



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
PETITION NO 4 OF 2015
(FORMERLY IN THE HIGH COURT OF KENYA AT MOMBASA
CONSITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO 80 OF 2014)

IN THE MATTER OF Article 22(1) AND 2 OF THE CONSTITUTION

IN THE MATTER OF Article 2(1)2) (sic), (10(10) (sic), 23 and 165(2)(B) (sic)

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 19, 20, 21(1), 27(1) AND 2, (sic) 209(3), 209(4) Article 210(1) Article 209(5) Article 190(1) and (2) 174 (sic) and Article 196(1)(b) 258(1) AND 2 (sic) OF THE CONSITUTION

BETWEEN

- 1. SABASTIAN R. MWAKUMBAKU
- 2. JOSEPHAT KAMBALE
- 3. MAKAU MATHAI NGUI.....PETITIONERS

AND

THE COUNTY GOVERNMENT OF TAITA TAVETA.....1ST RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY2ND RESPONDENT

RULING

INTRODUCTION

1. The Petitioners’ Petition and Notice of Motion application dated and filed on 18th December 2014 showed the National Transport and Safety Authority Act and County Transport and Safety Committee for Taita Taveta County as the 2nd and 3rd Respondents respectively.
2. On 22nd December 2014, Kasango J who heard the said application granted a temporary injunction restraining the Respondent (**sic**) (County Government of Taita-Taveta), by themselves, their officials, parking attendants, contracted company or companies so contracted to collect parking fees on their behalf or any person from imposing, charging, levying or demanding from the petitioners/, (**sic**) the Applicants (**sic**) Members or Member of the public the daily parking fee of Ksh. 600 or any sum exceeding the sum of Ksh. 150 currently legally chargeable per motor

vehicle per day within TAITA TAVETA county, (sic) Pending (sic) the hearing and determination of this application inter partes.

3. On 11th March 2015, the Petitioners their Amended Notice of Motion application dated 18th December 2014. The same was filed on 12th March 2015. In the said amended application, the name County Transport and Safety Committee for Taita Taveta County was crossed out in red indicating that it was no longer a party to the proceedings herein. In addition, the 2nd Respondent's name was also amended to read "National Transport and Safety Authority" instead of "National Transport and Safety Authority Act." The court will address the ramifications of this amendment later on in the Ruling herein.
4. In the said Amended Notice of Motion application, the Petitioners had sought the following orders:-
 1. Spent.
 2. Spent.
 3. **THAT a temporary injunction do issue restraining the Respondent (sic) (County Government of Taita-Taveta), by themselves, their officials, parking Attendants (sic) contracted company or companies so contracted to collect parking fees on their behalf, or at their behest, from imposing, charging, levying or demanding from the Petitioners/, (sic) the Applicants (sic) Members or Member of the public the daily parking fee of Ksh. 600 or any sum exceeding the sum of Ksh. 150 currently legally chargeable per motor vehicle per day within TAITA TAVETA county, (sic) pending the hearing and determination of this petition.**
 4. **THAT a mandatory injunction do issue directed to the 2nd and 3rd respondents, their agents, servants, employees, assigns or whomsoever to act as per the mandate empowered unto them under Act No. 33 of 2012 by only licencing motor vehicles which have duly complied with PSV regulations to operate within Taita- Taveta County and ensure they adhere to the regulations of the National Transport and Safety Authority Act, and the Traffic Act.**
 5. **THAT costs of the application be provided for.**

