



Mandera County Government & 3 others v Abdirahman & 6 others; Controller of Budget & 2 others (Interested Parties) (Civil Appeal (Application) E312 & E181 of 2022 (Consolidated)) [2022] KECA 761 (KLR) (24 June 2022) (Ruling)

Neutral citation: [2022] KECA 761 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E312 & E181 OF 2022 (CONSOLIDATED)
DK MUSINGA, P, AK MURGOR & F SICHALE, JJA**

JUNE 24, 2022

BETWEEN

**MANDERA COUNTY GOVERNMENT 1ST APPLICANT
COUNTY GOVERNOR OF MANDERA 2ND APPLICANT
COUNTY EXECUTIVE COMMITTEE, FOR FINANCE, MANDERA
COUNTY 3RD APPLICANT**

AND

**ISMAIL ABDULLAHI ABDIRAHMAN 1ST RESPONDENT
COUNTY ASSEMBLY OF MANDERA 2ND RESPONDENT
CONTROLLER OF BUDGET 3RD RESPONDENT
NATIONAL TREASURY 4TH RESPONDENT**

**AS CONSOLIDATED WITH
CIVIL APPEAL (APPLICATION) E181 OF 2022**

BETWEEN

COUNTY ASSEMBLY OF MANDERA APPLICANT

AND

**ISMAIL ABDULLAHI ABDIRAHMAN 1ST RESPONDENT
COUNTY GOVERNMENT OF MANDERA 2ND RESPONDENT
COUNTY GOVERNOR OF MANDERA 3RD RESPONDENT**



COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE, MANDERA COUNTY 4TH RESPONDENT

AND

CONTROLLER OF BUDGET INTERESTED PARTY

NATIONAL TREASURY INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

(Being an application for stay/suspension of the conservatory orders from the Judgment and Decree of the High Court at Garissa delivered on 19th May 2022 (A. Aroni, J.) in Constitutional Petition No. E002 of 2022)

RULING

1. This ruling relates to two consolidated applications, a Notice of Motion dated 25th May, 2022 (the 1st application) and Notice of Motion dated 19th May, 2022 (the 2nd application). The 1st application brought under rules 1(2), and 5(2)(b) of the Court of Appeal Rules, sections 3, 3A and 3B of the Appellate Jurisdiction Act and Articles 164 and 175 of the Constitution of Kenya, the 1st and 2nd applicants, the Mandera County Government and Mandera County Assembly sought orders for;
 - a. a stay and/or suspension of the conservatory orders granted by the High Court on 19th May 2022 pending the hearing and determination of the appeal herein.
 - b. a stay of any further proceedings in Garissa Constitutional Petition No. E002 of 2022 pending the hearing and determination of the appeal.
 - c. the costs of and incidental to this application do abide the outcome of the appeal.
2. The motion is brought on twelve grounds on its face in that: On 19th May 2022, the High Court delivered a ruling granting conservatory orders restraining the 1st applicant from withdrawing, transacting, operating or in any way dealing with monies held in the 1st applicant's bank accounts, whether recurrent or development, in the execution or implementation of the Supplementary Budget estimates passed on 14th February 2022 and also restraining the Controller of Budget from approving and disbursing funds from the Central Bank of Kenya in the implementation of the Supplementary Budget for the year 2021/2022; that section 135 of the Public Finance Management Act, 2012 provides for a supplementary county budget where the amount appropriated for any purpose under the County Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act, or money has been withdrawn from the county government Emergency Fund; that in compliance with the provisions of Articles 201 and 207 of the Constitution, the Public Finance Management Act and the County Governments Act, the 1st applicant's County Treasury prepared the Mandera County Supplementary Appropriation Bill, 2022 which was approved by the 2nd applicant on 14th February 2022; that the Mandera County Supplementary Appropriation Act 2022 was assented to by the Mandera County Governor on 22nd February 2022 and subsequently enacted on 25th February 2022.
3. It was further contended that as a consequence of the High Court's orders: i) the operations of the 1st applicant would be crippled and disrupted, which was contrary to public interest; ii) the funds provided for in the Supplementary Budget for provision of essential services to the residents, and to pay



