



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CONSTITUTIONAL PETITION NO 2 OF 2017

IN THE MATTER OF

THE PREAMBLE AND ARTICLES 1, 2, 3, 4(2), 10, 21, 22,

23, 24, 25, 26, 27, 28, 35, 47, 50(1), 73, 75, 232, 258 AND

259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF

THE ALLEGED VIOLATION OF ARTICLES 10, 21,

27, 35, 47, 73, 75, 159,165,201,210,232,258 AND

259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF

DOCTRINE OF LEGITIMATE EXPECTATION

IN THE MATTER OF

THE CONTINUING MISPPROPRIATION AND NEGLIGENCE BY

THE COUNTY TREASURY AND MISUSE OF PUBLIC FUNDS

IN THE MATTER OF

THE PUBLIC FINANCE MANAGEMENT ACT, THE PUBLIC

PROCUREMENT AND DISPOSAL ACT AND THE

ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

BETWEEN

MICHEAL KOJO OTIENO.....1ST PETITIONER

SAMORA MACHEL ALOSI.....2ND PETITIONER

VERSUS

COUNTY GOVERNMENT OF HOMA BAY.....1ST RESPONDENT

CYPRIAN AWITI.....2ND RESPONDENT

COUNTY TREASURY OF HOMA BAY.....3RD RESPONDENT

COUNTY SECRETARY OF HOMA BAY.....4TH RESPONDENT

COUNTY EXECUTIVE OF HOMA BAY.....5TH RESPONDENT

COUNTY EXECUTIVE FOR

TOURISM AND SPORTS.....6TH RESPONDENT

COUNTY EXECUTIVE FOR

TRANSPORT AND INFRASTRUCTURE.....7TH RESPONDENT

COUNTY ASSEMBLY OF HOMA BAY.....8TH RESPONDENT

THE ETHICS AND

ANTI-CORRUPTION COMMISSION.....9TH RESPONDENT

THE ATTORNEY GENERAL.....10TH RESPONDENT

RULING

By a notice of motion dated 8th March 2017, the applicants **MICHEAL KOJO OTIENO (1ST PETITIONER)** and **SAMORA MACHEL ALOSI (2ND PETITIONER)** have sought that this court do issue orders restraining **COUNTY GOVERNMENT OF HOMA BAY (1ST RESPONDENT)**, **CYPRIAN AWITI (2ND RESPONDENT)**, **COUNTY TREASURY OF HOMA BAY (3RD RESPONDENT)** **COUNTY SECRETARY OF HOMA BAY (4TH RESPONDENT)** **COUNTY EXECUTIVE OF HOMA BAY (5TH RESPONDENT)** **COUNTY EXECUTIVE FOR TOURISM AND SPORTS (6TH RESPONDENT)** **COUNTY EXECUTIVE FOR TRANSPORT AND INFRASTRUCTURE (7TH RESPONDENT)** **COUNTY ASSEMBLY OF HOMA BAY (8TH RESPONDENT)** **THE ETHICS AND ANTI-CORRUPTION COMMISSION (9TH RESPONDENT)**

(a) Restraining the 2nd -8th respondents from interfering with investigations carried out by the 9th Respondent

(b) Order the 9th respondent to commence investigations of a civil or criminal nature against the 2nd-7th respondent.

(c) Compel the 1st respondent to make discovery of and produce for inspection all documents pertaining to the projects which have been carried out by the County Government to confirm that they have complied with the provisions of the Public Finance Management Act and to ensure that

they register all the assets as required under the Public Procurement and Disposal Act. They also seek orders compelling the 1st respondent to register all the employees of Homa Bay County

The basis for these prayers is that it is all about implementing the Constitution of Kenya, and subjecting the 1st and 3rd Respondents as public entities to scrutiny in the performance of their duties. This is also in fulfillment of the provisions of section 24 of the Government Proceedings Act (Cap40) because the 8th respondent has not (as would be expected of public officers in the spirit of transparency while managing public funds) released to the public information regarding ownership, mortgage loans fund and car loans fund in the County Assembly. The applicants contend that the respondents must be stopped from ignoring the law.

