



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

PETITION NO. 8 OF 2015

**IN THE MATTER OF ARTICLES 1, 10, 23,28, 43, 46, 165, 174, 196, 201, AND 209(5) OF THE
CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL HUMAN RIGHTS
AND FREEDOMS SECURED AND GUARANTEED**

UNDER ARTICLES 28, 43, 46, OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LAIKIPIA COUNTY FINANCE ACT NO. 2 OF 2013

BETWEEN

JOSEPH KIGURU 1ST PETITIONER

JAMES WANJOHI NDERITU 2ND PETITIONER

STEPEH MURIITHI WAROTHE 3RD PETITIONER

JANE W. WACHIRA 4TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF LAIKIPIA RESPONDENT

JUDGMENT

1. The four petitioners **Joseph Kiguru, James Wanjohi Nderitu, Stephen Muriithi Warothe and Jane Wachira** bring this petition on their behalf and on behalf of the residents of **Kiano Estate, Ngare Narok Estate, Lumumba Estate and Starehe Estate** which are all situated in Nyahururu within the Laikipia County. The petitioners together with those that they represent in this suit bring this matter as tenants of the stated estates. Whilst the County Government of Laikipia the respondent is the owner of those estates.

2. The respondent enacted the Laikipia County Finance Act No. 2 of 2013 by virtue of which it increased the rent payable by the petitioners. The Act provided the increase in Kiano Estate in respect of one bedroom from **Kshs.1,500** to **Kshs.3,000** and in respect of two bedrooms from **Kshs. 2,000** to **Kshs.**

4,000. In the case of Ngare Narok Estate the increase was from **Kshs. 2,000** to **Kshs. 3,500** in respect of room numbers **1- 8** and **Kshs.1,500** to **Kshs. 2,500** in respect of rooms numbers **9-12**. For Lumumba Estate the increase was from **Kshs. 1,300** to **Kshs. 2,500**. The increase for the houses in Starehe Estate was from **Kshs. 500** to **Kshs.1000**.

3. It is the contention of the petitioners that the respondent failed to sufficiently subject the Laikipia Finance Bill 2013 to public participation before the Act was enacted. To that end the petitioners submitted that the enactment of the Act violated the Constitution of Kenya in particular violated Article 1 which article provides that all sovereign power belongs to the people of Kenya and which power the people of Kenya have delegated to the state organs such as the respondents. The petitioners also submitted that the enactment of the Act also violated Article 10 of the Constitution which article provides the national values and principles for governance amongst those principles is the principle of Public Participation. The petitioners also relied on **Article 174(c)** **Article 196 (1)(b)** and **Article 201(a)** which require public participation in the governance of the people of Kenya.

4. It was submitted on behalf of the petitioners that the notice published by the respondents in the **Daily Nation newspaper** on **19th February 2014** was too short a notice to enable the petitioners and other residents of Laikipia County to attend the meeting to discuss the Finance Bill on **22nd February, 2014**. Further that because not all residents of Laikipia County were literate it was submitted that the respondent should have used other means to notify such ones of that meeting. In this regard the petitioner relied on the case **ROBERT N. GAKURU AND OTHERS V. GOVERNOR KIAMBU COUNTY & OTHERS (2014) eKLR**. In that case the court while quoting from another case had this to say:-

“The phrase ‘facilitate public involvement’ is a broad concept, which related to the duty to ensure public participation in the law-making process. The key words in this phrase are ‘facilitate’ and ‘involvement’. To ‘facilitate’ means to ‘make easy or easier’ ‘promote’ or ‘help forward’. The phrase ‘public involvement’ is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of ‘involve’ includes to ‘bring a person into a matter’ while participation is define as ‘(a) taking part with other (in an action or matter); The active involvement of members of a community or organization in decisions which affect them’. According to their plain and ordinary meaning the words public involvement of public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in legislative process.”

5. Having referred the court to the requirement of public participation the petitioners requested the court to consider what the threshold of the such participation should be. The petitioners referred to **sections 87, 88 and 115(2)** of the **County Government Act No. 17 of 2012**. Those sections capture the provisions in the Constitution on public participation. To further their submissions that the respondent ought to have met a higher threshold the petitioners again referred to the case **ROBERT GAKURU & OTHERS (supra)** as follows:-

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively.

..... The County Assemblies ought to do whatever is reasonable to ensure that as 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. I hold that it the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may (sic) fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting station and other avenues where the public are known to converge to disseminate information with

respect to the intended action. (emphasis supplied).

.....The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent without democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the constitution contemplates that the public will participate in the law making process.....”.

6. The petitioner’s submitted that not only did the respondent fail to meet the required threshold of public participation before the enactment of the Act but that at the public participation meeting held on 22nd February 2014 was marred heckling and shouting which disrupted the debate. Further that there were no minutes produced as evidence of such public participation and that the report of the committee of finance of the county government did not suffice. In the petitioners’ view that report failed to be in tandem with the discussion which took place during the public participation.

