



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION. NO. 424 OF 2015

NAROK COUNTY GOVERNMENT.....PETITIONER

VERSUS

THE SENATE.....1ST RESPONDENT

THE SPEAKER OF THE SENATE.....2ND RESPONDENT

RULING

Introduction

1. The Petitioner filed the Petition herein on 2nd October 2015. Simultaneously, the Petitioner also filed an application for conservatory prohibitory and or injunctive orders to restrain the 1st Respondent and or its committees from debating and considering any questions on revenue collection from the Mara Conservancy and the expenditure thereof. The application is the subject of this ruling.

Background facts

2. The background may be gathered from the affidavit of Lenku Kanar Seki.
3. The Petitioner is one of the 47 devolved County Governments within the Republic of Kenya. Within the Petitioner's geographical boundaries is the Mara Conservancy. The conservancy generates revenue besides being a symbol of sustainable development in so far as the environment is concerned. The revenue is mainly generated from the Masai Mara Game Reserve. The Petitioner collects the revenue.
4. The Senator of Narok County, who represents the Petitioner in the 1st Respondent has for a while been interested in the collection and expenditure of the revenue in question. Other parties too have been interested. All the interested parties have been from the Narok County. The Senator together with the other parties have previously asked questions and demanded answers. They have been to court. They have been to the 1st Respondent. They have been to the Ethics and Anti Corruption Commission, an independent commission established under Article 88 of the Constitution. Decisions have previously been made related to the matter of revenue generated within the Petitioner's boundaries. Allegations of impropriety have been made too.
5. The Petitioner states that the questions have previously been asked before the 1st Respondent.
6. Notwithstanding the decisions by the court as well as by the 1st Respondent's committee and both by the Ethics and Anti-Corruption Commission and by the Director of Public prosecution, on 6th

October 2015 the Senator for Narok County once again raised the same issue. The Senator sought the Petitioner's disclosure on the revenue received from the Mara Conservancy and how the same had been collected and distributed in the months of February March and April 2014.

The Petitioner's Case

7. The Petitioner contends that a debate or consideration of the question as to the revenue collection and expenditure notwithstanding previous decisions by the court as well as the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions and also recommendations of the 1st Respondent's committee amount to a denial of the Petitioner's right to fair administrative action in contravention of Article 47. That it also would be in contravention of Article 159 of the Constitution which vests judicial authority in courts and tribunals.
8. The Petitioner also contends that a consideration by the 1st Respondent of the inquiries by the Senator of the Petitioner would contravene Article 96(3) of the Constitution as well as Article 226 (2) of the Constitution. The two Articles respectively restrict the 1st Respondents financial oversight role over the Petitioner to national revenue allotted by the County Government and vest the same financial management oversight to the County Assembly.
9. It is also the Petitioner's case that the 1st Respondent is and would be unreasonably interfering with the functions and objectives of devolved Government as set out in Articles 174 to 176 of the Constitution.

Respondents' Case

10. The Respondents on the other hand contend that the Petition is premature as the Petitioner being an arm, albeit devolved, of the Government has not exhausted all the dispute resolution mechanisms. The Respondents also state that the Petition is not only an affront to the role of Parliament under Articles 94 & 96 of the Constitution but is also intended to help suspend the fundamental provisions of Article 35 of the Constitution as to the right of access to information held by a state office.
11. Further it is also the Respondents' contention that the 1st Respondent has a Constitutional mandate to oversee national and county revenue under Article 96, 119, 216, 218 and 220 of the Constitution.
12. The Respondents also contended that the court has no jurisdiction to interfere with parliamentary proceedings or the happenings inside either house of Parliament.

The Issues

13. Currently for determination is only one core issue. The question is whether on the basis of the documents now before the court and without a thorough analysis and final findings of law and fact the court ought to grant the conservatory injunctive and prohibitory orders sought in the application dated 2nd October 2015.
14. A peripheral issue is also whether the Petition and application have been pre- maturely filed, with a more preliminary issue being whether the court has jurisdiction over the matter.

