



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CONSTITUTIONAL PETITION NO. 5 OF 2019

IN THE MATTER OF ARTICLES 2(2), 3(1), 19, 20, 21,(1) & 3(1), 165(3), 258(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PRACTICE AND PROCEDURE RULES 2013)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND THREATENED VIOLATION OF ARTILCES 10, 35(1) , 62(1), 174, 190(1), (2) 196(1), 1999(1), 201, 209(1), (3), (4) & (5), 210(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE MINING ACT, 2016, THE PUBLIC FINANCE MANAGEMENT ACT, 2012 AND THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF THE THARAKA NITHI COUNTY FINANCE, ACT, 2018

BETWEEN

BUSTRA SAVING AND

CREDIT CO-OPERATIVE SOCIETY LIMITED1ST PETITIONER/APPLICANT

ELIPHERET MICHENI.....2ND PETITIONER/APPLICANT

AND

COUNTY GOVERNMENT OF THARAKA NITHI COUNTY.....RESPONDENT

JUDGEMENT

1. **BUSTRA SACCO LTD** and **ELIPHERET MICHENI**, the Petitioners herein have brought this petition against the County Government of Tharaka Nithi, the Respondent herein seeking the following reliefs namely:-

i. A declaration do issue that the Tharaka Nithi County Finance Act, 2018 and in particular Section 14(1) is unlawful, unconstitutional, null and void ab initio in so far as the same was not subjected to proper public participation in accordance to articles 35, 174 and 196 of the Constitution and Sections 87, 91 and 115 of the County Government Act, 2012.

ii. A declaration do issue that Section 14(1) of the Finance Act 2018/19 and the Ninth Schedule thereof (Republic- 146 (a) (b) is unlawful, unconstitutional and illegal ab initio for violation of Articles 201, 209 and 210 of the Constitution of Kenya 2010.

iii. An order restraining the Respondent whether by themselves and/or its agents, servants or employees from levying or collecting cess fees/tax from the transporters and sellers of quarry products such stones, sand ballast, murrum, quarry chips, hardcore etc.

iv. Costs of the petition.

v. Any other relief deem fit by this honourable court.

2. Background

Busta Savings and Credit Co-operative Society, the 1st petitioner herein is a Co-operative Society duly registered under the Co-operative Societies Act No. 12 of 1997, within Republic of Kenya and the Society states that its members comprise residents and business people from Tharaka Nithi County where they operate and has been in business since 13th February, 2019. The members of the society comprising around 67 people are reported to own pick ups, lorries, trucks and tippers that are engaged in the business of selling and transportation of quarry products such as stones, sand ballast, quarry murram, and hardcore within Tharaka Nithi County.

3. The 2nd Petitioner simply describes himself as an adult male of sound mind resident within Chuka Town within Tharaka Nithi County and that he also engages in the same business with the 1st Petitioner.

4. The Respondent is a County Government in the Republic of Kenya duly established and constituted as per the Constitution of Kenya 2010 and being a devolved Government its powers and functions are listed under the Fourth Schedule Part 2 of the Constitution of Kenya 2010. As part of its functions and mandate, the Respondent collects revenue to finance its operations and as part of collection of that revenue, it started in March 2019 levying cess fees/tax on all transporters and sellers of quarry products either originating or passing through Tharaka Nithi County such as building stones, sand ballast, Murram, quarry dust and hardcore stones on the basis of **Section 14(1)** of Tharaka Nithi County Finance Act 2018 herein after to be referred to as impugned act. As per the provisions of that Act, the cess/tax payable by all pick up trucks transporters is Kshs,500 per truck while lorries, trippers and light trucks commonly referred to as canters pay a standard amount of Kshs.2,000/- per truck.

5. Petitioners claim that despite the cess collected no service is rendered in return and have contended that the cess/fees/tax as legislated is a form of production tax on mineral/natural resources which to them have been imposed on them illegally and unlawfully. They have come to court through this petition to have their concerns addressed.

