



**Kabundu & 2 others v Mombasa County Government & 6 others;
Director of Public Prosecutor & 4 others (Interested Party) (Civil Appeal
91 of 2019) [2021] KECA 143 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KECA 143 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 91 OF 2019
RN NAMBUYE, HM OKWENGU & F SICHALE, JJA
NOVEMBER 19, 2021**

BETWEEN

**PATRICK KABUNDU 1ST APPELLANT
MUTUMA CALEB MWITI 2ND APPELLANT
CHICHI KIMANI 3RD APPELLANT**

AND

**MOMBASA COUNTY GOVERNMENT 1ST RESPONDENT
GOVERNMENT MOMBASA COUNTY 2ND RESPONDENT
MOMBASA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT
CLERK OF MOMBASA COUNTY 4TH RESPONDENT
MOMBASA COUNTY ASSEMBLY COMMITTEE ON SECURITY AND
ADMINISTRATION (THRO CHAIRPERSON) 5TH RESPONDENT
MOMBASA COUNTY ASSEMBLY COMMITTEE ON JUSTICE AND LEGAL
AFFAIRS (THROUGH THE CHAIRPERSON) 6TH RESPONDENT
MOHAMED ANIR MOMBASA INSPECTORATE DIRECTOR 7TH
RESPONDENT**

AND

**DIRECTOR OF PUBLIC PROSECUTOR INTERESTED PARTY
ATTORNEY GENERAL INTERESTED PARTY
CHIEF MAGISTRATE MOMBASA INTERESTED PARTY
NATIONAL POLICE SERVICE INTERESTED PARTY**



(Being an appeal from the Ruling of the High Court of Kenya at Mombasa (Ogola, J) delivered on 9th May, 2019 in Mombasa High Court Petition No. 195 of 2018)

JUDGMENT

1. On 9th May, 2019, the High Court (Ogola J.) delivered a ruling in which it dismissed a notice of motion dated 11th July, 2018 that had been filed by the appellants against the respondents, and to which the respondents and interested parties had opposed through replying affidavits and written submissions.
2. The motion which was filed under Articles 3, 22, 23, 159(2), 165 and 258 of the Constitution, sought *inter alia*, orders as follows:
 - (i) that the honorable court does issue temporary injunction order restraining the 1st respondent either acting on their own or through its agents, employees and or, servants from collecting any revenue arising out of violation of the county legislation until the hearing and determination of this petition.
 - (ii) that conservatory orders be issued directing all revenues accruing from collection arising from violation of the county legislation to be paid to judiciary accounts and applied to the consolidated funds until the hearing and determination of this application.
 - (iii) that conservatory orders be issued directing all revenues accruing from collection arising from violation of the county legislation to be paid to judiciary accounts and applied to the consolidated funds until the hearing and determination of this application.”
3. The appellants’ notice of motion was anchored on a constitutional petition that they had filed before the High Court, raising issues concerning the devolution and operation of the court system, and alleging violation of the Constitution by the County Government of Mombasa in regard to its operation of the Municipal Court, through collection of fines and court fees without remitting the same to the judiciary consolidated fund; and the failure by county officials to uphold human rights when dealing with accused persons in the Municipal Court contrary to the provisions of the Constitution.
4. The appellants being aggrieved by the ruling of the learned Judge have lodged this appeal in which they have raised 10 grounds, whose main focus is the legality of the refusal by the court to grant conservatory orders, effectively permitting the Mombasa County Government to continue collecting revenue in violation of Articles 123,159(2)(c), 162(1) and 258(1) of the Constitution during the pendency of the hearing of the constitutional petition.
5. In support of the appeal, the 1st and 2nd appellants have each filed written submissions. The 1st appellant has identified several issues clustered around three areas, that is, breach of Articles 50(2)(d) of the Constitution 2010; Article 206 of the Constitution on consolidated funds and Article 207 on County Revenue; and the directive from the judiciary.
6. The 1st appellant submitted that other than courts created under Article 162 of the Constitution of Kenya, 2010 there exists no such courts as the Municipal Court and/or City



Court; that the Local Government Act which had created municipalities was repealed by the *County Government Act* No. 17 of 2012; and that after that Act was repealed, all bodies created by that Statute ceased to exist. In support of this proposition the 1st appellant relied on *John Michael Wanjau vs Municipal Council of Eldoret* [2013] eKLR; and the remarks of retired Chief Justice Dr. Willy Mutunga, when he stated that Courts which had been established under the repealed Local Government Act, had ceased to exist and that the functions of the defunct municipal or city courts had transitioned to the Magistrate's Courts within the various counties.

