



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**PETITION E1 OF 2020**

**1. CATHERINE KAMAU**

**2. SUSAN NJUGUNA**

**3. JOYCE ANYISO**

**4. ROSE KARUGI**

**5. CAROLINE KILISHIA**

**6. BUISIENEI BENAZIR**

**7. ALICE KERING**

**8. ELIZABETH GICHUKI**

**9. ROSE GATHONI**

**10. DOREEN KORIR**

**ZAITUNA IBRAHIM.....PETITIONERS**

**VERSUS**

**SPEAKER OF THE COUNTY ASSEMBLY OF NAKURU**

**CLERK NAKURU COUNTY ASSEMBLY**

**COUNTY ASSEMBLY OF NAKURU.....RESPONDENTS**

**RULING**

The petitioners filed application and Notice of Motion dated 30<sup>th</sup> September, 2020 seeking for orders;

*a. Spent.*

*b. Spent.*

*c. Spent.*

*d. Pending the hearing and determination of this petition this court be pleased to issue an order directing respondents to be compelled to pay the applicants the allocation of personnel emoluments for 3 wards staff and operation and maintenance costs of ksh.118, 333 per month as provided in the circulars.*

*e. Pending the hearing and determination of this petition this court be pleased to issue an order compelling the respondents to pay the outstanding allocation of personnel emoluments for 3 wards staff and operation and maintenance costs.*

f. *Costs of this application be provided for.*

This application is supported by the affidavit of the 1<sup>st</sup> petitioner and on the grounds that the petitioners were nominated as members of the County Assembly of Nakuru in September, 2017 to represent various disadvantaged grounds and on such nomination each was entitled to ksh118,333 per month for facilitation, office rent and office operations and which sum has never been paid but instead only received ksh.65,000 per month. From the circular on advisory ward offices operation costs issued by the Commission on Revenue Allocation (CRA) on various dates particularly one dated 28<sup>th</sup> June, 2018, 30<sup>th</sup> June, 2019 and 3<sup>rd</sup> August, 2020 the CRA outlined the ceilings provided for allocation of personnel emoluments for 3 wards staff, operation and maintenance costs per ward each month for Nakuru to be Ksh.118, 333.

Other grounds are that since the year 2017 the petitioners who are nominated member of county assembly (MCA) have been persistently discriminated against by the respondents by receiving Ksh.30,000 per month for each year 2017/2018 and ksh.65,000 per month for the 2018/2019 and 2019/2020 as against ksh.118,333 monthly paid to their elected colleagues.

The respondent's conduct is discriminative and an abuse of their responsibilities and a clear violation of the various provisions of the constitution and for these reasons the petitioners have suffered loss, damage, prejudice and discrimination. Such actions are illegal and unlawful and the orders sought should be issued.

In her Supporting Affidavit, Ms Kamau the 1<sup>st</sup> petitioner avers that upon nomination as an MCA in September, 2017 to represent the various disadvantaged grounds the petitioners were entitled to ksh.118, 333 per month for facilitation, office rent and office operations but these monies have not been paid but instead only received ksh.65, 000. The CRA advisory for Nakuru required the payment of Ksh.118, 333.

Ms Kamau also avers that since 2017 the petitioners have persistently been discriminated by the respondents by receiving Ksh.30,000 monthly for the year 2017/2018 and ksh.65,000 per months for the years 2018/2019 and 2019/2020 instead of ksh.118,333 per months similar to their elected colleagues. In Petition No.1 of 2019 National Gender and Equality Commission versus Majority Leader Nakuru County, the court made declarations that nominated and elected members of the county assemblies have equal status and are entitled to equal opportunities for leadership positions in the county assembly committees.

The conduct by the respondents is discriminative and an abuse of their responsibilities which violate the constitution.

In reply, the respondents filed Preliminary Objections and a Replying Affidavit of Joseph Malinda the Clerk, Nakuru County Assembly and on the grounds that the application and petition offends the provisions of section 12 of the Employment and Labour Relations Court Act and the only remedy available to the petitioners can only be advanced by the Salaries and Remuneration Commission which is not a party to these proceedings. The issues raised in the petition entail administration of the wards and this is not envisaged under the Employment Act and the court lacks jurisdiction to hear this matter and should be dismissed with costs.

