



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 7 OF 2018

JACKLINE MWAKHA OKANYA.....1ST PETITIONER

WALTER MAUBE ANDATI.....2ND PETITIONER

JOSEPHAT MWASEME KATITI.....3RD PETITIONER

VERSUS

PATRICK WAFULA KAMWESAR.....1ST RESPONDENT

JOHN SIMWA.....2ND RESPONDENT

MAURICE BULUMA INDAKWA.....3RD RESPONDENT

LABAN MALOBA ATEMBA.....4TH RESPONDENT

DANIEL WERE.....5TH RESPONDENT

BEATRICE ILAVONGA.....6TH RESPONDENT

PASCAL MWANJE.....7TH RESPONDENT

NEPHAT MBATI.....8TH RESPONDENT

CLERK COUNTY ASSEMBLY OF KAKAMEGA.....9TH RESPONDENT

SPEAKER COUNTY ASSEMBLY OF KAKAMEGA.....10TH RESPONDENT

KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD.....11TH RESPONDENT

RULING

1. The petitioners herein filed a Motion dated 12th November 2018, seeking:

a) an order directing the manager of Family Bank Kakamega branch to provide to the petitioners with all the monthly bank statements for account number 078000032659 or such other account operated by the County Assembly of Kakamega for the car and mortgage loan scheme;

b) an order that the 1st, 3rd, 4th, 9th, 10th and 11th respondents prepare or cause to be prepared proper individual financial statements of the mortgage account, individual mortgage loan account statements for all the members who have taken or benefited from the mortgage loan scheme from 2014 to date showing (i) amount of loan disbursed and when disbursed, (ii) interest rate charged (iii) amount paid by month to date and (iv) the outstanding balance (v) a statement of affairs of the mortgage Benefit scheme by quarter from 2014 to date;

c) an order that the 1st, 3rd, 4th, 9th, 10th and 11th respondents prepare or cause to be prepared schedules by month showing payroll deductions by month from 2014 to date and the corresponding bank credit depositing the loan deductions into the mortgage revolving fund account showing mortgage revolving fund account monthly bank accounts balances;

d) an order that the 1st, 3rd, 4th, 9th, 10th and 11th respondents provide to the petitioners a detailed and comprehensive budget for the financial year 2018/2019 as passed by the county assembly showing individual line items of expenditure that make up the final budget of Kshs. 1,048,717,390.00 presented to the county government;

e) an order that the 1st, 3rd, 4th, 9th, 10th and 11th respondents provide to the petitioners and any other nominated members of the County Assembly three partisan staff members and an office as is provided for and directed by the commission on revenue allocation pursuant to circular dated 28th June 2018;

f) an order of *mandamus* be and is issued compelling the respondents to immediately release the mortgage benefits due to the petitioners and other members of the county assembly without any further delay;

g) an order of *mandamus* be issued compelling the 1st, 3rd, 9th and 10th respondents in their official and personal capacities to immediately cause to be brought to the floor of the County Assembly for debate the reports of the Auditor-General on the financial statement for debate by the County Assembly of Kakamega;

h) a declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th respondents have acted in concert or failed to act and thus contributed to the misappropriation of funds and mismanagement of the mortgage loan fund which is contrary to the Articles 10, 73, 201(d)(e) and 232 of the Constitution of Kenya, the Public Service Values and Integrity Act, the County Assembly Act, the County Governments Act and Anti-Corruption and Economic Crimes Act;

i) a declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th respondents should take personal responsibility for the unlawful and unconstitutional handling of the car loans and mortgage fund as provided for under Article 226 (5) of the Constitution of Kenya, the Public Service Values and Integrity Act, the County Assembly Act, the County Governments Act and Anti-Corruption and Economic Crimes Act;

j) a declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th respondents are unfit to hold office either permanently or for a specific period as the court may deem just; and

k) an order that a special provision is hereby provided for the petitioners and other members of the County Assembly of Kakamega who are yet to receive their mortgage benefits extending their repayment period beyond the time prescribed by the Public Finance Management (Kakamega County Assembly Car Loans and Mortgage Fund) Regulations 2014, or in the alternative the 11th Respondent be held accountable for any extra costs resulting from the shortened repayment period or in additional interest charges.