6. The Petitioner's Case:

The petitioners have faulted the Respondent's decision to place cess fees/tax collection centres strategically in all major highways to collect fees which they claim was increased by 100% in respect to transporting of quarry products such as stones, sand ballast, murram quarry and hardcore without public participation by members of the public, interested parties and other stakeholders. In their view the Respondents conducted a routine exercise that cannot be public participation for the purposes of the constitutional threshold. The Petitioners contend that a mere invitation of people to a public forum through a single newspaper advert was insufficient given that in their view it is public knowledge that Tharaka Nithi County is vast with some remote areas that do not have proper access to newspapers thus necessitating use of other media to reach the public on matters of public participation and they have given examples as Churches, Mosques, Public Barazas, National and vernacular radio stations, social media, notices on public notice boards and use of County Government caravans .

7. The Petitioners have further faulted the Respondents for failing to supply copies of draft Finance Bill 2018 to the public which in their view was a clear concealment of information and contrary to principles of transparency in regard to levying of taxes and revenue collection in general.

8. The Petitioners have further contended that quarry products such as stones, ballast, murram, quarry chips and hardcore are minerals in law and any levy, fees, or charge by whatever name relating to the said natural resource should be imposed by an Act of Parliament which should either retain the duty of collection of revenue to a National Government or transfer the same to a County Government.

9. It is the Petitioner's case that while Meru County charges Kshs.400 cess fees for transport, the Respondent charges 2000/- from owners of lorries, tippers and canters and that that disparity in their view is unreasonable, and oppressive as it increases the cost of doing business and strifflers Petitioners' competitive edge in the market and impedes the implementation of the National Economic and Housing Policy for affordable housing.

10. The petitioners in this petition have invoked various articles in the Constitution to wit, Articles 2, 3, 10, 21, 22, 23, 174, 190, 196, 199, 201, 209, and 210. They have specifically pointed out that **Article 174** provides for objects of devolution which includes democratic and accountable exercise of power and enhancement of the participation of the people in the making of decisions affecting them. They have further pointed out that under **Article 190**, Parliament is required to enact legislation to ensure that County Governments have enough support to perform their functions.

11. The Petitioners contend that there is no Act of Parliament in place, at the time they filed this petition, authorizing the Respondent to collect any levy cess, tax, royalty or charge in respect to building stones, ballast, sand, murram, hardcore or any building materials sourced from the ground as contemplated under **Article 209 (3) (c)** of the **Constitution**. They have therefore challenged the legality of **Section 14** and the 9th Schedule of the impugned Act terming it illegal *ab initio*.

12. The Petitioners contend that the cess fees collected by Respondent pursuant to the impugned Act in respect to transportation of quarry products amount to a form of tax or royalties payable to the National Government under the mineral Act, 2016 and that levying of taxes or charges on natural resources and minerals is a function of the National Government under the Constitution. They have submitted that the collection of cess fees by the Respondent from transporters and sellers of quarry products amount to double taxation on the petitioners since pick ups, lorries, trucks, canters, and tippers are all required to pay parking fees if they are parked within the County. In their view this in itself is a violation of **Article 201 (b) (1)** which demands fairness in taxation. They contend that **Section 14 (1)** of the impugned Act relates

to extraction and transportation of quarry products which in their view is a form of production tax and not cess for a service. They argue that the Respondent in reality gets cess from extractors of quarry products and that is why different rates are chargeable for pickups as opposed to lorries, canters and tippers.

13. The Petitioners opine that quarry products are minerals within the meaning of the Mining Act 2016. They aver that the definition of land under **Article 260(a) (d)** of the **Constitution** includes the surface of the earth and subsurface and that definition of land includes natural resources contained in or under the surface. They further contend that article **62(1) (6)** define public land to include all minerals and mineral oils as defined by law and that **Article 62(3)** vests the same to National Government.

14. The Petitioners insists that cess as defined in concise Oxford Dictionary is a form of a tax and that **Section 14** of the impugned Act seeks to impose a tax on a product that is within the armpit of National Government and without enabling legislation from Parliament. They contend that County Government are authorized under **Article 209** of the **Constitution** to levy property and entertainment taxes and any other tax provided for under an act of Parliament. It is the Petitioner's case that the **Mining Act 2016**, does not donate any such authority. To support this contention, the Petitioners have cited the decision in **Robert N. Gakuru and Others -vs- Governor Kiambu County and 3 Others [2014] eKLR** where **Odunga J** held the following views;

"It is therefore clear that the County Assembly may only impose property rates and entertainment taxes unless otherwise authorized by an Act of Parliament and this position is emphasized by the provisions of Article 210 (7) of the Constitution which expressly provides that no tax or licensing fees may be imposed, waived or varied except as provided by legislation, County Government are however empowered to impose charges on services they provide. Such service would include parking and market fees. However to levy charges on the stones quarried unless authorized by an act of Parliament or any services rendered by the County Governments towards that end would clearly be illegal."

