



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
PETITION NO 4 OF 2015

TIMOTHY OTUYA AFUBWA1ST PETITIONER

FRED MARUTI2ND PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF TRANS NZOIA.....1ST RESPONDENT

RATILAL GOSAR DODHIA2ND RESPONDENT

VIPUL RATILAL3RD RESPONDENT

AVIR KANTI SHAH4TH RESPONDENT

J U D G M E N T

1. In their petition dated 3/3/2014 the petitioners are praying for the following orders;-

a) A declaration that the purchase of Land Parcel Number Kitale Municipality Block 7/20 by the 1st Respondent from the 2nd, 3rd and 4th Respondents at Kshs 185 million was unlawful, fraudulent, lacked transparency and hence null and void.

(b) That the said purchase of land be cancelled.

(c) That all monies paid to the 2nd, 3rd and 4th Respondents be refunded to the 1st Respondent.

(d) That costs of this suit be provided for.

2. The petition is brought by the applicants who pride themselves as legitimate voters with in Trans Nzoia and are bringing it on their behalf and that of the public.

They alleged that the 1st Respondent decided to purchase the said parcel of land for purposes of building its referral hospital. The said land was purchased by th e 2nd, 3rd and 4th Respondents from one Benjamin Nyarumbo Oonge for a total purchase consideration of Kshs 26 million in the year 2014.

3. Subsequently in February 2015 the 2nd, 3rd and 4th Respondents sold the same to the 1st Respondent for a total sum of Kshs 185 million which according to the petitioners was extremely high and excessive considering the period between the two sales and that it is the same property.

4. The petitioners did attach a copy of a valuation report by the Ministry of Lands which showed that as at 10/3/2014 the same was valued at Kshs 165 million. They argued that the valuation placed on the property was astronomical given that the same was not fully developed and that if allowed to continue public funds shall have been wasted.
5. According to them there was no public participation as provided under Article 227(1) of the constitution and the whole transaction was shrouded in secrecy.
6. On its part the 1st Respondent did not file any response to the petition and it argued its case through a preliminary objection which was disposed by the Environmental and Land court . Beyond that it did not file any response to the petition and neither did it file any submissions.
7. Neither did the 2nd, 3rd and 4th Respondent file any documents in opposition save their written submissions. In essence the annexures to the petitioners application were not contested.
8. Consequently this court takes the position that the agreement between the 2nd, 3rd and 4th Respondents and the 1st Respondent was valid for all intent and purposes.
9. Apart from the written submissions the counsels for the petitioners as well as the 2nd, 3rd and 4th Respondents did highlight their written submissions each arguing strongly their respective grounds. The petitioners maintained that there was lack of public participation and that unless stopped the people of Trans Nzoia County were going to undergo great loss. On his part counsel for the 2nd – 4th Respondents argued that the petition was totally uncalled for as the County Government Act provides avenues for any aggrieved party to complain.
10. He argued that Section 87 and 88 of the said Act provided clear guidelines. He prayed that the same be dismissed.

ANALYSIS AND DETERMINATION

11. Having perused the entire petition, the submissions as well as the authorities provided by the parties it is clear that the issues to determine include:-

a) Whether the petitioners have *locus standi*.

b) whether there are any constitutional issues.

c. The question of costs

12. The Respondent argue that the petitioners have no *locus standi* as they are not parties to the contract.

On their part they have argued that they are registered voters within Kwanza and Saboti Constituencies which I presume fall within the Trans Nzoia County.

13. That their petition is on behalf of the public and they have invoked the provisions of Article 258(2) (c) and 22(1) of the Constitution. Article 22 deals with the Enforcement of Bill of Rights and provides that every person can bring court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed and the same can be brought by a person acting on behalf of the public This Article in my view is so wide and the drafters of the constitution intended that nobody would be locked out of the mercy sit of justice when his interest or those of the public are threatened.

14. Article 258 of the constitution buttresses the provision of Article 22 above. I do find that the petitioners have *locus standi*. They fall within the class of persons anticipated under Article 258 of the constitution. They have not in my view brought this petition with ulterior motive or bad

faith. What they are saying simply is that the hospital to be build or expanded would be public. The funds used to purchase would be public. If the process is flawed then the Public would obviously suffer. The tax payer eventually would foot the bill.

15.I am particularly perturbed by the fact that the 1st Respondent who is the prime player in the contract failed to file any documents in support or opposition to the petition. For the foregoing reasons the petitioners in my view have *locus standi*.

16.The next issue for determination is whether the petition raises any Constitutional point. According to the Respondents there is nothing Constitutional at all. If anything Section 87 and 88 of the Local Government Act provides clear procedure and guidelines which ought to have been followed by the petitioners.

The petitioners countered this argument by stating that the said County Government Act has not been fully realised as the 1st Respondent is yet to fully give effect to Section 88 thereof.

17.Its worthy to quote the said Section at this juncture.

Section 87 states as follows;

“87 Citizen participation in County Government shall be based upon the following principles;

(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

(b) reasonable access to the process of formulating and implementing policies, laws and regulation including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;

(c) Protection and promotion of the interest and rights of minorities, marginalised groups and communities and their access to relevant information;

(d) Legal standing to interested or affected persons, organizations, and where pertinent , communities, to appeal from or review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth and disadvantaged communities;

(e) reasonable balance in the roles and obligations of county governments and non - state actors in decision - making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;

(f) promotion of public- private partnership, such as joint committees, technical teams and citizen commissions, to encourage direct dialogue and concerted action on sustainable development, and

(g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

88 (1) Citizens have a right to petition the county government on any matter under the responsibility of the county government.