2. The case by the petitioners is articulated through the grounds on the face of the application and the facts deponed in the affidavits they swore in support of the application.

3. The matter was placed before me on 5th December 2018 for directions following an order made to that effect on 19th November 2018 by Njagi J. I granted the respondents twenty-one days to file responses to the application. There was compliance for several of the respondents filed affidavits in reply. The fourth respondent swore his replying affidavit on 18th January 2019 and filed it herein on 21st January 2019. The first respondent swore an affidavit on 30th January 2019 which he filed hereon on 5th February 2019. Both opposed the application on the grounds articulated in their affidavits.

4. On 6th February 2019, the advocates appearing for the parties agreed, and a consent order to that effect was made, to canvass the application by way of written submissions to be filed and highlighted. The record reflects that there was compliance with the said directions. The petitioners filed their written submissions on 22nd February 2019, dated 20th February 2019. The 20th and 11th respondents filed theirs on 28th February 2019, dated 21st February 2019; while the 1st to 9th respondents filed theirs on 4th March 2019, dated 1st February 2019. The same were highlighted on 4th March 2019.

5. In their submissions, the petitioners emphasized their right to information and the need for discoveries. They insisted that they had been denied their right to car and mortgage loan, and that the same had been infringed due to mismanagement of funds by the respondents. The respondents on their part opposed the application. They submitted that the right to get the mortgage loan was not automatic and that the County Assembly did not have the money for the same. They also challenged the petitioners' authority to file the application. They held the position that the authority to grant a loan to a member is reserved for the car and mortgage committee and not the respondents.

6. The issues for determination that emerge from the Motion, the application, the affidavits, the written submissions and the oral highlights thereof are whether the petitioners have *locus standi* to file the application and whether they have offered sufficient grounds to warrant grant of the orders sought.

7. I will start by first considering the first issue, whether the petitioners have sufficient *standi* to mount the Motion. It is the petitioners position that the application is made on their behalf and on behalf of other members the Kakamega County Assembly who have been disgruntled by the respondents' conduct. The respondents on their part claim that some of the members of the County Assembly have denied granting the petitioners authority to file the application.

8. The law that guides the determination of this issue is Articles 22 and 258 of the Constitution of Kenya. The said provisions state as follows:

“22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

(a) a person acting on behalf of another person who cannot act on their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article which shall satisfy the criteria that –

(a) the right of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to proceedings, including commencement of the proceedings, are kept to a minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organization or an individual with particular expertise may with leave of the court, appear as a friend of the court;

(4) ……

258(1) Every person has the right to institute court proceedings claiming that this constitution has been breached, contravened, or is threatened with contravention;

(2) In addition to any person acting in their own Interest, court proceedings under Clause (1) may be instituted by –

a person acting on behalf of another who cannot act in their own name;

a person acting as a member of, or in the interest of, a group or class of persons;

a person acting in the public interest or;

an association acting in the interests of one or more of its members …

9. The courts have, since the promulgation of the Constitution, 2010, had to address the effect of these two provisions. One such case is *John Mining Temoi & Another vs. Governor of Bungoma County & 17 Others* [2014] eKLR, where the court said that:

“I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms.

A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties. In this case, Mr. Khaoya has described himself as the “CEO/CO-ORDINATOR” of the organization and the Petition is about the alleged violation of the Constitution, Mr. Khaoya has in my view illustrated that there is a nexus between him and the organization.”

10. The issue was also addressed in *William Odhiambo Ramogi & 2 Others vs. Attorney General & 6 Others* [2018] eKLR, where the court stated that:

“The judicial approach to locus standi has been relaxed post-2010 courtesy of Articles 22 and 258 of the Constitution. The import of the said provisions is that every person has the right to institute Court proceedings claiming that a right or fundamental freedom

in the Bill of Rights has been denied, violated or infringed, or is threatened or claiming that the Constitution has been contravened or is threatened with contravention. In addition to a person acting in their own interest, Court proceedings under Articles 22(1) and 258(1) of the Constitution may be instituted by—

- a. a person acting on behalf of another person who cannot act in their own name;
- b. a person acting as a member of, or in the interest of, a group or class of persons;
- c. a person acting in the public interest; or
- d. an association acting in the interest of one or more of its members.