THE PETITIONERS' CASE

5. The Petitioners' application was supported by the Affidavit of Sabastian R. Mwakumbaku that was sworn on 11th March 2015. The deponent also swore a Further Affidavit on 3rd August 2015. The same was filed on 5th August 2015. Their Written Submissions were dated 25th August 2015 and filed on 27th August 2015.
6. The Petitioners were said to be members of legal entities duly registered and licensed as public service vehicles (PSVs) ferrying passengers to, from and between Taita Taveta County and the outlying Counties within the Republic of Kenya.
7. Their case was that the 1st Respondents had breached the provisions of Article 201(1) of the Constitution by purporting to increase the parking fees from Kshs 150/= to Kshs 600/= and that they were being subjected to paying parking fees in Voi, Wundanyi, Taveta and other towns within the Taita Taveta County which was not supported by any legal framework as sub-counties had no authority to raise any revenue on their own.
8. It was their contention that under the previous Local Government Act, double parking fee could not be charged within one local Authority and in charging the parking fees as aforesaid, the 1st Respondent was violating the provisions of Article 209(5) of the Constitution which provides that taxation and other revenue raising powers of any County Government shall not be exercised in a way that prejudices the national economic policies and across County boundaries or the national mobility of goods, services, capital or labour.
9. They further argued that the County Government of Taita Taveta had no jurisdiction to impose any other tax or charge unless there was an existing Act of Parliament and that in the circumstances, the previous national legislative enactment continued to have the full force of the law. It was their averment that the court ought to stop the arbitrary levying of double parking charges until such time there was supporting legislative framework.
10. In respect of the 2nd Respondent, the Petitioners averred that it had failed to act fairly in discharging its mandate by applying different rules against PSVs to their detriment.

11.They further stated that the 3rd Respondent had failed to oversee the management and regulation of the road transport system in the County of Taveta Taveta, it had failed to prepare and submit to the 2nd Respondent such audit reports as it would require on the safety, reliability and efficiency of the road transport system within the county and it had also failed to advise the 2nd Respondent on matters affecting the road transport system within the county.

THE 1ST RESPONDENT'S CASE

12.In response to the said application, Fredrick Mliwa, the 1st Respondent's Director of Legal Services swore a Replying Affidavit on 17th July 2015. It was filed on the even date. It also filed a Notice of Preliminary Objection on the same date. Its Written Submissions were dated 11th November 2015 and filed on 12th November 2015.

13.The 1st Respondent was emphatic that the Petitioners obtained the injunctive orders that were issued by Kasango J by concealing and suppressing material facts. It argued that the Petition herein was fatally defective as the Petitioners did not have capacity and authority to sue on behalf of the members in their names as the membership was registered under the Co-operatives Societies Act.

14.It was its further argument that it had never levied double parking fees on vehicles so long as they displayed receipts of duly paid parking fees. Its case was that this court had no jurisdiction to direct it how to exercise its duty to levy parking fees and that in any event, the Finance Bill, 2014 had since been passed into law by the County Assembly as a result of which the Petition herein had been overtaken by events.

15.The grounds of its Notice of Preliminary Objection could be summarised as follows:-

1. **The Petition and Application were fatally defective, bad in law, null and void and ought to be struck out forthwith.**
2. **The Petition and Application offended the mandatory provisions of Section 12 of the Co-operative Societies Act Cap 490 (Laws of Kenya) and Section (sic) of the Companies Act Cap 486 (Laws of Kenya).**
3. **There was no resolution authorising the institution of the proceedings on behalf of TATAMA SACCO, Double T SACCO, 2TS SACCO and Wumeri Travel Company Limited and appointment of the Petitioners' advocates herein.**
4. **There was no proper authority to sue and swear Affidavits by the 1st Petitioner on behalf of the 2nd and 3rd Petitioners and on behalf of TATAMA SACCO, Double T SACCO, 2TS SACCO and Wumeri Travel Company Limited and hence the said Affidavits ought to be struck out.**
5. **The Petitioners had no *locus standi* to institute the proceedings herein**
6. **The Petition and Application were speculative and premature.**
7. **The Petition and Application were an abuse of court process.**

16.It therefore urged the court to dismiss the Petitioners' said application with costs to it.

THE 2ND RESPONDENT'S CASE

17.In response to the said application, Francis Meja, the 2nd Respondent's Director General swore a Replying Affidavit on 26th October 2015. The same was filed on 28th October 2015. Its Written Submissions were dated 3rd March 2016 and filed on 4th March 2016.