- suppliers and utility bills will remain unpaid; iii), the 1st applicant would be unable to pay employees' salaries and wages of over 3900 employees for the 3 months of the next financial year; and the supply of medical drugs to health facilities and provision of emergency water to drought affected sub-counties will be interrupted. That in granting the conservatory orders, the learned judge did not take into account the interests of or the extreme prejudice and disruption to the residents and the 1st applicant.
4. It was further contended that the 1st applicant has filed a Notice and Record of appeal against the ruling, and that the appeal was arguable in terms of the grounds set out in the Memorandum of appeal that was attached, wherein the applicants complain, inter alia, that the learned judge erroneously found that the 1st respondent had established that the 1st applicant was in blatant disregard of the Public Finance (County Government) Regulations, 2015 and the County Government Act, despite evidence to the contrary; that the judge wrongly exercised her discretion to find that the Petition would be rendered nugatory if the conservatory orders were not granted, without ascertaining what personal prejudice the 1st respondent would suffer particularly in the face of much needed funds for provision of water and relief to cushion the residents against the ravages of the drought; that further, the judge failed to determine the question of whether the Petition was res-judicata.
 5. The 1st applicant also complained that the judge failed to appreciate that the requirement of public participation in approving the budget estimates was adhered to as the public and residents of the 7 sub- counties were afforded an opportunity to make contributions to the budgetary estimates, the development estimates and recurrent expenditure which the County Treasury took into consideration. The motion was supported by the affidavit of Sulekha H. Harun, the County Executive Committee member for Finance and Economic Planning for the 1st applicant sworn on 25th May 2022, which largely repeated the grounds set out in the motion.
 6. In the replying affidavit sworn on 20th June 2022 by Ismail Abdullahi Abdirahman the 1st respondent, a resident of Mandera, he deposed that the Supplementary Budget did not conform to Articles 10, 201 and 207 of *the Constitution*, the principles of public finance of openness, accountability and the national values and principle of transparency were not complied with; that the approved Supplementary Budget did not include a budget for provision of services to assist residents affected by the drought; that instead, the Supplementary Budget made provision for renovation and painting of five (5) classrooms at Dikduro Primary School costing Kshs. 2.5 million, the development of a playground at Dololo Primary School at Kshs. 2 million; the construction of playground at Kubi Hill Primary at Kshs. 400,000 and an ECD classroom and twin toilets at Ayan Primary in Takaba South at Kshs. million; that the unilateral allocation of funding for projects that are the preserve of the National Government pursuant to Schedule 4 of *the Constitution* of Kenya rendered the applicants' actions a violation of the constitutional dictates on the relationship and cooperation between National and County Government.
 7. It was further deposed that the conservatory orders issued were intended to restrain the 1st applicant from withdrawing, transacting or operating or in any way dealing with monies held in the County Government's bank accounts so as to implement the Supplementary Budget, and that the orders did not affect the utilization of funds allocated in the main budget; that if the orders in the motion are granted as prayed, the pending Petition and the appeal will be rendered an academic exercise, and the course of justice would be subverted, since the substratum of the Petition will be lost following incurrence of expenditure under the Supplementary Budget.
 8. The 2nd application brought under section 3A and 3B of the *Appellate Jurisdiction Act*, and rules 5(2) (b) and 43 of the Court of Appeals Rules, the applicant in this application who we shall refer to as the 2nd applicant, the Mandera County Assembly sought orders to;



- a. suspend the orders of the High Court at Garissa delivered on the 19th May 2022 pending the hearing and determination of the intended appeal;
 - b. to stay further proceedings in the Garissa Constitutional Petition No. E002/2022 pending hearing and determination of this application and the intended appeal;
 - c. any other order that this Court may deem fit and just to grant; and
 - d. the costs of the application be provided for.
9. The motion was brought on eight grounds on its face to the effect that the High Court's ruling delivered on 19th May 2022 that restrained the 1st applicant, the Mandera County Government from withdrawing, transacting, or dealing in any manner whatsoever with monies being held in the bank accounts of the County will cause severe paralysis of all the functions of the 1st applicant, and by extension the 2nd applicant; that the appeal is arguable; that substantive among the 2nd applicant's complaints was that, the learned judge was faulted for striking out the 2nd applicant's replying affidavit, and by so doing it was denied a fair hearing. The motion was supported by the affidavit of Ahmed H. Surow, sworn on 30th May 2022.
10. Parties filed written submissions which counsel highlighted. Learned counsel for the 1st applicant, Mr. Issa, stated that the appeal was arguable for various reasons that, the trial judge failed to consider the proper test for grant of such an order, and more particularly, failed to consider the public interest element; that despite having earlier determined a similar petition, the judge failed to interrogate the issues, and had she done so, would have appreciated that the Petition was res judicata; that furthermore, no evidence was adduced by the 1st respondent to support the allegations advanced, yet the learned judge granted the conservatory orders against the weight of the evidence; that the 1st respondent's main grievance was that a part of the Supplementary Budget was to go towards construction of primary and ECD schools in some areas, instead of the monies being applied towards alleviating the water shortages affecting the residents of Mandera County due to the ongoing drought; that this notwithstanding, the judge restrained utilisation of the entire Supplementary Budget.
11. On the nugatory aspect, counsel asserted that the 1st applicant risked collapse as it will be unable to pay its bills, whether development or recurrent, as, at the end of the financial year the monies budgeted will be returned to the Treasury; that it will be unable to pay employees' salaries or medical supplies and other recurrent expenditure. Counsel informed the Court that despite the urgency, the trial court had fixed the hearing of the Petition for 20th July 2020, and the applicants were apprehensive that by such time, the appropriated amounts would have been returned to the Treasury since the financial year would have ended on 30th June 2022. Counsel asserted that the court need not have made such drastic orders since there was a robust regulatory process to govern any misappropriation of public monies, and other modes of redress.
12. Learned counsel Mr. Somo for the 2nd applicant in the 2nd application stated that he would rely on Mr. Issa's submissions, save to add that if this Court did not stay the orders, the employees of the 1st and 2nd applicant would be denied their salaries until September, 2022 when appropriations for the next financial year will have been made. Counsel further submitted that the 2nd applicant filed its reply to the Petition, but the court struck it out because it was filed out of time. It was explained that after the Petition was filed, counsel sought for instructions from the 2nd applicant which delayed, and by the time a response was filed, the time frame set down by the learned judge had lapsed; that as a result, the 2nd applicant did not have an opportunity to be heard.



