



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 187 OF 2018

IN THE MATTER OF:

**ARTICLES 20, 21, 22, 23 AND 165(3) (B) & ALLEGED CONTRAVENTION OF ARTICLES 10(2), 33(1) (A), 35,
174, 184, 196, 201 & 228 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF:

THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

IN THE MATTER OF:

**ALLEGED CONTRAVENTION OF SECTIONS 102, 117, 125(2), 126, 128(4), 129, 131 & 137
OF THE PUBLIC FINANCE MANAGEMENT ACT**

AND

IN THE MATTER OF:

ALLEGED CONTRAVENTION OF SECTIONS 3, 4, 7, 8, 10 OF THE ACCESS TO INFORMATION ACT NO. 31 OF 2016

BETWEEN

- 1. LOCAL EMPOWERMENT FOR GOOD GOVERNANCE**
- 2. INTERNATIONAL CENTRE FOR POLICY AND CONFLICT**
- 3. KITUO CHA SHERIA**
- 4. KWACHA AFRICA**
- 5. COMMISSION FOR HUMAN RIGHTS & JUSTICE**
- 6. MANYATTA YOUTH ENTERTAINMENT CBO**
- 7. HAKI YETU ST. PATRICKS.....PETITIONERS**

AND

1. THE COMMUNITY EXECUTIVE COMMITTEE MEMBER

FINANCE & ECONOMIC PLANNING - COUNTY GOVERNMENT OF MOMBASA

2. THE CLERK, COUNTY ASSEMBLY OF MOMBASA

3. THE CONTROLLER OF BUDGET.....RESPONDENTS

JUDGMENT

1. The Petitioners are all non-governmental organizations registered and/or incorporated as such in the Republic of Kenya, working towards the entrenchment of the principles of constitutionalism, rule of law and Human Rights as well as good governance in all spheres of life in the Republic of Kenya.

2. The 1st Respondent is the County Executive Member Committee in charge of finance and economic planning within the County Government of Mombasa as established under Article 179(2) (b) of the Constitution of Kenya of 2010.

3. The 2nd Respondent is the Clerk of County Assembly of Mombasa charged with the overall management and affairs of the County Assembly established under Article 176(1) of the Constitution of Kenya.

4. The 3rd Respondent is the Controller of Budget, a financial institution established pursuant to Article 228 of the Constitution, whose mandate is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds.

5. The Petitioners' case is that sometime in 26/06/2018, the County Assembly of Mombasa approved the Mombasa County Integrated Development Plan 2018/2022; Mombasa County Annual Development Plan for the Fiscal Year 2018/2019; Mombasa County Budget Estimate for the Fiscal Year 2018/2019; and hurriedly rushed through the 1st reading, 2nd reading, committee stage and 3rd reading of the Mombasa County Appropriation bill 2018, all in one afternoon sitting and passed the same as the Mombasa County Appropriation Act 2018. The Petitioners avers that the aforementioned approvals by the County Assembly of Mombasa were conducted in a manner and within a period contrary to timelines stipulated under the law and consequently, the timelines were not sufficient to permit any public participation in the budget making process.

6. It is also the Petitioners' case that they sought to obtain the following: The programme based budget for financial year 2016-2017 and 2017-2018; the final approved County Fiscal Strategy Paper (CFSP) Financial Year 2018/2019; the County Integrated Development Plan whether in its draft form or final approved form and the approved County Budget Review and Outlook Paper(CBROP) from the Respondents' offices, since prior to the 26/06/2018, the requested documents were not available on the Mombasa County Government website. Therefore, the refusal by the 1st and 2nd Respondent to publish and supply the documents to the Petitioners and members of the public denied the residents of Mombasa County the opportunity to effectively participate in the legislative process by failing to give them any opportunity to study all the documents approved on 26/06/2018, and this was a contravention of the Petitioners right under Section 87 of the County Government Act and the right to access information as required under Article 33(1) and (35) (1) (a) of the Constitution and under Section 4 (1) and 4 (4) of the Access to Information Act, No. 31 of 2016.

7. The Petitioners' aver that crucial budget policy documents were never prepared nor approved by the assembly and therefore, the Mombasa County Appropriation Act 2018 is a product of flawed process, irregular and its implementation will be contrary to the law. Therefore, the Respondents have infringed on the objects and principles of the Devolved Government, which require the State to give powers of Self Governance to the people, and to enhance the participation of the people in the exercise of their powers and in making decisions affecting them contrary to Section 125 of the Public Finance Act No. 18 of 2012.

