



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.603 OF 2014
(AS CONSOLIDATED WITH JR. APP. NOS.6 & 22 OF 2015
AND PETITION NO.63 OF 2015)

BETWEEN

ROBERT N. GAKURU.....1ST PETITIONER

JAMOFASTAR WELFARE ASSOCIATION.....2ND PETITIONER

AND

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. **Petition No.603 of 2014** was consolidated with **J.R. Applications Nos.6 and 22 of 2015** as well as **Petition No.63 of 2015**. All the three matters challenge certain provisions of the **Kiambu County Finance Act, 2014** (hereinafter “the Finance Act”) and in the interim, all Parties agreed that submissions shall be made for a Ruling on the following prayers;

“(1) That pending the hearing and determination of the Consolidated Petition, the implementation of the Kiambu County Finance Act, 2014 with respect to fees, rents and/or levies with respect to slaughterhouses, Madaraka and Jamhuri Markets, residential houses in Thika and carbon dioxide infrastructure maintenance fees be stayed on condition that;

- i. The Petitioners shall continue to pay whatever fees, rents and levies at the rates they have been paying prior to the enactment of the Kiambu Finance Act, 2014.*
- ii. The Petitioners undertake that should the Petition fail, they will pay whatever sum will be outstanding under the Finance Act, 2014 as at that date.”*

2. In that regard, Counsel for the Petitioners, and of relevance to the above orders argued that;

- i. In the process leading to passage of the Finance Act, 2014, there was no public participation contrary to **Articles 10(2) and 174 of the Constitution** as read with **Act No.17 of 2012**.*

- ii. Prior to the **Finance Act** being implemented, it was not gazetted as is the expectation of the law.
- iii. In the case of infrastructure maintenance fee for transport of carbon dioxide within Kiambu County, that the charges levied are unlawful as the roads where the levy is charged are not maintained by the Kiambu County Government. That the charges are also exorbitant and are unlawfully disguised as agricultural tax.
- iv. In some instances, even if public participation before the enactment of the **Finance Act** had been done, there was no notice of the fees that would be charged under it.
3. In addition, Counsel submitted that no prejudice would be caused to the Respondent if the orders sought are granted and that the wider public interest would override the implementation of an allegedly unlawful County Act. In any event, that all the Petitioners and those they represent are prepared to continue paying whatever taxes, charges and levies that they are currently paying in respect of the business(es) they are conducting within the jurisdiction of the County Government of Kiambu.
4. As to the principles applicable in the grant of interim orders in a Constitutional Petition, Counsel argued that an arguable case has been made out and unless the orders are granted, the Petitions and Judicial Review Application would be rendered nugatory. That there is therefore need to preserve the substratum of those cases and in any event, on a balance of convenience, the interests of the public ought to be considered.
5. For the above reasons, the Petitioners/Applicants sought that interim orders on the conditions specified above ought to be granted.
6. On his part, Mr. Wanyama, appearing for the Respondent, the County Government of Kiambu, submitted that there was full compliance with the Constitution when the **Finance Act**, was enacted. That in doing so, the County Government exercised its powers on behalf of the people of Kiambu and in compliance with the objectives of devolution in **Article 174** of the **Constitution** including on “reliable sources of revenue”.
7. In addition, that there was a factual and lawful basis in enactment of the **Finance Act** including on the levies to be charged for use of County roads which are under the management of the County Government under **Schedule 4** of the **Constitution**. In that regard, Mr. Wanyama made reference to **Articles 91, 209** and **210** of the **Constitution** to further make the point that the County Government has a general power to levy taxes and that county Legislation on road taxes overrides any national legislation enacted prior to the coming into place of County Governments.
8. As for the issue of public participation, he submitted that there was a public notice on 5th May 2013 and on other subsequent dates calling for the public’s input in the enactment of the Act and that indeed members of the public gave their views on the subject.
9. On gazettelement, he submitted that the Act was gazetted as **Act No.7** on 25th November 2014 and therefore it exists properly as a County law.
10. He further submitted that the **Kiambu Finance Act, 2013** had been nullified by the High Court and so prejudice would be caused if the **Finance Act, 2014** was stayed because the funds to be raised by levying of taxes have been budgeted for and that the County Government is obligated to raise taxes in such a lawful manner and sum as it deems fit for the benefit of the Public.
11. That therefore the Application is without merit and ought to be dismissed with costs.
12. As can be seen from the substantive prayer set out above, the Petitioners/Applicants seek a stay order on the implementation of the **Finance Act, 2014** with respect to specific levies and charges.