All the respondents oppose the application and the 1-7th Respondent in a replying affidavit sworn by **COSMAS JASEME** depose that the application is incompetent to the extent that the self same prayers are sought in the main petition and any orders issued herein would in effect terminate the lifespan of the main petition. It is also pointed out that the application is based on a presumption lacking material substance that the 2nd -7th respondents are either interfering or are at the verge of interfering with the 9th respondent's work. The application is also as being too general and seems to be a fishing expedition, as the applicants have not set out what projects or assets they are interested in. It is pointed out that this would amount to the court being invited to involve in the investigative process which is not part of its mandate.

The application is described as mischievous as the responsibility of any State officer in matters affecting integrity are personal and rest with the 9th Respondent. As regards the issue on assets and liabilities it is deposed that the issue has not been concluded as the then Transitional Authority never finished its work and identification of such assets and liabilities is in progress-currently the information sought is non-existent-reference is made to the annexed documents marked ! (a) to (10).

The respondent is categorical that the committee reports and recommendations the applicants rely on were infact forwarded to the **ETHICS AND ANTI-CORRUPTION COMMISSION** and are either pending action or been concluded. As for the Auditor General's report for 2014, it is deposed that the same had been dealt with by the Senate which cleared the 2nd respondent of any personal responsibility and the prayers amount to asking this court to quash the proceedings and decisions of the Senate.

The petition is described as a personal vendetta against the 2nd respondent and a classic example of self seeking citizens who for personal gain and esteem want to use the court to draw attention to themselves and should be dismissed.

The 8th respondent opposes the application and in an affidavit sworn by **OTIENO BOB KEPHAS** the 8th respondent's Clerk states that the application is made in bad faith and discloses no instance where the 8th Respondent has violated or infringed the Petitioners fundamental rights since the same have not even been particularized. He explains that Homa Bay County Assembly Board has exercised its powers and advanced Car Loan facilities and Mortgage facilities to the members of the County Assembly in line with the **Salaries and Remuneration Circular SRC/TS/CGOVT/3/16 dated 27th November 2013** and annexed as **Exhibit OBK1. And SRC/ADM/CIR/1/13 VOL III (128) dated 17th December 2014** and annexed as **Exhibit OBK2**. It is further deposed that the County Assembly has established the **County Assembly Loans Committee** mandated to manage matters of **Car Loans and Mortgage** facilities advanced to its members.

As for the issues raised in the Auditor General's report for the year 2014, the 8th respondent states that the same are still pending before the Senate Sessional Committee on County Public Accounts and Investments. In any case the Auditor General has written to all the County Assemblies in the country to submit written responses and supporting documents on all the issues raised in the Auditor General's report on financial operations of the County Assemblies to the Auditor General Regional Hub Offices on or before 5th May and to the Office of the Clerk to the Senate on or before 12th April 2017. A copy of the

notice of the sittings of the Senate Sessional Committee on County Public Accounts and Investments is annexed as Exhibit OBK8.

The 9th respondent in a replying affidavit sworn by **MERCY ATIENO AUDI** (a Report Analyst with 9th respondent) deposed that the section 25 of the Anti Corruption and Economic Crimes Act places a statutory duty on the 9th respondent to investigate all reports of alleged corruption or give reasons for not investigating such complains. It is contended that in the present situation the applicants had neither reported nor complained to the EACC of alleged corruption or breach of the code of ethics so seeking the court's intervention has not been established. She is categorical that the 9th respondent is ready and willing to conduct investigations and does not require a court order to do so.

MR MUTAI who appeared on behalf of the Attorney General informed the court that no response would be filed as the orders do not touch on the Attorney General nor did he attend court for the hearing because in his view the Attorney General's role would be insignificant.

