



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 16 OF 2016

FRANCIS MBUGUA MUNGAI & 3 OTHERS...PETITIONERS

VERSUS

NAKURU COUNTY GOVERNMENT.....RESPONDENT

JUDGMENT

1. By their petition dated 5th April, 2016, the petitioners seek the following orders:-

- a) a declaration that the 2016 demand notices/single business permits invoices issued by the respondent are illegal, unconstitutional, null and void;
- b) a declaration that the BRIM Codes Switch, advertisement levy and firefighting charges in the Nakuru County Finance Act, 2015 is illegal, ambiguous, unconstitutional, null and void;
- c) a declaration that sections 21 and 23 of the Nakuru County Finance Act, 2015 are unconstitutional;
- d) that the respondents bear the costs of this suit; and
- e) any other relief or orders that this court may deem as just.

2. The petitioners are business owners who operate in Dundori, Bahati Centre in Nakuru County and as such are required to take out annual licenses for their businesses. They have moved this court to challenge the Nakuru County Finance Act, 2015 whose provisions are applicable to the licenses for the year 2016.

3. They allege that by this Act, the respondent changed the BRIM codes for their businesses. **Section 21** of the Act which provides for charges for outdoor advertising makes reference to the **Physical Planning Act, 2009 (1996)** but this Act is no longer in force as it is now replaced by the **Physical Planning Act, 2012**. The section further provides that fees shall be chargeable as per the square feet and therefore would be dependent on the area. However as evidenced in the demand notices, the 1st respondent has applied a flat rate of Kshs. 1,000 or Kshs. 2,000 on all the businesses without applying the rate as prescribed. Section 23 which provides for the fire and disaster management fees does not provide how this fees will be tabulated.

4. The petitioners alleged that the BRIM codes of their business have been arbitrarily changed under the Act therefore subjecting them to inordinately high tax. They stated that they are willing to pay the tax as per the rates of the previous year.

5. The respondent opposed the petition by the replying affidavit of its Secretary and Head of Public Service Board. He contended that among the functions of the respondent set out under the Fourth Schedule at sections 2 and 3 of part 2, include control of air and noise pollution, other public nuisances, outdoor advertising and, firefighting services and disaster management. That the respondent is vested with power by **Article 185 (2)** of the **Constitution** to legislate and provide the services under the Fourth Schedule.

6. According to the respondent, it is empowered by **Article 209 (4) of the Constitution** to impose charges for the services it provides and it is for this purpose that the Finance Act was enacted. The respondent pointed out that there was no plea that the respondent imposed taxes for services that it does not provide. It argued that the taxes and licenses fees charged are to enable it perform its functions and cannot be deemed unlawful.

7. It deposed that there was ample participation by the general public and stakeholders during the passage of the Finance Act. He annexed to the replying affidavit a comprehensive advertisement in the Daily Nation Newspaper of 23rd July, 2015 and a letter also dated 23rd July, 2015 addressed to all the stakeholders to bring forth their opinions through their chairmen or secretaries. In addition, he deposed that the bill was published in the respondent's official website, www.nakuru.go.ke and an invitation was extended to the public to forward their

comments on the draft bill via email at dir.revenue.go.ke, post on the respondent's Facebook or Twitter handle or submit written responses to the respondent's secretary and head of public service.

8. The respondent stated that a stakeholder's meeting was held on 17th September, 2015 at Annex Chambers and an invitation to the general public was sent out by a letter dated 23rd July, 2015 for a meeting that was held on 15th September, 2015. The respondent further deposed that the bill underwent the full legislative process that is provided for by the law. That, the petitioners' rights have not been infringed in any manner by the respondent and as mandated by the Constitution, it ensured that there was adequate public participation while legislating.

The Applicant's Submissions

9. The petitioners relied on their submissions dated 14th November, 2016 and the supplementary submissions dated 24th February, 2017. The gist of the petitioners' submissions was that the law demands public participation and not consultation. According to them, consultation means the act of asking the advice or opinion of someone while participation denotes the act of taking part in something, such as partnership. They submitted that public participation was not a cosmetic venture and any views submitted by the public ought to be considered in the decision making process and that the final legislation should be endorsed by the public.

10. The petitioners' counsel relied on the South African Case of **Doctors for Life International v Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11 2006 (12) BCLR 1399** where the court held that openness and participation minimize the dangers of arbitrariness and irrationality in the legislation. That objective of involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public which in turn not only improves the quality of legislation but also promotes its legitimacy. Therefore public participation ought to be real and it ought not to be treated as a mere formality.

11. The petitioners further submitted that their claim was centered on the lack of proper public participation during the passing of the legislation which in their view has resulted in unreasonable and punitive provisions. Counsel submitted that the advertisement in the Daily Nation Newspaper dated 23rd July, 2015 was not proper for the reasons that the advert did not indicate the venue of the meeting and further it was in English language and therefore incomprehensible to a majority of the residents of the County. They faulted the respondent for not having made use of churches, dispensary grounds, town hall meetings and such similar forums to advertise for the meeting. The petitioners further submitted that by publishing the draft bill in its website, the respondent discriminated against the computer illiterate petitioners in the group who were unable to access it and therefore could not give any input.

