



REPUBLIC OF KENYA



**Gachuba & 10 others v County Government of Embu & 2 others (Constitutional
Petition E001 of 2021) [2022] KEHC 11252 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E001 OF 2021**

LM NJUGUNA, J

MAY 25, 2022

BETWEEN

MWANIKI GACHUBA 1ST PETITIONER
GEOFFREY KARIUKI KIRINGA RUKU 2ND PETITIONER
JOAB NJERU NGAI 3RD PETITIONER
PATRICK NGARI NJERU 4TH PETITIONER
NICHOLAS NJAGI NJERU 5TH PETITIONER
JOSEPH MWANIKI NYAGA 6TH PETITIONER
ELIAS NJERU KATHIGA 7TH PETITIONER
NICHOLAS N. IRERI WAKENDA 8TH PETITIONER
LINET MURUGI MWANGANGI 9TH PETITIONER
SILAS PETER MUCHIRI MUNYI 10TH PETITIONER
KEVIN MWENDA WILLIAM 11TH PETITIONER

AND

COUNTY GOVERNMENT OF EMBU 1ST RESPONDENT
SPEAKER OF THE COUNTY ASSEMBLY OF EMBU 2ND RESPONDENT
PUBLIC PROCUREMENT REGULATORY AUTHORITY 3RD RESPONDENT

JUDGMENT

1. The petitioners herein moved this court via a petition dated January 6, 2021 supported by a joint affidavit of the petitioners, of even date, and a notice of motion seeking an order of stay of the



implementation of item Nos. 260500 and 3110400 of the budget estimates for the Revenue and expenditure of the County Government of Embu for the financial year 2020/2021 dated the July 22, 2021 and the tender notice dated December 23, 2020 pending the hearing and determination of the petition.

2. In the end, the Notice of Motion was disposed of via a ruling delivered on March 3, 2021. In the petition, the petitioners herein seeks orders that:
 - i) A declaration that Item Nos. 260500 and 3110400 of the Budget Estimate for the Revenue and Expenditure of Embu County Government for the Financial Year 2020/2021 dated 22.07.2020 is unconstitutional and unlawful.
 - ii) An order of prohibition to prevent the 1st respondent from implementing Item Nos. 260500 and 3110400 of the Budget Estimate for the Revenue and Expenditure of Embu County Government for the Financial Year 2020/2021 dated July 22, 2020.
 - iii) An order of certiorari to quash Item Nos. 260500 and 3110400 of the Budget Estimate for the Revenue and Expenditure of Embu County Government for the Financial Year 2020/2021 dated July 22, 2020.
 - iv) A declaration that the tender notice dated December 23, 2020 and the tender documents thereof are unconstitutional and unlawful.
 - v) An order of certiorari to quash tender notice dated December 23, 2020 and the tender documents thereof.
 - vi) An order of mandamus to compel the 1st and 2nd respondents to subject identification of roads and the appropriation of funds therefore and the subsequent procurement of road works to public participation.
 - vii) Compensation for breach of petitioners' rights and legitimate expectations.
 - viii) Costs of the petition and interest thereof.
 - ix) Any other order the Honourable Court deems just to grant.
3. The petition is premised on the grounds on the face of it and further supported by affidavit sworn the petitioners wherein they allege that the 1st and 2nd respondents appropriated funds amounting to Kshs. 1,137,320,879/= for road works, out of which the lion's share of the road projects appropriated is in favour of Runyenjes' sub-county. That all the earmarked roads for upgrading to bitumen are all in Runyenjes sub-county and the identification of the said roads and appropriation of funds was not subjected to public participation. In addition, that the 1st and 2nd respondents also failed to reserve a minimum twenty (20) % of the budgetary allocation for the resident tenderers of Embu County and further, they did not act in the best interest of Mbeere community and residents of both Mbeere South and Mbeere North Sub Counties within Embu County. It was their case that the 3rd respondent who was charged with the responsibility of monitoring, assessing and reviewing the subject procurement to ensure that the 1st and 2nd respondents comply with the national values and principles of governance, the principles of public finance and the system of procurement of roads works, failed to execute its duties and as such, this court's intervention was sought to protect the interests of the marginalized Mbeere Community and areas.
4. Upon being served with the petition and the ex parte orders made on January 7, 2021, the 1st respondent filed an application seeking to have the ex parte orders discharged, set aside and/ or vacated and for striking out of the petition. The 1st respondent filed a notice of motion dated January 19,