AT the hearing the applicants faulted that the 9th Respondent for denying them the rule of law and ought to be ordered to commence investigations against 2nd -7th respondents as prayed. They also drew the court's attention to the contents of their further affidavit saying they had come across information released by the Controller of budget and one of the local dailies namely **The Daily Nation of 06th, 21st and 24th March 2017** that a huge amount of tax payers money had been lost in the hands of the 8th respondent and that there were many financial irregularities prevailing in the institution and wastage by counties on failure to use **IFMIS**.

In a strange twist of argument the applicants state that they are not asking for the 9th respondent's intervention into the mess within the County assembly which is why they are in court. They contest the claim that their application is incompetent saying the Constitution allows them to interrogate the government and demand for inspection of documents.

Mr. Nyauke on behalf of the 2nd -7th respondents submitted that application is misguided and mischievous as there is no material presented to the court to even suggest that the respondents are likely to interfere with any investigations or the 9th respondent's work so the orders sought in that regard should not be issued. He also contends that the applicants have not demonstrated how their rights have been violated and there has never even been any correspondence between the applicants and the respondents with regard to the complaints now being raised and in any event the 2nd -7th respondents would never interfere with the 9th respondent's work.

Counsel argues that the application has a political agenda targeting the 2nd respondent who is the Governor of Homa Bay County and this is confirmed by the fact that all the prayers leave out the 1st respondent, who is alleged to be the principal sponsor of this petition and the applicants are simply its agents who think that by not mentioning the 1st respondent they are safe in spreading out a wide blanket of prayers.

As regards the prayers that the respondents be compelled to conduct discoveries **MR NYAUKE** submits that this is an administrative duty which if the 2nd -7th respondent have failed to observe should be brought to this court by way of judicial review and not a constitutional petition. He poses the following questions-

- What documents do the applicants want inspected
- Do they want all documents beginning with receipts issued at the market to the oath of office
- Do the applicants want the registers for all the employees of Homa Bay County? Counsel

states that if the applicants are desirous of conducting a head-count of all the employees at the County offices they are free to do so

It is counsel's contention that the application is full of guesswork and portrays a total deficiency of knowledge on the operations at the County Government liabilities, saying assets and liabilities inherited by the County Government is by the inter-governmental relations agency (i.e. the Transition Authority) which is supposed to execute that mandate.. He argues that at least the applicants should at least have been aware of the Transition Authority's operations, where its mandate begins and ends as set out under article 179 of the Constitution of Kenya.

MRS. DHIKUSOKA on behalf of the 8th respondent submits that the orders sought with regard to interfering with investigations are unfounded and frivolous as nothing tangible has been presented to demonstrate such a position. She argues that the 8th respondent is mandated under Article 185 of the Constitution to be the legislative authority of government, represent the people, approve plans and policies affecting County government and undertake oversight of the County executive whilst respecting the doctrine of separation of powers. It is counsel's contention that in this regard the 8th respondent has actually partnered with the 9th respondent and allowed its agents to enter into the county premises whilst conducting investigations.

She pointed out that on 1st March the 1st Respondent was served with orders in **Miscellaneous Criminal Applications No 9, 10 and 12 of 2017** to allow the 9th respondent to enter into the County Assembly premises, seize and take possession of documents required for investigations. She submits that the prayers sought are not tenable and urges the court to dismiss the application.

MISS OMWERI on behalf of the 9th respondent submits that the court cannot purport to issue the orders sought because under article 79 of the Constitution the EAAC has powers and by dint of Article 249 of the Constitution it shall not be subjected to any directions by any person or authority. She also points out that the applicants have not made any request to respondent to act and met with a negative response and even if the 9th respondent had failed to act then the proper avenue for redress would be by way of judicial review and not a constitutional petition.

Counsel further points out that there are on-going investigations which are at various stages touching 1st-8th respondents Prosecution and once completed shall be submitted to the Director of Public Prosecutions. She explains that the very nature of the investigations make it such that the 9th respondent cannot publicize their actions it has taken and the applicants are acting out of ignorance in claiming that the 9th respondent has not taken any action.

In reply the applicants demanded evidence that the 9th respondent had taken any action against the other respondents.

