



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**MISC. 1 OF 2016**

**FORMERLY CONSTITUTIONAL PETITION NO. 9 OF 2015 (MACHAKOS)**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1(3)(4), 10, 174(C)(D)(F), 196(1)(B), 20(A) AND 209(3)(5) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28, 35, 43 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 87 & 96 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF SECTION 137 OF THE PUBLIC FINANCE MANAGEMENT ACT 2012**

**AND**

**IN THE MATTER OF THE KITUI COUNTY GOVERNMENT ACT NO. 1 OF 2014**

**AND**

**IN THE MATTER OF THE KITUI COUNTY FINANCE ACT NO. 5 OF 2014**

**BETWEEN**

**JOB KIMANTHI MUTUKUAA**

**JOEL MUEMA WILSON**

**ONESMUS KAUWI**

**SCHOLASTICA MUNYALO**

**GUSTUS JAMES MUTIO**

**PATRICK MWENDWA FRANCIS**

**PETER MUTHUI**

DUNCAN KAMBA

BAKARI BARAKA

DAVID NZOMO MWANZI

ANGELICAH WAMBUI

MUIMI MUTUA

JULIUS NYERERE

SAMUEL M. MUTUKUAA

JULIUS M. MUTUKAA

WILSON MUTEGI NYAGA

KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY;

KITUI COUNTY CHAPTER (*Suing On Their Own Behalf And On Behalf Of All Kitui*

*County Business Community Members*).....1<sup>ST</sup> PETITIONER

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA.....2<sup>ND</sup> PETITIONER

VERSUS

THE KITUI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

### J U D G M E N T

1. The 1<sup>st</sup> Petitioners filed a Petition dated **21<sup>st</sup> December, 2015** representing various business people within **Kitui County** against the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent while the 2<sup>nd</sup> Petitioner did it in its capacity as a protector and promoter of the rights of the vulnerable and marginalized individuals/communities in Kenya.
2. The 1<sup>st</sup> Respondent was sued as a Public Constitutional Body that was created under the Principle of Devolution under the Constitution of Kenya while the 2<sup>nd</sup> Respondent was sued as the Chief Legal Adviser of the Republic of Kenya.
3. The genesis of the matter is that the 1<sup>st</sup> Respondent enacted and assented to the **Kitui County Finance Act No. 1 of 2014** on **28<sup>th</sup> April, 2014** when the Petitioners had completed paying their rates and charges for the year **2014** at a rate that had been passed by the 1<sup>st</sup> Respondent's predecessor. In the circumstances the **Kitui County Finance Act No. 1 of 2014** was overtaken by events. Later on towards end of the year the 1<sup>st</sup> Respondent assented to **Kitui County Finance Act No. 5 of 2014**, law that prescribes the rates and charges for various properties and services for the financial year **2014 – 2015**. These **Finance Acts, Kitui County Finance Act No. 1 of 2014** and **No. 5 of 2014** brought major and huge departure/increases in rates and charges imposed by the 1<sup>st</sup> Respondent.
4. It was averred that the Petitioners were not afforded public participation in legislating and passing both Acts which was in contravention of the fundamental principle of public participation. Although the 1<sup>st</sup> Respondent undertook various initiatives towards ensuring public participation it failed to meet the minimum threshold for reasonable participation. The advertisement was in the daily newspaper and was done on **25<sup>th</sup> September, 2014** for events scheduled on the **30<sup>th</sup> September, 1<sup>st</sup> and 2<sup>nd</sup> October, 2014**. The distance to the venue of the meeting was far away from most people which discouraged people's participation. The advertisement was in **Kamba** dialect which locked out other communities. The Bill itself was not available for perusal as indicated.
5. Further they stated that the 1<sup>st</sup> Respondent has not embarked on a meaningful development projects that warrant an increase in rates and charges levied. An introduction of new items such as timber and lorry charges for Petitioners running businesses amount to double taxation.
6. That the 1<sup>st</sup> Respondent failed to establish the County Budget and Economic Forum to provide for consultation and facilitation of a broad public engagement in budgetary process.
7. Therefore they prayed for:

(1) A declaration that the **Kitui County Finance Act No. 1** and **No. 5** both of **2014** contravene **Articles 1(3)(4), 10, 174(c)(d)(f)**,

**196(1)(b), 201(a) and 209(3)(5)** of the **Constitution** and therefore null and void.

(2) A declaration that the 1<sup>st</sup> Respondent failed in its obligation on ensuring reasonable participation of the Petitioners in the process of leading to the formulation and passage of the **Kitui Finance Act No. 1 and No. 5 of 2014** and hence the Acts are null and void.