15. The Petitioners have in furtherance of their contention that County Governments cannot collect taxes on products that vest in the National Government have cited the decision in **Raiyly Woods (K) Ltd & Another - vs- Baringo County & 3 Others [2017] eKLR** where the court held a law enacted by the County Assembly must be in relation to the powers of County Government under the Fourth Schedule and where the County Government has no power or mandate over a matter under the Fourth Schedule, it has no power to make any law with regard to that matter.

16. The Petitioners have also faulted the enactment of **Section 14** of the impugned Act contending that there was no public participation contrary to the provisions of **Section 87** of the **County Government Act 2012** and the Constitution. They have relied on the decision in **Bumasutra Savings and Credit Cooperative Society Ltd -vs- County Government of Nakuru [2016]eKLR** where the court held that public participation is a vital component of participatory democracy and in particular the legislation process in the devolved governments and that County Governments are obligated to facilitate such public participation in legislative process and other business.

17. The Petitioners aver that the public participation conducted in respect to the enactment of impugned legislation was insufficient as the same in their view was characterized by a myriad of challenges including the fact that majority of the public were unaware of meetings convened by County Assembly for the purpose and that in their view saw low turn outs. The Petitioners contend that under **Article 176** of the **Constitution**, the County Government includes both the County Assembly and the Executive. The Petitioners contend that the County Assembly of Tharaka Nithi in its report indicated that they had challenges like low turnouts in meetings convened to enable the public to participate, that the public did not get times access on the Finance Bill 2018 and that finances to facilitate the process were also insufficient. The Petitioners have pointed out that as a result of those challenges the members of the public who participated could not give informed views on the bill.

18. It is a further contention of the Petitioners that the Respondent picked out 15 centres randomly which in their view was inadequate given the size of the County. They aver that in such a County, advertisement of scheduled public meetings accompanied with copies of Finance Bill would have been proper and that the Governor should not have assented to a bill that did not meet Constitutional threshold of public participation. They have urged this court to find that the impugned Act is illegal and unconstitutional citing the decision in **Bumasutra Savings & Credit Co-operative Society Ltd (supra)** where **Lenaola J** (as he then was) cited a South Africa decision in observing as follows:-

"It is trite that legislation must conform to the constitution in terms of both content and the manner in which it is adopted. Failure to comply with the manner and form requirements in enacting legislation renders the legislation invalid. And courts have powers to declare such legislation invalid."

19. The Petitioners aver that they were not accorded reasonable level of participation as there was no reasonable or meaningful opportunity for them to present oral submission or written memorandum before the impugned legislation was enacted. They have relied on **Robert N. Gakuru** decision where the Court held that;

"Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the constitutional dictates. It is my view that it behoves the County Assembly in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively."

The Petitioners feel that the public participation conducted before and during enactment of the impugned Act was a routine exercise that failed to meet the requisite Constitutional threshold and statutory standards and as such they urge this court declare **Section 14 (1)** of the said Act invalid, null and void.

20. **The Respondent's case**

The Respondent has opposed this petition through a Replying Affidavit sworn on 31st May 2019 by one Dorothy Naivasha- the CEC member of Finance, Economic Planning, Trade and Revenue in the County Government of Tharaka Nithi.

21. The Respondent asserts that the Forth Schedule of the Constitution of Kenya 2010 distributes the functions between the National and County Governments and that the functions of County Government in its view includes management and control of County Roads and Public Transport. The Respondent avers that a County is entitled to levy charges in order to operationalize its functions and services. It has cited **Article 209(4)** of the **Constitution** which empowers it to impose charges for services they provide which they say includes garbage collection, parking facilities, street lighting, drainage and road maintenance.

22. The Respondent has denied that the cess collected from transporters is in respect of minerals or any product but it is cess levied on vehicles carrying goods through the Respondent's jurisdiction. It maintains that the charge is in respect of the vehicles transporting goods and not on the product itself.

