



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

PETITION NUMBER 6 OF 2019

(AS CONSOLIDATED WITH JR NOS. 8 AND 191 OF 2019)

- 1. TRUCKERS ASSOCIATION OF KENYA.....1ST PETITIONER**
- 2. DUNCAN MWALYO AND 4 OTHERS.....2ND PETITIONER**
- 3. TRUCK VENTURES SAVINGS AND CREDIT
CO-OPERATIVE SOCIETY LIMITED.....3RD PETITIONER**

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT

JUDGEMENT

1. This petition was triggered by the enactment of *Machakos Finance Act, 2018* (hereinafter referred to as “the Act”). It was contended that in the Fourth Schedule to the said Act, various taxes, levies and licencing fees were provided for. However, in blatant disregard of the provisions of the Constitution and the said Act, the Respondent proceeded to issue a notice dated 20th February, 2019 which purportedly sought to increase the licensing fees payable by the Petitioners.

2. It was the petitioners’ case that the said levies are not anchored in legislation and therefore in contravention of the provisions of Article 210 of the Constitution. Further, the imposition of the said unlawful taxes, levies and fees contravenes the petitioners’ fundamental rights to property as their sole source of livelihood is made out of reach for being too expensive to carry on.

3. It was further contended that there was no public participation and/or consultation between the stakeholders in transport and quarry business with the Respondent before the said levies were imposed and that the same amount to double taxation as the petitioners are obligated to pay an annual permit fee. According to the petitioners the said levies are excessive, unreasonable and not in line with the economic situation of Machakos County.

4. The Petitioners sought the following orders:

- (a) A declaration that the notice dated 20th February, 2019 seeking to increase quarrying levies is unlawful and unconstitutional and against the provisions of Articles 209 and 210 of the Constitution of Kenya, 2010.**
- (b) A prohibition order against the Respondent from demanding from the petitioners the fees set out in the notice dated 20th February, 2019.**
- (c) An order of certiorari removing to this Court for purposes of being quashed the decision transmitted in the said notice.**
- (d) An order prohibiting the Respondent from implementing the said decision by way of arrest, detention or harassment of the Respondents or their agents.**
- (e) The decision to raise levies without amending the Machakos Finance Act, 2018 and failure to consult the stakeholders**

within the County violates the Constitution.

(f) Costs of the petition.

Respondent's Case

5. In opposing the petition, the Respondents contended that the Petitioners fabricated the alleged notice with sole purpose of misleading this Court to issue the said Orders since there is no time the Respondent increased fees as alleged. According to the Respondent, Machakos County Assembly did pass ***Machakos County Finance Act 2018*** (for the year 2018-2019 which was assented on 10th January 2019 and commenced on 18th January 2019) prescribing the fees applicable and payable herein. It was contended that the said Act was passed in full participation of the members of public and was gazetted on the 10th January 2019 and became operational on the 18th January 2019.

6. The Respondent averred that it did advertise through the *Daily Nation* and *Taifa Leo* calling for public participation forums for the Finance Bill 2018/2019. It was therefore its view that that is deemed as adequate notice of the process leading to the enactment.

7. According to the Respondent, the Court was misled in to issuing conservatory orders through an alleged notice which is forgery and not even signed by officers of the Respondent as required by law in full knowledge that the Act had been passed and duly gazetted in the official government printer/press. It was its view that the orders issued by the Court indirectly and effectively suspended an Act of County Assembly of Machakos which enjoys a presumption of constitutionality which Act is even not being challenged. Further, even the County Assembly of Machakos which has the sole mandate to pass County Laws was not made a party to the Petition thus clearly showing the conspiracy to mislead the Court.

8. According to the Respondent, the petitioners' sole intention is to frustrate the Respondent and cripple its financial activities by seeking to block its constitutional mandate and thus make sure the county government doesn't meet its obligations of devolution which is against the law. However, under the ***County Governments Act*** no 17 of 2012 and the Constitution of Kenya, the County Government is mandated by the law to pass the relevant Finance Acts for collection of Revenue to enable it run its activities and it was pursuant to that Machakos County Assembly passed the said ***Machakos County Finance Act 2018***. It was therefore the Respondents' case that the petitioners are motivated by their own ulterior motive.

