



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO.6 OF 2016

(CONSTITUTIONAL & JUDICIAL REVIEW DIVISION)

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013 (LEGAL
NOTICE NO.117 OF 2013)**

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 21, 23, 90, 91, 165, 177, 209, 258 AND 261 OF
THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27, 28, 35, 47 AND 50
OF THE CONSTITUTION OF KENYA 2010**

IN THE MATTER OF ARTICLES 196 AND 199 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF ENFORCEMENT OF ARTICLE 158 OF THE CONSTITUTION OF
KENYA 2010**

AND

IN THE MATTER OF THE NYERI COUNTY FINANCE ACT NO.5 OF 2015

AND

**IN THE MATTER OF THE COMMITTEE FOR EDUCATION, YOUTH AFFAIRS, SPORTS
AND INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) COUNTY
GOVERNMENT OF NYERI**

AND

**IN THE MATTER OF INITIAL REGISTRATION AND ANNUAL LICENCES FOR POST
SECONDARY/COLLEGES IN NYERI COUNTY**

AND

IN THE MATTER OF NYERI COUNTY PUBLIC PARTICIPATION ACT, 2014

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO.17 OF 2012

AND

IN THE MATTER OF THE URBAN AREAS AND CITIES ACT, NO. 13 OF 2011

1. JOHN MAINA GITAHI

2. NGUNJIRI G. WANJOHI

3. LYDIA MUTHONI KAGUU

4. FRANCIS N.KINYUA

5. GIBSON C.MAINA

6. JOHN KIGOI WAWERU

7. DAVID DEDAN MURIITHI

8. NELLY KOIGU

9. SOPHIA W.MURIITHI

10. PETER MUTAHI WACHIRA

11. VIRGINIA WACHIRA

12. JULIANA W.MWANIKI

13. SAMSON G.KAGIRI

14. ESTER GIKAMA

15. ANTHONY MAINA MURIITHI

16. JOB MAGONDU

17. JONES MUTHIANI.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF NYERI..... RESPONDENT

RULING

INTRODUCTION

1. The Notice of Motion was brought by way of a Certificate of Urgency under the provisions of Article 23 (1) of the Constitution of Kenya and is dated the 11th April, 2016; the Petitioners (who shall be hereinafter referred to as the applicants) are members of the Kenya Private Schools Association (KPSA) and are seeking the following orders inter alia;

(i) Spent

(ii) That a conservatory order be issued against the respondent to stop, stay and/or suspend the operationalization/ implementation of the Nyeri County Finance act No.5 of 2015 which was accented into law on the 21.12.2015 and published in the Kenya Gazette on the 31.12.2015; and order that status quo be maintained, or that the applicants may continue paying the disputed levies at the old rates pending the hearing and final determination of the Petition;

(iii) That an order be issued that the respondent produce for scrutiny and inspection The Hansard, draft bills and publications of the County Assembly, notices, advertisements, posters, meetings, attendance sheets of public for a attendees, correspondences and any other relevant document(s) with respect to initiating through to assenting of the controversial **NYERI COUNTY FINANCE ACT, NO.5 OF 2015**.

(iv) That leave be granted for any other affected business , public interest group(s) and/or organization(s) to be joined/added as interested parties in this Petition;

(v) Costs.

FACTS

2. The applicants contend that the county revenue law was passed in gross violation of the Constitution 2010 which requires that all laws whether at the national or county level be passed on public participation; that the process did not comply with the mandatory constitutional provisions; that the proposed revenue raising system was not in line with the principles of equity; also the imposition of the new hefty licence fees was unreasonable, unrealistic, exorbitant, discriminative, punitive, burdensome and would paralyse service delivery by the applicants;

3. Hereunder is a summary of the rival submissions made by Counsels for the applicants and the respondents;

PETITIONERS SUBMISSIONS

4. The submissions made by counsel for the applicants;

(a) The application raised only two issues; the constitutionality and legality of the respondents mandate to raise taxes and charges which were drastic and unreasonable; and whether there was public participation;

(b) The applicants relied on the grounds on the face of the application and the supporting affidavit dated the 6/04/2016 and the supplementary affidavit dated 17/05/2016 made by **JOHN MAINA MUTAHI**; he avers that he is duly authorised to make the affidavit to file a representative petition/class action on behalf of the other petitioners;

(c) He states that his fellow petitioners inclusive of himself are owners of post-secondary colleges; and contends that the criteria of levying fees determined by a student head count in the law passed by the County Assembly places such a heavy burden on investors in the education sector in Nyeri County; that the revised rates are a threat to the applicants economic rights as it will force them out of business and also dissuade investors in Nyeri County;

(d) That the sum proposed in their memorandum ranged from Kshs.20,000/- to Kshs.60,000/-; that the revised levies set for private schools/ colleges was in sum of Kshs.120,000/- which sum was exorbitant; and that there was a great disparity when compared to the levies charged over financial institutions and SACCOS which were being charged between Kshs.40,000/ to Kshs.50,000/-;

(e) The applicants submit that the respondents should not exercise their power to raise revenues for

the county in a manner that prejudices economic activities; that the respondents actions are grossly arbitrary and based on an unknown criteria of student head count; which is unworkable and discriminatory;

(f) That there was no public participation so as to arrive at a figure that was workable; that the meeting for Nyeri Town Hall scheduled for the 14/08/2015 where the applicants were to make their presentations never took place; that their views were never considered; that there was therefore no compliance with the mandatory provisions of the constitution;

(g) That the revised levies are so high and punitive to the applicants; the mode of enforcement by the respondents officers may undermine and inconvenience and paralyse the operations of the institutions;

(h) The applicants fear the respondents chaotic framework of enforcement for non-compliance which may befall the applicants if the orders sought are not granted;

(i) That prior to this petition the Petitioners had filed Petition No.10 of 2015; therein the applicants raised the same concerns in the Nyeri County Revenue Administration Act; that with the passing of the Act that petition has been overtaken by events;

(j) The respondent would not be prejudiced if the applicants continued paying old licence rates until the logical conclusion of this petition;

(k) The Petition discloses serious constitutional issues and the ends of justice can only be met by the grant of the orders sought; the applicants prayed for the orders to be granted.