23. The Respondent contends that the petitioners have failed to show or demonstrate the manner in which the respondent has violated their rights adding that the 1st Petitioner is a Sacco and has not adduced any evidence that its members are involved in the transport Sector in Tharaka Nithi and more so in the transportation of sand, murram or other quarry products. It has pointed out that the bundle of receipts attached do not demonstrate any relationship between the Petitioner and the bundle of receipts exhibited insisting that the receipts are in respect of motor vehicle Registration No. KBY 308 D which has not been shown to belong to Frankline Mbaka Mugendin and the said Mugendi has not indicated whether he is a member of the 1st Petitioner.

24. The first Respondent further contends that the legislative authority of a County is vested in and exercised by its County Assembly. It is submitted that in the exercise of its legislative function, the Tharaka Nithi County Assembly enacted the impugned Act to provide for imposition and variation of various fees, charges, licences, rents rates and other connected purposes. It has confirmed that the impugned Act was published in the Kenya Gazette and came into operation on 19th March 2019.

25. The Respondent has denied the Petitioners' claim that **Section 14** of the impugned Act is illegal and unconstitutional stating that **Section 14(1)** and part **1 (b)** of the Ninth Schedule of the Act does not provide for levying of taxes on natural resources and minerals nor for payment of minerals royalties. In its view the Acts provides for imposition of transport cess fee of Kshs.500 for pick ups and Kshs.2000/- for lorries. It has stated that the amount charged does not represent 100% increase as alleged because in the previous financial year, a sum of Kshs.1500/- was charged. It has faulted the petitioners for citing Meru County for comparison without exhibiting the copy of Meru County Finance Act for correct and factual comparisons.

26. The Respondent also contend that the County Assembly of Tharaka Nithi is distinct from the County Government and is capable of being sued as a legal entity and that this petition should have been directed at the legislative arm and not the executive arm of the County. In its view the County Assembly is the law making entity and failing to include them in this petition is fatal to the petition in their view because this court cannot make orders against them without giving them a chance to be heard. It submits that the Respondent cannot be held liable for any omissions and commissions of the law making body. It has cited the provisions of **Article 185** of the **Constitution** which vests the legislative authority to the County Assemblies and the doctrine of separation of powers which it claims applies here. In support, of this contention it has cited decision *Simon Wachira -vs- County Assembly of Nyeri and 2 Others [2013] eKLR* and the decision of this court in *Republic -vs- County Government of Tharaka Nithi Ex parte Mwirigi Mutua* where this court held that a party cannot impugn a piece of legislation without suing the legislative body that enacted the impugned legislation in order to give legislative body a chance to be heard. The Respondent contends that the Petitioners have not sued the proper body or person responsible.

27. Analysis and Determination

This court has considered this petition and the response filed. In my considered view 3 issues have cropped up for determination in this petition. They are as follows:-

- i. Whether the fees/cess charged by the Respondent on the petitioners and other transporters are legal.
- ii. Whether there was proper and sufficient public participation in the enactment of Section 14 (1) of Tharaka Nithi County Finance Act 2018.
- iii. Whether failure by the petitioners to sue the county Assembly of Tharaka Nithi is fatal to this petition.

28. (i) Whether the cess/fees charged by the Respondent on transportes are legal.

In order to decipher this issue a look at **Section 14(1)** of the impugned Act and the Mineral Act will provide an insight into the basis of cess/fees collected by the Respondent. **Section 14A** states as follows:-

"A person who operates a quarry or transports quarry products, red soil, or into or through the County shall pay a fee specified in part I of the Ninth Schedule." Part I of the 9th schedule of the said Act is headed "Quarry Transportation Infrastructure Cess Fees." It then cites that the transportation cess fees for stones, ballast, sand, quarry chips, hardcore, murram is Kshs.2000 for all lorries tippers and canters and Kshs.500/- for pickups.

29. On the other hand the Mining Act No. 12 of 2016 defines the word "*mine*" as-

a) "When used as a noun it includes an excavation or system of excavations made for the purpose of, or in connection with, the extraction of minerals or mineral products, and includes an open-case pit, quarry and any area where a mineral is won by dredging brine pumping, evaporation or other means; and

b) When used as a verb, means the carrying out of mining operation and include tailing....."