9. Since the Respondent is mandated by the law to charge rates and taxes in order to run its affairs and meet the obligations of devolution, the Respondent lamented that by granting the prayers sought in the petition, the Respondent's activities will be crippled and risk the closure of the government for lack of funds because the source of the money will have been cut off.

10. It was asserted that the petitioners have not demonstrated how the purported Notice increased fees and rates when in fact there is an Act in force.

11. The Respondent took the view that by issuing the Orders, although after being misled, the court arrogated itself powers of directing the Respondent how much levy or tax to charge thus usurping the powers of the Machakos County Assembly; yet the Respondent has a constitutional mandate to protect the natural resources of Machakos County from exploitation, unless the Statutory requirements are met for the economic benefit of all citizens. However, the petitioners want to frustrate that obligation by misleading the court to set the amounts to be levied which request has no basis in any known Kenyan Law.

12. In the premises the Respondent urged the Court to dismiss the petition with costs.

Petitioners' Submissions

13. On behalf of the petitioners it was submitted that upon perusal of the said legislation, the Petitioners realized that the same had not been gazetted and that is why the Respondents had issued the notice dated 20th February 2019 so as to give effect to the charges they were levying. In support of their submissions, the Petitioners relied on the decision of **Lenaola, J** (as he then was) in **James Gacheru Kariuki & 3 Others vs. Attorney General & 11 Others (2017) eKLR**.

14. It was submitted that in the instant matter the Respondent though being fully aware of the un-gazettement of the County Legislation, sought to legitimize it with the issuance of the impugned notice dated 20th February 2019, a notice which cannot stand in the stead of gazettement.

15. The petitioners urged the court to grant the reliefs sought in the Petition with Costs.

Respondent's Case

16. On behalf of the Respondent it was submitted that the petition is incompetent, fatally defective, devoid of merit and based on misapprehension of the relevant constitutional provisions, brought in bad faith and ought to be dismissed with costs forthwith. The same is made with sole intention to frustrate the respondent and cripple its financial activities by seeking to block its constitutional mandate and thus make sure county government doesn't meet its obligations of devolution which is against the law.

17. It was submitted that under the ***County Governments Act*** No 17 of 2012 and the Constitution of Kenya, the County Government is mandated by the law to pass the relevant Finance Acts to enable it run its activities and thus by seeking to block the ***Finance Act*** in the disguise of a fraudulent Notice, the petitioners are therefore motivated by their own ulterior motive.