7. The 1st appellant submitted that the county government has no business receiving or collecting funds emanating from violations of county by-laws that are imposed by the courts either as cash bail, fines or otherwise, for reasons that the County Government's role, by virtue of Article 185(2) of the Constitution, is to make laws that are necessary for or incidental to the effective performance and exercise of its powers under the Fourth Schedule.
8. The 1st appellant further submitted that where the law exhaustively provides for the jurisdiction of an executive body or authority, that body must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovations; that it is untrue that the money collected by the county government from the municipal law courts is collected in accordance with Article 207 of the Constitution; that the Mombasa County Government has misdirected itself in law under Article 207 of the Constitution in empowering the 1st respondent to collect money from the court, which is a function of the National Government.
9. The 1st appellant observed that the judiciary came up with a Magistrate and Kadhis Court Registry manual that requires all heads of section and chief magistrates to ensure that revenue accruing from court funds, bail and fees are collected by the judiciary and applied to the consolidated fund, and noted that while the county government of Mombasa was acting contrary to that directive, Machakos County Government has complied with those directives in regard to revenue collection in the county courts.
10. The 2nd appellant's submissions were substantially along the same lines as the 1st appellant's submissions and therefore we do not need to restate the same.
11. The respondents filed written submissions arguing that the law is that he who alleges must prove, and that the appellants had made allegations without providing enough evidence to satisfy the court that there was justification for the conservatory orders to issue; that there was no evidence to rule out that monies remitted through the accounts registered in the names of the County Government of Mombasa had the Consolidated Fund as its end channel; that this is a matter that can only be addressed after evaluation of evidence during the hearing of the constitutional petition; that in the absence of evidence confirming the allegations made, the court had no option but to decline to issue the orders sought by the appellants; and that based on the foregoing, the court was right in failing to grant the orders, as it was not in the interest of the public to grant the orders sought.
12. We have carefully considered this appeal, the submissions made before us, and the authorities cited. The main issue that arises for our interrogation is whether the appellants satisfied the conditions for granting the conservatory and interlocutory orders that they sought.
13. The guiding principles upon which courts determine interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution, were well stated in *Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 others* [2015] eKLR. which the learned Judge referred to.



14 The jurisdiction of the learned Judge in the application was therefore limited to examining and evaluating the material placed before him in order to determine whether the applicants had made out a *prima facie* case to warrant the Court to grant them an order of temporary injunction and/or conservatory orders.

15 The power of a court in an application for an interlocutory injunction is discretionary, and in *Mrao Limited vs First American Bank of Kenya Limited & 2 others* [2003] KLR 125, it was held that:

"The Court of Appeal may only interfere with the exercise of a court's judicial discretion if satisfied that:

- a. The judge misdirected himself on law; or
- b. That he misapprehended the facts; or
- c. That he took account of considerations of which he should not have taken account; or**
- d. That he failed to take account of consideration of which he should have taken account; or**

That his decision, albeit a discretionary one, was plainly wrong."

16. The question that we must therefore address, is whether the learned Judge properly or improperly exercised his discretion in refusing to grant the orders sought by the appellants. In this regard, we note that the learned Judge of the High Court referred to several authorities on the principles applicable in granting an interlocutory injunction, including *Mrao Limited vs. First American Bank of Kenya* (supra), *Nguruman Limited vs. Jan Bonde Neilsen & 2 others* [2014] eKLR, and *Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 others* [2015] eKLR.

17 The learned stated in part as follows:

25. This Court guided by the above dictums notes that the prayers in the Petitioner's Notice of Motion dated 11th July 2018 are substantially the prayers in the Petition filed before this Court. With this in mind, I tread with abundant caution in treating the prayers sought herein, which appears to have the rights of the parties decided at the interim stage.

26. The Petitioners have made very serious allegations that for the last three years public funds have been directed to Mombasa County accounts, the same has not been remitted to the Consolidated Fund and that public funds are now being channeled to some people's pockets in breach of the law.

27. The Petitioners also submit that the government will lose millions in revenue if the collections by the 1st Respondent in relation to court fines, fees and bail continues.

28. It is this Court's view that the allegations raised by the petitioners herein are very serious allegations that can be equated to fraud if proved. For the petitioners to raise a prima facie case with a probability of success, they need at least to demonstrate that the monies collected by the 1st Respondent did not end up in the Consolidated Fund but ended up in some people's pockets as alleged for the petitioners to qualify for the orders of temporary injunction against the 1st Respondent.

29. All that the Petitioners demonstrated was that the monies for Court fees, fines and bail were paid into a revenue account in the 1st Respondent's name and not the Judiciary revenue account like in Machakos County, where court fees, fines and bail were deposited



in the Judiciary's revenue account instead of the Machakos County's account as per the directive by the Chief Registrar of the Judiciary. That alone in this Court's view is not enough to warrant the issue of a temporary Injunction in the absence of any evidence of diversion of funds.

30. It is this Court's finding that the Petitioners have not established a prima facie case with a probability of success. Further, the Petitioners have not demonstrated how the continued collection of court fees, fines and bail by the 1st Respondent will occasion injury or loss to them. The Petitioners never rebutted the 1st Respondent's response in which it averred that the money collected in form of court fees, fines and bail by them is remitted to the Consolidated Fund. It is this Court's finding that the Petitioners have failed to demonstrate the injury or loss that will be occasioned if the temporary injunction against the 1st Respondent is not granted.

18 Clearly the learned Judge considered the law, properly applied the facts and concluded that the appellants had failed to demonstrate a prima facie case with a probability of success and had also failed to satisfy the conditions for the grant of a conservatory order. We do not find any reason to fault the learned Judge in this conclusion as the law is clear that a party seeking an interlocutory injunction must establish a *prima facie* case. The appellants made general allegations that were not anchored on any *prima facie* evidence.

19 In addition, the appellants did not demonstrate that they had any right or rights which were violated or threatened with violation, such as to call for an explanation from the respondents. Nor, did the appellants demonstrate any prejudice that they were likely to suffer if the conservatory orders were not issued. In our view, the learned Judge properly considered all the circumstances that were before him and did not address any irrelevant issue.

20 On the basis of the material that was before the learned Judge, he properly exercised his judicial discretion in dismissing the appellants' motion as the appellants did not satisfy the conditions for granting an interlocutory injunction or a conservatory order. We have no reason to interfere with the ruling of the learned Judge and the appeal is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