18.The 2nd Respondent was categorical that it had carried out its mandate within the provisions of National Transport and Safety Authority Act No 33 of 2012 and that it had not discriminated against the Petitioners. It stated that it had in fact ran an advertisement in the Daily Nation Newspaper on 12th September 2014 cautioning members of public from boarding vehicles that were not licensed or insured.

19.It also pointed out that it was liaising with the 1st Respondent in obtaining names of nominees

who would sit in the County Transport and Safety Committees of County of Taita Taveta.

LEGAL ANALYSIS

20. It is evident from the above that there were several substantive issues that were raised by all the parties herein. The court deemed it prudent to determine the issues arising therefrom under separate heads shown hereunder.

I. *LOCUS STANDI* OF THE PETITIONERS

A. LACK OF BOARD RESOLUTION

21. The Petitioners annexed copies of a Certificate of Registration of Self-Help Group from the Ministry of Labour, Social Security and Services showing the name of a legal entity referred to as Coast Matatu Owners Association Self-Help Group. It was issued in Voi on 7th November 2014. There was also a Certificate of Registration No CS/11559 that was issued to 2TS Savings and Credit Co-operative Society Limited under the Co-operatives Societies Act Cap 490 (Laws of Kenya) on 25th October. The year was not very legible but appeared to have been 2007.

22. Taita Taveta Matatu Co-operative Savings & Credit Society Limited was also registered under the Co-operatives Societies Act. The Certificate of Registration Number CS/NO.10418 was issued on 8th June 2004. The Certificate of Registration No CS/12896 to Double T Shuttle Savings & Credit Co-operative Society Limited was issued under the Co-operative Societies Act on 29th November 2010 while Certificate of Incorporation No CPR/2011/38788 for Wumeri Travel Company Limited was issued on 11th January 2011 under the Companies Act.

23. It did appear to this court that the 1st Respondent's objection to the 1st Petitioner capacity to sue in his own name on behalf of the said legal entities was based on these different Certificates of Registration. It was its argument that the Petition and the application herein were incompetent and fatally defective for want of a Board Resolution authorising the Petitioners herein to file the said pleadings.

24. It placed reliance on the cases of **East Africa Portland Cement Limited vs Capital Authority & 4 Others [2014] eKLR** and **Mombasa Petition No 27 of 2011 Midland Finance & Securities Limited & Another vs Kenya Anti-Corruption Commission** where the Mumbi Ngugi and Mureithi JJ respectively found the proceedings to have been incompetent for failure to file the petitions therein.

25. On the other hand, the Petitioners submitted that they were directors of the Coast Matatu Owners Association which they said was not a Co-operative Society but rather, that it had been registered under the Societies Act. They argued that consequently, they were not required to have obtained any Board Resolution before they instituted the proceedings herein on behalf of the legal entities.

26. It was their further argument that in any event, courts have previously held that such a resolution did not need to be filed at the time a suit was being filed as it could still be filed later. They referred the court to the cases of **Leo Investments Limited vs Trident Insurance Company Limited [2014] eKLR**, **HCCC N 585 of 2004 Milimani Nairobi Tavuli Clearing & Forwarding Limited vs Charles Kalujee Lwanga**, **HCCC No 391 of 2000 Milimani Assia Pharmaceuticals vs Nairobi Veterinary Centre Limited Nairobi** and **Civil Appl No 329 of 2009 Kenya Commercial Finance Company Limited vs Richard Akwesera Onditi** all cited in the case of **Leo Investments Limited vs Trident Insurance Company Limited** (Supra) where the common thread was that a resolution could be ratified subsequent to filing of proceedings in court and hence proceeding could only be struck out as a last resort.