RESPONDENTS SUBMISSIONS

5. In responding the respondent relied on the Replying Affidavit made by **Nelson Muraguri Mbekanya** and is dated the 27/04/2016 in which he deponed that;

(i) The Finance and Economic Planning Committee was to review all the County legislation and call for public participation and then report back to the County Assembly with all the public views raised together with any petitions regarding the bill;

(ii) The Committee published the Bill in the Daily Nation and Standard Newspapers on the 4/08/2015; and invited written memoranda and presentations by stakeholders and interested groups; which were to be forwarded to the County Clerk;

(iii) Further publication was done on the 10th, 11th, 12th and 13th August between the hours 4-5pm through a local radio station (Kameme FM); members of the public were invited to send in their views; a public participation forums were organised and took place at Muhito PCEA Church Mukuruweini, Othaya CDF Hall, Naro Moru Hall and at Karatina Town;

(iv) On the 11/08/2015 a Memorandum was presented by private school owners association- Mathira Branch; on the 23rd September the respondent received a Petition from the Kenya National Association of private colleges and schools- Nyeri Chapter;

(v) On the 10th November, 2015 all the views gathered by the committee in conjunction with the office of the County Clerk concerning the Bill together with the applicants views were presented in report form to the County Assembly and were all duly considered;

(vi) That public hearing does not connote personal hearing of every person claiming to be affected by the Bill; accordingly all the requirements set down by decided cases had been duly met; that the application herein does not raise a prima facie case with a likelihood of success;

(vii) That none of the applicants was denied an opportunity to be heard; that none of them have demonstrated an infringement of Articles 27, 28, 35 and 47 of the Constitution 2010; hence none shall be prejudiced if denied the conservatory order sought;

(viii) That staying of the entire Act would have serious consequences capable of paralysing the operations of the respondent in revenue collection; a suggestion was made so as to avert the impending crisis and that different sections of the Act be apportioned different commencement dates and that the hearing of the Petition be fast tracked;

(ix) That new rates are payable annually and took into account inflationary trends; and were fair and workable rates for investors in the education sector;

(x) He averred that the applicants were not entitled to the orders sought and prayed that the application be dismissed with costs.

ISSUES FOR DETERMINATION

6. After hearing the parties respective submissions the only issue framed by this court for determination is whether a conservatory order is merited pending the hearing and determination of the Petition.

ANALYSIS

7. In ascertaining whether the orders sought herein are merited this court shall make reference to the principles applicable to granting of injunctive orders in civil matters; the guiding principles are set down in the celebrated case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** which are as follows;

(i) The applicant must establish a prima facie case with a probability of success;

(ii) That the applicant must demonstrate they stand to suffer irreparable loss that cannot be compensated by way of damages;

(iii) If in doubt, the court can then make a decision on a balance of convenience.

Whether the applicant has made out a prima facie case

8. It is not in dispute that the applicants are investors in the education sector are therefore stakeholders who will be affected by increased levies and fees captured in the Act. It is not also in dispute that the Respondent enacted the impugned Nyeri County Finance Act, 2015 and that in the process of enacting the Act public participation was a constitutional obligation.

9. The applicants herein must establish an arguable case or a prima facie case to demonstrate that the actions and the decision emanating therefrom violated their right to public participation in the legislative process and thus the survival of their businesses was directly threatened; and that they are therefore deserving of the orders sought; the applicants are therefore asking this court to look at the administrative action of the respondent which is alleged not to have been in conformity with the statutory standards;

10. The forms of facilitating public participation are varied and the question that comes into mind after hearing the submissions of both Counsel, is whether the applicants and other interested parties were afforded a reasonable opportunity to have an adequate say prior to the enactment of the Act. On this aspect the court is satisfied that the Petitioners have made out a prima facie case arguable case on failure of public duty and process. The full extent and level of public participation, reasonable opportunity afforded and adequate say are issues that will be canvassed and determined by the trial court at a full hearing.

11. The question is which party will be greatly inconvenienced if the order sought is not granted. Taking into consideration the respondents officers well known mode of enforcement for non- compliance it is the

view of the court that the applicants will be the ones who will be greatly inconvenienced in that if they fail to comply to pay the new levies their businesses will be affected and may face imminent closure or paralysis; and they may never regain the goodwill of their customers; the balance of convenience therefore is found to tilt in favour of the Petitioners.

12. I shall say no more and will only add that the integrity of the whole process needs to be interrogated and all the parties ought to be given a fair chance to be heard and this can only be done at the hearing of the main petition.

FINDINGS AND DETERMINATION

13. For the reasons stated above this court finds that this is a suitable case for the issuance of the conservatory order; the application is hereby allowed.

14. The fees/ levies imposed by the Respondent pursuant to the Nyeri County Finance Act are hereby suspended pending the hearing and determination of this Petition; this Order shall only apply to the Petitioners named herein pending the hearing and determination of the Petition; the Petitioners shall continue payment of the fees and levies in force before the enactment of the Nyeri County Finance Act.

15. The Petitioners are hereby directed to fast track the Petition for hearing and determination on a priority basis for its early determination.

16. Parties are at liberty to apply.

17. The Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 12th day of April 2017.

HON. A. MSHILA

JUDGE