18. It was submitted that in essence, the Respondent averred that Machakos County Assembly did pass **Machakos County Finance Act 2018 (for the year 2018-2019)** which was assented on 10th January 2019 and commenced on 18th January 2019 prescribing the fees applicable and payable by members of Public including the Petitioners herein. To mislead the Court, the Petitioners fabricated the alleged notice purporting to have been issued by the Respondent. They then stated that the Respondent had increased levies without an Act of County Assembly of Machakos. In a further attempt to mislead the Court, the Petitioner stated that the said Act had been declared unconstitutional. It was however submitted that the **Machakos County Assembly Finance Act 2019 (2018-2019)** has never been declared unconstitutional by any court of law as opposed to Machakos County Finance Act 2017 (2017-2018) whose 3 provisions were declared unconstitutional.
19. It was therefore submitted that there being no orders preventing the Respondent and/or the Director Revenue Administration from enforcing **Machakos County Finance Act 2018 (for the year 2018-2019)** which was assented on 10th January 2019 and commenced on 18th January 2019, the Petition herein is thus made in bad faith. The court was invited to look at the levies in the Act and the purported notice and it would establish that the amounts are similar in all brackets.
20. It was submitted that instead of filing a Suit to challenge the said Act, the Petitioners fabricated the alleged notice to use back door to mislead the Court as they knew of the enactment of the Act. They knew that they could not challenge its constitutionality as same was passed in full participation of the members of public and was gazetted on the 10th January 2019 and became operational on the 18th January 2019.
21. It was submitted that the Respondent did advertise through the *Daily Nation* and *Taifa Leo* calling for public participation forums for the Finance Bill 2018/2019 and that is deemed as adequate notice of the process leading to the enactment of the said Act.
22. It was submitted that under the County Governments Act no 17 of 2012 and the Constitution of Kenya, the County Assembly of Machakos is mandated by the law to pass the relevant Finance Acts for collection of Revenue to enable the Respondent run its activities. Pursuant to those powers, Machakos County Assembly passed the said **Machakos County Finance Act 2018** and the petitioners have not stated how enforcing the said **Machakos County Finance Act** violates arbitrary increased levies.
23. It was submitted that enforcement of the **Finance Act** by the Respondent is different from enactment by the Machakos County Assembly. The Respondent is mandated by the law to charge rates and taxes in order to run its affairs and meet the obligations of devolution unless the Act is declared unconstitutional. In this case it was submitted that the Petitioners have not demonstrated that the Respondent is charging any levies or charges except those provided for in the said Act.
24. It was submitted that since orders of Court are not issued in vacuum, the Court should advice the Petitioners that in the event they are aggrieved by the **Machakos County Finance Act 2018**, they cannot seek redress through this manner but should instead file the relevant proceedings to challenge the said Act.
25. It was submitted that the Respondent fully complied with the law with respect to public participation before the enactment of the **Finance Act 2017**. The county assembly, an organ of the respondent and on behalf of the county government of Machakos caused the **Machakos County Finance Act after assent** to be published in the Kenya gazette in full compliance with the law for the willing members of the public including the petitioners to access the same.
26. It was contended that the petitioners through the current petition are maliciously requesting and misleading the Court to direct the county government on how to conduct its affairs which is contrary to the law. This is because, both the courts and the respondent have different roles to play which must at all times be respected unless there is violation of the law. However, in this case the petitioners have not demonstrated any law which was violated by the Respondent at all. To the contrary, the Respondent has a duty to protect the resources of the County of Machakos from exploitation for the economic benefit of all citizens. However, the petitioners want to frustrate this obligation by asking the court to set the amounts to be levied which request has no basis in any known law of the land as there is an Act of Machakos County Assembly already in force. It was reiterated that if the Court was to allow the Petition, the effect would be to declare **Machakos County Finance Act 2018 unconstitutional against laid down legal principles. In support of its submissions the Respondent relied on Nairobi Metropolitan Psv Saccos Union Limited & 25 Others vs. County Government of Nairobi & 3 Others [2013] eKLR and The Institute of Social Accountability & Anor vs. The National Assembly & 3 Others [2015] eKLR.**
27. In the Respondent's view, the court can only interrogate the orders sought if the Petitioners were challenging the constitutionality of the **Machakos County Finance Act for 2018-2019** which not the case here. It was its submission that this Court cannot interfere with another arm of government's function unless a clear cut case is brought on which provisions of the law are being infringed or threatened to be infringed by a body carrying out its mandate within the confines of the Constitution. This so because once it is pointed out that there is an Act of Machakos County Assembly in force, the principle of separation of powers sets in reason being that the Court cannot question a single clause therein when County Assembly of Machakos is not a party. In addition, the Act is not being challenged in this Petition.
28. It was contended that once Machakos County Assembly passed the said Act, the purported Notice which from its face was issued after the Act came into force cannot override the **Finance Act**. The Court should presume that the procedures of passing the said Act were adhered to until and unless the contrary is proved in a separate suit. In this regard the Respondent contended that courts of law have restated that presumption of constitutionality of statutes is always not in doubt, a position which was affirmed by the Court of Appeal of Tanzania in the celebrated case of **Ndyanabo vs. Attorney General [2001] EA 495, Hambardda Wakhana vs. Union of India Air [1960] AIR 554, and Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004.**
29. The Respondents therefore prayed that the Court dismisses the petition with costs.
30. I have considered the instant petition, the affidavits filed in support of and in opposition thereto and the submissions on record.