8. It is the Petitioners' case that the County Government of Mombasa to date has never established the County Budget & Economic Forum whose primary mandate is to provide a means for consultation by the County Government. Further, it is averred that the rushed approval of the budgetary documents by the 1st and 2nd Respondents was designed to disenfranchise residents of the County of Mombasa, and deny them the opportunity to participate in the budget making process as contemplated under Article 201 of the Constitution, which requires the process to be open and accountable.

9. Being aggrieved by the actions of the Respondents, the Petitioners filed this petition seeking the following orders:

1. A declaration that the budget making process of Mombasa County for the Fiscal year 2018/2019 was unlawful & unconstitutional.

2. A declaration that the Mombasa County Appropriation Act 2018 is unprocedural unconstitutional null and void.

3. An Order that the 1st and 2nd Respondent commence the budget process anew in full compliance with Constitution, Public Finance Management Act No. 18 of 2012, County Government Act and Access to Information Act 2016.

4. An Order of permanent injunction restraining the 3rd Respondent by herself, her agents, servants and/or any other person acting on her instructions from authorizing, approving, allowing and/or permitting the 1st Respondent from withdrawing money from the County Revenue Fund pursuant to the Mombasa County Appropriation Act 2018 until full compliance with order 3 above.

5. Costs of this Petition.

6. Any further reliefs or orders that this honourable Court shall deem just and fit to grant to meet the ends of Justice.

10. The Petition is supported by the affidavit sworn on 5/07/2018 by **Lucas Fondo** who is the 1st Petitioner's Executive Director.

The Response

11. The 1st Respondent opposed the Petition by way of Replying Affidavit sworn on 12/07/2018; Response to Petition dated 13/07/2018 and Grounds of Opposition dated 16/07/2018.

12. The 1st Respondent avers that public participation before presentation of the Budget to the County Assembly is undertaken by the County Treasury before being forwarded to County Assembly which finally debates the same. It is therefore the 1st Respondent's case that when a new term begins, after a general election, the County Government embarks on a County Integrated Development Plan (CIDP) as a first document that will run for the term of the County Government, and is undertaken after every general election. Therefore, the process of preparing the CIDP began in the month of December 2017, after formation of the Cabinet, the first public participation was conducted, and it covered six (6) sub-counties namely: Changamwe; Jomvu; Kisauni; Nyali; Likoni and Mvita covering all the thirty (30) wards in the County from 18/12/2017 to 20/12/2017.

13. The 1st Respondent avers that the theme of the public participation meetings was "**Mombasa County Government Development Plan (CIDP) for 2018 -2022 Public Participation forum and issues raised by the Public (Wananchi) and suggested solutions during the CIDP Public Participation exercise from 18th to 20th December 2017**", and invitations were made to all residents of Mombasa, including **Mr. Lucas Fondo** and indeed feedback was received from the residents who raised issues and gave out their view as evidenced at page 5 of the 1st Respondent's bundle of documents.

14. The 1st Respondent avers that in February 2018, the National Treasury issued the Budget Policy Statement, which guides the County on the ceilings for the next financial year budget of the County, and from the ceiling provided, the 1st Respondent prepared a County Fiscal Strategy Paper in draft form, which was then shared with the public through Advertisement placed in the Newspapers for meeting to be held on 21/02/2018 and 22/02/2018 for public participation on the CFSP. The said meetings were attended as per a copy of the attendance sheet that has been annexed at page 111- 189 of the 1st Respondent bundle of documents.

15. The 1st Respondent avers that the County Treasury proceeded to prepare Budget Estimates for public participation on 25th, 26th, and 27th April 2018 in all the six (6) sub-counties, all the wards, and the documents were shared with the public on the ceiling, and the programs that the County Government was planning to undertake. A copy of the participants was annexed in the 1st respondent bundle at pages 191 to 250.

