



**Okoti v Otuoma, The Governor of Busia County & another; Athi Limited & 4 others
(Interested Parties) (Petition E001 of 2024) [2024] KEHC 6190 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
PETITION E001 OF 2024
WM MUSYOKA, J
MAY 31, 2024**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**HE DR PAUL NYONGESA OTUOMA, THE GOVERNOR OF BUSIA
COUNTY 1ST RESPONDENT**

BUSIA COUNTY GOVERNMENT 2ND RESPONDENT

AND

ATHI LIMITED INTERESTED PARTY

**THE ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED
PARTY**

THE BUSIA BUSINESS OWNERS ASSOCIATION INTERESTED PARTY

ABDIKADIR HASSAN HUSSEIN INTERESTED PARTY

FATUMA BILLE INTERESTED PARTY

RULING

1. I am tasked with determining a Motion, dated 15th April 2024. The same seeks 2 principal orders, the transfer of the matter from the High Court at Busia to the High Court at Milimani, Nairobi; and the reference of this matter to the Chief Justice for empanelling of a bench of an even number of Judges to hear it.
2. On the aspect of the transfer of the matter, the petitioner raises the issue of his security and safety, on the basis that, at a past court appearance at Busia, his entourage was stoned as he exited the court precincts. The respondents have countered that those allegations have not been established.



3. It is a matter of common notoriety that there was an incident, where violence broke out, after a court appearance, when the parties hereto were exiting the court premises. The matter has attracted quite a lot of interest amongst traders within Busia town, going by the number applications made for joinder of interested parties. The very base of the matter touches on the livelihoods of some people, and this may have excited passions. Of course, the information sought is in the possession of the respondents, who are based within Busia County, and the projects, that are at the heart of it, are all within Busia County. The High Court, sitting at Busia, would be best placed to hear and determine the matter. However, where security and safety concerns arise, it would be best to be err on the side of caution. I am alive to the fact that there are security agencies at Busia County, as elsewhere in Kenya, but it may be more convenient to have this matter handled away from Busia, where the security and safety concerns could be lesser.
4. However, the issue is not as simple as the High Court moving a file from one High Court station to the next. Whereas the High Court does have a mandate to transfer a matter from one court to another, under section 18 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, that discretion or jurisdiction is limited to the situations envisaged under that provision, and, often, that turns largely on jurisdiction, and on supervisory power over subordinate courts. The matter herein relates to activities within Busia County, and the court at Busia is fully seized of the matter, within its jurisdiction. There would be no jurisdiction for the High Court at Busia to purport to transfer the matter from itself, where there is territorial jurisdiction, to another High Court station, where there could be general jurisdiction, but not territorially. More importantly, it could also mean, by such transfer, the High Court at Busia would be arrogating to itself the mandate to distribute and allocate judicial work, as between High Court stations, which mandate is the exclusive reserve of the Chief Justice.
5. On the empanelment of a bench of an uneven number of Judges, Article 165(4) of the *Constitution* empowers the High Court to certify a constitutional matter before it, as raising substantial questions of law, on the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and on questions with respect to interpretation of the Constitution.
6. The issue that the petitioner has raised is that he has sought information from the respondents, which relate to certain projects that the respondents are carrying out or are planning to, within Busia County, and in respect of which the petitioner, as Senator for Busia County, believes he has oversight responsibility. He argues that the respondents have withheld that information, which he believes amounts to either a denial of a right, or a violation, or an infringement of that right, or there exists a threat to that right. The respondents have responded that the information sought has already been availed to the Senate of the Republic, where the petitioner sits, and, in the view of the respondents, that would amount to compliance, with the requirement relating to disclosure and access to that information. According to the respondents, the petitioner can access that information from the Senate, and there should be no obligation on their part to disclose information to him, either as Member of Senate for Busia, when that information has already been released to the Senate, or as a member of the general Busia public.
7. What then arises from that are questions as to whether a Senator is entitled to access information from the County Government of the County that he represents in Senate, as part of his oversight role as Senator, without having to pass through the Senate. There is also the question as to whether the Senator would be entitled to that information as an ordinary citizen resident within the County, and affected by the activities of the County Government. The issue is as to whom the County Government should allow access to information, relating to projects that it plans to implement or is implementing within the County, and any other information relevant to any of its activities within the County.