The objections made were however withdrawn vide Notice of Withdrawal dated 23<sup>rd</sup> October, 2020.

Malinda also avers in his Replying Affidavit that the application by the petitioners is defective and in contravention of the constitution and has not disclosed any constitutional violations against the petitioners. The orders sought in the interim are of a permanent nature and should not issue. The issues in dispute relates to public funds and any decision herein must be guided by the Public Finance Management Act, the County Government Act and the Appropriation Bills.

The issue before court relates to ward offices administration Fund and not personal emoluments at the petitioners have averred in the application. Through Circular No.26 of 2014 by the Controller of Budget, Counties are to follow the guidelines with regard to Ward Development Fund pursuant to the applicable laws. An elected MCA represents a given Ward and funds are disbursed based on this unit. The petitioners as nominated MCAs do not have Wards and only undertake oversight representation and therefore have no office in any given ward and operate from the offices of County Assembly premises and assigned one partisan staff.

On the payment of office rent, no petitioner has attached evidence of such expense. Nominated MCA do not operate physical offices and have offices within the County Assembly premises.

Funds for wards administration are budgeted for, appropriated for and allocated through legislative power of the County Assembly pursuant to article 185 of the constitution and section 104(1)(a) and (b) of the Public Finance Management Act. It is the responsibility of the County Treasury to prepare the Annual Budget for a county and to coordinate the preparation of estimates of revenue and expenditure of a county government. The procedure for the budgetary process under section 117 of the Public Finance Management Act therefore starts with the preparation of a county fiscal strategy paper which is then approved by the County Assembly each year.

Under section 117, 125, 129 and 133 of the Public Finance Management Act the following must be passed during the budgetary process in each fiscal years;

- a. A county fiscal strategy paper pursuant to section 117(1) and (6) of the Public Finance Management Act representing the financial outlook of a county and be adopted by the county assembly by 14<sup>th</sup> March each year;
- b. A county budget estimates of revenue expenditure pursuant to section 125, 129 and 131 of the Public Finance Management Act and presented to the county assembly by the county executive member for finance by 30<sup>th</sup> April each year for approval by the county assembly before 30<sup>th</sup> June each year;

c. A County Appropriations Act which the County Government must consider and enact by 30<sup>th</sup> June each year; and

d. A County Finance Act pursuant to section 133 of the Public Finance Management Act, a County Assembly must consider and enact by 30<sup>th</sup> September each year.

Mr Malinda also avers that it is the mandate of the Treasury, County Executive and County Assembly to prepare and approve budgets for a county. The petitioners sit in the County Assembly and all the budgets including the Ward Administration funds are passed through the house.

Utilisation of public funds including the ward administration funds must pass through the process and provisions of section 117 of the Public Finance Management Act and all funds allocated to MCAs are approved by the assembly where the petitioners sit and have a right to vote. The petitioner have come to court three (3) years later to claim that funds that they have participated in the allocation with their approval.

The petitioners have claimed from funds approved in budgets for the years 2017/2018, 2018/2019 and 2019/2020 knowing well that such funds have been fully utilised, accounted for and audits conducted and unutilised funds returned to national treasury and the prayers sought against the respondents cannot issue. To allow for orders sought would require the Clerk County Assembly of Nakuru to restart the budgeting process all over again contrary to section 117 of the Public Finance Management Act and the various allocation of revenue operations after the petitioners having participated in the approval.

Article 73(1) of the constitution enjoins all state officers including the respondents to exercise authority in trust and in a manner that brings honour to the office and with integrity and principles under article 201 of the constitution.

The circular referenced by the petitioners is by error in that budgetary ceilings pursuant to section 12 of the County Allocation of Revenue Act came into force on 5<sup>th</sup> September, 2014 where the CRA recommend the budgetary ceilings on the recurrent expenditures of each county government to the Senate; the recommendations made by SRC in a circular are not binding on the respondents but mere guidelines as to the budgetary limits with regard to ward administration funds as held in **Speaker, Nakuru County Assembly & 46 others versus Commission on Revenue Allocation & 3 others [2015] eKLR**; the budgetary ceilings do not denote a maximum allocation but a maximum which can be utilised towards ward development fund; the issued circular requires the respondents to assess the payment based on the operations and financial expenditure of the members; there is no evidence that the petitioners have used private funds in the discharge of their respective public duties; there is an assumption that funds were made available for the use by the petitioners and such are in the custody of the respondents which assumption is wrong; and the petitioners have not submitted as to what mandate they were discharging using the Ward Administrative Funds and that such has been halted.