Arguments

15. The application was canvassed by way of oral submissions before me on 14th October 2015.
16. Mr. Makokha, for the Petitioner, stated that the Petitioner had a prima facie case with chances of success. That the 1st Respondent was evidently abusing the powers donated under Article 96 (3) of the Constitution. Under the said Article, the 1st Respondent could only exercise an oversight mandate on the use of national revenue allocated to counties. According to Mr. Makokha, the County Assemblies were the only organs enjoined to audit and oversee the collection and expenditure of revenue directly generated by the counties.
17. Mr. Makokha submitted further that the entire Petition may be rendered nugatory if the conservatory orders are not issued as the 1st Respondent is bent on pursuing a personal war against

the Petitioner which is simply going to drag down the Petitioner's development agenda. Besides, the matters sought to be investigated, discussed and considered by the 1st Respondent have previously been investigated, discussed and considered by not only the 1st Respondent but also the Director of Public Prosecutions and the 1st Respondent duly exonerated.

18. On the minor issue as to whether or not the Petitioner had exhausted other laid down dispute resolution procedures, Mr. Makokha submitted that there was no dispute capable of being resolved elsewhere, rather the Petitioner was challenging an unconstitutional and illegal process being invoked and applied by the 1st Respondent.

The Respondents' Submission

19. Mr. S.M. Mwendwa urged the Respondents' case.
20. Mr. Mwendwa asserted that the Petitioner was duty bound to observe the provisions of the Intergovernmental Relations Act, 2012. Making reference to the case of **Speaker of the National Assembly –v- Karume [1992] LLR 3070**, Counsel submitted that where there is a procedure for redress of any particular grievance the procedure ought to be strictly followed. Counsel then submitted that the Intergovernmental Relations Act 2012 at sections 31 through 35 exhaustively provided for disputes between arms of the Government to be resolved amicably and without resorting to judicial proceedings. Judicial proceedings were only to be invoked as the last resort. Counsel contended that the dispute between the Petitioner and the 1st Respondent fell under the provisions of Article 189 (3) of the Constitution and, consequently, the provisions of the Intergovernmental Relations Act, 2012 were applicable.
21. Counsel also relied upon the cases of **Peter Ochara & 3 Others –v- Constituency Development Fund Board & 3 Others [2011] e KLR**, **Hassan Shano & 3 Others –v- National Committee of the Constituency Development Fund [2010] eKLR**, **James Wambugu Gakunyi –v- The National Alliance Party & 3 Others HCCP No. 357 of 2012** amongst others, to further affirm the point that the Petition was premature and simply deserved to be struck out.
22. The Respondents' counsel also argued that the Petition is an affront to the Senate's authority and powers under Article 94 and 96 of the Constitution in so far as it seeks to halt parliamentary proceedings. According to counsel, county and national revenues could not be separate. In any event, he added, the previous decision of the court that stated that the Senate's oversight role was limited to national revenue granted to the County government was the subject of challenge in the Court of Appeal.
23. Finally, counsel submitted that the Petitioner stood to suffer no injury or loss if the conservatory orders were not granted. In any event, added Mr. Mwendwa, the Senate was already seized of the matter and ought to be allowed to proceed as by law mandated.

Petitioner's rejoinder

24. The Petitioner's rejoinder especially to the contention that the Petition is premature is to be found partly in the written submissions filed on 6th October 2015.
25. The Petitioner contended that the 'dispute' before the court is not of the type envisaged under Article 189 (3) and (4) of the Constitution and Section 31 through 35 of the Intergovernmental Relations Act, No. 2 of 2012. The Petitioner submitted that the Petitioner was simply trying to stop the 1st Respondent from perpetuating an illegality. That the Petitioner was only trying to ensure that the decision of the court is HCCP No 8 of 2013 **International Legal Consultancy Group –v- Senate & Clerk of the Senate [2014] eKLR** was observed and upheld. The said decision was inter alia, to the effect that the oversight mandate of the Senate with respect to county governments is limited to national revenue allocated to County Governments.
26. Secondly, by way of rejoinder the Petitioner contended that Article 165 (3) of the Constitution mandates the High Court to investigate and prevent any attempt by any person to act unconstitutionally. Besides, the Petitioner is of the view that to insist on alternative procedure is to limit this court's jurisdiction and tie the court to technicalities.

