



Abdirahman v Mandera County Government & 3 others; Controller of Budget & 2 others (Interested Parties) (Constitutional Petition E002 of 2022) [2022] KEHC 11362 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E002 OF 2022**

A ALI-ARONI, J

MAY 19, 2022

BETWEEN

ISMAIL ABDULLAHI ABDIRAHMAN PETITIONER

AND

MANDERA COUNTY GOVERNMENT 1ST RESPONDENT

COUNTY ASSEMBLY OF MANDERA 2ND RESPONDENT

GOVERNOR, MANDERA COUNTY 3RD RESPONDENT

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

AND

CONTROLLER OF BUDGET INTERESTED PARTY

NATIONAL TREASURY INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. Ismail Abdullahi Abdirahman, the Petitioner moved the court by way of a Notice of Motion on 9th March 2022 pursuant to Articles 165 (3) (b) & (d), 165 (4) of [the Constitution](#) and rules 19, 23 & 24 of [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013) seeking for the following orders;

1. Spent
2. Spent



3. That pending hearing of the application and petition, interim and conservatory orders do issue and be directed to the Respondents jointly and severally, their agents or authorized representatives restraining them from withdrawing, transacting, operating, investigating; or howsoever dealing with any monies held in the bank accounts of the County Government of Mandera whether recurrent or development in the execution or implementation of the supplementary budget estimates passed on 14th February 2022.
 4. That pending the hearing and determination of the application and petition, the Controller of Budgets, the 1st Respondent herein, its agents or authorized representatives be restrained from approving and/or disbursing funds from the Central Bank of Kenya or any monies held in the County Government of Mandera accounts in the implementation of the supplementary budget of the County Government of Mandera for the year 2021/2022.
 5. Any other reliefs the court may deem fit and expedient in the circumstances.
 6. Costs of the Application.
2. The application was predicated on grounds re-hashed in the supporting affidavit to the effect that the County Assembly had passed a supplementary budget estimates for the Mandera County for the year 2021/2022 without due regard to Article 196 of *the Constitution* as read with Section 3(f) of the County Government Act, 2012 as it sought to provide services which are the sole preserve of the National Government; the said budget lacked itemization of payments for project stated therein and in particular it failed to make provisions that would cushion the residents of Mandera against drought, and it discriminated parts of Mandera County.
 3. Further in the Petitioner's affidavit of 5th March 2022 he stated that the supplementary budget estimate was opaque, illegal and failed to adhere to rule 40 of the Public Finance Management (County Government) Regulations 2015; it did not conform with the intent and purposes of supplementary budgets as stipulated in rule 39 of the Regulations, that the said budget is meant to create room for misappropriation of funds. Further Kshs.336.8m being re-allocated to other projects was not accounted for in the budget.
 4. As for the 1st, 3rd and 4th Respondents they objected to the application vide an affidavit dated 22nd March 2022, sworn by Sulekha H. Harun the County Executive Committee member for Finance and Economic Planning for Mandera County Government.
 5. In the said affidavit the Executive Committee member confirms that the 2nd Respondent debated, discussed and passed the supplementary budget estimates which she presented for the 2nd Respondent's approval together with the recommendations of the Finance Committee and having passed the budget estimates the appropriation bill was enacted.
 6. In answer to the allegation of non-participation of the public she deponed that the County Treasury of Mandera in coming up with estimates for revenue expenditure for the annual budget for the financial year 2020/2021 held public participation in each of the seven sub-counties forming the Mandera County.
 7. Further she contended that the supplementary budget was necessitated by the drought that affected parts of North Eastern and that indeed on the 8th September 2021 the President declared drought a national disaster.
 8. As regards the allegation of the County Government taking up roles meant for the National Government, she asserted that the law allows partnerships at the two levels of Government and



the argument that the projects being funded fall within the work of the National Government is misguided.

9. She argued further that the Petitioner failed to attend the County Assembly or to petition his member of the County Assembly on the grievances being raised; and should the Court grant the orders as prayed for, the same will affect and disrupt the operations of the County Government which is contrary to public interest yet no violation of the law was exhibited.
10. The 2nd Respondent filed his affidavit in objection out of time and the same was struck out.
11. As for the 1st Interested Party it neither supported nor objected to the application. However, it informed the court that the alleged Appropriation Act had not been supplied to them. Further supplementary budget ought to be re-allocation of ongoing programs in accordance with Section 154 of the [Public Finance Management Act](#).
12. On its part the 2nd Interested Party sought to be removed from the proceedings. There having been no objection from the Petitioner and the court recognizing that the matter did not concern the said Interested Party the oral application was allowed.
13. Having considered the submissions and authorities cited by the parties the key issue for determination is whether or not to issue conservatory orders pending hearing and determination of the main petition.
14. The parties in their various arguments have raised several pertinent issues that in the view of the Court will be well articulated at the hearing of the main petition. For now, the court has to consider whether a case has been made for a conservatory order to issue so as to preserve the subject matter in issue.
15. The Supreme Court in the case of [Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others](#) [2014] eKLR held;-

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes”.

16. In [Invesco Assurance Co. Ltd vs MW \(Minor suing thro’ next friend & mother \(HN\)\)](#) [2016] eKLR the court stated; -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

17. The principles to be considered were also well summarized in the case of [Board of Management of Uburu Secondary School vs City County Director of Education & 2 Others](#) [2015] eKLR as follows
 - (i) The need for the Applicant to demonstrate an arguable prima facie case with a likelihood of success, and/or to show that in the absence of the conservatory orders he is likely to be prejudiced.



- (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and the objective of a specific right or freedom in the bill of rights.
- (iii) Thirdly, the court should consider whether an interim conservatory order if not granted, the petition or its substratum will be rendered nugatory.
- (iv) Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny conservatory order.”

18. Looking at the case at hand,

i. Has the Applicant/Petitioner made a prima facie case? The Applicant argues that the supplementary budget for the Mandera County for the financial year 2021/2022 violates *the Constitution* of Kenya 2010; and its tenets, the principles of good governance, division of functions between the National government and County Government and the Principle of public participation. In as much as the 1st and 4th Respondents have attempted to explain the processes adopted, the allegation of blatant disregard of the Public Finance (County Government) Regulations, 2015 and the County Government Act so far remain unexplained, he has demonstrated his arguments yet the respondents have been unable to challenge the same for now.

ii. Would denial of the order render the substratum of the Petition nugatory?

The issue at hand is the implementation of the supplementary budget in the meantime. Clearly if conservatory orders are not issued and the supplementary budget is implemented as passed the whole Petition will be rendered useless hence the need to preserve the substratum of the petition.

iii. The Court’s view is that public interest will also be served by allowing the parties to fully ventilate the issues before court and to allow the Court make a determination whether the processes that were put in place and the supplementary budget subject matter adhered to laid down constitutional and legal requirements and would benefit the people of Mandera.

19. Consequently prayers 3 & 4 of the Notice of Motion dated 8th March 2022 be and are hereby granted.

20. Further it is directed that the Respondents and the Interested Parties each do file and serve their respective responses to the main Petition within the next 10 days.

21. The Petitioner do file a reply if need be and serve the same together with his submissions within ten (10) days service

22. The Respondents and Interested Parties will file and serve their submissions ten (10) days upon service of the reply and submissions by the Petitioner

23. Time being of essence no extensions will be granted.

24. Costs of the application do abide the outcome of the main petition.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 19TH DAY OF MAY, 2022.

.....

ALI-ARONI

JUDGE