Mr Malinda also avers that there is no discrimination against the petitioners as alleged and the application should be dismissed with costs.

The petitioners in response filed the Supplementary Affidavit of Ms Kamau that the petitioners are nominated MCAs and the CRA vide letter dated 3<sup>rd</sup> August, 2020 by circular and advisory of ward officers operation costs provided that the ceilings provided for personnel emoluments for three wards staff and operations and maintenance costs for officers are for all MCAs, both elected and nominated. The circular provided that the total costs for running the MCA office per month is ksh.118, 333.

Both parties agreed and filed written submissions.

The petitioners submitted that the CRA has allocated funds for all MCAs and the separation by the respondents is not justified as held in **Kenya County Government Workers Union versus Wajir County Government & another [2020] eKLR** tat a unilateral variation on an employment contract is unlawful and amounts to repudiation and breach of contract. The respondents have been paying the petitioners different emoluments as nominated MCAs contrary to what is paid to elected MCA at Ksh.118, 333 per month and the difference is due from the financial year 2017/2018 to date.

The respondents submitted that Ward development funds are not anchored under any law hence a subject for controller of budget during audits and to address this county governments came up with a way to legalise this expenditure and by use of circular No.26 of 2014 guidelines to finance projects at the ward level and to prioritise projects at the ward level and key features being the county executive member for finance should address the initiatives to be funded; appoint an administrator; and manage the approved funds with the MCA participating to mobilise ward residents support and implementation. Such funds do not related to personal emoluments.

The circular by CRA dated 30<sup>th</sup> September, 2019 provides for an office assistant in the recurrent expenditure and running expenses including rent for office is under the operations and maintenance budget lines. The approved budget are by the Assembly and the petitioners participated in the same over the years. Such funds for the ward development are not personal emolument but for public development. The petitioners have not spent any personal funds in their public duties to justify a claim for the same from the year 2017/2018 to date.

The respondents also submitted that there is no discrimination against the petitioners as alleged. As MCAs they participate in the approval of budgets each financial year. There is no spate treatment of the petitioners by the respondents as alleged.

The petitioners have failed to demonstrate the principles with regard to the grant of a permanent injunction at the interlocutory stage s held in **Ngurunam Limited versus Jan Bonde Nielen & 2 other, CA No.77 of 2012**. There is no prima facie case or balance of convenience does not favour the petitioners to warrant the orders sought.

The respondents do not retain funds for the financial years 2017/2018 to date for payment to the petitioners as sought. Section 136 of the

Public Finance Management Act requires the respondents to return all unspent funds back to the national treasury and pursuant to section 136 of the Act the respondents are required by the exchequer to account to render an account and hence funds for the years sought are not in their custody and the matter is overtaken by events.

The application by the petitioners is without merits and should be dismissed with costs.

#### Determination

As noted above, The respondents had filed Preliminary Objections touching on various questions of law but these were withdrawn vide notice dated 23<sup>rd</sup> October, 2020. Despite the Notice of Withdrawal and thus removing such objections, there exists valid questions of jurisdiction herein which the court ought to address. Though not addressed, the court cannot move without jurisdiction despite the parties not addressing this fundamental question.

The petitioners moved the court by way of a petition. They have relied on the provisions of articles 3, 22, 23, 27, 40, 47, 48, 50, 65, 165 of the constitution and section 87, 88, 115 and 117 of the County Government Act.

The petitioners describe themselves as nominated members of the county assembly of Nakuru representing marginalised groups whereas the respondents are the speaker, clerk and county assembly of Nakuru.

The foundation of the petition is that pursuant to article 165(3)(d)(i) and (ii) of the constitution the court has jurisdiction to interpret the constitution and make a determination with regard to whether there is a contravention on the facts that upon the nomination of the petitioners in September, 2017 as MCAs they were entitled to Ksh.118,333 per month for facilitation, office rent and office operations but such monies have not been paid to them whereas the elected MCAs are paid and this is discriminatory. That the CRA has issued circulars on the payment of ksh.118, 333 to each MCA but the respondents have violated the same and paid the petitioners less and the balance is due.