16. The 1st Respondent avers that they received various memoranda from the persons who actively participated in the meetings as exhibited at page 251 of the 1st Respondent's bundle of documents and it is unfortunate that the 1st Petitioner was never aroused into action by all the public advertisements. Further, the 1st Respondent avers that after participation, they submitted to the County Assembly the Budget Estimates, both Revenue and Expenditure, for their approval and in doing so the following documents were prepared:

- a) **Mombasa County Report on Public Participation Forum for county Budget 2018/2019 held on the 26th & 27th April 2018 and**
- b) **Draft Budget, drawn by the County Treasury for the 2018/2019 financial year.**

Moreover, it was thereafter that the County Assembly timeously advertised on 28/05/2018 calling for public participation as required under County Assembly Act, and in compliance of the Advertised Notice of 28/05/2018, memoranda from the public were received with various views on the matter. The 1st Respondent states that it is evident that there was public participation in the process of coming up with the Budget of the County of Mombasa.

17. The 1st Respondent maintains that residents could always access the required information through any of the following modes, namely: from the sub-County Administrators; from the Ward Administrators; through Email and Postal Office box number of the County; from the County website and by telephone. Therefore, the 1st Respondent avers that it is erroneous for the Applicant to contend that they were denied information that they required concerning the Budget, when they have not specified the manner in which they sought for that information, and the officer who declined to supply the same.

18. The 1st and 2nd Respondents' Grounds of Opposition dated 16/07/2018 is as follows:

1. **That on 25/06/2018 the Petitioners filed Petition No. 170 of 2018, which was voluntarily withdrawn, on 28/06/2018, in Court upon their perusal of the grounds raised by the 1st and 2nd Respondent in opposition thereto.**
2. **That the present Petition is in all respect a replica of the withdrawn Petition.**
3. **That the Petitioners are in violation of Section 107 of the evidence Act by failing to tender any evidentiary material in support of the allegations made in the Petition.**
4. **Neither the County Government of Mombasa, nor the County treasury has been made parties in the Petition.**

19. The 2nd Respondent opposed the Petition by way of a Replying Affidavit sworn on 13/07/2018. He avers that it is a fact that all the required documents were prepared and approved by the County Government as required by law and the allegations of crucial documents not being prepared is not factual.

20. The 2nd Respondent further avers that it is incumbent upon the Petitioners to specifically indicate with certainty and particularity, the non-conforming areas/parts of the three documents to which they make reference, to enable any reader of the Affidavit know what is being challenged.

21. The 2nd Respondent avers that there was nothing wrong or irregular, in the manner the Assembly dealt with the County Appropriation Act, and to set the record straight, there was no Act debated on 26/6/2018, since the assembly only debates “Bills” which once assented to by the Governor, the same become “Act”, and what was debated was the Mombasa County Appropriation Bill, 2018, which was published in the Kenya Gazette on 22/06/2018 as required by law.

22. It is the 2nd Respondent’s case that Standing Order 118 makes provision that:

118(1) Except with the leave of the County Assembly, not more than one stage of a bill may be taken at any one sitting.

(2) paragraph (1) shall not apply to or in respect of an Appropriation Bill or a County Revenue Fund Bill.

Therefore, from the foregoing, the only bill on the order paper was the County Appropriation Bill 2018/2019 which was debated in the manner provided by Standing order number 118(2) and therefore, the allegations that the County Appropriation Act 2018 is a product of a flawed process and irregular or that its implementation will be contrary to any law are unfounded.

23. The 3rd Respondent opposed the Petition by way of a Replying Affidavit sworn on 23/04/2021 by Mr. Stephen Masha who is the 3rd Respondent’s Deputy Controller of Budget. He avers that the 3rd Respondent in discharging its mandate, is guided by *inter alia*, the principles of public finance enshrined under Article 2011 of the Constitution, The Controller of Budget Act 2016, the Public Finance Management Act, and fidelity to Articles 1, 3, 10, 73, 228, and 249 of the Constitution.

24. It is the 3rd Respondent’s case that with regard to overseeing budget implementations, the controller of budget has two distinct functions namely:

a) To authorize withdrawals from the Equalization Fund, Consolidated Fund, County Revenue Funds and any other public fund upon being satisfied that the withdrawal is authorized by law; and

b) Overseeing and superintending compliance by both the National and County Governments with budgetary implementation procedures and principles as spelt out in the Constitution, the Controller of Budget Act, the Public Finance Management Act, and other relevant legislation.