27. It is clear from the aforesaid decisions that different courts approach the issue of a board resolution differently. This court takes the view that a resolution can be filed subsequent to the filing of proceedings to regularise the position. Indeed, courts must restrain themselves from striking out proceedings if the technicality complained of can be regularised by a subsequent act of an offending party. In any event, Article 159(2) (d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to technicalities.

28. In the case of **Daylight Drycleaners Limited v Samchi Telecommunications Limited &**

another [2015] eKLR, this very court reached a similar finding. It cited with approval the case of Mavuno Industries Limited & 2 Others vs Keroche Industries Limited [2012] eKLR in which Odunga J had stated as follows:-

“Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff’s bundle of documents...The mere failure to file the same with the plaint...did not invalidate the suit.”

29. For all intents and purposes, this court would not have struck out the application and Petition herein as the Petitioners would have had an opportunity to regularise their position so as to validate the said proceedings. In effect, the 1st Respondent’s preliminary objection on the issue of want of a board resolution would not have persuaded this court to strike out the Petitioners’ application and Petition herein.

B. PETITIONERS’ CAPACITY TO SUE UNDER VARIOUS ACTS

30. Having said so, a perusal of the Certificates that had been attached to the Petitioners’ application showed that contrary to what the Petitioners had contended, the different entities they were purporting to represent were registered under different provisions or legislation.
31. In fact, the Petitioners association namely Coast Matatus Owners Association Self Help Group was not registered under the Societies Act as it had averred. Rather, it had been registered as a self-help group with the Ministry of Labour, Social Security and Services as Vol/CD/2/0853.
32. Clearly, the different legal entities are governed by different sets of legislation. However, one thing is clear. All proceedings under the different Acts demand that a person instituting proceedings must have *locus standi* to do so on behalf of the entity.
33. In the case of Wumeri Travel Company Limited which was governed by the Companies Act, a Board Resolution was required to authorise the Petitioners to institute the present proceedings on its behalf. Evidently, lack of a Board Resolution clearly meant that the Petitioners had no capacity to sue on behalf of the said limited liability company.
34. Coast Matatu Owners Association Self-Help Group must have had officials to represent it. If the Petitioners argued that it was registered under the Societies Act, then the Societies Act can only sue or be sued through its duly elected officers. In relation to a society, an officer means the president, vice-president, chairman, deputy chairman, secretary or treasurer thereof, or any member of the committee, council or governing body thereof, or any person who holds in the society any office or position analogous to the foregoing, but does not include a trustee, auditor or patron who takes no part in the management of the society.
35. Under the Societies Act, the Petitioners could not therefore file the Petition herein as members of the legal entity. The importance of such office bearers making decisions on the such legal entities is legislated under the provisions of Section 24 of the Societies Act which provides that a person who purports to act as an officer of a registered society, and who has not been duly appointed or elected as an officer of that society commits an offence.
36. The Petitioners did not furnish the court to demonstrate that they were such officers in the Coast Matatus Owners Association Self Help Group. In the absence of such proof, they were mere busy bodies who had no *locus standi* to institute the proceedings herein on behalf of Coast Matatu Owners Association Self-Help Group.
37. In respect of 2TS Savings and Credit Co-operative Society Limited, Taita Taveta Co-operative Savings & Credit Society Limited and Double T Shuttle Savings & Credit Co-operative Society Limited which were registered under the Co-operative Societies Act, legal proceedings could only be instituted by their respective office bearers.
38. In Section 2 of the Co-operative Societies Act, it is clear that an officer includes a chairman, vice-chairman, secretary, treasurer, committee member, employee or any other person empowered under any rules made under this Act, or by-laws of a co-operative society, to give directions in regard to the business of the society.
39. There was no indication that the Petitioners were office bearers of the Co-operative Societies they were purporting to act or that they were members in any of the legal entities they were purporting

