



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.325 OF 2014

BETWEEN

TRANSPORT USERS ASSOCIATION.....PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

NATIONAL TREASURY.....2ND RESPONDENT

MINISTRY OF TRANSPORT.....3RD RESPONDENT

RULING ON A PRELIMINARY OBJECTION

Introduction

1. The present Petition filed on 11th June 2014 is a lengthy document with a myriad of issues raised it. However, at page 36, the Petitioners have sought determination of the following questions:

- 1. Whether or not the Respondents or any of them were in breach of or contravened the provisions of the Constitution of the Republic of Kenya in any manner fundamental in relation to the enactment of the Act?*
- 2. Whether or not the Respondents or any of them was in breach of or contravened the provisions of PFMA, the County Government Act and the Consumer Act in a manner fundamental in relation to enactment of [the] Nairobi City Finance Act 2013?*
- 3. Whether the mechanisms the first Respondent employed to present the Nairobi City Finance Bill 2013 met the constitutional and legal threshold on public participation?*
- 4. Whether or not the PSV sector and Nairobi residents at large publicly registered outrage, dissatisfaction and strike owing to the social economic impacts the Act imposes on them?*
- 5. Is Nairobi City County Finance Act 2013 valid?*
- 6. What should be the order on costs?*

2. Upon the said questions being answered, the Petitioners pray for the following orders, i.e. that;

- a. *The 1st Respondent violated several Articles of the Constitution, amongst which; 118(1)(b) and 196(1)(b) that directs the National and County legislatures respectively to facilitate public participation in their work. Therefore Nairobi City County Finance Act 2013 is unconstitutional.*
- b. *The 1st Respondent by themselves, their officials, contracted companies, or any person, servant and or agent whosoever of the 1st Respondent acting under or at their behest from imposing, charging, levying or demanding from the Petitioner or member of the public, PSV's or any other motorist within Nairobi under the zonal jurisdiction of the County Government of Nairobi will amount to breach of Article 46(c) of the Constitution to which extent the said Act is, and was unconstitutional. And declare a permanent injunction of the same.*
- c. *Ethics and Anti-Corruption investigate the 1st Respondent and in particular their officials or offices responsible for the process of enactment of the unconstitutional/illegal Nairobi City County Finance Act 2013 for acting in breach of Article 73(1) and (2) of the Constitution.*
- d. *The 1st Respondent to give a timeframe of implementing the Court decision on adopting parking metres management system.*
- e. *The 1st Respondent breached the constitutional provisions that supports access to information by all Nairobi residents, which is a key ingredient to effective and active citizen participation and oversight responsibilities as in Article 118(1)(a) and 196(1)(a) and Article 201(1)(a). Therefore, pursuant to Section 87 of County Government Act 2012, the Petitioner seeks an order through this honourable Court that the 1st Respondent facilitates proactive disclosure of or timely access to information, data, documents, and other information relevant or related to policy formulation, implementation, law and regulations, including approval of development proposals, projects, budgets and the performance standards to the Petitioner and other relevant stakeholders in their future official business.*
- f. *The Petitioner be included and incorporated in the 1st Respondent's transport Section joint committees; technical teams and citizen commissions in accordance to Article 174(c), 184(1), and Section 87 of County Government Act 2012 (h) to encourage and promote direct dialogue, shared responsibility and to provide complementary authority and oversight to concentration of sustainable development.*
- g. *The 1st and the 3rd facilitate an Integrated Public Awareness Campaign programmes on Transport and Road Safety within the zonal jurisdiction of Nairobi County with the Petitioner as envisaged in the Article 46(b), (c) and the Consumer Protection Act 2012 [Sections] 3, (4)(e) and (f).*
- h. *The Petitioner be compensated by way of damages.*
- i. *Cost of the Petition and interlocutory proceedings.*
- j. *All such other orders(s) as this Honourable Court shall deem just.*

3. The Notice of Preliminary Objection under consideration is dated 25th September 2014 and is worded thus:

1. *That the instant Petition is res judicata, the issue in dispute, that is, the unconstitutionality of the Nairobi Finance Act, 2013 for lack of public participation is an issue that has been heard and determined by a Court of competent jurisdiction in Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others versus County of Nairobi Government & 3 Others [2013] eKLR.*
2. *That this Honourable Court lacks the jurisdiction to entertain this Petition having*

pronounced itself on the subject matter of public participation in the enactment of the Act in issue.