7. The petitioners further submitted that the houses in the respective estates were in dilapidated state which was a violation of **Article 43 (1)(b)** which provides that every person has right to accessible and adequate housing. It was argued that the conditions of the houses also violated **Article 46(1)** which refers to consumer rights. Further that because the average increase of rent was 88% that increase removed those house from the reach of those who are low income earners.

8. The respondent relied on affidavits of Joel Wamichwa and Josphat Mutwiri and Henry Kimani. The deponents are all within the Laikipia County Government. It was the respondent’s submission that the Finance Bill had been subjected to public participation and scrutiny before enactment into the Act by the Laikipia County Assembly. That the public were invited to a public participation forum by a notice in the Daily Nation of 19th February 2014. That notice also invited members of the public to make submissions in writing. To that end the respondent drew the courts attention to the attendance sheet of that meeting which reflected the first petitioner Joseph Kiguru as a participant of the consultative meeting. Further the respondent referred to the petition dated 3rd March 2014 written by the petitioners to the county assembly and another petition written on behalf of the petitioners by the advocates which was addressed to the Governor of Laikipia County and was dated 21st March 2014. The respondent highlighted a portion of the petitioners’ petition as follows:-

“some of the people who seemed to support the increment during a recent meeting at Nyahururu town hall to discuss the Finance Bill were not tenants and therefore had no moral obligation to express alleged satisfaction with the rent increment.”

9. The respondent relied on that passage as evidence that the petitioners acknowledged that there was debate at the public participation meeting. This debate as submitted by the respondent was also captured by the committee of the finance of the Laikipia County Assembly in their report which they gave to the assembly about the public participation. The report inter alia stated:-

“That the increase on house rent was very high yet the county does not maintain the houses. That the charges be affected after renovations of the houses.”

10. The respondent in its submission drew the courts attention to the facts that after the public participation the proposed rent increase in the Finance Bill were revised downwards and that revision was reflected in the Act.

11. In response to the petitioners’ argument that the respondent did not allow adequate participation to the Finance Bill the respondent submitted that what is reasonable opportunity to participate depends on the circumstances of each case. The respondent relied on the case **ASSOCIATION OF GAMING OPERATORS KENYA & 41 OTHERS V ATTORNEY GENERAL & 4 OTHERS (2014)eKLR** where the court had this to say:-

“29. The petitioners’ complaint is that the National Assembly did not consult with stakeholders in the gaming industry or the public prior to the passing of the bill. The evidence presented is to the contrary. When the Finance Bill 2013 was published it elicited a response from the 1st petitioner who forwarded a memorandum to the committee. The complaint seems to be that they were not given an opportunity to make oral submissions. As the authorities I have cited show, an oral hearing is not necessary in every situation and the legislature has wide latitude to determine how to perceive submissions. Although public participation in the law making process is required, essentially all that is required of the legislature is to provide opportunity for some form of submissions at some point in the legislative process.

30. In my view the opportunity availed to the petitioners to forward their memorandum is ample demonstration that there was public participation. The fact that the outcome did not result in what the petitioners wanted does not necessarily negate public participation.”

12. The respondent also relied on the case of **REPUBLIC V NAIROBI CITY COUNTY EXPARTE PIUS OMOLLO & 6 OTHERS (2015)eKLR** where the court stated:-

“However it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say.”

COURTS ANALYSIS AND DETERMINATION

13. The petitioners by their petition sought the following prayers:-

(a) That a declaration be issued to declare that the Laikipia Finance Act specifically Schedule 11 violated Articles 10, 43, 209(5) and 210 of the Constitution.

(b) That a declaration be issued to declare that Schedule 11 of the Laikipia County Finance Act, 2013 specifically as far as it touches on rent payable in respect of Kiano, Ngare Narok, Lumumba and Starehe estates is unconstitutional to the extent that it purports to exorbitantly increase rent in the absence of proper and sufficient public participation involving the tenants of the said estates.

(c) That a declaration be issued to declare that schedule 11 of the Laikipia County Finance Act, 2013 specifically as far as rent payable in respect of Kiano, Ngare Narok, Lumumba and Starehe Estate is an affront to Article 43 of the Constitution to the extent that the exorbitant rent rates contained therein gravely compromises the petitioner’s right to accessible and affordable housing.