69. The issue of locus standi in Constitutional Petitions is now well settled. The Court of Appeal in Nairobi Civil Appeal No. 290 of 2012 Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR substantively dealt with the issue and laid down the applicable test which was affirmed by the Supreme Court. In that case it was argued that the Respondent, an NGO (Trusted Society of Human Rights Alliance) whose mandate included the pursuit of constitutionalism lacked locus standi to challenge the appointment of Mumo Matemu as the Chair of the Ethics and Anti-Corporation Commission. In responding to the question, the Court of Appeal firmly stated as follows:

26. It is hard to maintain the argument that the first respondent did not suffer any injury to warrant this standing to lodge the Petition before the High Court. It is equally hard to maintain the position that the first Respondent was acting as an interlocutor for a private third party, in a matter of public interest such as this. In the context of our commitment to integrity in leadership as expressed in the Constitution, we cannot gainsay the importance of the issue of the leadership and institutional integrity of the Ethic and Anti-Corruption Commission.

27. More so, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the Courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the Courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the Petition was filed before the High Court by an NGO whose mandate includes pursuit of constitutionalism and we therefore reject the arguments of lack of standing by Counsel for the Appellant. We hold that in the absence of a showing of bad faith as claimed by the Appellant, without more, the first Respondent had the locus standi to file the Petition. Apart from this, we agree with the Superior Court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution....

28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some specific interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest ...

29. It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reasons of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution ...

70. It is imperative to note that the foregoing position had been taken by some Courts well before the promulgation of the Constitution in 2010. (See *Shah Vershi Devji & Co Ltd vs. The Transport Licensing Board Nairobi* (1970) EA 631; (1971) EA 289 and *Muriithi vs. Attorney General & 5 others* (2006) 1 KLR 443)”

11. From the above authorities, it is clear that the issue of locus standi in constitutional petitions has changed since the inception of the Constitution of Kenya 2010. From the parameters set in the above decisions it is obvious that the petitioners herein, being members of the County Assembly of Kakamega, have the locus to file the application on their own behalf and on behalf of any other members of eth County Assembly that might be affected by the alleged infringement.

12. I will now advert to the second issue: whether the petitioners have offered sufficient grounds to warrant grant of the orders sought in the application. It must be noted that the application and the orders sought are based on the allegation of misappropriation of funds by the respondents. In their application, the petitioners allege that there was misuse of funds and gross mismanagement of County Assembly of Kakamega resources by the respondents, and that same was documented in the reports prepared by the Auditor-General on the financial statements of County Assembly of Kakamega for the three years that are relevant to the instant proceedings. It is on the basis of these reports by the Auditor-General that the petitioners herein seek for the orders in the application.

13. The process of handling audit reports by County Assemblies was well described by court in *Michael Kojo Otieno & Another vs. County Government of Homa Bay & 9 Others* [2018] eKLR where court held that:

“49. The Auditor General’s report pointed out that the County Assembly did not maintain an accurate and updated fixed assets register for the non-current assets. It would appear that there does exist an assets register but the information contained therein is incomplete—that was the observation made in the auditor’s report to the effect that land of unknown value, Hansard machine and

furniture were not listed in the register. The auditor recommended that the management reviews and updates the fixed assets register failure to which the responsible officer was to be held liable.

50. Certainly from the reports by the various committees and the Auditor General, there were apparent violations detected and certain recommendations made. The validity of these reports is borne by the oversight role of the County Assembly is addressed under Article 184 (3) of the Constitution that:

“A county assembly..., may exercise oversight over the county executive committee and any other county executive organs.”

51. Assembly Committee is a group of Members of the Assembly designated to do the detailed work of the Assembly. Section 14 (1) (b) of the County Governments Act, 2014 provides that subject to the standing orders, a county assembly “may establish committees in such a manner and for such general or special purposes as it considers fit, and regulate the procedure of any committee so established”. Committees perform specific roles on behalf of the Assembly. Therefore, their mandate and powers are given by the Assembly, through the Standing Orders (Rules of Procedure).