Discussion and Determination

27. I have perused the pleadings filed herein. I have also read the submissions filed by the parties and considered carefully the oral arguments advanced.
28. Two issues have already been identified. Has this court the necessary remit to intervene with the proceedings of the Respondents? Is the Petitioner entitled to the orders sought at this intermediary stage?
29. On the issue of remit, the Respondents submitted that the Judiciary should never interfere with the workings of other arms of Government. The doctrine of separation of powers was invoked. Also invoked was parliamentary privilege. It was then stated that what goes on in parliament is outside this court's jurisdiction.
30. I would give a quick answer.
31. The Court has the necessary remit. As was observed by the Supreme Court of Zimbabwe in the case of **Smith v Mutasa (1990) LRC 87**, the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution. The supremacy of the Constitution which can never be gainsaid was being reiterated. Our Constitution gives the Court the power to intervene.
32. It is important to restate the provisions of **Article 165 (3)(d)(ii)** of the Constitution with regard to the jurisdiction of the Court. Under the said Article, the Constitution expressly mandates the Court with jurisdiction to determine the question ***"...whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution..."***
33. **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 authorised under this Constitution.

34. Then Article 3(1) provides that

"Every person has an obligation to respect, uphold and defend this Constitution."

35. Parliament, by dint of Articles 2 and 3, is certainly subject to the supremacy of the Constitution. It cannot act outside the confines of the Constitution. Where it does so, the court can and must intervene. Parliament is not immune to judicial scrutiny. I find that the court has the necessary remit, conferred by the Constitution to interrogate whether Parliament is acting within the constitutional provisions.
36. As was stated in the South African case of **Doctors for Life International v Speaker of the National Assembly and Others CCT 12/05)[2006]ZACC 11 at para 38, :**

"...Under our Constitutional democracy, The Constitution is the Supreme Law. It is binding on all branches of government and no less parliament when it exercises its legislative authority, Parliament must act in accordance with and within the limits of the constitution, "and the Supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled" Courts are required by the Constitution "to ensure that all branches of Government Act within the Law "and fulfil their constitutional obligations."

37. Those words and sentiments would apply to our scenario with equal measure. I adopt the same in this Petition. I also hold the view that the sooner all arms of government appreciate the fact that we are operating under a new constitutional dispensation, the better.
38. The second issue involves the Petitioner seeking a conservatory order.
39. A series of cases have laid down the guidelines to be followed by the court when faced with an application for conservatory orders. In the case of **Kenya Small Scale Farmers Forum –v- Cabinet Secretary, Ministry of Education Science and Technology NBI HCCP No. 399 of 2015 [2015] eKLR**, the court stated as follows as concerns applications for conservatory orders:

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 – v- 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 –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- 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 – v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- 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 –v- 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 –v- 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 for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589."*

40. The above principles are sound save to stress that whilst exercising the discretion the doctrine of proportionality must come into play also. The basic question therefore is whether the Petitioner has satisfied the set criteria.

41. The essence of the Petitioner's claim is that the 1st Respondent in demanding or asking for details of the revenue collected from the Mara Game Reserve and how the same was expended, was going beyond its mandate. For the Petitioner this role is limited to and reserved for the Petitioner's County Assembly. The Respondents reply is simple. The Senate has an oversight role to protect the interest of the counties and that role is not limited to overseeing expenditure of national revenue.

42. The Petitioner however seems to be departing from the Petition itself where the Petitioner has alleged that the Petitioner's rights to fair administrative action and fair trial under Articles 47 and 50(1) respectively of the Constitution were under violation or threat of violation. I did not hear counsel submit in any way to show that the Petitioner's rights or freedoms have been or are about to be infringed.

43. My view on this issue is short.

44. The court in NBI HCCP No.8 of 2013 **International Legal Consultancy Group –v- Senate & Clerk of the Senate [2014] e KLR** made a finding on the issue of the Senates role under Article 96(3) of the Constitution. It returned the verdict that the Senate's (1st Respondent's) oversight role in matters concerning revenue was restricted to national revenue allocated to the County Government. The role did not extend to revenue generated locally by the counties. So stated the court:

"We must however mention that the Senate's oversight role cannot be likened to the role of the County Assembly under Article 226(2) of the Constitution. Under Article 96(3), the Senate's oversight role is restricted to the National revenue allocated to the counties. It has no oversight over grants, loans and revenue generated locally by the counties. Under Article 226(2) of the Constitution the County Assembly has a wide berth to oversee all the financial resources of the county including revenues allocated by the National Government and the revenue generated locally by the respective County. 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. To that extent, we find that the Senate and the County Assembly only have a collective role in the oversight of nationally allocated revenue to the Counties.”