- to act for. In any event, as was ably submitted by the 1st Respondent, Regulation No 5 of the National Transport and Safety Authority (Operations of public Service Vehicles) Regulations provide that a person desirous of operating public service vehicles shall be a member of a body corporate connoting that the Petitioners could not institute the proceedings herein on behalf of the legal entities in their personal capacities.
40. In view of the aforesaid, this court could only come to the conclusion that the 1st Petitioner had no *locus standi* to file the proceedings on behalf of the legal entities or in their individual capacities under the various Acts as they did not demonstrate their membership or proof of their being office bearers to any of the said legal entities.
41. The 1st Petitioner could not therefore have purported to swear the Affidavit in support of the Amended Notice of Motion. On the ground that the Petitioners did not have capacity to institute the proceedings herein on behalf of the legal entities under the Co-operative and Societies Act and Companies Act, the court found that it could strike out the Petitioners' Application and Petition as no life could be breathed into them.
42. In arriving at this rare conclusion, this court had at the back of its mind that striking out of proceedings must only be done as a very last resort as was held in the case of **DT Dobie & Co (Kenya) Ltd vs Muchina [1982] KLR** which outlines the duty of the court to sustain rather than terminate suits. It should be a general rule, rather than the exception, that courts should at all times endeavour to consider the merits of a case rather than be too quick to strike out pleadings at an interlocutory stage.
43. Against the backdrop that the Petitioners were purportedly representing a Society, it would be a waste of judicial time to analyse their case as presented as it was not clear what their interest in this case would be. In this respect, this court was persuaded that there was merit in the 1st Respondent's preliminary objection that the Petition and Application offended the provisions of Section 12 of the Co-operative and Societies Act that provides that upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, **to sue and be sued** (emphasis court) and to do all things necessary for the purpose of, or in accordance with, its by-laws and the provisions of the Companies Act that stipulate that a limited company is a body corporate with capacity to sue and to be sued.
44. However, despite the 1st Respondent having made out a very good case for the striking out of the Petitioners' Petition and present application, the court nonetheless deemed it prudent not to make a definite finding under this head at this stage and opted to first consider the merits or otherwise of the Petitioners' proceedings which had also been brought under the provisions of the Constitution of Kenya, 2010.

C. PETITIONERS' CAPACITY TO SUE UNDER THE CONSTITUTION OF KENYA, 2010

45. The 1st Respondent was correct in arguing that the court cannot direct county governments how they are to levy their charges, which the Petitioners do not also object to. Indeed, Article 209(4) of the Constitution of Kenya provides that the national and county governments may impose charges for the services they provide.
46. The Petitioners' grouse was that the 1st Respondent contravened the provisions of:-
- a. **Article 190(2) of the Constitution of Kenya that provides that County governments shall operate financial management systems that comply with any requirements prescribed by national legislation;**
 - b. **Article 196(1)(b) of the Constitution that provides that county governments shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees;**
 - c. **Article 209 (3) that stipulate that the county government can only levy any other tax that is authorised by an Act of Parliament;**
 - d. **Article 209(5) of the Constitution of Kenya that provide that the taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the**

- national mobility of goods, services, capital or labour; and**
- e. Article 210 (1) of the Constitution of Kenya that states that no tax or licensing fee may be imposed, waived or varied except as provided by legislation;**

which it argued must all be done with a view meeting the objectives of devolution as set out in Article 174 of the Constitution of Kenya, 2010.