52. Committees are integral parts for the conduct of Assembly business. An effective Committee system makes the Assembly to be more responsive to the needs of the electorate while making the role of the Members more relevant and the democratic process more representative of, and accountable to, the views of the electorate.

53. Committees conduct detailed investigation into an issue which may not be carried out efficiently and effectively by the whole parliament and therefore contributes to the attainment of democratic ideals especially transparency and accountability.

54. With regard to accounts and auditing of public entities Article 226 (2) of the Constitution of Kenya provides: -

“The accounting officer of a national public office is accountable to the National Assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.”

55. What then becomes the fate of the recommendations made in those reports- are the courts the direct vessels of ensuring implementation? Committees of the Assembly make recommendations to the Plenary of the Assembly in the form of resolutions. Their recommendations may or may not be acted upon by the Assembly or may be rejected or ignored altogether. Mrs. Dhikusoka argued that there is the Public Service Investment committee which receives the Auditor General’s report for scrutiny, then calls the committee members to address it. Also there is the Senate Public committee on Investments which sits to go through the reports before taking action. As for the sectorial committee reports, she states that once recommendations have been made and resolutions passed, the same are passed to the Committee on Implementation through the County Clerk-so these steps have not been exhausted.

56. I note that the Public Accounts and Investment Committee is responsible generally for:

- Examining accounts showing appropriations by the County assembly to meet public expenditure
- Examining reports, accounts and workings of the County public investments
- Examining whether affairs of the County Public investments are managed with sound financial or business principles and prudent commercial practices.

57. In addition, the Committee is responsible for receiving and discussing at first instance, reports from the Auditor General. With the assistance of the Auditor General, the Committee develops recommendations which it must implement. The Auditor General is required to follow up to confirm whether the recommendations have been implemented.

58. What follows once the Auditor General’s report has been presented to the County Assembly? The empowering provisions of Article 229 (7) and (8) as follows:

“229 (7) Audit reports shall be submitted to Parliament or the relevant county assembly.

(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.”

59. Further Senate has an oversight role over the affairs of the County Governments, indeed under Article 96 (3) the Senate the allocation of national revenues to the counties and exercises an oversight role over the national revenue allocated to the County governments. The Senate Sessional Public Accounts and Investments Committee is established by the Senate pursuant to Standing Order No 212 and is mandated-

(a) “pursuant to article 96 (3) of the Constitution, to exercise oversight over national revenue allocated to the county governments;

(b) Pursuant to article 228 (6) of the Constitution, to examine the report of the controller of Budget on the implementation of the budgets of county governments;

(c) Pursuant to article 229 (7) and (8) of the Constitution to examine the reports of the Auditor-General on the annual accounts of the county governments;

(d) To examine special reports, if any, of the Auditor-General on county government funds;

(e) To examine the reports, if any, of the auditor general on the county public investments; and

(f) To exercise oversight over county public accounts and investments.”

14. In the instant application, it is clear that the audit reports were presented before the Public Accounts Investments Committee, and in the committee’s report dated the 20th March 2018, it observed that the allegations of mismanagement could not be verified as there was lack of supporting evidence. It recommended that mechanisms be put in place to ensure the recovery of the amounts loaned out to the members of the County Assembly who had defaulted. It also recommended that quarterly financial reports on the statements of accounts of the car loan and mortgage fund scheme be submitted to ensure prudent management of the funds.

15. It must be noted that there have been not charges against the respondents herein for the mismanagement or misuse of the funds. The recommendations made do not touch on the personal conduct of the respondents. It is also noteworthy that the audit reports that the petitioners rely on do not apportion personal or individual liability for the loss of funds. The rule of law and justice demands that one be presumed innocent until proven guilty. The petitioners herein have not in any way provided proof that there was misuse and mismanagement of funds. If the same were to be offered, then the respondent will have to be subjected to a fair hearing were they can defend themselves and challenge the charges. The petitioners’ application is based on unsubstantiated claims with no proof, and court cannot, on an interlocutory application, by a party declare a party guilty of an offence that they have not been tried for. That will be an affront to justice and fairness. It is on this basis, that I find that prayers 8, 9 and 10 of the Motion must fail. See *Michael Kojo Otieno & Another vs. County Government of Homa Bay & 9 Others* [supra]. The petitioners can and have the capacity to table and pass a motion in the County Assembly to have the respondents account for their alleged acts of misuse or mismanagement of the subject funds.