(3) A declaration that the increases in rates and charges as contained in the **Kitui County Finance Act No. 1 of 2014** and **Kitui Finance Act No. 5 of 2014** are unreasonable unfair, unproportionate, unjustifiable and oppressive.

(4) An order directing the 1<sup>st</sup> Respondent within **sixty (60) days** from the date of the judgment to fully comply with the provisions of **Section 137** of the **Public Finance Management Act 2012** by constituting a forum to be known as the **Kitui County Budget and Economic Forum** and whose membership shall strictly comply with the requirement of the said section.

(5) An order directed to the 1<sup>st</sup> Respondent to have in place adequate budgetary allocation for Civic Education for educating the County Citizens on the principle of participation in budget matters and in formulation of its finance laws.

(6) An order directing the 1<sup>st</sup> Respondent to forthwith put in place adequate measures to ensure active engagement and participation of all the Petitioners and the entire County Citizen in any proposed increments or changes in rates and charges in the 1<sup>st</sup> Respondent's Finance Laws including and not limited to:

i. Conducting Civic Education and Seminars.

ii. To supply the Petitioners with all the relevant information as provided under **Article 35** of the **Constitution** including any proposed bills and informative pamphlets on any intended/proposed changes in its finance laws before convening desired participatory meetings.

iii. The aforesaid information be supplied unconditionally to the Petitioners timely in a period of not less than 14 days preceding any participation meetings.

iv. The 1<sup>st</sup> Respondent to make public all proposals and alternatives suggested during the participation meetings with those rejected being clearly shown and reasons for such rejection.

**8. Job Kimantheni Mutukaa** the 1<sup>st</sup> Petitioner swore an affidavit having been authorized by his co-petitioners in support of the Petition where he basically reiterated what was stated in the Petition. Save that where the information was not within his knowledge he revealed the source of the information.

9. In response the 1<sup>st</sup> Respondent filed grounds of opposition stating that the application lacks merit and is an abuse of the Court process. That the **Kitui County Finance Act No. 5 of 2014** was passed procedurally after full public participation and it took effect in **January, 2015**. Suspending it would cause harm and loss to the 1<sup>st</sup> Respondent and subject it to unnecessary and litigation from business people who have already paid rates and licence fees.

10. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by **Musyoka Nyamae** the County Secretary in response to the Petition. He deponed that the **Kitui County Finance Act No. 1 of 2014** was an instrument that consolidated the Finance Act of the County Councils of Kitui and Mwingi, the Town Council of Mwingi and Municipal Council of Kitui and no changes were made on rates and taxes that were last revised in **2008** and **2009**.

11. That the contested **Kitui County Finance Act No. 5 of 2014** is the substantive Finance Act that was passed by the 1<sup>st</sup> Respondent after the **2013** General Elections. When the Act came into force there was no problem with implementation until the 1<sup>st</sup> Petitioner was incited by some political persons to resist the rates. Consequently they organized a demonstration within town in which some politicians participated.

12. That the Finance Bill was submitted to the Kitui County Assembly after Civic Education and public participation was conducted. The allegation that businesses will be supplied has no merit and the 1<sup>st</sup> Respondent agreed to suspend the new rates on single business permits so as to discuss the Petitioners grievances but they seem to be actuated by other motives.

13. The Petition was canvassed by way of written submissions. In his submissions highlighting what was filed **Mr. Mwariri** for the Petitioners stated that the **Kitui Finance Act No. 5 of 2014** was introduced without the required public participation. High, unreasonable, unrealistic increases were made in rates and charges payable. This sparked a public outcry and demonstration by the citizens of Kitui County. On the **27<sup>th</sup> February, 2015** the operation of the Act was suspended by the 1<sup>st</sup> Respondent but no steps were taken to review the rates.