25. The deponent avers that Section 125(1) of the PFM Act, 2012 outlines the steps to be taken in every financial year during the budget process of the County Governments. They consist of the counties undertaking the following steps:

(a) preparation of the integrated development planning process which shall include both long term and medium term planning;

(b) planning and establishing financial and economic priorities for the county over the medium term;

(c) making an overall estimation of the county government’s revenues and expenditures;

(d) adoption of County Fiscal Strategy Paper;

(e) preparing budget estimates for the county government and submitting estimates to the county assembly;

(f) approving of the estimates by the county assembly;

(g) enacting an appropriation law and any other laws required to implement the county government’s budget;

(h) implementing the county government’s budget; and

(i) accounting for, and evaluating, the county government’s budgeted revenues and expenditures.

26. Therefore, the 3rd Respondent avers that the orders of permanent injunction restraining it from authorizing and approving any withdrawal of money from the County Revenue Fund Pursuant to Mombasa County Appropriation Act 2018 sought by the Petitioners have been overtaken by events since the financial year 2018/2019 has already lapsed and in the absence of a Court order, all the proper requisitions were effected.

Rejoinder

27. The Petitioners in response to the 1st and 2nd Respondents Grounds of Opposition filed a Supplementary Affidavit sworn on 1/10/2020 by **Mr. Lucas Fondo**. The deponent avers that the Respondents have failed to demonstrate that there was any attempt to conduct public participation in the process of passing the Annual Development Plan 2018-2019 pursuant to Section 126 of the Public Finance Management Act, 2012 and Section 115 of the County Government Act, 2012, which require that public participation should be mandatory.

28. The deponent further avers that pursuant to the County Public Participation Guidelines by the Ministry of Devolution 2016, all the documents are required to be disseminated seven (7) days prior to the date of public participation as a minimum requirement. However, this was not the case herein, because all the documents were passed in one session.

29. It is also averred that the County failed to take the necessary steps to institute the Budget and Economic Forum pursuant to Section 137 of the Public Finance Management Act 2012 and Guidelines by Commission on Revenue Allocation for the formation of the County Budget and Economic Forum of 2015, part D, under nomination which requires the forum to be in place 30 days after appointment of the County Executive Committee members.

Submissions

30. The Petition was canvassed via written submissions. The Petitioners and the 1st and 2nd Respondents have complied. However, the 3rd Respondent opted to make oral submissions.

31. **Ms. Annette** learned counsel for the Petitioners reiterated the content of the affidavits in support of the Petition and submitted that the main issue for determination is the compliance of statutory timelines and the consequences of not complying with the said statutory timelines, which in her opinion were fatal.

32. As to whether the passing and/or approval of the Mombasa County Integrated Development Plan 2018-2022, the Mombasa County Annual Development plan 2018/2019, Mombasa County Budget Estimate and the County Appropriation Bill 2018 passed in the afternoon of 26/06/2018 by the Mombasa County Assembly was unconstitutional, and unprocedural, **Ms. Annette** submitted that the residents of Mombasa have a right to exercise their powers either directly or indirectly. In this instance, the residents of Mombasa had the right to exercise their powers directly by taking part in the making of the appropriation Act 2018 since the Budget would affect them directly. However, they were denied that right when strict timelines that encourage public participation were not adhered to by the 1st and 2nd Respondents. Further, counsel submitted that the strict timelines as required under the law, is not a wishful statement. It is expected to be adhered to, and in the absence of proper justifications, an illegality is occasioned. Counsel cited the finding in **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR**, where the Supreme Court of Kenya stated that timelines is a manifest example of such exemplary standard. Counsel submitted that this is a constitutional requirement that goes to the root of democratic governance.

33. On the question of the alleged denial of access to information contrary to Article 33(1) of the Constitution and Section 35(1) of the County Government Act, counsel submitted that it is on record that the Annual Development Plan (ADP) 2018/2019 was not presented for public participation at all and both the CIDP and ADP were not complete and thus not uploaded in the website or provided to the public in time for the public to consider in the making of the Budget Estimates 2018/2019 or the Appropriation Act, 2018. As to public participation, Counsel for the Petitioners submitted that the non-compliance with the strict timelines hindered the Petitioners and other members of the public from participating in the budgetary process as required by law. **Ms. Annette** cited the finding in **Diani Business Welfare Association and Others v County Government of Kwale [2015] eKLR**, where the Court stated:

“25. Though sections 87 and 91 of the County Governments Act respectively establish detailed principles and modalities and platforms for citizen participation in policy formulation and legislation, the modalities of quantitative and qualitative participation is still wanting. By quantitative participation, I refer both to the amount or extent of information disseminated by a County Government; such as the Respondents herein, and also to the widest possible extent to the citizens concerned. By qualitative participation, I mean the extent of both the information and the array of citizens who would engage in meaningful debate of the proposals for legislation by the County Government. This is to avoid the cynical attitude, if Professor Fulani has read in, then it, or the proposals are in order.