13. In that regard, it must be noted that the Petitions and Judicial Review Applications are partly predicted on the Constitution and partly on **Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules**. In submissions, Counsel did not make any distinction as to what principles of law should be applied in either of the circumstances. For my purposes, I will deal with the issue according to principles known to judicial review and partly also touch on interim reliefs in Constitutional Petitions where there is an existing legislation such as the **Finance Act**.

14. Although Counsel cited no authority on either of the two subjects, I have perused the decisions in **Senator Johnson Muthama vs DPP and Others, Misc. J.R. Appl. No.424 of 2014** and **R vs Cabinet Secretary for Transport and Infrastructure and Others ex-parte Kenya Country Bus Owners Association and Others J.R. Case No.124 of 2014**.

15. In both cases, Odunga J. made findings to the effect that;

- i. When a decision sought to be quashed has been fully implemented, stay orders ought not to be granted as there would be nothing to say. He relied on the decision in **George Wekulo vs LSK & Anor, Kakamega H.C. Misc. Appl.29 of 2015** in making that finding.
- ii. In an application for stay, the Court ought to be careful not to touch on the merits of the main application for judicial review to avoid the awkward situation of pre-judging the substantive proceedings.
- iii. Stay orders are discretionary and their scope and purpose is limited and the learned judge in that regard cited with approval the findings of Maraga J. (as he then was) in **Taib vs Minister for Local Government and Others, Msa Misc. Appl. No.158 of 2006** where he stated thus;

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction ... In judicial review applications the Court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency for the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited ...

He went on to add that;

The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken.”

- iv. Following the decision in **Taib (supra)**, stay orders are granted to ensure that the application for substantive orders should not be rendered nugatory.

16. Regarding stay orders in Constitutional Petitions, in **Gatirau Peter Munya vs Diskson Mwenda Kithinji & Others, Supreme Court Application Number 5 of 2014**, the Supreme Court made a clear differentiation between conservatory orders under the Constitution and orders of injunction or stay. It rendered itself as follows;

““Conservatory Orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning with public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or

“high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

17. I am duly guided and applying all the above principles to the present case, certain glaring facts must be noted and which must lead me to opine as follows;

- i. It is not denied that the Respondent, on the question of public participation, put out notices in daily newspapers including on meetings were held at various places within Kiambu County to prepare for the enactment of the Bill.

At this stage of the proceedings, I am unable to determine conclusively whether or not the level of public participation met the constitutional threshold but it is sufficient that there was some measure of public participation as opposed to none at all.

- ii. The **Finance Act**, was gazetted on 25th November 2014 and so any complaints in that regard cannot have any basis. More fundamentally, the Act has been in place and has been implemented since enactment. Whereas the County Government has the obligation to impose taxes under it, the taxation imposed must be reasonable and I am not prepared to determine the latter issue in interlocutory proceedings.
- iii. On levies for transport of carbon dioxide within Kiambu County, there is no disagreement that the County Government can levy charges where County roads are used to transport carbon dioxide. There is also no dispute that it cannot do so where the roads(s) used are under the maintenance of the National Government. I will not issue any orders with regard to the question whether the specific charges levied are exorbitant or not as to do so would amount to determining the whole dispute.
- iv. As to the prejudice to be caused to either the Petitioner/Applicants or the Respondents if the **Finance Act** is not stayed, I am satisfied that since the Kiambu County Government is mandated by law to levy charges and taxes, it will suffer greater prejudice if it is stopped from doing so. I am aware for example that the Finance 2013 was nullified by the Court and on a balance, discretion should favour the County Government continuing to perform its role as a taxing organ pending an in-depth interrogation of the issues raised in the consolidated Petition. Public interest must therefore override the private interests of private entities set up for private gain.

18. On the whole and noting the principles set out above, I am not satisfied that even with the condition that the Petitioners/Applicants may refund the County Government for any underpayment of taxes should they succeed at the Application as framed and argued should be granted. The County Government can also refund the Applicants any taxes that they may ultimately be found to have overpaid.

19. For the above reasons, I see no merit in the prayers set out above and the same is dismissed.

20. Let costs abide the outcome of the Petitions as consolidated.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MARCH, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Miss Muchina for 1st Respondent

Prof. Kiama for Petitioner

Mr. Wanyama for 2nd Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further order

Submissions on Article 165(4) on 7/4/2015 at 10.30 a.m.

Notice to issue.

ISAAC LENAOLA

JUDGE

27/3/2015