



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**PETITION NO. 29 OF 2015**

**EVANS ABUYA TINEGA & ANOTHER.....PETITIONERS**

**VERSUS**

**THE GOVERNOR, NYAMIRA COUNTY GOVERNMENT & 2 OTHERS.....RESPONDENTS**

**RULING**

**Introduction**

1. The Petitioners filed a petition on 9<sup>th</sup> July, 2015 seeking the following orders:

- a. **A declaration that the respondents have violated the constitution of Kenya 2010 and the County Government Act 2012.**
- b. **That the Respondents be compelled to ensure Public Participation in all development projects.**
- c. **Costs of this petition.**

2. Simultaneously with the Petition, the Petitioners also filed an application by way of Notice of Motion seeking conservatory prohibitory and injunctive orders as follows:

- a. **THAT this Application be certified urgent and be heard on priority basis.**
- b. **THAT a temporary prohibition do issue restraining the Respondents from carrying out any projects and/or suspend any development projects at Esise Ward, Nyamira County until there is a proper ward development Committee Representative in place pending the hearing and determination of this Application interpartes.**
- c. **THAT temporary prohibition do issue restraining the Respondents from carrying out any projects and/or suspend any development projects at Esise Ward, Nyamira County pending the hearing and determination of this petition.**
- d. **THAT an order directing the Senate to investigate the development projects at Esise ward, Nyamira County pending the hearing and determination of this petition.**
- e. **Costs.**

3. The said application is the subject of this ruling.

### **Background.**

4. The application is premised on the grounds stated on the body of the notice of motion and on the affidavit of **EVANS ABUYA TINEGA** which show the background of the case as follows:

a. **The petitioners state that they are the residents of Ekerubo settlement scheme within Esise Ward in Nyamira County who claim that they are interested in knowing how Government funded projects are carried out in line with the constitutional provision that citizens be consulted in everything being done by leaders on their behalf through public participation.**

b. **The petitioners contend that the respondents have failed to avail to them crucial information regarding the development projects initiated in their area and that public funds are being embezzled and/or used in an opaque manner. The petitioners claim that all the development projects in their area are suspect since they (petitioners) have been excluded in the approval of development projects and proposals.**

### **The Petitioners case**

5. The Petitioners argue that as residents of Esise Ward, they have noted that the respondents are carrying out development projects in their area in a selective manner and have failed to account for the use of the County's resources for 2 financial years being 2013/2014 and 2014/2015.

6. The petitioners further contend that the residents of Esise Ward felt that they have been short-changed since they were not involved in selecting the Ward development committees and project management committees.

7. The Petitioners also contend that the respondents have contravened the provisions of both the Constitution and County Government Act 2012 and therefore the need for this court's intervention by suspending all the projects in Esise Ward until a proper Ward Development Committee is constituted.

### **Respondents case**

8. The respondents, on their part, filed a replying affidavit in response to the said application sworn on 6<sup>th</sup> November, 2015 by Kennedy Ndege who describes himself as the chairman of Esise Ward Development Committee in which he states, firstly that the petitioners are not residents Ekerubo Settlement Scheme.

9. He further states that the County, Government of Nyamira has initiated several development projects within Esise Ward which projects have been initiated by the elected leaders in consultation with the members of the ward. He has annexed a list of members of the Ward Development Committee to the affidavit as annexure KN1 and list of the flagship projects as annexure KN3.

The deponent has also attached annexure KN4 to his affidavit which a letter addressed to the court signed by at least 17 residents of Esise who object to their names being used in the petition against the Respondents. The signatories that they did not authorize anyone to file a petition on their behalf and want their names to be expunged from the petition.

10. He further depones that all the projects have been carried out in a transparent manner through public participation as shown in the minutes of the meetings held and correspondences which have also been annexed to the said replying affidavit as annexure KN2.

11. The respondent's deponent further states that the third parties who have been contracted to carry out the projects will be adversely affected if the prohibitory and injunctive orders sought by the petitioners are granted. The respondents contend that the petitioners' complaint lacks authenticity, is not meritorious and ought to be dismissed with costs.