45. I am aware that I am not bound by the decision of the court in the **International Legal Consultancy Group –v- Senate & Another (supra)**. I am however also aware that the doctrines of *stare decisis* and precedent dictate that certainty be encouraged in the law, especially judge made law. I find for now that the reasoning in **International Legal Consultancy Group –v- Senate & Another (supra)** was very sound. I see no reason to depart from that reasoning and holding especially at this interlocutory stage.
46. I note though that the court in **International Legal Consultancy Group v Senate & Another (supra)** did not go further and define what “oversight ” means. The Constitution itself has not offered a definition of the word oversight. I however do not imagine ,without even a deeper analysis of the decision, that the court could have meant that the Senate is gagged in so far as matters touching on revenue of the county governments are concerned. Looking at Article 96 of the Constitution it is apparent that the Senate has a rather wide mandate. It can ask questions and questions can be asked of it. It represents counties and protects the interest of the counties and their governments.
47. I have perused the questions sought to be answered in the 1st Respondent. For now and without the benefit of a full interrogation, I do not hold the view that they amount to overseeing the locally generated revenue. They are not, in my view, audit or appraisal or inspection questions. They are not intended to open up the county revenue to structured scrutiny in the sense of the word ‘ oversight’. In my view, the Senator of Narok County is simply seeking information and provision of such information. The questions, for ease of reference, read as follows:
- i. *Can Narok County Government disclose how much revenue have they received from Mara Conservancy in the months of February, March and April 2014*
 - ii. *Mara Conservancy on their part should also disclose the amount of revenue collected and distributed in the above three months*
 - iii. *Can the [Narok] County Government disclose how much revenue was stolen [on 10th July 2015 from one of the main gates of Masaai Mara Reserve]*
 - iv. *Were the suspects [of the theft in(c)above] arrested and charged in court*
 - v. *How many armed game rangers were guarding the gate that fateful night?*
48. I am not immediately able to discern how the above questions amount to overseeing the locally generated revenue. The questions are limited and do not, in my preliminary view, amount to superintending, controlling or managing the county government’s locally generated revenue.
49. For this too, I find that in so far as the 1st Respondent wants to have questions put to the Petitioner concerning its locally generated revenue, the Petitioner has not established a prima facie case with chances of success that the Petitioner’s right to fair trial or fair administrative action is about to be violated.
50. I am also not convinced that if the above questions are put through before the Senate there will be a breach or violation of the Constitution. The Petitioner will certainly have the time and opportunity to provide the answers. I have also taken into consideration that public interest may also necessitate that the answers to the above questions are provided.
51. The Petitioner also complained that the 1st Respondent was subjecting the Petitioner to unnecessary processes and departments including the Ethics & Anti Corruption Commission. To the Petitioner this was in breach of the provisions of Article 47 of the Constitution. I would hold for the moment a different view, based on the documents availed. The various other bodies including the Ethics and Anti Corruption Commission have a role both under the Constitution and statute to play. I do not for the moment find any merit in the complaint by the Petitioner that the constant references to these bodies equate a violation of the Constitution. There is, in short, no prima facie case on this limb.
52. What prejudice is the Petitioner to suffer if the 1st Respondent continues with the debate and consideration of the Petitioner’s locally generated income? I am presently unable to see any. The Petitioner says the Petitioner’s development agenda may be slowed down or stalled altogether. The Petitioner however failed to tender evidence and demonstrate how possibly that may happen.