26. Without taking away the sting in Judge Sacks judgment in Minister of Health vs. New Clicks South (PTY) Limited (supra), that what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say, what amounts to reasonable opportunity does not only depend on the circumstances of each case, but more importantly also, the manner (quality) of presentation of both the opportunity and the material of the proposals to be considered.

27. Despite the provisions of section 137(1) of the Public Finance Act, 2012, that every country do establish County Budget Forum comprising of a number of representatives, not being public officers, equal to the number of executive committee members appointed by the Governor from persons nominated buy organizations representing professionals, businesses, labour issues, women persons with disabilities, the elderly and faith based groups at the County level, no or little information is availed to the citizens on the role of such For a, despite their important purpose to provide a means for consultation by the County Government on –

(a) preparations of the County plans, the County Focal Strategy Paper, and the Budget Review and outlook Paper for the County, and

(b) matters relating to land getting, the economy and financial management at the County level.

All in account with the law relating to County Governments – that is to say the County Governments Act.”

34. **Mr. Buti** learned counsel for the 1st and 2nd Respondents submitted that the Petitioners after filing the instant Petition on 5/07/2018 went to slumber until the 7/09/2020 when the file was placed before the Court for dismissal during the service week. Consequently, it is not difficult to realize that the Fiscal year of 2018/2019 the main subject of Prayer 1 in the Petition is long past and overtaken by events. Counsel submitted that the Petition lacks proof and contains general unsubstantiated allegations.

35. On public participation, **Mr. Buti** submitted that there was more than adequate public participation carried out before embarking on the budgetary process as shown on the Affidavit of **Mariam Mbaruk** from page 1 to 301 of the bundle. Therefore, none of the prayers sought by the Petitioners is capable of being granted, particularly in light of the evidence tendered by the 1st and 2nd Respondents.

The Determination

36. I have carefully considered the Petition, the opposing Affidavit and submissions of parties. From the outset, as a preliminary issue, I do wish to take judicial notice of the fact that the Mombasa County Appropriation Act 2018 that is being challenged by the Petitioners is no longer in operation. In fact, there has since been enacted **Mombasa County Appropriation Act 2019** assented to on 20/06/2019; **Mombasa County Appropriation Act 2020** assented to on 20/06/2019 and at the time of writing this judgment there is a Mombasa County Appropriation Bill that is waiting to be passed by the County Assembly of Mombasa into the **Mombasa County Appropriation Act 2021**

37. I have had a quick glance at the prayers sought in the Petition. In my view these prayers have been overtaken by events since Mombasa County Appropriation Act 2018 which is being challenged has lapsed and is no longer in operation.

38. To illustrate his point, Prayer “1” of the petition seeks a declaration that the budget making process of Mombasa County for the Fiscal Year 2018/2019 was unlawful & unconstitutional. Unfortunately, the Petitioners went into deep sleep after filing their petition on 5/7/2018. On 7/09/2020 this file was placed before the court for dismissal. By then, the financial year 2018/2019 had already lapsed since the Petitioners were never granted any orders of stay. The same applies to prayer “2” of the petition, which sought a declaration that the **Mombasa County Appropriation Act 2018** was unconstitutional. Regarding prayer 3 of the petition, it is not practicable for the budget process to start afresh since the **Mombasa County Appropriation Act 2018** has been overtaken by events as earlier mentioned. Lastly, prayer 4 of the petition is not awardable since financial year 2018/2019 already lapsed and all the proper requisitions were effected.

39. In **Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR**, Mativo J stated that:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.”

And that,

“No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.”

40. Applying the principles in the above authority to the instant case, it is obvious that all the prayers in the petition have been overtaken by event and therefore, there remains no unresolved justiciable controversy in this Petition. Because Courts generally only have subject-matter jurisdiction over live controversies, when a case becomes moot during its pendency, the appropriate first step is a dismissal of the case. On this ground alone, this case falls for dismissal.

41. **Ms. Annette** counsel for the Petitioners, has argued that a constitutional illegality does not have a time limitation. Therefore, the fact that time has lapsed does not render all the prayers irrelevant. **Ms. Annette** further submitted that the County Budget Forum is still non-existent and therefore it renders this petition still relevant.

