



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHT DIVISION

PETITION NO 114 OF 2015

KAJIADO MULTI TRANSPORTERS SACCO LIMITED.....PETITIONER

AND

THE GOVERNOR KAJIADO COUNTY.....1ST RESPONDENT

THE EXECUTIVE COMMITTEE KAJIADO COUNTY.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. Kajiado Multi-purpose Transporters Sacco Limited, the petitioner, is a limited Cooperative Society registered with the Commissioner of Co-Operative and is involved in the transport business within the County of Kajiado.

2. The petitioner filed a petition dated 25th March 2015 to challenge the 1st respondent's Finance Act (No1) of 2014, contending that it is unconstitutional for the reason that the 2nd respondent failed to observe the constitution. It was contended by the petitioner her members who are residents of Kajiado County, were not consulted during the enactment of that legislation as demanded by the constitution. They contended that the impugned Finance Act, 2014 introduced levies, licensing fees and fines that have detrimental effect to the social, political and economic wellbeing of the residents of Kajiado County. The petitioner, therefore, sought the following reliefs.

a. A declaration that the enactment of the Kajiado County Finance Act 2014 gazette Kajiado County supplement No 1 of 2014 without consulting the petitioner/Residents of Kajiado County offends and violates Article 1(3), (4), 3, 10, 50, 174(c), 196, 201(a), 202(1),(2), article 2, 209(3)(5) and 22(1) and (2) of the Constitution of Kenya 2010 and the same is null and void to the extent that is inconsistent with the constitution.

b. A declaration that the levying of fines and illegal arrests on the petitioner's members/nosiness community operating sand transport business and other related businesses without due process offends and violates Articles 47, 48, 49 and 50 of the constitution of Kenya 2010.

c. And order directing the respondents to compensate the petitioners a sum of Kshs.1,019,000/- being loss of business earnings for the time that the respondents continued clamping down the petitioner's trucks in breach of the court order barring the same.

d. Costs of this petition.

e. Any other orders writs and directions the Honourable court considers appropriate and just to grant for purposes of the petitioner's constitutional rights.

Response

3. The 1st respondent filed a replying affidavit by Dr Kennedy Ole Kerei, the Secretary, Kajiado County Government, sworn on 13th April 2015. He deposed that before the impugned Finance Act was enacted, they conducted public participation including business sectors that were likely to be affected. He stated that they conducted participated in different forums and that no sector was left behind.

4. Dr Kerei deposed that the petitioner is only one of the numerous sand harvesting and transport sacco groups and individuals within the 1st respondent county. He stated that prior to the enactment of the impugned Act, the all transporters used to pay Kshs.2000/- per trip which was found to be combersum and easy to infiltrate by crooks. According to Dr Kerei, this forced the county to hold meetings with stakeholders,

including transporters KENHA, KERRA, Police and Sand loaders on the way forward.

5. He deposed that those numerous meetings culminated in the meetings of 22nd July 2014, which was also attended by the petitioner's representatives and an agreement was reached and it has been complied with by other transporters. He contended that it is improper for the petitioner to claim now that there was and public participation when it attended the stakeholders' engagements over the issue.

6. He denied that the charges are discriminatory and termed the petitioner's contention misleading. He stated that the monthly payment is more convenient since it allows transporters to undertake as many trips as one can manage.

Petitioner's submissions

7. Mr Wanyoike, counsel for the petitioner, submitted highlighting their written submissions, dated 28th June 2016, that there was no public participation in so far as the finance Act, 2014 was concerned. Learned counsel contended that public participation was critical in such a process as provided for in Articles 10, 174(c), 196 and 201(a) of the Constitution. He further contended that their arguments are also based on sections 87 and 91 of the County Government Act.

8. He went on to contend that there was neither civic education nor circulation of circulars during the enactment of the impugned legislation, and that any meeting held was held as a mere formality without complying with the principles set in section 91 of the County Government Act on public participation.

9. According to counsel, the legislation was aimed at introducing punitive levies and contended that petitioner whose members are engaged in transporting sand within the county, had a legitimate expectation that any issues concerning their work they would be involved which was not the case.

10. He relied on the decision of ***Robert W Gakuru v Kiambu County Assembly & Others*** [2014] eKLR to contend that public participation should not be a mere formality and that there should be both qualitative as well as quantitative process of public participation.

Respondents' submissions

11. Mr Kaikai, counsel for the respondent submitted also highlighting their written submissions dated 20th July 2016, that there was public participation and that the petitioner's representatives were present. Learned counsel submitted that the impugned Act was assented to on 10th October 2014 hence the levies the petitioner is complaining about were lawfully introduced.