2021 and wherein it stated that the petition herein was premature and an abuse of court process as the petitioners did not file any petition before the County Assembly to raise the issues brought before this court as required by sections 15 and 88 of the County Governments Act; that there was public participation as required by law in all the sub counties with respect to the projects, the subject matter of the challenge before this court and that the petitioners misled the court by alleging that there was no public participation undertaken.

5. It was also stated that the petitioners had failed to disclose to this court that most of the projects have been ongoing for more than two years and that there had been no objection to any of the same in financial years 2018-2019 and 2019 – 2020 and as such, the petition has not been filed to advance any public interest. It is its case that the procurement proceedings have been terminated and as such, the substratum of the petition and the application has been overtaken by events. That the petitioners sought orders that have stayed the implementation of projects in the county being funded by the National Government through conditional grants and that are being implemented by the Kenya Roads Board. Further that, the petition does not raise any issues touching on those projects and therefore, the interim orders as had been granted by the court ought to be discharged. In the end, it was prayed that the interim orders be discharged as a matter of urgency to safeguard the dignity of this Honourable Court.
6. On his part, the 2nd respondent deposed that, the petition arises out of the 1st respondent's constitutional and legal duty in its approval of budget and expenditure as mandated by section 8(c) of the County Government Act and articles 185 and 220(2) of the Constitution of Kenya 2010. That in line with that constitutional and legal mandate, the County Assembly of Embu did receive the budget estimates for the revenue and expenditure from the 1st respondent for the year 2020/2021. That after due process and subjecting the proposed estimates to public participation as required under article 196 of the Constitution, the County Assembly duly approved the budget estimates and that the process of approval is neither being challenged nor questioned.
7. It was further deposed that the process was carried out by the entire Embu County Assembly, with the assistance of its committee, and it was not carried out by the Speaker of the County Assembly. That what is in issue are the tenders that the 1st respondent advertised for procurement of the roads works and neither the Speaker nor the County Assembly have any role to play in advertisements by the County Government. That the County Assembly became functus officio after approving the budget estimates and it has no legal mandate on the implementation of the approved budget estimates nor any stake in the priorities and/or considerations that the County Government makes before or during implementation.
8. The 3rd respondent deposed that it has the statutory mandate of ensuring that procurement procedures established by the law are complied with. In response to the allegations that it refused to monitor, assess and review the procurement to ensure that the 1st and 2nd respondents complied with the national value and principles of governance, principles of public finance and the system of procurement of road works, it averred that the authority never received any request to monitor, assess and/or review the subject procurement from the applicants or any other person.
9. It was also averred that the 3rd respondent has never received any complaint from the petitioners in reference to the subject procurement for investigations on any irregularities pertaining to the subject procurement and that if any such complaint had been raised, the same would have been addressed appropriately. That, therefore, it is wrong, inappropriate and misleading for the applicants to allege that the 3rd respondent refused to carry out its mandate as alleged.