47. Notably, the Petitioners contended that as at the time of filing the Petition herein, the Finance Bill, 2014 had not been passed. In Paragraph 9(f) of its Replying Affidavit, the 1st Respondent averred that the said Bill had since been passed and as a result, the Petitioners' Petition had been overtaken by events.
48. In response thereto, in Paragraph 8(e) of their Further Affidavit, the Petitioners contended that the 1st Respondent had not stated when the Finance Bill was passed into law and that even if the same had been passed, the same could not act retrospectively.
49. It was their further argument that even if it they did not have *locus standi* to institute the proceedings herein under the Societies Act, which this court found not to have been the position as the different legal entities had been registered under different Statutes, they had a right to defend the Constitution of Kenya by virtue of Articles 22 and 258 of the Constitution of Kenya.
50. They further pointed out that the 1st Petitioner had clearly averred in his Supporting Affidavit that the Petitioners had sued on their own behalf and that of other members of the different legal entities and that even if the Society's name was to be struck out for lack of proper instructions, the Petition and the said Affidavit could survive because of their personalised nature.
51. They referred the court to the case of **Randu Nzai & 2 Others vs The Secretary, Independent Electoral and Boundaries Commission & 9 Others [2012] eKLR** where the court therein held that any person could institute proceedings under Article 22 of the Constitution.
52. These cases were, however, distinguishable from the facts of this case as the Petitioners herein were not contesting the violation of fundamental freedom that fall under the Bill of Rights but rather, they were challenging a contravention of the Constitution of Kenya, 2010 by the Respondents.
53. The more relevant case therefore appeared to have been that of **John Mining Temboi & Another vs Governor of Bungoma County & 17 Others [2014] eKLR** where Mabeja J observed thus:-

“A literal interpretation of Articles 22 and 258, in my view confers upon any person the right to bring an action in more than two (2) instances. Firstly, in the public interest, and secondly, where a breach of the Constitution is threatened in relation to a right or fundamental freedom.”

54. Article 258 of the Constitution of Kenya provides as follows:-

1. **Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or threatened with contravention.**
 2. **In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-**
 - a. **a person acting on behalf of another who cannot act in their own name;**
 - b. **a person acting as a member of, or in the interest of, a group or class of persons;**
 - c. **a person acting in the public interest; or**
 - d. **an association acting in the interest of one or more of its members.**
- bc. The question of whether or not the said Finance Bill was passed, whether or not the same could act retrospectively, whether or not the same was passed without public participation or whether or not injunctive orders could be issued against the 1st Respondent were not matters the court could address at this interlocutory stage and would need to proceed for full trial.
- bd. Indeed, all the issues that were raised by the Petitioners regarding the contravention of the Constitution of Kenya were weighty issues that they could bring on their own behalf and on behalf of others by virtue of Article 258 of the Constitution of Kenya.
- be. These were matters that were within the province of this court. Article 165(3)(d)(ii) of the

Constitution of Kenya provides that the High Court has jurisdiction to hear and determine the question of whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

bf. The court was thus persuaded by the Petitioners that it would not be in the interests of justice to strike out their Application and Petition on the ground that it would ordinarily have upheld the 1st Respondent's preliminary objection that the Petitioners lacked *locus standi* to sue on behalf of others under the various legislation for the reason that the Constitution of Kenya is the supreme law and supersedes all other laws.

II. COMPETENCE OF THE PETITION AND APPLICATION

59. Be that as it may, although the Petitioners were within their right to institute the proceedings herein on their own behalf and on behalf of others under the provisions of Article 258 (2) (b) and (c) of the Constitution of Kenya, the court found that their application and Petition to have been fatally defective and incompetent as the orders they had sought, could not be granted. The reasons have been addressed under the distinct heads shown hereunder.

A. NATURE OF THE ORDERS SOUGHT

60. The 1st Respondent argued that injunctive orders could not be issued against it. It contended that in Section 16 of the Government Proceedings Act Cap 40 (Laws of Kenya), it was a government within the meaning of the said Act.

61. It referred the court to the case of **Kilimanjaro Safari Club Limited vs Governor Kajiado County (in place of County Council of Kajiado) [2014] eKLR** where Ogola J rendered himself as follows:-

“...It is common ground that the Government Proceedings Act came into force before devolution. There is no express term “Government” in the said Act. In that case the term Government as sued in the said Act is inclusive and there is no reason why the County Government should be excluded from the operations of the said Act...I think I have said enough to show that the County Government is “Government” as per the provisions of the Government Proceedings Act. Therefore the provisions of the said Act apply in proceedings brought against the County Governments...”