14. The advertisement made by the 1<sup>st</sup> Respondent in the Daily Nation Paper as a form of communication could not reach most people due to a high level of poverty and illiteracy. The other form of communication, advertisement through the local dialect was restrictive. Citing the case of **Robert N. Gakuru & 2 Others vs. Governor Kiambu County & 3 Others (2014) eKLR** he stated that policy makers should make use of many channels to ensure there is public participation which include churches, mosque, temples, public barazas, national and vernacular radio broadcasting stations.

15. Further he argued that the notice was too short. That the Act itself contravenes the Constitution. It is unfair, unjustifiable and oppressive.

16. In response, **Mr. Mwalimu** for the 1<sup>st</sup> Respondent stated that before the legislation was enacted there was sufficient public participation. The advertisement was done in the Daily Newspaper that has wide circulation. For those who could not read, it was repeated in the vernacular radio station.

17. The County Assembly that has representatives of the people as envisaged by the Constitution considered the law and passed it. He argues that the 1<sup>st</sup> Respondent had a duty to invite people to attend but could not force them to attend.

18. With regard to the rates being unreasonable he stated that the 1<sup>st</sup> Respondent harmonized all rates that were obtaining in all local authorities. It did not make any increments. Majority of people paid dues. The persons who came up with the petition were incited by political rivals. The **Kitui Finance Act No. 5 of 2015** was suspended and other Acts have been passed therefore it will be of no use for the Act that is suspended to be ruled upon.

19. In reply **Mr. Mwariri** argued that the Court can still issue guidelines in compliance with **Section 137** of the **Public Finance Management Act of 2012** in the interest of public.

20. Issues to be determined are:

- Whether the 1<sup>st</sup> Respondent ensured there was public participation prior to passage and enactment of the **Kitui County Finance Act No. 1 of 2014** and the **Kitui County Finance Act No. 5 of 2014**.
- Whether the provisions of the **Public Finance Management Act** were complied with.
- Whether the **Kitui Finance Acts No. 1 and No. 5 of 2014** are null and void for contravening the Constitution.
- Whether the present Constitutional Petition is overtaken by events.

21. The **Constitution of Kenya, 2010** emphasizes the sovereignty of the people of Kenya. People have the mandate to exercise the power bestowed upon them either directly or through their representatives whom they elect. At the county level they are represented by Members of the County Assembly (**See Article 1 of the Constitution**). When it comes to implementation of Public Policy decisions people are expected to participate (**Vide Article 10 of the Constitution**).

22. It is not alleged that the 1<sup>st</sup> Respondent did not ensure there was public participation. It is stated that it did not accord the Petitioners reasonable public participation and the residents of Kitui County in the legislating and passing of the two (2) Finance Acts. An advertisement was done in the Daily Nation Newspaper. For the residents of Kitui County who could not access the Daily Newspaper that is written in English language, another form of advertisement made was in the vernacular radio stations. The communication was in the **Kamba** language.

23. The 1<sup>st</sup> Respondent was duty bound to engage the Citizens of Kitui to enable them participate in making decisions they were to come up with. The 1<sup>st</sup> Respondent did it in a way it deemed to be public participation but it has been faulted for not doing it reasonably.

24. In the cited case of **Robert N. Gakuru & 2 Others vs. Governor Kiambu County** the Court was of the view that:

**“...the County Assemblies ought to do whatever is reasonable to ensure that 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.”**

25. In the **South African** case of **Minister for Health vs. New Clicks South Africa (PTY) LTD** it was stated that:

**“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.”**

26. Here what is expected as submitted is that there should be reasonable notice. This reasonable notice should be given to all residents to be affected by the legislation.