12. When the application came up for hearing ex-parte on 13<sup>th</sup> July, 2015, this court (differently constituted) granted temporary orders of prohibition restraining the respondents from carrying out any projects and/or suspended any development projects at Esise Ward, Nyamira County until there is a proper Ward Development Committee Representative in place, pending the hearing and determination of this application interpartes.

13. When application came up for hearing before me on 9<sup>th</sup> November, 2015, parties agreed to canvass their arguments by way of written submissions.

### **Applicants' submissions**

14. Josiah Abobo & Co. advocates for the applicant submitted that the applicant was prompted to file the instant motion by respondents' lack of accountability in the management and use of the county's resources and further by the lack of citizen's participation in the development of policies and plans in the delivery of services in the Nyamira County.

15. The applicants' contention is that it had unsuccessfully sought information, data and documents from the respondents regarding the projects that had been planned for and funded by the County Government of Nyamira in respect to Esise Ward for the **financial years of 2013/2014 and 2014/2015** in line with the **provisions of Article 35 of the Constitution of Kenya and Sections 30 (3) (f) and (g), Section 87 (a) and (b) of the County Government Act.**

16. The applicants further contended that there was no Ward Representative Development Committee in respect to Esise Ward and as a result, its functions were not performed according to the law and that the respondents failed to disclose the amount of funds released to various projects.

17. The applicants argued that the law enjoins the respondents to consult the people before making decisions that affect them. According to the applicants, the respondents were by law, required to ensure that the developments in the wards were carried out in a transparent manner with proposals on such projects emanating from the people themselves.

18. The applicants objected to the replying affidavit sworn by one Kennedy Ndege stating that he is not a party to the petition.

19. The bigger part and indeed the rest of the applicants written submissions consist of what should really be a response/rejoinder to the respondents replying affidavit as the applicants counsel has endeavored to challenge the averments and annexures contained in the replying affidavit.

20. It is my humble view that submissions whether oral or written should focus on the law and the facts that have already been placed before the court by the parties in their pleadings. In this regard therefore a counsel for representing a party should steer away from joining the fray by making statements that can only be construed to be statements from the bar. The applicant should have, in this regard sought leave to make a formal and sworn affidavit in response to the respondents' replying affidavit instead of making what amounts to such response, in the written submissions.

21. The applicant also submitted that the due process of the law has to be adhered to in the carrying out of projects within the County and as such, the respondents' contention that the already contracted third parties would adversely be affected by the prohibitory orders sought could not hold water.

22. Lastly, the applicants submitted that the respondents' annexure which is a letter addressed to court by some petitioners purporting to withdraw their signatures in the petition is of no probative value, is improperly before the court and is doctored/fabricated with the aim of defeating the ends of justice.

### **Respondents' submissions**

23. M/s Nyachiro Nyagaka & Co. Advocates for the respondents' narrowed down the issues for

determination as follows:

- a. **Whether the orders of prohibition sought can issue.**
- b. **Whether the circumstances have arisen for the senate to investigate development projects as sought.**
- c. **Whether there has been citizen participation**
- d. **Whether sufficient grounds have been advanced to warrant the granting of the orders sought.**

24. On the first issue, which is closely linked to the last issue of whether or not the orders sought can be granted, the respondents submitted that the courts have set the principles on applications for conservatory orders as follows:

1. **The applicant must demonstrate that they have a prima facie case with a likelihood of success and that they would suffer prejudice as a result of the violation or threatened violation if the conservatory orders sought are not granted. The respondents' cited the case of Centre for Rights Education and Awareness & 7 others vs the Attorney General HCCP No. 16 of 2011. In Geofrey Mwali Ngungi vs DPP and 4 others NBI HCCCP No. 428 of 2015 it was held that it is not enough to that the prima facie case is potentially arguable but rather that there is likelihood of success.**
2. **That the grant or denial of conservatory relief ought to enhance constitutional values and objects specific to the rights or freedoms in the Bill of Rights.**
3. **That if the conservatory order is not granted, the petition or its substratum will be rendered nugatory.**
4. **The public interest should favour a grant of conservatory order.**
5. **The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters. See centre for Human Rights and Democracy and 2 others vs Judges and Magistrates Vetting Board and 2 others HCCP No. 11 of 2012 and Suleiman vs Anubizen Resort Ltd [2004] 2 KLR 589.**

25. The respondents thus submitted that the applicants did not demonstrate and their application complied with any of the above stated principles.