62. In addressing the meaning of “county government” the court had due regard to Article 1(2) of the Constitution of Kenya which provides that **“The people may exercise their sovereign power wither directly or indirectly through their democratically elected representatives”** which Article 1(4) of the Constitution of Kenya states that such sovereign power shall be exercised both at national and county levels.

63. Under Section 43 of the County Government Act No 17 of 2012, a county government may, pursuant to Article 156(4) of the Constitution request the Attorney-General to represent it in court or in any other legal proceedings to which it is a party other than in criminal proceedings, a role the Attorney-General would take in respect of the national government.

64. It is evident from Article 6 of the Constitution of Kenya that both national and county governments are distinct but interdependent. In this regard, this court therefore found itself in agreement with the 1st Respondent's submissions that it was a “government” within the meaning of a government ascribed under the Government Proceedings Act as was ably pointed out by Ogola J.

65. In this respect, an injunctive order cannot be granted against a county government where a relief has been brought pursuant to Article 258 of the Constitution of Kenya as the question would ordinarily not be one of contravention of the fundamental freedoms that are enshrined in the Bill of Rights. The court took the view that in a case involving a county government, it could only grant declaratory reliefs where proceedings have been filed under the provisions of Article 258 of the Constitution of Kenya.

66. This court's interpretation of this was based on the ground that in any proceedings under Article 22, a court may grant appropriate relief including:-

- a. **A declaration of rights;**
 - b. **An injunction;**
 - c. **A conservatory order;**
 - d. **a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
 - e. **an order for compensation; and**
 - f. **an order of judicial review.**
- 67.If it was the intention of the drafters that an injunction could have been granted in proceedings filed under the provisions of Article 258 of the Constitution of Kenya, then nothing would have been easier than for the legislators to have amended the Government Proceedings Act to exclude county governments from the operation of the said Act and also set out in detail the several reliefs a court could grant in the same manner they had specified for contravention of fundamentals freedoms enshrined in the Bill of Rights under Part 2 of the Constitution of Kenya.
- 68.From the way the reliefs had been drafted, it did appear to this court that the Petitioners were not seeking any writs such as certiorari as there was no administrative decision to quash. The court therefore agreed with the 1st Respondent that an injunctive relief is not one that could be granted against it.
- 69.The court was also of the view that if the proper prayer had been granted at an interlocutory stage, the issue of a proper prayer having been dealt with hereunder, the same would have rendered the Petition spent as the court would have had to consider its merits at an interlocutory stage. The better option would have been for the Petition to proceed for full hearing. That may well have been the reason why on 3rd June 2015, Emukule J who was handling this matter in the High Court of Mombasa directed that the **Petition** (emphasis court) would be determined by way of written submissions.
- 70.Going further, there was no prayer for the relief of an injunction sought in the Petitioners Petition. The Petitioners ought to have sought, in their application, an order for prohibition prohibiting the Respondents and in particular the 1st Respondent from doing any of the acts it was complaining about as this relief for prohibition was well set out in the said Petition.
- 71.The present application had sought injunctive orders against the 1st Respondent while the Petition had sought orders for prohibition among others. Notably, any prayers in an application must always mirror what is the substantive suit. Introducing a prayer for injunction or a mandatory injunction in their present application had no legal basis as the said prayers had no limb to stand on. The Petitioners' application would therefore not succeed solely on this ground.

B. NOTICE UNDER SECTION 13A OF THE GOVERNMENT PROCEEDINGS ACT

- 72.As can be seen hereinabove, the court found that the 1st Respondent was a government within the meaning attached to "government" in the Government Proceedings Act.
- 73.In that respect, the Petitioners were required to issue the 1st Respondent with the mandatory notice under Section 13A of the Government Proceedings Act. The same provides as follows:-

“No proceedings against the Government shall (emphasis court) lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.”