10. Further that, the petition is couched in blank statements of allegations which are not supported by any material facts to prove such alleged breach of constitutional rights as against the 3rd respondent and can only be termed as a fishing expedition to cause unnecessary anxiety, trouble and expenses to the 3rd respondent.
11. Further that, the tender advertisement dated the December 23, 2020 for all the roads listed under paragraph 8 of the supporting affidavit which the applicants claim are in Runyenjes sub-county were cancelled and such cancellation reported to the 3rd respondent on the January 8, 2021.
12. In the end, the court heard the two applications and delivered its ruling on March 3, 2021.
13. In regards to the main petition, directions were given on filing of submissions but none of the parties complied.
14. The court has carefully considered the petitioners' Petition; the documents filed herein and from the aforesaid, the issue for determination is whether the petitioners are deserving of the orders sought.
15. The respondents, in a nut shell, have denied that the alleged rights have been infringed and thus the petitioners are undeserving of the orders sought. The respondents have raised an issue where it is alleged that the petitioners have failed to disclose any constitutional violation as the same has not been laid out and further, the procurement proceedings forming the basis of the petition herein have been terminated and the substratum of the petition herein has been overtaken by events.
16. Rule 10 of the Mutunga Rules, 2013 clearly provides what a competent Petition should include. Rule 21(3) of the Mutunga Rules, 2013 provides that the court may frame the issues for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case and lastly, Rule 22(2)(b) provides that submissions shall contain a brief statement of facts with reference to exhibits, if any, attached to the petition, issues arising for determination ; and a concise statement of argument on each issue incorporating the relevant authorities referred to, together with the full citation of each authority.
17. The Court of Appeal affirmed the test outlined in Anarita Karimi Njeru and in Mumo Matemu (supra). On its part, the Supreme Court affirmed the importance of complying with the stated principles by stating in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR as follows:

“(349) ...Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
18. The first question, therefore, is whether the petitioners have disclosed a violation of the Constitution, the constitutional provisions violated and the manner in which the provisions were violated. In their pleadings, the petitioners allege violation of their rights and principles enunciated and protected by inter alia articles 22(1) (2) (b) (c), 23 (1) (3), 48, 50 (1), 159(2) (a) (e) ,165 (3) (a) (b) (d) (ii) (6) (7), 258



(1) (2) (b) (c), 10 (1) (c) (2) (b), 19 (1) (2), 20 (1), 21 (3), 27 (1), 47 (1), 56(e), 174 (e) (g), 201 (b) (iii), 203 (1) (h), 224 and 227 (1) of the Constitution. The petitioners' case is that the actions of the respondents have affected the rights of the residents of both Mbeere South and Mbeere North Sub-Counties within Embu County. They proceeded to specify the orders they are seeking against the respondents which are tied to the statutory and constitutional mandates of the respondents. It therefore follows that the petitioners have complied with the requirement of setting out the provisions of the Constitution alleged to have been contravened. Whether their pleadings disclose a constitutional dispute is an issue that I now proceed to determine.

19. The above conclusion, would then lead me to the question whether the petitioners' rights were violated as alleged. In part E of the petition, the petitioners have enumerated the nature of injuries that have been caused to them (Mbeere community and residents of both Mbeere South and Mbeere North Sub Counties within Embu County). The petitioners have enumerated that the Mbeere community has suffered discrimination, unfair and unequitable treatment as they were not involved in the identification of the roads and the appropriation of funds. That they have suffered injustice and prejudice as they were denied equal benefits of the law and further injustice and prejudice as the identification of the roads and the appropriation of funds negated their sovereignty and their best interests. It was stated that the identification of the roads and the appropriation of funds was actuated by atavism, pathological tribalism and acute hatred, abuse of power, malice and personal interests.
20. The 1st respondent on the other hand is of the view that the allegations by the petitioners are blatantly false and are calculated at misleading the court in granting the orders sought. That there was public participation in compliance with section 125 (2) of the Public Finance Management Act and section 87 of the County Governments Act, in all the sub counties of Embu County, with respect to the budget process for funding of the roads, the subject matter of the challenge before this Honourable Court. It is its case that the petitioners failed to disclose to this Honourable Court that most of the impugned projects have been ongoing for more than two years and that there had been no objection to any of the projects in the financial years 2018/2019 and 2019/ 2020.
21. That in compliance with the provisions of section 10(2) of the Public Finance Management Act No. 18 of 2012 which requires public participation in the budget process, on 21.04.2020, the Embu County Government Department of Finance and Economic Planning invited members of the Public to submit written proposals on Embu County Budget Estimates 2020/21 through advertisements in the dailies [See JNN3 an advert dated Tuesday, April 21, 2020 inviting members of the public to submit written proposals on Embu County Budget Estimates 2020/2021]. That due to the directive by the Ministry of Health suspending all public gatherings and the preventive measures by the County Government of Embu to contain Covid – 19 pandemic, members of the public were required to send their views, proposals and memoranda to the CEC Finance and Economic Planning via email addresses provided on the advertisements not later than 25.04.2020.
22. It was also the 1st respondent's case that in compliance with the provisions of the Public Finance Management Act and the County Government Act, in the year 2018, the County Government of Embu set out to prepare the Second County Integrated Development Plan (CIDP) for the period covering 2018 – 2022. To this end, the County Government of Embu advertised the invitation for public participation forums in preparation and development of Embu CIDP for 2018 – 2022 by inter alia giving proposals on priority programmes and/or projects to be implemented by the County Government of Embu for the said five year period. [See JNN 6 - an invitation for public participation forums in preparation and development of Embu County integrated development plan (CIDP) for 2018 – 2022].