12. Learned counsel referred to minutes of 22nd July 2014 which showed that the petitioner was represented in the meetings that were held to discuss the issue and that the impugned Act deals with various issues in the county and not sand transporters only. According to Mr. Kaikai, the impugned charges were re-enacted in the finance Act 2016 and, therefore, the finance Act 2014 no longer operates.

Determination

13. I have considered this petition, the response thereto, submissions by counsel for the parties and the authorities relied on. There is only one issue for determination; whether there was public participation during the enactment of the impugned Finance Act, No 1 of 2014 of the County Government of Kajiado.

14. The petitioner has argued that there was no public participation yet the impugned act introduced punitive levies and fines affecting the residents. The contention seems to be on the charges levied on transportation of sand within the county.

15. The 1st and 2nd respondents contend on other part, that there was public participation and that the petitioner was represented in the meetings that were held in addressing the issue of sand transportation within the county. They referred to minutes of 22nd July 2014 which show that the petitioner was represented in those meetings. They therefore argued that the issue is not about the constitutionality of the Act. According to them, the petitioner is against the charges which, in any case, affect all other transporters within the county.

16. Public participation is one of the national values and principles in our constitution. Article 10(2) of the Constitution recognizes public participation as a national value that binds all persons and state organs and public officer.

17. Article 118 of the Constitution is also clear that the national Assembly must observe this principle of public participation in its legislative processes and those of its committees. The County Government Act also recognizes this principle and states that county assemblies must abide by this principle in their legislative mandate. Moreover, there are also decisions emphasizing this fact including the case of ***Robert N Gakuru v Kiambu County Assembly & Others***.(supra)

18. In the case of ***Matatiele Municipality & Others vs. The President of South Africa & Others*** (2) (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC) , court stated that;

"The representative and participative elements of our democracy should not be seen as being in tension with each other...What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process"

19. In Minister for Health vs New Chicks South Africa Pty Ltd CCT 59/04, the same court observed that forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation and that what matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

20. And the court of Appeal held in Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR, that;

[20]“...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation,..”

21. To that extent, therefore, the fact that county assemblies must comply with the principle of Public participation in their legislative mandate is not in doubt. The question that arises, is whether the present petition in reality challenges the constitutionality of the finance Act No 1 of 2014 of Kajiado county for failure to comply with the principle of public participation.

22. I have read the petition and supporting affidavit. Although the petitioner seems to suggest that there was no public participation, it is clear which aspects the challenge is based. Even in the submissions, the petitioner states generally that the Act introduced punitive levies and fines but failed to point out the said levies and fines.

23. What however came out clearly, is the fact that the petitioner and its members are against the levies charged on transportation of sand within the county, which is now paid monthly instead of daily. The petitioner’s submissions to documents attached to this petition and many applications that it has filed really relate to their charges on transportation of sand.

24. On this, the respondents have averred and submitted that the issue was discussed in various meetings with stakeholders and the resolutions from such meetings informed the legislation in the form of the Finance Act of 2014 which the petitioner has impugned.

25. I have in particular seen the minutes for a stakeholders’ forum held on 22nd July 2014. It is clear that there was one **Gerald PC Maina** who attended the meeting representing the petitioner herein. Gereld Maina is the same person who has been swearing affidavits in the present petition. That meeting was specifically for sand harvesting stakeholders and the petitioner was dully represented. There can be no doubt, therefore, that on the issue of sand harvesting which seems to be the real issue in this petition, the petitioner was consulted. I must also point out that public participation does not mean all the views given by those present must prevail, although they must be taken into account in the enactment of the policy or legislation.

26. Finally, Mr Kaikai submitted that the charges introduced in the Finance Act 2014, were re-enacted in the Finance Act, 2016 which came into operation to replace that of 2014. He contended, and rightly so in my view, that even if the court was to find the Finance Act, 2014 unconstitutional, the impugned charges would still remain in force having been re- enacted in the Finance Act, 2016. The petitioner’s counsel seemed to ignore this important revelation and said nothing about it.

27. Taking that submission into account, and were this court to find the impugned Act constitutionally invalid, which is not the case anyway, the court would have acted in vain because its decision would only be of academic value. And as the Supreme Court observed in Embu County Assembly V Martin Nyaga Wamboia [2018] eKLR, court orders should not be issued in vain.

28. Having taken the totality of this petition into account, I am not satisfied that there is merit any merit in it. The petition is declined and dismissed with costs to the 1st and 2nd respondents.

Dated, Signed and Delivered at Nairobi this 25th Day of January 2019

E C MWITA

JUDGE