- Indeed, it may well be argued that the questions as asked may be for the benefit and in the interest of Narok County, pursuant to Article 96(1) of the Constitution.
53. I also have no doubt that the 1st Respondent is aware of the decision of this court in **International Legal Consultancy Group –v- Senate & Another (supra)**. Counsel submitted that the 1st Respondents have preferred an appeal against that decision. For the moment though I am satisfied that the Respondents are aware that they must draw the line and not purport to superintend the Petitioner when it comes to locally generated revenue once the answers to the questions, the subject of contention herein are given.
 54. Will the Petition or its substratum be rendered nugatory? The Petition seeks declaratory orders. The only other order is one for an injunction. The declaratory order may be made even long after the 1st Respondent would have finalized debate. The effect of the declaratory orders will, if issued in favour of the Petitioner, be to render void any of the proceedings and resolutions as may be made by the Respondents concerning and touching on the subject matter; that is to say revenue collection and expenditure by the Petitioner from the Mara conservancy.
 55. I also have no doubt that this court during trial will have the opportunity to demystify what the word “oversight” under Article 96 portends. This will assist the county governments as well as the Respondents to be able to clearly draw the line.
 56. Would Constitutional values be preserved and principles maintained through the issuance of the conservatory orders?
 57. The Petitioner has demonstrated that thus far the relevant provisions of the Constitution as interpreted by this court are that the 1st Respondents has no remit to discuss audit discern or oversee the revenue which is locally generated by the Petitioner. That is the position of the law as it stands now with Article 96 (3) having been given a restrictive construction by the court in **International Legal Consultancy Group –v- Senate & Another (supra)**. The 1st Respondent like all persons and organs of the state is enjoined to observe and respect the Constitution, which is the Supreme law. The 1st Respondent is also enjoined to observe and respect court orders judgments and rulings. That is part of the concept of the rule of law which is applicable to all equally. It is a Constitutional value.
 58. I believe too, public interest also dictates that parties be encouraged to obey court orders, if not forced to.
 59. The Petitioner has however not demonstrated that the mere asking of questions presages oversight being exercised by the 1st Respondent.
 60. I hold the view that public interest will be better served if no orders are granted in the interim. I have also ascertained that if the orders are not granted the Petitioner will not be of necessity put to hardship or unnecessary prejudice. If too the orders sought are not granted, the Petition itself is not likely to be rendered nugatory.
 61. In such circumstances, counsel of prudence also dictates that I balance and exercise my discretion cautiously.
 62. I would not do so in favour of the Petitioner. The relevant and pertinent facts in these respect are there. The 1st Respondent is aware of the decision of this court in **International Legal Consultancy Group –v- Senate & Another (supra)** where the court stated that the role of the Senate in overseeing revenue is limited to national revenue received by the county governments and not locally generated revenue . It ought to take the lead and observe the holding therein. It must be able to exercise caution and not purport to oversee that which it has no mandate over. Yet, I see no reason why the question posed cannot be put across and answers given, limited to the questions.
 63. Before I conclude and give the final disposal orders, I would like to express a view or two on the issue of the dispute resolution forum.
 64. There is no doubt nor controversy that where the Constitution or Statute sets or establishes a dispute resolution procedure then the procedure must be used by parties within such rubric: see **Kipkalya Kones –v- Republic & Another [2008] 2 KLR 43**. While I appreciate that principle of law that the court must always refrain, I must take cognizance of Article 258 of the Constitution which allows parties to prompt the court where there is a violation of or threatened violation of the Constitution . The Court should never be divested of authority and my reading of the Intergovernmental Relations Act does not reveal any provision which divests this court of

jurisdiction.

65. In the instant case, the 1st Respondent stated that the dispute resolution forum has been laid out under Article 189 of the Constitution and sections 31-35 of the Intergovernmental Relations Act, 2012. The Constitution as well as statute encouraged a more reliable but less acrimonious way of resolving disputes between governments or government entities. Litigation is ranked last. It should come after all other forums have failed. The Petitioner contends that there is no ‘dispute’ as contemplated by Article 189. I would tend to agree.

66. The 1st Respondent is apparently aware of the position of the law. I state so in view of counsel’s submissions that the 1st Respondent has since appealed against the Court’s decision in **International Legal Consultancy Group –v- Senate & Another (supra)**. It is unlikely that the 1st Respondent would want to engage the Petitioner. It would be an exercise in futility even if the Petitioner tried. Secondly, one must take cognizance of the fact that Article 165(3) of the Constitution gives this court the right to adjudicate matters the like now before me. Statute cannot take such remit away.

Disposal

67. The orders sought seek to intercept proceedings in the Senate. Caution must always be exercised : see **Trusted Society of Human Rights Alliance –V- Attorney General and 2 others NBI HCCP No. 229 of 2012 (2012) eKLR** at paragraph 71. I have exercised caution and reviewed the matters before me. I saw and found no exceptional circumstances established by the Petitioner to warrant the application being allowed. There is a lower risk of injustice if the application is disallowed.

68. The totality of the circumstances would dictate that I dismiss the application.

69. It is so dismissed.

70. There will however be no order as to costs.

Dated, signed and delivered at Nairobi this 9th day November, 2015

J.L.ONGUTO

JUDGE

Delivered in the presence of:

..... **for the Applicant**

..... **for the Respondents**

C/Clerk: Richard