



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CONSTITUTIONAL PETITION NO. 10 OF 2020
IN THE MATTER OF ARTICLES 10(2) (a) and c, 174(a), (c) and i, 196(i) AND 201(a) OF THE. CONSTITUTION OF
KENYA 2010
IN THE MATTER OF PUBLIC FINANCE MANAGEMENT ACT 2013, ARTICLE 207
AND
IN THE MATTER OF COUNTY GOVERNMENT ACT 2012. ARTICLES 21(3), 50(3) AND 87a, b & c
AND
IN A MATTER OF NAKURU COUNTY REVENUE ALLOCATION BILL 2018 ARTICLES 6(1) and 7(1).

BETWEEN

LABAN OMUSUNDI NANZUSHI.....1ST PETITIONER

VERSUS

NAKURU COUNTY GOVERNMENT EXECUTIVE MEMBER OF

FINANCE AND ECONOMIC PLANNING.....1ST RESPONDENT

NAKURU COUNTY ASSEMBLY2ND RESPONDENT

JUDGEMENT

1. The petitioner filed this petition on his own behalf and in the public interest seeking the following reliefs:

- a. A declaration that the entire process of budget making process was unlawful and unconstitutional and thus invalid**
- b. An order for the respondents to come up with proactive ways to ensure qualitative and quantitative public participation in the entire process of the budget making.**
- c. The costs of the petition.**

2. The petitioner's argument is that, public participation process for the financial year 2020/2021 was not well communicated to the residents of Nakuru County to include those who cannot access newspapers and online services. He contends that there was no sensitization for public participation at the ward level for the budget making process.

3. The petitioner contends that, public participation process should be qualitative and quantitative; and the respondents who bear the mandate under the constitution and Acts of Parliament failed to ensure that participation was conducted. He averred that the radio station advertisement was not properly proved as the respondents have not indicated the date when the radio advert was aired and further the radio station selected being Radio Yetu does not cover all parts of Nakuru County.

4. The petitioner further averred that the newspaper advert purportedly gave the public only 2 days within which they were to raise any issues in the budget making process and the excerpts attached as evidence do not explicitly tell that they are adverts from either standard or nation newspaper.
5. On the issue of the website, the petitioner averred that owing to the illiteracy level and poverty in Nakuru County, it was meant to lock out and deny most people from participating.
6. The petitioner further averred that the 1st respondent did not exhibit any memorandum from the residents of Nakuru as being their contribution to the budget making process and the 2nd respondent has only 10 Memoranda from 10 wards out of the 55 wards in Nakuru County a clear indication that more than 80% of the wards did not participate.
7. He further averred that the 2nd respondent did not produce to the court any resolutions of the purported meeting with the civil societies organizations.
8. He averred that the end results of the budget making process is unconstitutional for want of public participation and will not reflect the views of the ordinary residents to whom the power is vested and cited the case of **Doctors for life international vs speaker of the national assembly and others (CCT12/05) (2006) ZACC 11;2006 (12) BCLR 1399 (cc) (6) SA 416** where the court held as follows: -

“If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formation of legislation. The objective in involving the public in the law making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance of the legislation. This not only improves the quality of the law making process but also serves as an important principle that government should be open, accessible, accountable and responsive, and this enhances our democracy.”

9. The petitioner submitted that public participation requires a reasonable opportunity to be given to the members of the public and all interested parties to know about the issues and have adequate say.