The word "**mineral**" as defined means; "**a geological substance whether in solid, liquid or gaseous form occurring naturally in or on the earth, in or under water, in mine waste or tailing and includes the minerals specified in the 1st Schedule but does not include petroleum, hydrocarbon gases or ground water.**"

A look at the list of what constitutes "**minerals**" as per the list given in the 1st schedule include minerals like diatomite, Fluorite, Phosphates, Precious stones (diamond, rubies) , rare minerals etc. The quarry stones or quarry products like the one specified in Part I of 9th Schedule of the impugned Act, certainly are not included. I am therefore not persuaded by the Petitioner's contention that Respondent has charged fees on a product that is within the ambit of National Government. Quarry stones, murrum, quarry chips and other quarry products are not in my view minerals governed under the Mining Act No.12 of 2016. Furthermore Tharaka Nithi County Finance Act 2018 does not state that the Act is based on the minerals being transported. It does not attempt to regularize even the amount being transported. It only states that the cost to be paid by transporters is pegged on the type of vehicle used for transport. It would be extrapolating the objects and purpose of the Mining Act too far in my view, if one was to conclude that quarry stones, hardcore and other quarry products like quarry chips fall within the meaning of "**minerals**" in the Mining Act 2016. It is clear that under the Mineral Act, one has to acquire prospectors license, mining, permit among other requirements under the Mining Act to prospect or mine minerals in Kenya. Those requirements do not apply to mining or production of quarry stones, murrum or quarry chips. Parliament when enacting the mining Act certainly never intended to include quarry stones, murrum or quarry chips as part of "**minerals**" within the meaning of that Act and more so as can be seen in the First Schedule of the Act the same are missing in the list provided.

30. There is however no dispute that the Respondent is levying cess/fees on transportation of any product and not on the product itself. Therefore it matters not whether the transporter is ferrying "**minerals**" within the meaning of Mining Act, sand or even cabbages to various markets within or outside the County. The cess/fees imposed by County Government on transportation of goods within the areas of their jurisdiction in contemplated under **Article 209 (4)** of the Constitution and is legitimate so long as it is a service charge backed by the necessary County legislation. This issue has been subject of a number of decisions in this County. In the case of **Base Titanium Ltd -vs- County Government of Mombasa & Another [2017] eKLR** the court when dealing with almost a similar matter made the following observations;

" At the outset, it is conceded and I agree that in view of Article 62 of the Constitution which defines public land to include minerals and vests such land in the National Government, there is no power in a County Government to levy a tax or other charge on the mineral product. However, to extrapolate the interpretation to conclude that a levy charged on the vehicles that transport the titanium minerals, as with transportation of any other goods is prohibited by the constitution is in my view erroneous. With respect, I do not accept that a charge on the "transportation" thereof, a charge for road service provided by the County Government, is a charge on the "mineral" product itself, which is the province of the National Government. The cess charges are on the vehicles transporting goods of any kind entering and off-loading in Mombasa and are not a tax or charge on the product transported."

31. In the light of the Constitution (**Article 209 (4)**) and the above decision, this court is of the considered view that the Respondent or County Governments in general cannot be faulted for levying cess fees or service charge on transporters ferrying lawful goods into or outside their area of jurisdiction so long as the same (collection of cess/fees) is backed by proper legislation. It is a different ball game however, if County Government is put to task to explain if the service charge levied is really put to the desired purpose which is to provide good services to the transporters and residents to a given County.

32. The petitioners have complained that they have been subjected to double taxation through cess fees collected by the Respondent at strategic points along the County roads and other charges like parking fees. I have looked at the First Schedule Part IV and I have noted that the charges are for fire fighting services. They range from Kshs.500 for a single truck operator to Kshs.2500/- for large transport companies with over 30 vehicles. The second Schedule Part I - 300 is clearly with regard to trade licensing fees in respect to several business listed thereunder. The third Schedule is in respect to solid waste management services and the service fees charged is in respect to all business operators depending on the region and capacity of the business. The Forth Schedule -R- 35 is to do with monthly parking charges and the same is charged on all vehicles from saloon cars to trailers. I am therefore of the view that different charges are for distinct services and cannot be claimed to be double taxation. The owner of a lorry parked may not be the owner of a quarry or lorry used to transport quarry within or outside the County.