27. In the matter of **Peter Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits – Constitutional Petition No. 305 of 2012 (2015) eKLR** the Court stated thus:

**“.....public participation is a national value that is an expression of the sovereignty of the people as articulated under Article 1 of the Constitution. Article 10 makes public participation a National Value as a form of expression of the sovereignty. Hence, public participation is an established right in Kenya; a justifiable one – indeed one of the corner stone of our new democracy.”**

28. The Daily Nation Newspaper has a Nation Wide circulation. However it must be remembered that Kitui County is vast. Most inhabitants of Kitui are illiterate and poverty stricken. It is unlikely that the information advertised in the Newspaper reached all residents of Kitui County. The 1<sup>st</sup> Respondent chose to relay the information to residents by broadcasting through the FM Radio station which communicated in **Kikamba** language. As correctly submitted by **Mr. Mwariri**, most towns in Kitui County like Kitui, Mwingi, Kyuso and Mutomo are cosmopolitan towns. Not only **Kambas** reside there. We have **Somalis** residing in Mwingi and Mutomo. There are **Kikuyus** and other Ethnic Groups that live in the County. It is common knowledge that **Kiswahili** is a National Language. The question to be posed is why the communication was not in **Kiswahili**, a National Language?

29. Further, the advertisement was made on the 25<sup>th</sup> September, 2014. The engagement was scheduled for 30<sup>th</sup> September, 2014. This was not adequate time for the citizens to prepare to participate in sharing views. The time was not reasonable as the notice given was not adequate. Without preparing for the engagement they would have participated appropriately as envisaged by the Constitution of Kenya.

30. Section 137 of the **Public Finance Management Act, 2012** which is in respect of establishment of County Budget and Economic Forum for County Budget Consultation Process provides thus:

**“(1)As soon as practicable after the commencement of this Act, a county government shall establish a forum to be known as the (Name of the County) County Budget and Economic Forum.**

**(2) The County Budget and Economic Forum shall consist of —**

**(a) the Governor of the county who shall be the chairperson;**

**(b) other members of the county executive committee;**

**(c) a number of representatives, not being county public officers, equal to the number of executive committee members appointed by the Governor from persons nominated by organisations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level.**

**(3) The purpose of the Forum is to provide a means for consultation by the county government on —**

**(a) preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and *Outlook Paper for the county; and***

**(b) matters relating to budgeting, the economy and financial management at the county level.**

**(4) In addition to the above, consultations shall be in accordance with the consultation process provided in the law relating to county governments.**

***Responsibilities of County Executive Committee Member for finance and functions of the county government in respect to public finances.”***

31. Section 107(1) and (2) of the **Evidence Act** provides thus:

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

32. The Petitioners were duty bound to prove their allegations. The Petitioners have submitted that there is a County Budget and Economic Forum. They were duty bound to provide evidence to prove that it did not comply with the aforesaid provision of the statute. This was not done.

33. The present Constitutional Petition was filed on the 25<sup>th</sup> day of **March, 2015**. The **Kitui County Finance Act** by then the **Finance Act No. 1 of 2014** was not in operation. The **Kitui County Finance Act** date of commencement was indicated as 5<sup>th</sup> **December, 2014**. The Act prescribed rates of taxes fees and charges for the year **2014 – 2015**. By consent of the Petitioners and the 1<sup>st</sup> Respondent dated 27<sup>th</sup> **March, 2015**, the rates applicable were the ones that were being paid previously. In the same vein the application was abandoned to pave way for hearing of the Petition. The Petition was canvassed on the 13<sup>th</sup> day of **October, 2016**. Prior to the matter being heard the **Kitui County Finance Act No. 6 of 2015** was assented to on the 9<sup>th</sup> **October, 2015**. It provides for rates for taxes, fees and charges. Subsequently there was an Act for **2016**. Having been a legislation that was to operate for a specific duration and having been suspended for the entire duration, the Petition was overtaken by events.

34. From the foregoing it is the finding of this Court that the public participation was not accorded to the Petitioners as envisaged by the **Constitution of Kenya**, therefore the **Kitui County Finance Act No. 1 and 5 of 2014** was indeed null and void and I so declare.

35. However, since the Petition was overtaken by events and the Petitioners having failed to prove that **Section 137** of the **Public Finance Management Act, 2012** was not fully complied with, other orders sought cannot issue.

36. With regard to costs, being a public interest matter, no orders shall issue.

37. It is so ordered.

**Dated, Signed and Delivered at Kitui this 23<sup>rd</sup> day of August, 2017.**

**L. N. MUTENDE**

JUDGE