16. The petitioners seek orders of *mandamus* to compel the respondents to release the mortgage benefits allegedly due to the petitioners without delay. The law on the order of *mandamus* is clear. In *Margaret Wanjiku Kiiru vs. Attorney General & 4 Others* [2017] eKLR, the court observed as follows about it:

“The scope of the order of mandamus was define in Kenya National Examination Council vs. Republic, ex parte Geoffrey Gathenji & 9 Others, supra, citing an excerpt from Halsbury’s Law of England, 4th Edition Volume 1 at page 111 from paragraph 89 which provides.

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet the mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed ‘the mandate’ it is stated:

“The order must command no more than that which the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

The court then stated:

“What do these principles mean? They mean that an order or mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

For the order to be issued, the aggrieved party must show that the body refused to perform the statutory duty despite being asked to perform it. This was the holding on the court in Republic vs. Kenya Vision 2030 Delivery Board & Another, ex parte Eng Judah Abekah [2015] eKLR where it held thus-

“Therefore, the fulcrum of an order of mandamus is that a statutory duty must be owed to an applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy.”

In this case the petitioner has failed to prove that the clerk failed to list her motion on priority notwithstanding a request to do so. The motion was not debated by the House on the first day it was listed in the Order Paper due to the fact that on that day the business of the house was disrupted. This disruption was not attributed to and cannot be blamed on the 4th respondent nor indeed any of the respondents.

The petitioner subsequently withdrew the motion before the next session of the house and she did not re-submit the motion for debate thereafter. In the circumstances it cannot be said that the Clerk of the Assembly refused to act in accordance with Order 69(1). Consequently, an order of mandamus cannot issue and this prayer is hereby declined.”

17. It should be noted that the petitioners herein have not in any way demonstrated any attempts by them to present a motion on the matter at hand so as to have the issues discussed by the County Assembly. Further, they have not followed up on the recommendation made by the committee.

18. The orders the petitioners are seeking herein are definitive in nature. Should the orders sought herein be granted, the petition would be determined at an interlocutory stage via an interlocutory application. The court said in *Witmore Investment Limited vs. County Government of Kirinyaga & 3 Others* [2016] eKLR that:

“20. However, the application before me is asking for more. The prayer to extend the validity period of 2014 licence and a mandamus remedy to compel the 1st Respondent to issue alcoholic manufacturing licence for the year 2016 as sought are not dependent on the pendency of the petition herein because the issues raised in this application are distinct and different from the petition itself which brings me into the next issue but before I delve into it I have to say that I agree with the decision cited by the Applicant in the case of *Mwangaza Humanitarian Assistance -Vs- NEMA & 2 Others* [2013] eKLR where Hon. Justice Lenaola observed that in exercising jurisdiction under Article 23 (1) of the Constitution courts should also be mindful of the procedures and the law invoked and that a judicial review order is such a serious claim that cannot be made at an interlocutory stage as they are final in nature. So while I agree with the Applicant Article 23 establishes judicial review order as a relief available in a constitutional petition, the remedy in my view is only available when a court is determining a petition brought under Article 22 and finds basis that a judicial review order is the appropriate relief. On the other hand, if a party is desirous of obtaining a prerogative order of mandamus and specific performance at an interlocutory stage, the legal avenue provided is the route prescribed under Order 53 Rule 1 of the Civil Procedure Rules and the Law Reform Act. The same cannot be circumvented as that would amount to an abuse of court process. It is true that a statute is subject to a constitution and not vice versa but the context of this application is different because it has sought a judicial remedy at an interlocutory stage claiming denial of a right under the Bill of Rights when the same is yet to be determined. Determination of such a right at this stage in my view would have determined the petition if the violations had been cited in the petition pending before this Court.