26. On the issue of whether or not the senate can investigate the development projects in Esise Ward, the respondents submitted on the role of the senate as stated Under **Article 96 of the constitution** and as was highlighted by the court in the case of **International Legal Consultancy Group vs Senate and Clerk of Senate (2014) eKLR**, and argued that the petitioners had not laid a basis upon which the senate could be invited to investigate the said development projects.

27. On the question of whether or not there was citizen's participation in the initiation and execution of the development projects, the respondents contended that there was public participation as all the projects were duly advertised as shown in the annexures to the replying affidavit. The respondents added that there was a County Development Board duly created under the County Development Act that was mandated to adopt County integrated development plans before they are tabled into the County Assembly for approval. It is the respondents' argument that public participation does not mean that a particular person had to be heard.

28. Lastly the respondents submitted that the applicants had not given sufficient grounds to warrant the

granting of the orders sought as they have not shown the link between them and the provisions of the constitution alleged to have been contravened and the manner of contravention. On this point the residents relied on the holding in ***Anarita Karimi Njeru vs Attorney General*[1979] KLR 54**.

29. The respondents argued that the applicants' application had not met the requisite threshold for the grant of the orders sought and prayed for its dismissal with costs.

### **Analysis and Determination**

30. After perusing the petition, the instant application, the replying affidavit, the written submissions and the authorities cited by the respondents, I note that the main issue for determination is whether, on the basis of the pleadings before the court, and without making final findings in law and in fact, the court ought to grant the conservatory injunctive and prohibitory orders sought in the instant application, at this intermediary stage.

31. A peripheral issue that has also arisen out of the submissions of the applicants is whether the deponent to the respondents' replying affidavit, one Kennedy Ndege had the locus standi to swear the said affidavit on behalf of the respondents.

32. The issue of whether or not this court can direct the senate to investigate the development projects initiated by the Nyamira County Government in respect to Esise Ward also arose from the pleadings.

33. Beginning from the last issue for determination which is whether or not this court can give orders directing the senate to investigate the development projects of Esise Ward, I find the answer to that question in the doctrine of separation of powers. I find that, as long as it is mandated by the constitution, the court has powers to interfere in the processes of other branches of the government. **Article 165 (3) (d) (ii) of the Constitution** grants the court the jurisdiction to determine the question.

**“Whether anything said to be done under the authority of this constitution or of any law is in consistent with, or in contravention of the constitution.”**

Article 2 of the constitution states that:

**2 (1) This constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.**

**(2) No person may claim or exercise state authority except as authorized under this constitution.**

Under Article 3 (1) of the constitution:

**“Every person has an obligation to respect, uphold and defend this constitution.”**

34. By dint of the provisions of Article 2 and 3 of the constitution outlined hereinabove, parliament, which includes the senate, is subject to the supremacy of the Constitution and courts can intervene in instances where parliament contravenes the provisions of the constitution. In which case therefore, the legislature is not immune to judicial scrutiny.

Conversely and apart from the courts intervention in instances where the legislature contravenes the law, can the court direct the legislature on what to investigate or better still, how to conduct its proceedings?

35. My answer to the above question is to the negative. It is my understanding that the courts mandate to intervene in instances where the law or constitution is contravened by parliament does not extend to the court giving directions to the legislature on what agenda or issues to investigate. The doctrine of separation of powers between the different arms of the government does not envisage a scenario where courts set the agenda for parliament on what issues they need to discuss or investigate.