3. That the Petition is incompetent, unsustainable, a waste of the Court's precious time and otherwise an abuse of the Court process.

4. That judicial decisions such as the one in (1) above are public records which are known or ought to be known to the Petitioners herein.

1st Respondents Submissions

4. The 1st Respondent filed Submissions on 27th January 2016 and its Counsel stated that firstly, the law on preliminary objections is as was stated in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696** which is to the effect that such objections must be limited to matters of pure law and if upheld, should dispose of the entire case. Secondly, that the issues raised above are barred by the doctrine of *res judicata* and that since this Court in **Nairobi Metropolitan PSV Sacco Union Ltd & 25 Others v County Government of Nairobi, Petition No.486 of 2013**, addressed the issue of public participation in the enactment of the **Nairobi County Finance Act, 2013**, and its decision upheld by the Court of Appeal in **C.A 42 of 2014**, the said issue cannot be raised in subsequent proceedings by dint of the said doctrine of *res judicata*.

5. Thirdly, that for the above reasons, following the decision in **Owners of Motor Vessel Lillian 'S' v Caltex Kenya Ltd [1989] KLR 1** where a Court lacks jurisdiction, including by reason of *res judicata*, then it ought to down its tools at once.

6. Lastly, on costs, the 1st Respondent, invoking the Supreme Court decision in **Rai v Rai [2014] KLR**, has submitted that costs follow the event and that it is entitled to the same upon the Petition being struck off.

Petitioners Submissions

7. In response, the Petitioners, while agreeing that the law on preliminary objections and *res judicata* is as set out by the 1st Respondent, deny that the present objection meets that test because the parties in **Metropolitan PSV Sacco (supra)** were different; the issues in contest were different; the prayers now sought, including against the 2nd Respondent, are completely new and therefore the present Petition should be heard on its merits.

8. In addition, and specifically on the issue of public participation or lack of it, prior to the enactment of the **Nairobi Finance Act 2013**, the submission of the Petitioner is that the said issue was not determined with finality in **Metropolitan PSV Sacco** and cannot therefore be the basis of any invocation of the doctrine of *res judicata*.

Determination

9. Is the present Petition barred by the doctrine of *res judicata* and if so, is this Court then divested of the jurisdiction to determine it? By way of background, the issues arising for determination in **Metropolitan PSV Sacco (supra)** were the following:

a. Whether there was adequate and appropriate public participation prior to the enacting of schedule 6.1 in the Schedule to the Nairobi City County Finance Act of 2013.

b. Whether the 1st and 2nd Respondents complied with the law in the budget making process.

c. The applicable law in the collection of parking fees in the County of Nairobi.

d. Whether the Petitioners are entitled to the remedies sought.

10. Elsewhere above, I reproduced the issues sought to be determined in the present Petition and in that context, I should begin by agreeing with the Parties that following **Mukisa Biscuits (supra)**, only pure points of law should be properly raised by way of a preliminary objection. In addition to that finding, it is also the law as I know it that once the preliminary objection is upheld, the entire matter before the Court should be put to rest.

11. As regards *res judicata*, this Court has previously had the opportunity to address the doctrine in its generic sense in civil law and with specificity in Constitutional petitions. That is why in a constitutional petition before him, Majanja J. in **Edwin Thuo v AG, Petition No.212 of 2012** stated thus;

“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is, in the second suit, trying to bring before the court in another way and form, a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata’.”

