meru [2018] eKLR** observed as regards constitutional petitions, as follows:

**“Provision of the relief of an injunction in constitutional petitions is doubtless a development of law. See article 23 of the Constitution which gives court authority to grant appropriate orders including an injunction in order to uphold and enforce the Bill of Rights. Article 23 of the Constitution is reproduced below:**

#### **23. Authority of courts to uphold and enforce the Bill of Rights**

**(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**(a) a declaration of rights;**

**(b) an injunction; [underlining mine]**

**(c) a conservatory order;**

**(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

(e) an order for compensation; and

(f) an order of judicial review.”

17. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in **Anarita Karimi Njeru vs. Republic [1979] eKLR**. That is, the Applicant must specify which specific provisions of the Constitution that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.

18. In **Robert Amos Oketch vs. Andrew Hamilton & 8 Others [2017] eKLR**, the court held: -

“First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of Anarita Karimi Njeru v. Republic (supra). In that case, the court stated that ... a party who wishes the court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it.

....

Applying the above principles to this case, I have considered the petitioner’s pleadings, the evidence as well as submission by his counsel and in my view this is not a proper constitutional petition challenging violation of fundamental freedoms. I say so because, although the petitioner had pleaded provisions of the constitution, he has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of the constitution for redress”.

19. In **Husus Mugiri v Music Copy Right Society of Kenya & another [2018] eKLR Mabeya J held as follows...**

“In so far as the petition fell short of the test in the Anarita Karimi’s Case, it is doubtful if the first test of Giella v. Cassman Brown can be met.”

20. From the foregoing, although the petitioners have pleaded provisions of the Constitution, they need to demonstrate how the conduct of the Respondents have abrogated those provisions and what constitutional injuries they have or are likely to suffer.

21. Onguto J in **Tom Onyango & 5 others v Independent Police Oversight Authority & 4 others [2015] eKLR** stated the following:

“In the instant case, I confirm that I have read the Petition. The pleadings have not specifically pinpointed the Articles alleged to have been violated. The Petition however takes the trajectory of a constitutional application when the Petitioners complain that their prosecution is an abuse of the Respondents’ constitutional powers and the further that their trial itself is an abuse of the process. I am also not convinced that the Petition is beyond repair through amendments.”

22. From the foregoing, the first question this Court ought to ask is whether the Petitioners have established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

“a *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

23. The Court of Appeal in **Pattni v. Ali & 2 Others** Ca No. 354 of 2004 (*UR183/04*) held as follows:

“... in interlocutory applications, the orders that are sought do not decide the rights and obligations of the parties but are merely meant to keep matters in status quo pending such determination. “

24. In **Nguruman Ltd v Jan Bonde Nielsen & 2 others [2014] eKLR**, the Court of Appeal stated that:

“We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for

an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

25. This Court guided by the above dictums notes that the prayers in the Petitioner's Notice of Motion dated 11th July 2018 are substantially the prayers in the Petition filed before this Court. With this in mind, I tread with abundant caution in treating the prayers sought herein, which appears to have the rights of the parties decided at the interim stage.

26. The Petitioners have made very serious allegations that for the last three years public funds have been directed to Mombasa County accounts, the same has not been remitted to the Consolidated Fund and that public funds are now being channeled to some people's pockets in breach of the law.

27. The Petitioners also submit that the government will lose millions in revenue if the collections by the 1st Respondent in relation to court fines, fees and bail continues.

28. It is this Court's view that the allegations raised by the petitioners herein are very serious allegations that can be equated to fraud if proved. For the petitioners to raise a prima facie case with a probability of success, they need at least to demonstrate that the monies collected by the 1st Respondent did not end up in the Consolidated Fund but ended up in some people's pockets as alleged for the petitioners to qualify for the orders of temporary injunction against the 1st Respondent.

29. All that the Petitioners demonstrated was that the monies for Court fees, fines and bail were paid into a revenue account in the 1st Respondent's name and not the Judiciary revenue account like in Machakos County, where court fees, fines and bail were deposited in the Judiciary's revenue account instead of the Machakos County's account as per the directive by the Chief Registrar of the Judiciary. That alone in this Court's view is not enough to warrant the issue of a temporary Injunction in the absence of any evidence of diversion of funds.

30. It is this Court's finding that the Petitioners have not established a *prima facie* case with a probability of success. Further, the Petitioners have not demonstrated how the continued collection of court fees, fines and bail by the 1st Respondent will occasion injury or loss to them. The Petitioners never rebutted the 1st Respondent's response in which it averred that the money collected in form of court fees, fines and bail by them is remitted to the Consolidated Fund. It is this Court's finding that the Petitioners have failed to demonstrate the injury or loss that will be occasioned if the temporary injunction against the 1st Respondent is not granted.

31. This Court has the powers to issue conservatory orders in constitutional petitions under Article 23 (3)(c) of the Constitution, and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

32. The applicable principles for the grant of a conservatory were detailed by Onguto J. in **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR**. Where it was held as follows:

**“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.”**

33. Similar sentiments were shared in **Muslims for Human Rights (MUHURI) & 2 Others v Attorney General & 2 Others [2011] eKLR** Ibrahim J held:

**“In an application for interim orders of the nature of Conservatory Orders or even one for an injunction, the court is not hearing and/or being called upon to determine the main Petition. The Constitutional court is being called upon to preserve**

the status quo pending the hearing of the Constitutional Petition or motion. The court does not have to take and hear all the evidence and delve into the entire case on its merits. The hearing of the Petition and determination of all issues and questions in dispute will be done at the “trial” and upon completion thereof when a final judgment is to be delivered.

As a result, at this stage I am not obligated to go into all the evidence and even consideration of all the matters of law. My function is to have a reasonable overview to enable me decide on the criteria or principles applicable when considering an application for a Conservatory Order and to what extent the principles are applicable to the facts and circumstances of this case...”

34. The petitioners having failed to demonstrate a prima facie case with a probability of success and/or likely prejudice if the injunction being prayed for is 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 v City County Director of Education(supra)** and as a consequence, these prayers for conservatory orders will therefore have to wait full hearing of the Petition to confirm if and when applicable procedures have been met.

35. Accordingly, this Court finds that the Application dated **11<sup>th</sup> July 2018** is without merit and the same is hereby dismissed.

36. Costs to be in the cause.

**Dated, Signed & Delivered at Mombasa this 9<sup>th</sup> day of May, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Kabundu 1<sup>st</sup> Petitioner

Mr. Mwiti 2<sup>nd</sup> Petitioner

Mr. Tajbhai holding brief Buti for 1<sup>st</sup> – 4<sup>th</sup> Respondents

Mr. Tajbhai holding brief Kisingo for 5<sup>th</sup> – 7<sup>th</sup> Respondents

Mr. Isaboke for DPP

Mr. Mkok for 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Interested Parties

Mr. Kaunda Court Assistant