42. Section 137 of the Public Finance Management Act, 2012, which is in respect of establishment of County Budget and Economic Forum for County Budget Consultation Process provides thus:

“(1) As soon as practicable after the commencement of this Act, a county government shall establish a forum to be known as the (Name of the County) County Budget and Economic Forum.

(2) The County Budget and Economic Forum shall consist of —

(a) the Governor of the county who shall be the chairperson;

(b) other members of the county executive committee;

(c) a number of representatives, not being county public officers, equal to the number of executive committee members appointed by the Governor from persons nominated by organisations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level.

(3) The purpose of the Forum is to provide a means for consultation by the county government on —

(a) preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper for the county; and

(b) matters relating to budgeting, the economy and financial management at the county level.

(4) In addition to the above, consultations shall be in accordance with the consultation process provided in the law relating to county governments.

Responsibilities of County Executive Committee Member for finance and functions of the county government in respect to public finances.”

43. The burden of proving the allegations of the non-existence of the County Budget and Economic Forum lay squarely upon the Petitioners. In **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another** [2018] eKLR, the High Court stated at paragraph 55 and we agree:

“It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the Evidence Act (Cap 80) provides that “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”. It is therefore the duty of the person who asserts that there is a breach of section 44 of the Banking Act to prove by evidence that that indeed is the case. That is why section 109 of the Evidence Act again provides that “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

44. In the instant case however, the Petitioners allege negatives: that the County Budget Forum is still non-existent and therefore, the 1st and 2nd Respondents have failed to comply with the requirement of Section 137 of the Public Finance Management Act, 2012. Should the Petitioners still be compelled to bear the burden of proof?

45. In High Court Miscellaneous Application No. 267 of 2014 – **Republic v Public Procurement Administrative Review Board & 3 Others**, the court stated:

“The applicant having denied notification, it was upon the Procuring Entity to prove on the standard of balance of probability that the applicant was duly notified of the decision of the Procuring Entity. To contend that the applicant ought to have adduced evidence from its computer that it did not receive the notification would not only amount to shifting the onus of proof but to compel the applicant to prove a negative. I appreciate that under Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya, “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” I also appreciate the legal maxim that omnia praesumuntur legitime facta donec probetur in contrarium (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by Seaton, JSC in the Uganda Case of *J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991*:

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general, the rule which applies is ei qui affirmat not ei qui negat incumbit probatio. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase “burden of proof” has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence...The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced.”

46. It is noteworthy that the 1st and 2nd Respondent gave the issue of formation of County Budget and Economic Forum a wide berth in their affidavits and submissions even though the said issue was raised by the Petitioners at paragraph 12 and 13 of the petition. It was incumbent upon the 1st and 2nd Respondents to adduce evidence showing that indeed Section 137 of the Public Finance Management Act, 2012 had been complied with and that a **County Budget and Economic Forum** had in fact been established. In the absence of such evidence, this Court has no option but to believe the Petitioners.

47. Although the Petitioners pleaded the issue of the non-formulation of the County Budget and Economic Forum, there was no specific prayer seeking for the creation of the County Budget and Economic Forum. However, it is my view that this Court as a Court of equity and in exercise of its jurisdiction under Article 23 (3) is able to fashion a remedy that would be appropriate in the circumstances hereof. The Court of Appeal in **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft (‘Deg’) & others** [2011] eKLR held as follows on the issue of a wrong being without a remedy...

“It is regrettable that despite these lamentations, the learned Judge did not render justice between the parties according to law. It is not enough for a Court of law to tell a victim of injustice that a wrong had been perpetrated against him without offering a remedy. It is a maxim of equity that Equity will not suffer a wrong to be without a remedy. The idea expressed in this maxim is that no wrong should be allowed to go unredressed if it is capable of being remedied by Courts of justice. See Snell’s Equity 23rd Edn page 28.”

48. Accordingly, I find that this petition partially succeeds and the Petitioners have proved that they are entitled to the following order, which I hereby grant:

a) An order is hereby issued compelling the Respondents to forthwith, and not later than 90 days from the date of this judgement, establish **County Budget and Economic Forum**, which meets the requirements of the provisions of the Section 137 of the Public Finance Management Act, 2012.

b) Parties to bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Adika for Petitioners

Mr. Buti for Respondents

Ms. Peris Court Assistant