12. The same principle is certainly applicable to the present Petition which is one seeking an interpretation of the Constitution *vis-à-vis* certain impugned actions of the Respondents. To address the preliminary objection therefore, it would be best to reproduce **Section 7** of the **Civil Procedure Act** where the principle is explained in civil law and which is relevant to the extent explained in **Edwin Thuo (supra)**. It provides thus:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

13. In applying the above principles, it seems to me that the question of public participation prior to the enactment of the **Nairobi County Finance Act 2013** was conclusively settled by this Court in **Metropolitan PSV Sacco**.

14. The Court of Appeal in an appeal against the said decision then conclusively determined the issue in the following terms:

“The Constitution and the relevant statutes are silent on the period of the notice to be given to the public. Nevertheless, it has to be reasonable notice. Although we agree that the notices issued may not have been sufficient considering the social conditions of the ordinary Kenyans who may not access the information through the websites and the print media, from the averments in the affidavit of Lilian Ndegwa sworn on 16th October 2013, in response to the Appellant’s Petition in the High Court, it is clear that “representatives of Motorist Associations of Kenya, Kenya Bus Operators, Double M operators among other stakeholders attended and gave their views.” As Kenya Bus Operators and Double M Operators are among the PSV operators, it means that the appellants had notice of the public fora but only a few attended. As the trial Judge correctly observed, the words of Chaskalson, CJ., in the South African case of Minister for Health v New Clicks South Africa (PTY) Ltd, succinctly cover the situation in this case:

“It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made.”

What is necessary is that reasonable notice is given and the views of those who attend are taken into consideration.

In this case, none of the above mentioned PSV operator groups who attended the 1st Respondent’s consultative for as well as the representatives of the Motorist Association complained that the notice given to them was too short. Similarly, the other appellants did not adduce any evidence that the notice given was insufficient. In the circumstances, it would not be right to annul the 1st Respondent’s Finance Act on mere submissions of counsel that the appellants were not accorded a reasonable opportunity to air their view on it.

In the upshot, we find no merit in this appeal and the same therefore fails. This being a public interest litigation, we order that each party to bear its own costs” – See Metropolitan PSV Sacco and 25 Others v County Government of Nairobi and Others [2015] eKLR.

15. The submission by Counsel for the Petitioners on this part is therefore mistaken because the word **“public”** is generic and includes the present Petitioners. Similarly, any submission that the decision was limited to the parties in that case cannot stand as the decision was made *in rem* as explained in **Section 44** of the **Evidence Act**.

16. But having so said, it is also true that the present parties are different from the parties in **Metropolitan PSV Sacco** and notwithstanding the issue of public participation being barred by the doctrine of *res judicata*, there are new issues raised in the present Petition which were never determined in the prior case. Those issues include: the alleged breaches of the provisions of the **Public Finance Management Act**, the **County Government Act** and the **Consumer Protection Act** in the enactment of the **Nairobi County Finance Act, 2013** the role of the Ethics and Anti-corruption Act, the right to information as well as the issue of transport Section joint Committees, technical terms and citizens commissions. In the prior case, what was alleged were breaches of the **Traffic Act** and specifically the issue of parking levies. Alleged lack of public participation was raised but in that context only.

17. The new issues require interrogation and to lock out the Petitioners from the temple of justice at this stage would be grossly unfair, a path this Court refuses to take because no competent Court to my knowledge has finally heard and determined them and so the principle of *res judicata* cannot be applied.

18. Having so held, it is obvious that with or without the issue of public participation prior to the enactment of the **Nairobi Public Finance Act, 2013** having been previously determined, the Petition remains live and *res judicata* was ill invoked. The issue of public participation in the context stated above would also be a matter to be adequately determined at the hearing of the Petition taking into account the findings made both by this Court and the Court of Appeal in the **Metropolitan PSV Sacco** case.

Disposition

19. For the above reasons, the Preliminary Objection is overruled, but costs shall abide the determination of the Petition.

20. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2017

E. CHACHA MWITA

JUDGE