33. (ii) **Whether there was public participation in the enactment of Section 14(1) of the Tharaka Nithi County Finance Act 2018.**

It is not in dispute that one of the greatest pillars in the new Constitutional dispensation is Kenya in public participation of the people of Kenya in decision making process. Indeed under **Article 10** of the **Constitution**, Public Participation is a National value and principle that binds and guides all state organs, State offices and Public office in discharging their duties. It goes without saying therefore that in view of the fact that sovereign power belongs to the people of Kenya and exercised in accordance with the Constitution their views must be respected and given consideration in all matter including legislation processes.

34. The question of public participation in legislative processes applies both at the National level (Parliament) and the County level (County Assembly). At the County level this principle was appreciated in **Doctors for Life International -vs- Speaker of the National Assembly and others (CCT 12/05) [200] 2 ACC 11, 2006 (12) BCLR 1399 (CC) 2006(6) SA 416 (CC)** as hereunder;

"If legislation is infused with a degree of openness and participation. this will minimize dangers of arbitrariness and irrationality in the formulation 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 the legislatures are aware of those concerns. This will promote legitimacy and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible accountable and responsive. And this enhances our democracy....."

In my view public participation ought to be real not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that public participation is given prominence in legislative process. This is clearly stipulated under **Article 196** of the **Constitution of Kenya 2010** which states as follows:-

"A County Assembly shall conduct its business in an open manner and hold its sittings and those of its committees in public and facilitate public participation and involvement in the legislative and other business of the assembly and its Committees."

35. The courts have weighed in through various decisions on the importance of this aspect of public participations in decision making. In ***Republic -vs- County Government of Kiambu Ex- parte Robert Gakuru & Another*** [2016], as cited by the Petitioners herein, **Odunga J** made the following useful observations;

"In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be a true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public. This position public participation is attained both quantitatively and qualitatively. The County Assemblies ought to do whatever is reasonable to ensure that as many of their Constituencies in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous"

In the light of the above decision, there is absolutely no doubt that the enactment of any piece of legislation including the impugned Act herein should demonstrate the important component or input of public participation. In the absence of the participatory approach in the legislative process, any Act passed cannot pass the Constitutional test and cannot be sustained.

36. the big question posed in this petition in whether the impugned Act can pass the Constitution test and the answer to that question, is intervened with the 3rd and final issue for determination in this petition.

37. (iii) **Whether the failure by the petitioners to sue County Assembly of Tharaka Nithi is fatal to this petition.**

The Constitution of Kenya 2010 is candid on the different roles played by different arms of Government both at the National and County Level. In regard with the issue at hand, the legislative authority of a County vests on the County Assembly. **Article 185** of the **Constitution** states as follows;

1) "The legislative authority of a County is vested in and exercised by, its County Assembly.

2) A County Assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule."

There is no dispute that the impugned Act herein is a product of legislative function of the County Assembly of Tharaka Nithi. And the question posed is whether the responsibility of ensuring that a bill passed in the County Assembly of Tharaka Nithi meets the Constitutional threshold rests on the Respondent or the County Assembly? The Respondent is of the view that the responsibility lies with the County Assembly and owing to the doctrine of separation of powers such as responsibility is left to the County Assembly. On the other hand, the petitioners have asserted that under **Article 176** a County Government include County Assembly and therefore the Respondent cannot escape liability. I have looked at the provisions of **Article 176** of the **Constitution of Kenya** and it states as follows:-

"There shall be a County Government for each County consisting of a County Assembly and a County executive."

The word used in the Constitution is "**Consist**" and the Concise Oxford English Dictionary (12th Edition) define "**Consist**" as "**be composed of, a set of vehicles forming a complete train,**" on the other hand the word "**include**" used as a verb means "**comprise or contain a part of a whole make part of a whole or set.**" The two words are the same and can be used interchangeably. What is clear however is that it is apparent that the word as used in **Article 176** (consist) clearly shows that the Executive arm of the County Government is separate and distinct from the County Assembly though they both form or comprise the County Government of Tharaka Nithi. The Petitioners were clear in their minds on who they were suing. This can be seen from the affidavit of service they only served Executive arm of the County Government.