31. In this petition, it is clear that the petitioners are challenging the notices dated 20th February 2019 and 22nd February, 2019. However, it did not escape this Court's notice that in their affidavit, the applicants introduced the issue of the failure by the Respondents to comply with the principle of public participation. However, public participation would only be an issue at the stage prior to the enactment of an Act and once the same is passed with its schedules, it cannot be successfully argued that the notices whose effect are to implement the provisions of the Act and its schedules ought to have been subjected to public participation as well.

32. In this petition the Respondents have contended that the taxes, levies and licence fees which it is demanding are pursuant to ***Machakos County Finance Act 2018*** (for the year 2018-2019) which was assented on 10th January 2019 and commenced on 18th January 2019. A perusal of the fees in the schedule to the Act and the impugned notice clearly reveals that they are the same. Therefore as long as that schedule remains, this Court cannot issue orders whose effect would be to render the said schedule inoperative or a dead letter of the law. I would adopt the reasoning of **Lenaola J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others vs. County of Nairobi Government & 3 Others Petition No. 486 of 2013** where he stated that:-

“I must also state that this Court cannot direct the 1st Respondent on how to exercise its duty of levying parking fees. The 1st Respondent has the option of legislating on the calculation of parking fees and in its wisdom it has done that taking into consideration public views, its policies as well as the revenue it ought to raise.”

33. I further associate myself with the decision of **Githua, J in Jipe Kindegarden Limited vs. City Council of Nairobi [2012] eKLR** in which the learned Judge held that:

“The law is that the Court cannot issue orders of prohibition to prevent public bodies like the Respondent or inferior tribunals from performing their statutory duties and functions when the same are executed in accordance with the law. The supervisory jurisdiction of the High Court can only be exercised where it is proved that public entities or inferior tribunals have either abused their powers in the exercise of their statutory duties, have acted without or in excess of their jurisdiction or have breached the rules of natural justice *inter alia* occasioning legal injury to the person complaining of the aforesaid acts.”

34. In this case, to grant the orders sought herein would amount to nullifying the provisions of the said ***Machakos County Finance Act 2018*** when there is no express prayer seeking such orders in these proceedings.

35. In the submissions filed by the Petitioners, a new ground was introduced that the said Act was never gazetted. With due respect, that ground was not the basis of either the petition or the judicial review applications. If it was intended that the said grounds be the basis of the suits, the pleadings ought to have been amended accordingly before the evidentiary facts could be introduced in the affidavits.

36. Having considered the issues raised before me as well as the material upon which the said issues are based, I find that these consolidated suits are unmerited.

37. As regards costs, I associate myself with the position of the Indian Supreme Court in the case of **Ashok Kumar Pandey vs. State of West Bengal Writ Petition (crl.) 199 of 2003** where it stated as follows: -

“Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.”

38. I am also guided Court was urged to be guided by the directions given in the case of **Okiya Omtatah Okoiti & 2 Others vs. Attorney General & 3 Others [2014] eKLR** where it was stated that:

“..... any person who seeks to institute a claim for the violation of the Constitution must do so based on a legitimate, bona fide and genuine claim. It has over the years become increasingly popular for persons to institute a constitutional case claiming to be acting in the public interest but in fact self-serving and financial interests drive such claims.....if a party is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any of the 40 Million people of this country, the doors of the court will not be ajar for him. While therefore it is the duty of this Court to enforce the Constitution and the fundamental rights and freedoms embedded in it, the Court must ensure that Articles 22, 165 and 258 of the Constitution that create the gateway to the Court are not abused. Public interest litigation cannot be used for the purposes of vindication of personal grudges or enmity and I reiterate that it must be used for legitimate claims based on the Constitution and nothing else but the law.”

39. In this case, I am not satisfied that the petitioners were actuated more with their commercial interests than with the urge to protect public interests.

Order

40. Consequently, the consolidated suits fail and they are dismissed with no order as to costs.

41. It is so ordered.

Read, signed and delivered in open Court at Machakos this 29th day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for Mr Maritim for the Respondent

Mr Kingoina for Mr Kariuki for the Petitioner

CA Geoffrey