As regards the position adopted that their application is incompetent they tell off the respondents saying they cannot tell them what to do when they come to court to seek redress as ordinary citizens who are perturbed by what they have read in the newspapers and it has nothing to do with politics.

INTERFERENCE WITH INVESTIGATIONS:

For the order in prayer (1) to issue the applicants must demonstrate that there are on-going investigations which the 2nd -7th respondents have attempted to scuttle or interfere with. The applicants have not alluded to any specific investigations currently being carried out by the anti-corruption agency, the police or any other organ. They have not referred to any specific instance, word or deed by any of the respondents to warrant drawing an inference that there is a likelihood of interference with investigations. I think granting the orders restraining orders would be tantamount to blowing air into an empty porridge mug!

COMMENCEMENT OF INVESTIGATIONS

The applicants as residents of Homa Bay County have concern in the manner the public finances are being utilized and managed.

Article 10 of the Constitution binds all State organs, State officers and public officers to uphold national values and principles of governance which include integrity, transparency and accountability and what I can decipher is that this forms the basis of the applicants' contention. Yet the question which begs to be answered is whether the applicants have ever raised their various concerns to any investigative agency and been ignored or denied audience. I say this because the 9th respondent owes its existence to Article 79 of the Constitution of Kenya, and its functions are clearly set out under the Anti Corruption and Economic Crimes Act. Of greater significance though is the fact that investigations have taken place involving the Homa Bay County Assembly and various office holders there from, and I take judicial notice that by 1st March 2017 the 9th respondents had commenced investigations and proceedings against the 8th respondent's clerk in **High Court Homa Bay Miscellaneous Case No 8 of 2017 ETHICS AND ANTI CORRUPTION COMMISSION versus BOB KEPHAS OTIENO AND ANOTHER** and **High Court Homa Bay Miscellaneous Case No 10 of 2017 ETHICS AND ANTI CORRUPTION COMMISSION versus BOB KEPHAS OTIENO**. The 9th respondent's counsel has explained that the nature of the investigations is such that it would not be prudent to publicize the details of their actions-I think the existence of the two files vindicate the 9th respondent on that.

DISCOVERY AND INSPECTION OF DOCUMENTS:

The applicants were not specific as to which fundamental right has been infringed but by reading of the petition I can glean that one of the rights they seek to enforce is access to information as enshrined under article 35 of the Constitution which provides that

“35 (1) every citizen has the right of access to

(a) information held by the State, and

(b) information held by another person and required in the exercise of protection of any right or fundamental freedom

The applicants seek that the respondents be compelled to produce for inspection **ALL** documents pertaining to the projects which have been carried out by the County Government. The first issue that comes to mind is this; - has there been past correspondence by the applicants requesting for such documents. 2ndly as **MR. NYAUKE** puts it, just which documents do they require? I concur that the prayer is rather wide and too general- it does not restrict itself to a given period or to specific projects, and it does not need a fertile imagination to envisage the ambiguity this creates. The bulk of those prayers which the respondents carry out in the course of their administrative functions and the proper avenue for redress ought to have been to move the court by way of judicial review!

The applicants may have had a genuine desire to hold the respondents accountable in the discharge of their duties **BUT** they seem to have acted in haste propelled by the newspaper reports they read without establishing what was actually on the ground. Had they been just a little more diligent they would have realized that there was absolutely no reason to seek orders against the 9th respondent. They would also have first made a request to the respondents setting out with clarity the nature of documents they required for inspection instead of asking the court to make a rather blanket and indefinite order requiring documents for **ALL** the projects undertaken. They would have read through the Auditor General's report and the findings of the Senate, sieved through to pick up the pertinent issues. Unfortunately due to this lack of diligence the applicants end up with a rather untidy state of affairs thereby literally placing the cart before the horse and which this court can ill afford to offer relief. The upshot is that the application lacks merit and is dismissed.

Delivered and dated this 08th day of May, 2017 at Homa Bay.

H.A.OMONDI

JUDGE