38. A County Assembly is an independent arm of County Government with its powers and privileges like to sue or be sued in its own name. As observed above the legislative authority vests on the County Assembly and all legislation must pass through the County Assembly under **Article 183**, the functions of the Executive arm is inter alia to implement County legislation and though a Governor of every County Government must assent to any bill before the same is gazetted to become law, the big question posed here is whether an Executive arm of a County Government can be held vicariously liable for either omission or commission of the County Assembly. With due respect to the views expressed by the Petitioners' counsel in this petition, I hold the view that each arm of the County government is responsible for its actions in discharging of their respective responsibilities. I agree with the respondent's position that each County Government is a miniature of a National Government structure and in line with traditions and principles that govern National structure, the doctrine of separation of powers applies in equal measure. Each arm has its roles cut out and it behoves upon each arm to ensure that the roles have been carried out strictly as per the dictates of the Constitution and Statutory obligations. When they fail to adhere to the Constitutional and legislative demands, the County Executive is not answerable. The duty to undertake the legislative process and ensure that the Constitutional threshold are met is the responsibility of the County Assembly. In my view they are the ones better placed to explain how the process of legislation was undertaken and whether the legislation passed (impugned Act) has the component of public participation that meets the Constitutional threshold as enunciated in the case of **Gakura** (supra) and the other decisions.

39. I have held in other matters that have been placed before me such as in *Republic -vs- County Government of Tharaka Nithi Exparte Mwirigi Mutua & 3 Others [2018] eKLR* to successful impugn a piece of legislation, a party must include in its suit, the legislative body so that they are accorded an opportunity of being heard. To proceed without according the legislative body a chance of being heard is akin to condemning them unheard which flies in the face of doctrine of natural justice. A party must be heard as of right under **Article 50(1)** of the **Constitution of Kenya 2010**. My view has not changed because it is inconceivable that one can sue Mr "X" in order to get a relief from Mr. "Y". The Petitioners in this petition are clearly aggrieved by the action of omission by the County Assembly of Tharaka Nithi and this can be seen from the fact that they have cited a report from that body which indicates that the public participation in respect to the enactment of the impugned Act was "*characterised by a myriad of challenges.*" The question posed is who between the County Executive, and County Assembly is better placed to explain whether it is true that there were a myriad of challenges in facilitating public participation? It is the County Assembly who is responsibly by law to answer those questions and in their absence it is unfair to render a determination that may be adverse to their role in enactment of the impugned Act, without giving them a chance to be heard. In my view suing the County Government of Tharaka Nithi without specifics as to which body the grievance is directed to is bad for want of specificity. The petitioners ought to have specifically sued both arms of the Government in order to address the grievance wholesomely. Instead they have directed their grievance to the executive arm, which in my view are the implementers of the laws passed by County Assembly. In common parlance, I view the petitioners action as taking actions against a spanner boy instead of including the owner of the garage. In this sense, the Executive arm are the spanner boys or the implementers of the legislation passed by the County Assembly. Of course they have a stake in the legislation passed that is why at times you find that sponsors of certain bills are the executive arm but sponsoring a bill is one thing, the passage of such a bill in my view is another and it is the sole responsibility of the County Assembly to ensure that the bills are passed in accordance with the Constitution and Statutory obligations. In the exercise of such functions, the County Assembly is independent or at least they are required to be independent and cannot act at the whims of the Executive at the expense of Wanjiku. That is what in my considered view, makes this petition fatally defective. The defect of not including the necessary body or person renders my hands tied as I am unable to determine one way or another in respect of whether or not the impugned Act is Constitutional or not.

I find that rendering a decision without hearing the "*culprit*" (read County Assembly) however noble the decision is, however strong the arguments advanced by Petitioners are, will as I have observed breach the cardinal rule of natural justice which is the right to be heard. To that extent, I find the petition herein incompetent for want of specificity and non joinder and unfortunately despite the industry and eagerness exhibited by the Petitioners in this petition I have no option but to strike out the petition here in for being incompetent. I am however reluctant to make any other as to costs. So each party to pay own costs.

Dated, signed and delivered at Chuka this 23rd day of July, 2019.

R. K. LIMO

JUDGE

23/7/2019

Judgement dated, signed and delivered in the open court in presence of Mwititi for Petitioner and Muthomi for Respondent.

R. K. LIMO

JUDGE

23/7/2019