12. The petitioners also faulted the mode of advertising used by the respondent as ineffective and incapable of reaching all the residents of the County. This they contended, was evidenced by the low turnout in the meetings that were held by the respondent.

The Respondent's Submissions.

13. In the brief submissions dated 10th October, 2016, the respondent reiterated its position that there was public participation during the passing of the **Finance Act**. They state that the same was ably demonstrated by the replying affidavit sworn by **J. M. Mutari**, the County's Secretary and head of Public Service Board on 1st August, 2016. They submitted that there were numerous invitations to the general public and stakeholders to submit their comments and public hearings were held at the sub county level. It argued that whereas it has a duty to inform the public, be open, accountable and invite the stakeholders for public participation, it does not have the duty to compel the attendance of the persons invited. As such it cannot be held accountable for those individuals who failed to attend the meeting even after being invited and they were estopped from challenging the constitutionality of the Act on this account. It argued that the majority of the stakeholders were satisfied with this Act.

14. In supplementary submissions dated 10th October, 2016 the respondent cited the decision in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County Government & Others [2013]** in support of the proposition that it is not necessary and cannot be expected for the public authority to give a personal invitation to every individual who stands to be affected by a regulation. It suffices if the nature of the concerns of the different sectors are taken into account; and that the act of levying the charges cannot be regarded as oppressive or unreasonable

15. The respondent further submitted that it is empowered by **Article 185(2) of the Constitution** to legislate and provide for the services listed under the Fourth Schedule. That **Article 209(4)** empowers the County Government to impose charges for services it provides. The respondent reiterated that there was public participation and that all the stakeholders were given ample opportunity to give their opinions and were sensitized on the contents of the bill.

Analysis

16. There was no contention that the Constitution makes provision for the levying of tax by the County Government. **Article 185 (2) of the Constitution** vests in the County Assembly the powers to 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. The Fourth Schedule, which distributes the powers between the National and County Governments provides, at part 2, that controlling outdoor advertising and providing firefighting and disaster management services within the county are the functions of the County Government.

17. It is clear therefore, that the matters contained in **Sections 21 and 23** of the **Nakuru County Finance Act** are within the ambit of the duties of the County Assembly. It is also empowered by **Article 209 (5) of the Constitution** to impose tax on the services it provides. From the description, the petitioners were not professionals and therefore are not exempt from taxation by the County Government by regulation 7 of the Fourth Schedule. Further, there was no evidence that the petitioners were eligible to pay any other tax in relation to their businesses to the national government which then would have made the tax that is demanded by the respondent double taxation.

18. The petitioners' dispute concerned the lack of public participation in the making of the **Nakuru Finance Act 2015**. Participation of the people, accountability and transparency in governance are among the values of governance under **Article 10 of the Constitution**. The duty of the County Government to involve the people in its affairs is specifically provided for by **Article 196 (1) (b) of the Constitution** which states-

1 A county Assembly shall-

(a).....

(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees

19. The same requirement is found at **Section 87 of the County Governments Act, No. 17 of 2012** and at **Section 91** which compels the County Government to facilitate the establishment of platforms for citizen participation. Since the coming into force of the **2010 Constitution** jurisprudence on public participation has grown in leaps and bounds as shown below:

20. In **Diani Business Welfare Association and others v County Government of Kwale [2015] eKLR**, the court emphasized the principle that public participation is attained when the members of the public and the interested parties are given reasonable opportunity to know about the issue at hand and to have an adequate say.

21. The South African Constitutional Court in **Doctors for Life International vs. Speaker of the National Assembly and Others (supra)** defined the basic tenets of the principle of public participation as follows:-

“The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process.”

22. The same court interpreted the meaning of the obligation to *“facilitate public participation”* which is as stated in our Constitution as follows-

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.”

23. There is no precise formula of how the right to participation will be exercised and each case must depend on its own circumstances. In **Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others (2013) eKLR** cited to me by the respondent, the court opined that:-

“...it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation”

24. In **Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR**, the court in delimiting the sphere of public participation stated thus:-

“However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. 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 issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.” Emphasis added.

25. In **Diani Business Welfare Association and others v County Government of Kwale (supra)** the court held that 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.

26. Facilitating in the first instance connotes offering the public sufficient information about the bill under concern and allowing them sufficient time to give their responses. In **Doctor's for life International v The Speaker National Assembly and Others (supra)** the court held that-

“Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may

be made, interested persons who wish to contribute to the lawmaking process may not be able to participate and make such contributions.”

27. It is therefore imperative that adequate information is disseminated to the public to enable them know of the Bill in question in order to engage in any meaningful public participation. In **Minister of Health v New Clicks South Africa (PTY) Ltd (supra)** cited in **Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others (supra)**, the court held that:-

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. 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 a reasonable opportunity will depend on the circumstances of each case.” Emphasis added.