13. On his part, learned counsel for the 1st respondent, Mr. Kinaro, submitting in respect of the 1st and 2nd applications stated that, the trial court's orders should not be stayed as they were intended to preserve the approved Supplementary Budget; that if the budget is expended then the Petition will be rendered nugatory, and an academic exercise; that the allegations that the 1st applicant's operation risk being disrupted is untrue since the conservatory orders are specific to the Supplementary Budget and not the main budget.
14. On the public interest element, counsel went on to submit that the Supplementary Budget comprised of votes or items that were not allowable, and were against public interest; that there is imminent danger of the funds being misappropriated to the detriment of the residents; and that it was true that the funds would be returned to the Treasury if not utilised. Regarding the striking out of the 2nd applicant's reply, it was submitted that, it was filed during the hearing of the Petition without leave which was prejudicial to the 1st respondent.
15. There was no appearance from the other parties, despite their having been served with the hearing notice.

In so far as applications filed under rule 5 (2) (b) of this Court Rules are concerned, the threshold requirement to be satisfied are amplified in the case of Republic v Kenya Anticorruption Commission & 2 others [2009] eKLR thus;

The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that 1st, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. 2nd, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.

16. On the question of whether the appeal is arguable, the applicants' main complaint is that in the exercise of her discretion to grant the conservatory orders, the learned judge did not consider the public interest element, having regard to the circumstances of this case, and as espoused by the Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR. It was contended that had the learned judge taken this into account, she would not have issued the all-encompassing, drastic and far reaching orders that would be to the ultimate detriment of the applicants and the residents of Mandera County. Indeed, if in granting the conservatory orders the trial judge failed to take into account the public interest element by weighing out the impact of such order on the applicants, as public service entities, and on the residents of Mandera, we find that the applicants' grievances raise an arguable matter for ventilation before this Court.
17. On the nugatory aspect, it was strenuously argued by the applicants that the conservatory orders would disorganise the applicants' operations, impede staff salary payments and deny essential services to the residents of Mandera County. But more importantly, if unutilised by the end of the financial year, the funds appropriated under the Supplementary Budget will be returned to the Treasury and may not be availed to Mandera County thereafter.
18. On the other hand, the 1st respondent's response was that, it is true that the funds will be returned to the Treasury unutilised, but that in any event the restraining order will stop misappropriation of the funds by the applicants, and that if the order was stayed, the Petition and the appeal would be rendered an academic exercise, as the substratum of the Petition and the appeal which is the Supplementary Budget will have ceased to exist.



19. Indeed, there is no question that the conservatory order, if maintained will forestall expenditure of the Supplementary Budget. But in addition to this, if the order subsists, the funds will be returned to the Treasury, and will no longer be available to the applicants or for the benefit of residents of Mandera County. Conversely, it is not also lost on us that, the restraining orders will similarly render the Petition nugatory as it will no longer be underpinned by the Supplementary Budget, once the funds are returned to the Treasury. This begs the question of what then does the 1st respondent have to gain by both parties, and the people of Mandera County, being denied the benefit of the budgetary provisions?
20. This brings us to the application of the public interest element as directed by the Supreme Court in *Gatirau Peter Munya (supra)*. And in appreciating the peculiar circumstances in which the parties found themselves (such as is the case herein), this Court in the case of *National Union of Water and Sewerage Employees & 3 others v Nairobi City Water and Sewerage Company Limited & 3 others* [2013] eKLR adopted the succinct observations set out in the case of *East African Cables Limited v Public Procurement Complaints, Review and Appeals Board & another* [2007] eKLR thus;

We think that in the particular circumstances of this case, if we allow the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that the advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action, and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."

21. In our view, the circumstances of this case would call for us to adopt the above approach. As earlier observed, neither of the parties stand to gain from the conservatory orders being maintained, since this would in effect result in the funds pertaining to the Supplementary Budget being returned to the Treasury when a substantial part of it should have been utilised for the greater benefit of the applicants in service of their employees, suppliers and the residents of Mandera County, and who would otherwise be subjected to hardship. Given these premises, in our view, providence demands that the conservatory orders be stayed in the interest of the public.
22. In sum, we find that the Notice of Motion dated 25th May 2022 (the 1st application) as consolidated with the Notice of Motion dated 30th May 2022 (the 2nd application) are merited and succeed. The conservatory orders granted in the ruling dated 19th May 2022 and the proceedings in Constitutional Petition No. E002 of 2022 are stayed pending the hearing and determination of the appeal. The matter being of public interest, we make no orders as to costs.

It is so ordered.

DELIVERED AND DATED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL



F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