- 74.In the court file, there was no indication whatsoever that the Petitioners had issued such a notice to the 1st Respondent before they commenced the proceedings herein. The absence of such a mandatory notice led this court to come to a firm conclusion that the Petition and the present application were incompetent, fatally and incurably defective.
- 75.It therefore follows that the orders the Petitioners had sought in their present application were null and void *ab initio* and could not be granted.

C. SUPPORTING AFFIDAVITS BY THE 2ND AND 3RD RESPONDENTS

76. There were three (3) Petitioners who had filed the Petition herein. However, only the 1st Petitioner had sworn a Verifying Affidavit. The Petition was therefore irregularly filed. This is, however, not a defect that would have persuaded this court to strike out the proceedings herein as leave could have been granted to the 2nd and 3rd Petitioners to regularise the position.
77. While this court could have overlooked this failure to file additional Verifying Affidavits for being a procedural technicality which could have been remedied by a subsequent act by the 2nd and 3rd Petitioners, it could not ignore that fact that the Petition was not sustainable for want of the mandatory Notice under the provisions of Section 13A of the Government Proceedings Act.

D. AMENDED NOTICE OF MOTION APPLICATION

78. All in all, this court found the Petitioners' Amended Notice of Motion application to have been defective for the reason that they amended their Notice of Motion dated 18th December 2014 without leave of the court. They could not purport to strike out the 3rd Respondent from the proceedings herein merely by striking out its name by red pen or amending the 2nd Respondent's name. Notably, they had referred the 2nd Respondent as **"National Transport and Safety Authority Act."** (emphasis court)
79. Once they served the 1st Respondent on 4th March 2015, they could not amend their Notice of Motion dated and filed 18th December 2014 without leave of the court. It was not sufficient for their advocate to have informed Emukule J that **"they may drop the claim against the 3rd Respondent."**
80. This was not a technicality that could be cured by Article 159 (2)(d) of the Constitution of Kenya. It was a substantive issue. The 3rd Respondent was adversely mentioned in Paragraph 28 of the 1st Petitioner's Affidavit in support of the present application, Ground No (3) on the face of the Certificate of Urgency in support of the said application and Ground No (3) of the said application and ought to have been given an opportunity to defend itself.
81. Procedure demanded that all parties to the suit herein had to be served with the court process to give them an opportunity to respond to the issues they had been accused of doing. The Petitioners failed to serve the 3rd Respondent to their detriment. If for some reason the Petitioners realised that there was no such legal entity such as the 3rd Respondent, it was still incumbent upon them to have still sought leave of the court to delete its name from the proceedings herein.
82. Consequently, no orders that had been sought in the application herein as the said application was amended without leave of the court rendering the same fatally defective and incompetent..

CONCLUSION

83. While the 1st Respondent was not able to satisfy this court that there was merit on all the grounds of its Notice of Preliminary Objection, it nonetheless found that the Petitioners' Petition and application had too many flaws. The holding in the case **DT Dobie & Co (Kenya) Ltd vs Muchina** not to strike out the Petition and application herein could not come to their assistance.
84. The 1st Respondent contended that the legislation on finance was passed and as a result, the Petitioners' Petition had been overtaken by events. The striking out of the Petitioners' Petition and application might well give them an opportunity to consider their next course of action. Indeed, the issues the Petitioners had raised were substantive in nature and ought to be determined on merit.

DISPOSITION

85. For the foregoing reasons, the upshot of this court's ruling was that the Petitioners' Notice of Motion application amended on 11th March 2015 and filed on 12th March 2015 and their Petition that was dated and filed on 18th December 2014 were not merited and the same are hereby dismissed with costs to the 1st and National Transport and Safety Authority which was served with

the present Amended Notice of Motion application showing that it was a party to the proceedings herein when *strictu sensu*, it was not and it filed its Replying Affidavit and Written Submissions.

86. For the avoidance of doubt, the injunctive orders that were issued by Kasango J on 22nd December 2014 are hereby set aside and/or vacated.

87. It is so ordered.

DATED and DELIVERED at VOI this 28th day of April 2016

J. KAMAU

JUDGE