21. I agree with the Applicant that the enactment of the 2010 Constitution of Kenya expanded the frontiers of intervention by courts in matters to do with Judicial Review. This is a fact and protection that the citizens of this country decided to provide in order to shield themselves from excesses by the state or state agencies. However, a litigant should properly move the Court by invoking the specific powers of the court and clearly pleading that a specific right has been violated or denied. Furthermore, I have considered the decision cited by the Applicant in the case of *John Kipngeno Koech & 2 others* and I have noted the following observations made by the Court in obiter which I find relevant in this application;

“The order of mandamus is an order directing a public body, authority, person or inferior tribunal exercising public duty to exercise that function or duty if it has not done so. In this case the County Assembly of Nakuru carried out its mandate and its decision is the subject of an order of certiorari already granted. It must be emphasized that the former prerogative order and now judicial order of mandamus is not equivalent of a mandatory injunction or specific performance in contract. The order only lies where the statutory or public duty has not been performed or carried out. My favourite example is the liquor licensing bodies – when they fail to meet and consider applications for liquor licenses the court will direct them to meet and consider the applications but the court will not direct them to grant licenses or make decisions in any one way. There is no legal basis for an order of mandamus”

These observations were made by Hon. J. Anyara Emukule in a judgment he delivered on a petition presented about violation of the petitioner’s rights and the court was determining the appropriate remedy for the violation of rights. It is important therefore to note that the decision was made at the determination of the petition itself unlike the situation here where the Applicant is seeking the Court’s intervention at an interlocutory stage. In my considered view the remedy can only be available after interrogation or canvassing of the entire petition and the responses made thereon.

22. I also find that the Applicant is uncertain whether it is seeking the order of mandamus as an equitable remedy or a judicial review remedy. The two remedies are similar because both command actions to be performed but they are distinct and different. A party must be specific because of procedural differences and the fact that the two remedies have different spheres. As an equitable remedy, mandamus was used at common law in rare circumstances and the standard of proof is higher than other forms of injunctions. The Court of Appeal in the case of *Shariff Abdi Hassan -Vs- Nathif Jama Adan* [2006] eKLR quoted with approval the decision in *Lochabak International Finance Ltd. vs. Agro Export & Anor* [1986] 1 All ER 901 in observing that the standard of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. The court in setting out the principles applicable in granting mandatory injunction stated as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

In *Canadian Pacific Railway -Vs- Gand* [1949] 2KB, Cohn L J said at page 249

“I entirely agree ... that the granting of a mandatory injunction on interlocutory relief is very exceptional form of relief to grant, but it can be granted. The reason for this principle is simply because the relief has the effect of meting out justice in a summary manner without the need to wait for full hearing of the entire case.”

So for good reasons courts are often reluctant to grant this type of injunctive reliefs.

23. *On the other hand as already aforesaid, the writ of mandamus is a prerogative remedy sought to enforce performance of public or statutory duties by public authorities or government agencies. The remedy is administrative in nature though the scope has now been extended to cover enforcement of rights under the constitution, it is a discretionary remedy and the procedure available in law for a party seeking the remedy is either through Order 53 of the Civil Procedure Rules or through a constitutional petition under Article 22 of the Constitution of Kenya 2010. In whichever way, the Applicant has not satisfied this Court that either of these remedies is appropriate at this stage.*”

19. It should also be noted that the prayers sought in the application are to are the same as the ones sought in the petition. The orders of *mandamus* sought if granted will effectively determine the petition. It will be in the best interest of justice that the issues raised herein be canvassed fully during the main hearing of the petition.

20. In the upshot, it is my finding that the petitioners have not provided sufficient grounds to warrant grant of the prayers made in the Motion. I further find that this application is not the right forum to address the issues raised as they are for determination at the hearing of the petition. Consequently, the application ought to and is hereby dismissed.

DELIVERED DATED AND SIGNED IN OPEN COOURT AT KAKMEGA THIS 14th DAY OF June, 2019

W MUSYOKA

JUDGE