(2) Citizen petitions shall be made in writing to the County government.

3. County legislation shall give further effect to Section 88.”

18. In *Anarita Karimi Njeru V. Rep (No 1) (1976 -80) 1KLR*, the court stated as follows -

“ We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution it is important (if only to ensure justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

19. This of course was pronounced when the pre 2010 Kenya constitution existed. The same was limited in scope. The 2010 Constitution has even opened greater space to approach salient factors one may feel are being violated by bodies or individuals. In this regard the issue raised by the petitioners in my view are within Article 22 and 258 of the constitution and those provided under Section 87 of the County Government Act.

20. The question that comes into my mind is whether in light of the above provisions was it right for the petitioners to have approached this court vide the petition? Wasn't it right for them to have filed their petition via the above provisions of Section 88?

The last question would be answered by another question namely has the County Government of Trans Nzoia given any effect to Section 88?

In other words is there a procedure provided that would ensure that any petition by the citizens such as the petitioners herein would be processed to the end?

21. Apparently from what is available on record there is nothing provided.

22. So hypothetically once the citizen lodges a petition, the 1st Respondent can choose to ignore it and there would be no recourse to the petitioner or the complainant.

23. In the absence of any appropriate legislation which the drafters of Section 88 expected this court and the Constitution for that matter shall be the only arbiter. This in my view was correctly taken by the petitioners.

If peradventure the 1st Respondent would have proved that it had provided a mechanism of how the complaints brought under the provision of Section 87 and 88 above were handled, then perhaps they would have thought otherwise.

Needless to say the Constitution being the Supreme Law of the land clearly opens the door for the petitioners, which door is so wide to permit any complaint to be adjudicated.

24. I am also alive to the fact that where there are appropriate legislation any party complaining ought to resort to it as of first instance before thinking of invoking any provisions of the constitution. In this case section 88 aforesaid seems to bar the petitioners from exercising this right hence the invoking of the provisions of Article 22 and 258 of the Constitution.

25. The other fundamental issue to consider is the question of whether the rights of the petitioners were infringed. The purpose of such petition is not to determine strictly whether there was any legal breaches by the Respondent in their contract but whether they followed the proper laid down procedure in arriving at the same. I note that there is nothing to indicate that there was any public participation as clearly envisaged under Section 87 of the County government Act in particular section 87(a) which talks of “ approval of development proposals, projects and budgets”

26. There is nothing exhibited by the 1st Respondent or all Respondents for that matter indicating that there was such public participation. There is nothing to show that the 1st Respondent deliberated and notified the public at large. The amount of money to be spend in my view is such a colossal sum that there was need to have had input from the public. Whether the value was

right or wrong is not for this court to determine in this petition but again in safeguarding public resources it was important for the public to be put in the picture.

27. Section 115 of the County Government Act provides that;

“Public participation in the County planning processes shall be mandatory and be facilitated through

(a) Mechanism provided for in part VIII of this Act; and

(b) Provisions to the public of clear and unambiguous information on any matter under consideration in the planning processes including -

(I) Clear strategic environmental assessments'

(ii) Clear environmental impact assessment reports

(iii) expected developments outcomes; and

(iv) development options and their cost implications”

2. Each county assembly shall develop laws and regulation giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.”

28. From the above provisions it is clear that the role of the public cannot be ignored. The above provisions are essentially to ensure that a small clique of people need not sit in a small “smokey” room and make wide ranging decisions without the impact of the majority.

29. It was the responsibility of the 1st Respondent to notify all and sundry that in the effort to increase or expand health provisions in the county, it was desirous of acquiring such a facility and that the 2-4th Respondents had one. That should there be any party having any objection then it would be provided a forum to do so. The spirit of public participation is to ensure that everything undertaken by the 1st Respondent was above board. In my view the issue of the value of the property would easily be discussed in another forum where any objections would be accorded an opportunity to challenge and provide any other alternative.

In any case the 1st respondent has a constitutional obligation to provide such health services to its constituents and purchasing such facility would obviously be within its mandate.

30. The upshot of my findings are that there was no such public participation. The authority provided by the petitioners of **Robert N. Gakuru & others Vs Governor Kiambu County and 3 others (2014) eKLR** applies in all fours.

What is appalling and as earlier stated is the lack of adequate response by the respondents to the petition. At worst there ought to have been such evidence from the County Legislative Assembly of the 1st Respondent or such sufficient persuasive evidence.

31. As to the question of costs, it is common knowledge that in such public interest litigation, as long as it is brought in good faith, parties ought to shoulder their costs. As alluded earlier I do not think that this petition is unmeritorious or vexatious. The petitioners have raised a serious public interest matter which ought to be considered and merited intervention by this court. Consequently I find that for the lacklustre response by the Respondent each party shall bear their respective costs.

CONCLUSION

32. The petition is hereby allowed as follows-

(a) The purchase of Land Parcel No Kitale Municipality Block 7/20 by the 1st Respondent from the 2nd, 3rd and 4th Respondents for the sum of shs 185 million is hereby declared null and void and the same is hereby cancelled.

(b) Any monies paid by the 1st Respondent to the 2nd, 3rd and 4th Respondents be refunded to the 1st Respondent unconditionally.

(c) Each party shall bear their respective costs.

Delivered this 23rd day of June, 2016.

H.K. CHEMITEI

JUDGE

No appearance for the Petitioners

NO appearance for the 1st Respondents

Wanyama for the 2nd , 3rd and 4th Respondents

Emily - Court Assistant