14. The above prayers present the following issues for determination.

- a. **Did the Laikipia county assembly fail to provide opportunity for public participation in its finance bill?**
- b. **Does the Laikipia Finance Act violate the petitioner’s right to access to housing?**

ISSUE (a)

15. As correctly submitted by the petitioner the constitution requires the public be involved or to participate in their governance. This is clearly seen in article 1, 10, 174, 196(1)(b) and 201(a). The Constitution envisages inclusiveness of the members of the public in a manner in which they are governed and in particular in the passing of legislation. The petitioners as can be seen from the petition and their supporting affidavit were aggrieved not in the absolute lack of public participation before the enactment of the act but rather that their grievances were not addressed before that enactment. In the views of the petitioners rent increment as provided in the Act is unjustifiable in view of what they described as deplorable state of the subject houses. The petitioners presented their written petition to the Laikipia County assembly dated 3rd March 2014 and another written on their behalf by their advocate dated 21st march 2014. Further and it was later conceded by the petitioner's that the first petitioner Joseph Kiguru and 21 other tenants of the subject houses attended the public forum where the public participation was conducted. It follows that the respondent did not violate the provisions of the Constitution which require public participation. The public were afforded reasonable opportunity to air their views both orally and in writing in respect of the Laikipia County Finance Bill. In this regard I echo the words of Justice Lenaola in the case **NAIROBI METROPOLITAN PSV SACCOS UNION LTD & 25 OTHERS V COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS**. Where the learned judge stated:-

“Public participation is not the same as saying that the public’s view must prevail”.

16. The fact that the respondent did not fully implement the suggestions of the petitioners does not amount to a lack of public participation.

It follows that issue (a) is found in the negative. That is, the Laikipia county assembly did not violate the constitution in enacting the Finance Act because the public were given adequate opportunity to participate in discussion of the Finance Bill.

ISSUE (b)

17. This issue requires determination whether the Act violates the petitioner's right to housing. The petitioners in advancing their submission on this issue referred to the case **SATROSE AYUMA & 11 OTHERS VS. REGISTERED TRUSTEES OF THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME AND 3 OTHERS NRB HIGH COURT PET NO. 65 OF 2010**. In the Satrose case the facts are at variance with the present petition. In the Satrose case the petitioners were facing eviction and a notice to vacate the premises had been given by the respondent. In this present petition however there is no real threat of eviction unless the petitioners fail to pay their rent in which case the respondent may exercise its rights to seek for their eviction. It follows that the fact that the rent was increased under the Act does not amount to violation of article 43 of the Constitution. What indeed the petitioners seem to invited this court to entertain by filing this petition is for the court to interfere with the mandate of the respondent to set the amount of rent payable. In this regard I wholly rely on the decision of Justice G. ODUNGA in the case of **ROBERT GAKURU & OTHER (Supra)**. The learned judge had this to say:-

“The court however is not entitled to interfere with the tariffs and pricing of services simply on the ground that the court could have decided otherwise since the court ought not to substitute its opinion for that of the county government. As long as the provisions of the constitution and the relevant legal provisions are complied with the court ought not to interfere.”

Justice Lenaola in the case **MT. KENYA BOTTLERS LTD AND OTHER VS. ATTORNEY GENERAL AND OTHERS PETITION NO. 72 OF 2011** in the same vein had this to say:-

“..... This court cannot enter into the arena of deciding what fees is reasonable or more convenient of proper to be levied. That is the exclusive jurisdiction of the first and second

respondent. This court will only intervene if the petitioner’s had demonstrated that in charging the parking fee the respondents have violated the existing law or acted in contravention of the law.”

18. In my view the Laikipia assembly did not violate the constitution in setting the amount of rent payable in the Finance Act for the subject estate. In particular the assembly did not violate Article 43 of the constitution for the reasons given above. It is in view of the above that I respondent in respect of issue **(b)** in the negative.

19. Having determined issue **(a)** and **(b)** in the negative I need to consider the issue of costs. The principal on costs is that they follow the event. The event in this regard is that the petitioners have failed in their claim. There is no basis before this court why the costs should not be ordered to follow the event. The petitioners although in their petition alleged that there was no public participation they were proved wrong by the respondent in its replying affidavit whereby it attached the newspaper notice notifying the public that there would be a forum of public participation of the Finance Bill. However more importantly the respondent proved the petitioners wrong when they attached a signed attendance sheet of the forum which revealed that the first petitioner attended the forum. That revelation was made more poignant because the first petitioner was the one who swore the affidavit in support of the petition on behalf of the other petitioners. He however at the time of swearing that affidavit failed to reveal that he attended the forum. In my view that was less than candid on the part of the petitioners. Further it was later revealed that 21 tenants of the subject houses who also supported this petition attended the forum. It is for that reason that I shall order the petitioners to pay the respondents costs of this petition.

20. I make the following orders:

(a) The petition is hereby dismissed with costs to the respondents.

(b) The conservatory orders issued on 17th September 2014 are hereby vacated.

DATED AND DELIVERED THIS 28TH DAY OF JULY 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Petitioners:

Respondent:

For Petitioners:

For Respondent:

COURT

Judgment read in open court.

MARY KASANGO

JUDGE