36. In **High Court Petition No. 229 of 2012- Trusted Society of Human Rights vs The Attorney General and others.**

The court, while considering the principle of separation of powers in relation to the judiciary and the legislature observed as follows at paragraph 63 and 64 of its judgment:

**63 “We begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine it means that when a matter is textually committed to one of the coordinate arms of government, the courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic constitutions, the new Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others. This constitutional design is a direct influence from Montesquieu, the noted French philosopher who is often called the father of modern constitution-alism.**

**Noting that separation of powers was essential to the liberty of the individual, Montesquieu famously said: when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty: because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner..**

**There would be an end of everything were the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing public resolutions and of trying the causes of individuals. I CHARLES SECONDANT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151-52 (Thomas Nugent trans., Hafner Publishing co. 1949) (1748).**

**(64) Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieu influence is palpable throughout the foundational document, the constitution, regarding the necessity of separating the governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two.”**

37. I agree with the respondents ‘submissions that the role of the Senate, as stipulate under **Article 96 (3) of the Constitution** is an oversight role restricted to the national revenue allocated to the counties.

**Section 96 (3) of the Constitution** provides as follows:

**“The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.”**

38. In the case of **International Legal Consultancy Group vs Senate and Clerk of Senate (supra)**, it was held inter alia;

**“The Senate cannot therefore overreach its oversight mandate under article 96 (3) to any other aspect of County Government operations and resources as that is the sole preserve of the County assemblies.”**

39. Having regard to the law and the holding in the above quoted case of **International Legal Consultancy Group (Supra)** even if I was to find that this court can direct the senate on what issues to investigate, which I have already found would go contrary to the principle of separation of powers, the applicants have still not demonstrated the basis for inviting the senate’s investigation of the Esise Ward

developments given the senate's clear role in terms of **Article 96 (3) of the Constitution**.

40. Turning to the question of whether or not the respondents deponent to the replying affidavit, Kennedy Ndege, had the locus standi to swear the said affidavit in response to the instant application, I note that the said deponent, has at the outset of the said replying affidavit at paragraphs 1 and 2 described himself as follows:

1. **“That I am the chairman of Esise Ward Development Committee and duly conversant with the facts herein.**

2. **That I am duly authorized to make and swear this affidavit.”**

41. I note that the respondents in this petition and application are listed as the Governor of Nyamira County Government, Teresa Nyaanga MCA – Esise Ward and the executive Committee, Nyamira County Government.

42. The petition revolves around the suspension of development projects of Esise Ward in Nyamira County. I find that there is no person more qualified to answer to the issues raised in the instant application than the chairman of the Esise Ward Development Committee. I further find that having stated the capacity in which he swearing the replying affidavit, the respondents deponent is qualified to swear the said affidavit as he is neither a busy-body nor a stranger to the matter at hand, but is a key person having the requisite information and authority from the respondents to make and swear the said affidavit.

43. Turning to the most critical issue in this instant application which is whether the applicants have made out a case for the grant of the conservatory prohibitory and injunctive orders sought, I note that the ground for seeking the said orders is that there was lack of public participation or consultation prior to the initiation of the development projects and that the respondents failed to avail to the applicant, critical information regarding the funding of the initiated projects. It was the applicant's case that public funds were being embezzled and/or used in an opaque manner.

44. The respondents have on their part attached annexure “KN2” among other annexures to the replying affidavit being advertisements and minutes as proof that there was public participation meetings conducted on diverse dates. As I had earlier noted in this ruling, the applicants did not contest this annexures through a further affidavit, but chose to irregularly challenge them in their written submissions.

45. In the case of **Robert N. Gakuru & 2 others vs Governor Kiambu County & 2 others (2014) eKLR Hon. Justice Odunga** observed as follows:

**“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forums as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”**

46. I have carefully perused the contents of the affidavit of Kennedy Ndege together with the annexures which have not been controverted by the applicants. It is clear to me, from the said replying affidavit that

Esise Ward has in place, a Ward Development Committee chaired by the respondents' deponent and that numerous public participation meetings were held following advertisements in the local dailies over the development projects in Nyamira County as a whole and Esise Ward in particular.

47. The applicants were not, in their application, specific on which particular projects were initiated by the respondents without public participation or which funds were embezzled and how much for that matter thereby making it difficult for this court to pin point the affected projects with a view to making specific orders regarding the same. Instead, the applicants have sought blanket orders of suspension of all the development projects in Esise Ward.