8. I concede that these are issues that a single Judge can quite comfortably deal with. However, I do note that they are matters or issues that go beyond Busia County, for whatever decision the court makes on the matter could impact on all the 47 Counties and the Senate of Kenya. That would, therefore, make it a matter of substantial general public importance, and which substantially affects the rights of the parties, to warrant being heard by a bench or panel of more than 1 Judge. I am persuaded, therefore, that the matter herein could be referred to the Chief Justice, for assignment of a bench of an uneven number of Judges, being not less than 3, to hear and determine the matter.
9. I am alive to the caution made in *Wycliffe Ambetsa Oparanya & 2 others vs. Director of Public Prosecutions & another* [2016] eKLR (Odunga, J), that that certification ought not be made merely because the parties are asking for it. I am aware of the parameters within which the court considers whether a matter is of substantial importance, to warrant invocation of Article 165(4) of the *Constitution*, guided by *Chunilal V. Mehta vs. Century Spinning and Manufacturing Co* AIR 1962 SC 1314 (Sinha, Bhuvneshwar P.(CJ), Kapur, Hidayatullah, Shah & Mudholkar). I also bend to the wisdom, in *Okiya Omtata Okoiti & another vs. Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 3 others* [2015] eKLR (Waki, Warsame & Mohammed, JJA), that decisions of a bench of 3 or more Judges would bear more jurisprudential weight, and that a substantial question would require a substantial decision.
10. The questions of law that would be addressed by the multi-Judge bench, would be the 3 framed by the petitioner, at paragraph 10 of his Motion, dated 15th April 2024, namely:
 1. Whether the mandate of the Senate to oversight County Governments, under Article 96, as read with Article 1(1), of the *Constitution* is, as argued by the respondents, limited to the corporate mandate of the Chamber, the House relies on annual audit reports of the Auditor-General, carries out annual post-mortems on the operations and activities of the County Government; or, as argued by the petitioner, whether it extends to the work done by an individual Senator, exercising his individual oversight mandate, in his electoral unit, using Senate oversight funds, to monitor and evaluate ongoing projects being implemented by the County Government;
 2. Whether, in his official capacity, as a County leader, with obligations and a mandate to represent the people of the County, pursuant to Article 1(2) of the *Constitution*, the individual Senator:
 - i. has an obligation and mandate, in his personal capacity, to directly oversight the County Government away from the institution of the Senate as a corporate entity;
 - ii. is entitled, in the discharge of his oversight obligation and mandate over the County Government, to access official information and documents on the operations and activities of the County Government; and
 - iii. loses his right as a citizen, under Article 35 of the *Constitution*, to access information from the County Government.
 3. Whether, as the Chief Executive of a County, pursuant to Article 179(4) of the *Constitution*, a County Governor is the officer:
 - i. responsible for releasing information to the public as the information access officer of the County Executive, under section 7(1) of the *Access to Information Act*, 2016; and



- ii. primarily responsible for ensuring that the County Executive complies with the *Public Procurement and Asset Disposal Act*, pursuant to section 44(1) of the Act.

11. In the end, I hereby dispose of the application, dated 15th April 2024, in the following terms:

- a. That I hereby decline to order transfer of the matter herein to the High Court of Kenya at Milimani, Nairobi, for hearing and disposal;
- b. That I refer the matter, in terms of Article 165(4) of the *Constitution*, to the Chief Justice, for empanelling of a bench of an uneven number of Judges, to hear and determine the matter herein, and to specifically address the questions framed in paragraph 9 of this ruling; and
- c. That the Chief justice may, should it be found fit so to do, and in Her Ladyship's absolute discretion, consider giving directions relating to the Station from where the matter may be handled.

12. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED, IN CHAMBERS, AT BUSIA THIS 31ST DAY OF MAY 2024

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Okoiti, the petitioner, in person.

Advocates

Mr. Owuor, Mr. Mogire and Mr. Ndwiga, instructed by the County-Attorney, for the respondents.

Mr. Hussein, instructed by Wetangula Adan & Company, Advocates for the 1st interested party.

Ms. Ayungu, Advocate for the 2nd interested party.

Mr. Omeri and Mr. Otieno, instructed by Omeri & Company, Advocates for the 3rd interested party.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the 4th and 5th interested parties.