RESPONDENT’S CASE

10. In response, the respondents submitted that public participation was fully adhered to and undertaken in compliance with the provisions of **articles 10, 35,196 (1) of the Constitution and Sections 87and 115 of the County Government Act.**
11. The respondents submitted that the 2nd respondent sent invitations to the public and subsequently held a public participation forum amidst the pandemic in line with the Ministry of Health guidelines and ensured that announcements were first made in a popular local radio stations inviting the general public to participate and encouraging residents to send their views on the Nakuru County budgetary estimate 2020/2021 financial year.
12. The respondents further submitted that, advertisements were made on the 12th of June 2020 in two daily local newspapers of nationwide circulation; the standard and daily nation and thirdly, the 2nd respondent explored the use of ICT based platforms by creating a website and subsequently providing links for members to convey the information that provided a forum for members of the public to air their views and further, a meeting was held on 8th July 2020 in the 2nd respondent’s Assembly Chambers where oral presentations were made.
13. The respondents submitted that the 2nd respondent’s action of setting up a website, advertising in 2 local dailies and on radio amounted to the modern day communication and the mode of communication met the threshold for public participation.
14. The respondents further submitted that a meeting convened at the 2nd respondent premises with the Nakuru Civil Society where members present aired their views.
15. The respondents urged this court to find that the petition raises no constitutional issues; brought in bad faith, that it lacks specificity and the facts are not pleaded with clarity in order to demonstrate violations of the constitution.
16. The respondent cited Court of Appeal decision in the **Mumo Matemu -v Trusted Society of Human Rights Alliance &5 Others [2013] eKLR**, which upheld the principle established in **Anarita Wairimu Njeru Vs Republic (1979) eKLR** where the court proceeded to dismiss the petition on ground of failure to plead the case with precision.
17. And further in the case of **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition 486 of 2013** where the court opined as set out hereunder: -

“the mode and manner of giving effect to public participation will vary from case to case and there must be some clear reasonable level of participation afforded to the public.... It is not the same as saying the public views must prevail”.

18. The respondents urged this court to find that the petition lacks merit and dismiss the same with costs.

ANALYSIS AND DETERMINATION

19. I have considered averments herein, submissions filed and annexures to affidavits filed and consider the following as issues for determination: -

- i. Whether requirement for public participation was compiled in the budget making process.
- ii. Whether the Petitioner is entitled to the reliefs sought.

(i)Whether requirement for public participation was compiled in the budget making process

20. The petitioner urges this court to find that the budget making process was unconstitutional on the ground that public participation was not carried out as required by law. On the other hand, the respondent argued that the public were indeed involved through all manner of communications considered in the modern day communication.

21. Public participation as a national value under Article 10 of the Constitution is an expression of the sovereignty of the people articulated under **Article 1** of the **Constitution**. **Article 185** vests legislative authority of a County Government in a County Assembly. **Article 196 (1) (b)** obligates a County Assembly to facilitate public participation in its legislative business. Public participation in matters of public finance is also reinforced under **Article 201 (a)** in that it provides that there shall be openness and accountability, including public participation in financial matters.

22. Documents attached to affidavits herein show that various forms of communication which include radio station, two newspapers of wide circular being The standard and Nation; and website was created and local radio station was used to reach the public. In my view, the different forums used was intended to reach different categories of audience. Those who were unable to access information through website could be reached through radio, those able to read could access information either through physical or e newspapers.

23. In respect to use of local radio station, the respondent argued that the radio station namely “Radio Yetu” does not reach the whole of Nakuru county. I however note that no evidence was availed to confirm that it does not cover the county.

24. Further to the above, it is also evident that a forum was created for members of the civil society to air their views concerning the proposed budget.

25. From the averments, following sensitization forums done, Memoranda from members of Free Area, Baruti neighborhood association, Mwariki Residence Association. Rhoda Ward, and Nakuru persons living with disability and the letter from Baharini are attached. The fact that not all areas presented memorandum in my view, cannot be used to gauge audience reached as there is need to take judicial notice of the fact that not all reached prepared and present memoranda.

26. From the foregoing I find that the budget making process was lawful and constitutional and therefore valid. It follows therefore that the petitioner is not entitled to prayers sought.

27. FINAL ORDERS

- 1. The petition is hereby dismissed.**
- 2. The application having been a public interest litigation, I make no orders for costs.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 29TH DAY OF JULY, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Petitioner present in person

Ms. Odhiambo holding brief for Daye for 2nd respondent