48. I am however of the view that the steps taken by the respondents to constitute a Ward Development Committee, to publish advertisements of public participation meetings and to hold such meetings gave members of the public including the applicants reasonable opportunity to attend such meetings and give their views. On the face of it and taking into account the fact that the applicants did not specify the projects initiated by the respondents without public participation, I am inclined to hold that the respondents, as shown in their annexures to the replying affidavit, effectively notified members of the public of the project meetings.

49. On the grant of conservatory orders, case law has outlined the guidelines to be followed by the court when faced with such applications.

50. In *Kenya small scale farmers forum vs Cabinet Secretary, Ministry of Education Science and Technology NBI HCCP No. 399 of 2015 [2015] eKLR*, the court stated the said guidelines as follows:

i. **"The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see *Centre for Rights Education and Awareness & 7 others vs The attorney General HCCP No. 16 of 2011*. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see *Godfrey Mutahi Ngunyi vs The Director of Public Prosecution & 4 others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others vs Attorney General & others HCCP No. 7 of 2011*.**

ii. **The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see *Satrose Ayuma & 11 others vs Registered Trustees of Kenya Railways Staff Benefits scheme [2011] eKLR* and also *Peter Musimba vs The National Land Commission & 4 others (No. 1) [2015] eKLR*.**

iii. **If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: See *Martin Nyaga Wambora vs Speaker of the County Assembly of Embu & 3 others HCCP No. 7 of 2014*.**

iv. **The public interest should favour a grant of the conservatory order: See the *Supreme Court of Kenya's decision in Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others [2014]eKLR*.**

v. **The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see *Centre of Human Rights and Democracy & 2 others vs Judges and Magistrates Vetting Board & 2 others HCCP No. 11 of 2012 as well as *Suleiman vs Amboseli Resort Ltd [2004] 2 KLR 589*.***

51. The above guidelines bring me to the question of whether or not the applicant has satisfied the set criteria. I am afraid not. As I have already noted in this judgment, the applicants have not demonstrated, to my satisfaction, that there was no public participation in the initiation of the projects complained about. In any event, the applicants have not pin-pointed to this court, which specific projects the respondents initiated without public participation or which funds were embezzled.

52. Most importantly, the applicants have not shown that their petition would be rendered nugatory if the conservatory orders sought are not granted.

53. In my view, even though the Constitution has opened up a lot of space for the public to participate in decision –making on the issues that affect them, the same constitution also provides for safeguards for the same public to be represented by their duly elected representatives right from the grass roots, at the Ward level through their members of the county assembly (MCAS) to the Senate, through their Senators. This representation does not however in any way take away the Constitutional provision that the citizens (Wanainchi) also participate directly in such affairs. Having due regard to the above scenario and without appearing to make final orders on whether or not there was public participation in the development projects, at this interlocutory stage I find that with the material availed before me by the parties, the dictates of this courts discretion ought not to be exercised in favour of the applicants. It is my view that the wider interest of public good and the interest of the citizens in Esise area require that the development projects initiated by the County Government in their area be allowed to continue as the orders sought by the applicants will have the boomerang effect of stalling the said projects indefinitely pending the outcome of the petition an eventuality that will neither benefit the applicants nor the area residents in general taking into account that their Ward will lag behind in developments as other Wards prosper. It is my finding that there will be no justice in stopping development project in the entire Ward at the instance of two people.

54. I find that the applicants have not established a prima facie case with chances of success that there was no public participation or that funds are being embezzled.

55. I am also unable to find how the petition will be rendered nugatory if the conservatory orders sought are not granted since the orders sought are declaratory in nature and the court can make such declarations at any point after a full hearing of the petition.

As I have already stated, public interest does not favour the grant of the orders sought.

56. In a nutshell, after carefully reviewing the application before me, I find that there are not good grounds to warrant the application being allowed.

The totality of the circumstances dictate the dismissal of the application.

57. Consequently, the said application is hereby dismissed with no orders as to costs.

**Dated, signed and delivered in open court this 7<sup>th</sup> day of June  
2016**

**HON. W.A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Abobo for the Petitioner
- Mrs. Asati for Nyachiro for the State
- Omwoyo court clerk