Jurisdiction is not a matter of consent between the parties. The court without jurisdiction cannot abrogate it through whatever means. In the case of **Owners of the Motor Vessel “Lilian S” versus Caltex Oil (Kenya) Limited [1989] KLR 1**, the court held that;

*... Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ...*

The rationale for stopping at this point is further espoused in the case of **Ali Jarso Wako & another versus Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020] eKLR**

*However, what does the expression “down tools” mean ..., to be precise, meant and can only be taken to have meant that once jurisdiction is established to be lacking, the court cannot purport to deal with the matter further. It cannot not be taken to mean that I just down my tools, the pen, and fold the file and infinitum. That could result in a large numbers of files that are just folded, never to touched because the court has downed its tools. ...*

In this regard, the petitioners as MCAs are nominated by their respective political parties pursuant to articles 177 (1) (b) and (c), (2) and (4) of the Constitution for a term of 5 years. These are members of the County Assembly of Nakuru serving for a specific mandate and representing the various interest groups therefrom.

There is no relationship between the parties as contemplated under Section 12 of the Employment and Labour Relations Court Act, 2011 or the preamble thereof as read together with Article 162(2) of the Constitution, 2010. Further, the issue in dispute relates to the allocation of ward development funds held under a vote approved by the County Assembly of Nakuru and unrelated to employment and labour relations and related matters thereto and hence deny this court jurisdiction.

As noted above, the petitioners opted to move the court by way of petition. Several provisions of the constitution have been highlighted as having been violated. However, in the case of **Anarita Karimi Njeru versus Republic [1979] eKLR** the court held that a person who files a constitutional petition should set out with a reasonable degree of precision the nature of complaint(s) complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

In this regard, the petitioners are not clear on the rights said to be infringed and there is no demonstration as to the nature of discriminatory allegations made. As members of the County Assembly of Nakuru since September, 2017 the petitioners have presided over the budgetary making and approval process up and until the latest of June, 2020. Challenges to the budgetary allocations which ought to be addressed at the floor of the County Assembly in the nature of Ward development allocations cannot be bypassed and removed from the County Assembly and placed with the court. The petitioners as active actors and MCAs cannot extricate themselves from their role thereof and claim there is discrimination against them by the respondent with regard to a process within their control.

This court well aware of the decision in **Nakuru Petition No.1 of 2019 – National Gender and Equality versus Majority Leader Nakuru County & others** – the subject therein is distinguishable from the matter herein and cannot be interrelated.

Equal treatment of all MCA while undertaking their mandate cannot be equated to discriminatory treatment upon passing the budget in application of the Public Finance and Management Act.

Since nomination and appointment, the petitioners have presided over the passing of the 2017/2018, 2018/2019 and 2019/2020 budgetary allocations as MCAs. They cannot now turn around and assert that such was undertaken through a discriminatory treatment. To do so would be to lose sight of the very essence of their role as MCAs serving the marginalised groups of Nakuru County.

In this matter, **National Gender and Equality versus Majority Leader Nakuru County & others**, cited above, the 1st petitioner herein was an interested party. The cause of action partly related to alleged discrimination against nominated MCAs and that they had no defined geographical constituency and in that regard their mileage allowances were capped unlike the case of elected MCAs as provided for by the SRC. The High Court went to find that it had jurisdiction to hear such matter.

In this regard and relating to the question of jurisdiction, the Court of Appeal in the case of **Attorney General & 2 others versus Okiya Omtata Okioti & 14 others [2020] eKLR** held that;

*... there is no fidelity to the Constitution in seeking to enforce the constitution through unconstitutional means. The issues raised in the petitions were weighty but were misdirected to the wrong forum. The Constitution has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised. Having come to that conclusion, we have no basis for venturing into the merits of the appeal.*

*We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in United States **International University (USIU) v. The Attorney General & Others [2012] eKLR** and this Court in **Daniel N. Mugendi v. Kenyatta University & 3 Others [2013] eKLR**. However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters.*

The issues in dispute between the parties herein are removed from the jurisdiction of this court. the court must stop at this instance.

**Accordingly, the court denied jurisdiction, the petition is hereby struck out.**

**Each party shall bear own costs.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF JANUARY, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

.....and.....