28. In this case, the respondent informed the members of the public and the stakeholders of the Finance bill by way of an advert in the Daily Nation Newspaper. It also informed the members of the public that the draft bill could be downloaded from the respondent’s website and was also available at the Sub County Administration and Ward Administration offices. Whereas the bill itself was made easily accessible to these persons, it is my opinion that the advert itself did not amount to adequate facilitation. This is because the bill in question concerned finance matters of the County and touched on matters of tax and licences. Therefore its contents were of concern to all persons within the County. Such an advert ought to have been accessible to all people taking into account the different demographic groups within the County. An advertisement in the newspaper, was not viable because of the diversity of the people in Nakuru County bearing in mind that a good number of people do not access the newspaper.

29. In **Republic vs County Government of Kiambu Ex parte Robert Gakuru & another (supra)** the court emphasized on the obligation of the County to attain what is regarded as quantitative and qualitative public participation in the following terms:-

“The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents 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. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that.”

30. It is my view, on the facts of the present petition, that the mode of facilitation was unsatisfactory. The advert did not give the members of the public sufficient information to understand the nature of the bill and again the respondent should have taken steps beyond advertising in the newspaper to sensitize the citizens. In **Robert N. Gakuru & Others v Governor Kiambu County & 3 others (supra)**, the court also held a similar opinion that a newspaper advert does not suffice for purposes of seeking public views and their participation.

31. The lack of proper dissemination of information in this case was further aggravated by the mode through which the public was required to give their views. It was stated in the advert that any comments and submissions on the bill may be made in writing to the County Secretary and Head of Public Service, by email to the dir.revenue.go.ke, or on the respondent’s Facebook or Twitter handle. This mode excluded a considerable number of people in the County who are illiterate or not techno savvy. I am therefore persuaded that there was no proper opportunity for the wider public to participate in the enactment of the bill.

32. The respondent further invited the stakeholders within the Nakuru County to give their comments also in writing. From the letter dated 23rd July, 2015 the stakeholders were diverse and included the chairmen and secretaries of businessmen, manufacturers, those in the Law Society of Kenya, those in the medical field and the entertainment industry. This invitation was to the representatives of these associations. It was however not shown to me that the identified stakeholders reasonably covered all categories of persons who would be affected by the bill or indeed reflected adequate representation of the wider public. I would in this respect conclude that there was failure to engage the general public which would be affected by the bill in question.

33. The respondent also annexed lists of persons who attended the public participation meetings held throughout the county in various dates. From the lists supplied by the respondents, the participants were quite diverse. However there was no information on how these meetings were advertised for and whether there was ample time for people to prepare. The respondent indicated that a letter dated 23rd July 2015 was issued to the general public inviting them to attend a public forum on 15th September, 2015. However, this letter was not annexed to the pleadings and it was not indicated where the meeting was allegedly held. Therefore although the meeting may have been held, the lack of evidence of proper facilitation and opportunity to the public makes this court unable to find that the respondent acted reasonably in the circumstances.

34. In the final analysis, it is my finding that the respondent failed to prove that it discharged its mandate to ensure effective public participation. It is my firm conclusion that the passage of the **Nakuru County Finance Bill 2015** fell short of the Constitutional threshold of public participation. Having so found however, should I grant the reliefs sought?

35. Declaratory orders under **Article 258 of the Constitution** are issued at the discretion of the court. In **Jayne Mati & Another Vs. Attorney General & 2 Others (2011) eKLR, Majanja J** stated thus:-

“.....The responsibility of the court is to weigh the facts of the breach against the letter and spirit of the Constitution and determine whether relief should be granted to protect the Constitution.... The issuing of a declaration or any other relief under Article 258 of the Constitution is a matter of discretion for the court dependent on the circumstances of each case.....It is not in every case that the court will grant relief.”

36. I will also borrow from the reasoning of **Odunga J** in **Judicial Review Misc. App. No.335 of 2014** that:-

“the court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. It can therefore withhold the gravity of the order where among other reasons there has been delay and where the public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized.”

37. **The Finance Act 2015** sought to be annulled relates to the financial year 2015/2016. The court takes judicial notice that due to passage of time, however, interests must have accrued under the said Act and that would militate against the nullification of the Act. The Act did not just provide for the licences in question in the present petition but for the whole gamut of revenue collection, expenditure and financial management of the County for the financial year. To annul the Act at this stage would not only cause hardship and chaos in the County financial management and provision of services budgeted for pursuant to the Act, but would also affect third parties who were not parties to the petition. This clearly would not serve the public interest.

38. It is also clear that the Finance Act 2016 was subsequently passed and implemented. Due to this and passage of time it follows that it is no longer efficacious to annul the preceeding **Finance Act of 2015**. As stated above, public interest militate against the grant of such an order.

39. The petition is thus not allowed. There shall be no orders to costs.

Judgment delivered, dated and signed at Nakuru

This 20th day of March, 2018

R. LAGAT KORIR

JUDGE

In the presence of:-

Emojong Court Clerk

Ms. Chepngetich holding brief for Mr. Wambeyi for petitioners

Ms. Kahika holding brief for Orege for respondent