23. That the roads identified in the impugned Tender Notice are part of the roads identified in the CIDP for 2018 – 2022 and further, in the report of the Liaison Committee on the Budget Estimates for the Revenue and Expenditure of Embu County Government for the Financial Year 2020/2021 where they were identified together with the appropriation of funds thereto, both of the documents have been subject to public participation. That on 15.08.2018, the Embu County Government Finance and Planning Department advertised a public notice for public participation on the Annual Development Plan 2019 – 2020 to be held on 21.08.2018 in various sub county headquarters including Mbeere North and Mbeere South Sub Counties of Siakago and Kiritiri respectively. [See JNN 10 – an advert (dated Wednesday, August 15, 2018) calling for public participation on Annual Development Plan 2019 – 2020]. In view of the foregoing, the court finds that there was public participation.
24. In regards to whether the identification of the roads, appropriation of funds and subsequent tender was discriminatory, unfair, unequitable and malicious, it was the case of the 1st respondent that the residents of Mbeere South and Mbeere North Sub Counties prioritized health care and agriculture before infrastructure while the sub counties of Runyenjes and Manyatta prioritized infrastructure instead of health facilities as the same were already in place. [See JNN 15 report on public participation for Mbeere South Sub County].
25. Further that, by the time the petitioners approached the court, the said procurement process had already been terminated. This was as a result of the fact that there was need to redesign the roads necessitated by overrun costs of relocation and reinstatement of services. As such, there was need for the procurement process to be annulled to allow for the redesign and restart the process. [See JNN1 Resurveying of Various roads to be upgraded to bitumen standards and the need to redesign the road due to reinstatement of services].
26. It is the 3rd respondent’s case that the tender advertisement dated December 23, 2020 for all roads listed in paragraphs 8 of the applicants supporting affidavit, which, the applicants claim are all in Runyenjes sub-county were canceled and such cancellation was reported to the 3rd respondent on 08.01.2021 while the 2nd respondent’s case is that neither the speaker nor the county assembly play a role in the advertisements by the county government. That the County Assembly became functus officio after approving the budget estimates and it has no legal mandate on the implementation of the approved budget estimates nor does it have any stake in the priorities and considerations the county government makes before and during implementation.
27. The petitioners are claiming compensation for breach of their rights and legitimate expectations but from the foregoing, it is outright that the respondents carried out their statutory and constitutional mandate as per the requirements of law. Subjective feelings without proper proof by the petitioners have not convinced this court that the said alleged rights were infringed. The courts and tribunals have to do the best they can with the available material to make a reasonable assessment, but this court is constrained by lack of sufficient evidence to enable it make a finding that the petitioners’ rights have been violated as there is no solid evidential foundation especially considering that the tender advertisement was cancelled and there is evidence to that effect.
28. In my view, the petitioners have failed to discharge the burden of proof, to the required standard. The legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. [See Rajah JA in *Bristone Pte Ltd v Smith & Associates Far East Ltd* [2007] SGCA where Rajah JA held the view that:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”



- 29. The burden of proof as to any particular fact lies on that person/s who wish/es the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on the other person/s.
- 30. In view of the foregoing, I am unable to agree with the petitioners that they deserve the orders prayed for.
- 31. The petition is hereby dismissed but with no orders as to costs.
- 32. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF MAY, 2022.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondents

