



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.415 OF 2014**

**BETWEEN**

**TYSON NG'ETICH.....1<sup>ST</sup> PETITIONER**

**PETER ARAP LANGAT.....2<sup>ND</sup> PETITIONER**

**AND**

**THE GOVERNOR, BOMET COUNTY GOVERNMENT..... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER, BOMET COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE**

**MEMBER FOR FINANCE, BOMET COUNTY.....3<sup>RD</sup> RESPONDENT**

**BOMET COUNTY GOVERNMENT.....4<sup>TH</sup> RESPONDENT**

**CONTROLLER OF BUDGET.....5<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Petition seeks to impugn the budget making process undertaken by relevant organs of the Bomet County Government for allegedly having flouted the provisions of the Constitution, **The Public Finance Management Act (PFMA) of 2012** and the **County Government Act of 2012**. It has been alleged that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents breached **Article 201** of the **Constitution** by passing a law that was in clear violation of the provisions of **Sections 125, 126, 128, 129, 130 and 131** of **PFMA**. Further, that the County Assembly of Bomet violated **Article 196** of the **Constitution** by not conducting public participation on the budget estimates for the financial year ending 2015 and therefore failed to subject the Appropriation Act to public scrutiny contrary to the provisions of **Article 10(2)** of the **Constitution**.

## The Petitioners' case

2. The facts leading to this Petition are outlined in the Petitioners' Petition dated 18<sup>th</sup> August 2014 as follows;
3. That as at 31<sup>st</sup> August 2013, the County Executive Committee Member for Finance (CECF) had not issued any budget circular detailing the requirements of the budget for the 2014-2015 financial year. That he also did not submit the annual development plan to the County Assembly for approval and the budget estimates presented on 30<sup>th</sup> April 2014 to the County Assembly did not identify the Appropriations by Vote and programme as required by the law. Further, that in fact the revised budget estimates for the County Government were presented to the County Assembly on 5<sup>th</sup> June 2014. On 24<sup>th</sup> June 2014, the County Assembly approved the report of the Budget and Appropriation Committee which proposed amendments to the estimates as submitted by the CECF. It was their case therefore that the CECF ignored the approved budget estimates by the County Assembly and the said estimates were not reflected in the Appropriation Bill Supplement No. 14 of 2014, which was enacted by the County Assembly on 30<sup>th</sup> June 2014. In addition, that the Governor declined to assent to the Appropriation Bill into law and on 2<sup>nd</sup> July 2014, returned it to the Speaker of the County Assembly with a memorandum stating that the Budget estimates had exceeded the budgetary ceilings set by the Commission on Revenue Allocation.
4. Thereafter on 16<sup>th</sup> July 2014, the County Assembly passed the Bill a second time and forwarded it to the Governor who failed to assent to it for the second time. A suit was thereafter filed by the County Assemblies Forum challenging the legality of the ceilings prescribed by the Commission on Revenue Allocation and Controller of Budget. On 25<sup>th</sup> July 2014, the County Assemblies Forum, The Council of Governors, the Commission on Revenue Allocation and Controller of Budget entered into a consent that a vote on account be taken by each County to provide for recurrent expenditure pending the determination of the Petition.
5. The County Assembly on 30<sup>th</sup> June 2014 passed a vote on account on the approved budget estimates allowing for the withdrawal of money to cater for recurrent expenditure. On 22<sup>nd</sup> July 2014, a vote was passed by the County Assembly based on the budget estimates submitted by the CECF. On the same date, the Governor wrote to the Speaker of the County Assembly asking that the Assembly revisit the Appropriation Bill. On 24<sup>th</sup> July 2014, the Deputy Governor wrote to the Speaker of the County Assembly giving notice that the County Government would not pay the salaries of staff of the County Assembly recruited by County Assembly Service Board.
6. On 24<sup>th</sup> July, 2014 the CECF submitted new budget estimates to the Assembly and on 28<sup>th</sup> July 2014, the County Assembly Committee on Budget and Appropriations reported to the Assembly that on the strength of legal advice by the Assembly's Legal Department the new Budget Estimates ought not to be considered as the Appropriation Bill passed by the Assembly had already become law.
7. On 28<sup>th</sup> July, 2014 the Appropriation (Amendment) Bill County Gazette Number 15 was tabled before the County Assembly. The Speaker ruled against the debate of the Bill citing it as unlawful as he considered that an Appropriation Bill can only be amended or modified through a Supplementary Appropriation or nullification by a Court of law. The County Assembly resumed its sittings at 5.00pm and proceeded to approve and pass the Budget Estimates submitted by CECF on 24<sup>th</sup> July 2014. The Assembly thereafter passed the Bomet County Appropriation (Amendment) Bill Supplement No. 14.
8. The Petitioners, based on the above facts, submitted that the estimates approved by the Assembly on 28<sup>th</sup> July, 2014 did not involve public participation and the estimates were prepared contrary to the provisions of the PFMA and that they do not conform with the County Integrated Development Plan and Fiscal Strategy Paper. Further, that the County Appropriations

(Amendment) Bill was not programme-based as the Annual Development Plan for Bomet County had yet to be approved by the County Assembly for purposes of the budget making process as provided under the PFMA. Further, that the discussion of the Appropriation Bill was not on the Order Paper for the afternoon session on 28<sup>th</sup> July 2014 and the Petitioners also claimed that if the law is to be strictly interpreted, Bomet County has two parallel and contradictory appropriation laws for the financial year 2014/2015 thus violating **Article 224** of the **Constitution** and **Section 135(1)** of the **PFMA**. That the two Acts deal with matters which are not devolved such as the creation of the County Higher Education Board and lastly, they submitted that the Appropriation Acts were not gazetted as contemplated under **Article 199(1)** of the **Constitution**.

9. The Petitioners have therefore prayed for the following declarations and orders;

***“(a) A declaration that the Budget making process of Bomet County for the financial year 2014-2015 be declared unlawful and unconstitutional.***

***(b) A declaration that the Bomet County Appropriation Act of 2014 and Bomet County Appropriation [Amendment] Act of 2014 are unprocedural, unconstitutional, null and void.***

***(c) A declaration that the CEC Finance Bomet County and the Governor of Bomet violated the Constitution by hijacking the budget making process for the year 2014-2015.***

***(d) An order that the Bomet County begins the Budget process afresh in full compliance of the Constitution and the Public Finance Management Act, 2012.***

***(e) An order that the Controller of Budget only release one-half of the amount included in the budget estimates submitted to the County Assembly on the 5<sup>th</sup> of June 2014 pending the passing of a new Appropriation Act that complies with the Constitution and statutes.***

***(f) Cost of the Petition be awarded to the Petitioners.***

***(g) Any other or further relief that the Honourable Court may deem just and fit to grant.”***

#### **The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ Case**

10. The Governor, Bomet County, The CECF and the Bomet County Government opposed the Petition through the Affidavit of David Kipyegon Cheruiyot, the CECF, sworn on 11<sup>th</sup> September 2014.

11. Mr. Cheruiyot deponed that he issued the budget circular before 30<sup>th</sup> August 2013 as provided by law setting out the guidelines for the preparation of the budget estimates for the 2014/2015 financial year which were approved by the County Executive Committee. That the Annual Budget Estimates and Appropriation Bill for the financial year 2014/2015 were prepared and passed in the form and according to the procedure prescribed in the Constitution, the PFMA and in line with the budget estimates’ recommendations and circulars from the Controller of Budget and Commission on Revenue Allocation. That they were prepared on programme-based budgeting framework, aligned to the approved Bomet County Integrated Development Plan and the County Fiscal Strategy Paper already approved by the County Assembly.

12. He stated that he did not prepare budget estimates for the County Assembly as alleged by the Petitioner and that he only brought to the attention of the Clerk of the Assembly that the County Assembly Budget estimates had exceeded the ceilings contained in the Controller of Budget’s circular.

13. On the issue of public participation, he submitted that the public was involved in the budget making process and in the enactment of the Bomet County Appropriation Bill No. 14 of 2014,

which was later amended as the Bomet County Appropriation (Amendment) Bill No. 15 of 2014. That advertisements were carried out in local newspapers of national circulation and members of the public were invited to participate in public forums held at the sub-County level to discuss inputs in the Bomet County budget estimates. In addition to the public forums held in the sub-counties, the budget estimates were also posted on the 4<sup>th</sup> Respondent's website and members of the public were invited to make inputs on the budget estimates. He further stated that the Bomet County Budget and Appropriation Committee specifically also carried out public participation at the sub-County level and added that the Bomet County Assembly Budget and Appropriation Committee took into account the views of members of the public before making its recommendations to the County Assembly. Further, that members of the public and the media were not excluded from any of the County Assembly sessions in respect of the Budget Estimates and Appropriation Bill for the financial year 2014/2015.

14. He also contended that he specifically ensured that the Bomet County Government Budget making process was conducted in a manner and within a time frame that was sufficient to permit public participation.
15. Mr. Cheruiyot was emphatic that there is only one Appropriation Bill for Bomet County for the financial year 2014/2015 and that the Appropriation Bill No. 14 of 2014 revealed that it had exceeded the ceilings developed by the Commission on Revenue Allocation and there was therefore need to have it amended. That the Appropriation Bill No. 14 of 2014 had in any event not been approved by the Governor and on 28<sup>th</sup> July, 2014, the Bomet County Assembly passed the Bomet County Appropriation (Amendment) Bill No. 15 of 2014 having taken into account the recommendations of the Controller of Budget. He claimed that there are no legal provisions requiring public participation at the stage of amending the Appropriation Bill.
16. It was the further submission of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents that there was adequate and appropriate public participation prior to the enactment of the Bomet County Appropriation Bill. On that point, they relied on the cases of ***Commission for the Implementation of the Constitution v Parliament of Kenya and 2 others Petition No. 454 of 2012, Moses Munyendo & 908 Others v Attorney General and Another Petition No. 16 of 2013 and Law Society of Kenya v Attorney General Petition No. 312 of 2012***. They thus submitted that they had all complied with the provisions of Article 10, 184 and 196 of the Constitution on public participation, in the governance of Counties and in their legislative making processes.
17. In concluding their case, they submitted that the Petitioners had not set out with some degree of precision the provisions of the Constitution they alleged to have been violated and even if they had done so, they had no *locus standi* to file the Petition. They therefore prayed that the Petition be dismissed with costs to the Respondents.

### **The 2<sup>nd</sup> Respondent's case**

18. The 2<sup>nd</sup> Respondent, the Speaker Bomet County, Mr. G.K Kipngetich, replied to the Petition through his Affidavit sworn on 5<sup>th</sup> September 2015.
19. He stated that the CECF submitted three different budget estimates to the County Assembly regarding the budget for the 2014/2015 financial year on diverse dates i.e firstly on 30<sup>th</sup> April 2014, he forwarded the County Budget Estimates for the Budget Estimates of the County Assembly and those of the County Executive. Secondly, and as a result, on 5<sup>th</sup> June 2014 CEC member for Finance submitted budget estimates to the Budget and Appropriation Committee of the County Assembly. That the estimates submitted on 5<sup>th</sup> June 2014 were not in conformity with the Medium Term County Fiscal Strategy Paper approved by the County Assembly on 14<sup>th</sup> March 2014.

20. That between the 10<sup>th</sup> to the 12<sup>th</sup> of June 2014, the County Committee on Budget and Appropriation held five public participation forums in the five sub-Counties of Bomet County where members of the public gave their views on budget estimates. He stated that he received a letter dated 6<sup>th</sup> June 2014 from the Controller of Budget forwarding a report on the Bomet County draft budget estimates. In that report, it had been observed that the budget should be revised so as to conform to the budget approach and the County Planning Framework. Subsequently, the Budget Appropriation Committee invited the CECF Finance to clarify various aspects of the budget estimates but instead, he sent his Finance Officer who was unable to answer most of the questions put to him. That the County Assembly then invited all the CEC members for a consultative meeting which was held from 16<sup>th</sup> to 17<sup>th</sup> June 2014 and in that meeting, it was agreed that Members would forward an itemized budget for the development expenditure for the budget estimates to fully conform to the requirements of the PFMA and enable the Budget Appropriation Committee to finalize its report. However, the CEC members failed to submit the documents on time forcing the Budget Appropriation Committee to work on the estimates on their own. On 24<sup>th</sup> June 2014, the Budget Appropriation Committee tabled its report before the County Assembly recommending some amendments to the budget estimates which were approved by the County Assembly but the Budget estimates as approved by the County Assembly were not published.
21. On 30<sup>th</sup> June 2014, the Bomet County Appropriation Bill dated 27<sup>th</sup> June 2014 prepared by the County Executive was tabled in the County Assembly and it was passed with amendments in order to bring it into conformity with the Budget Estimates approved by the Assembly. That the Governor then referred the said Bill back to the County Assembly together with a memorandum indicating reasons as to why he could not assent to the Bill as submitted and principally because, in his view, they had not adhered to the budgetary ceilings earlier referred to. On 16<sup>th</sup> July 2014, the County Assembly considered the Memorandum and passed the Bomet County Appropriation Bill 2014 for a second time and it was again submitted to the Governor for assent. On 22<sup>nd</sup> July, 2014 the Governor revisited the issue and stated that he did not agree with the budget estimates approved by the Assembly. Mr. Kipnetich then replied to the Governor's letter informing him of the precarious position the County would find itself in, if it revisited the budget as the Budget Estimates and the Appropriation had been considered twice and the County Assembly had completed its legislative role after passing the Appropriation Bill a second time and had thus exhausted all legal avenues of revisiting the budget. He also informed him that the seven days' period within which he had to assent to the Bill and for it to become law had lapsed and as such the Bill had automatically become an Act by operation of law.
22. Thereafter, on 24<sup>th</sup> July 2014, and despite the above prevailing situation, the CECF submitted fresh budget estimates to the Assembly which was completely different from the estimates approved on 30<sup>th</sup> June 2014. The budget estimates as presented included the budget of the County Assembly and were tabled before the Assembly on 24<sup>th</sup> July 2014 and committed to the Committee of Budget and Appropriation to deliberate and present a report to the Assembly. On 28<sup>th</sup> July 2014, the Committee on Budget and Appropriation presented its report rejecting the purported estimates as being unlawful, un-procedural and having been overtaken by events. That on the same day, despite the absence of proper Budget Estimates, a Bill titled, "**The Bomet County Appropriation (Amendment) Bill**" dated 26<sup>th</sup> July 2014, was tabled before the County Assembly. Mr. Kipnetich stated that he gave a ruling that the proceedings on the purported estimates were unlawful, irregular and not sustainable. The Assembly consequently stood adjourned but that the House convened the same day to deliberate on the Annual Development Plan which did not proceed as it emerged that the Committee on Finance and ICT had sought more time to study the same. The Leader of the Majority in the Assembly then stood up and moved a motion for revisiting the purported budget estimates which was overwhelmingly supported by most members of the County Assembly thus overruling the Speaker's earlier ruling on the matter.
23. Mr. Kipnetich claimed that immediately after the reading of the order to adopt the report of the Budget and Appropriation Committee, a motion was adopted expunging the recommendations by

the Committee hence allowing the purported budget Estimates to be approved as submitted and the County Assembly went on to pass the Bomet County Appropriation (Amendment) Bill, 2014. He admitted that the Amendment Bill was similar to the Bomet County Appropriation Bill that had been rejected twice earlier save that the figures for the County Executive had been further broken down. Further, he admitted that the Budget Estimates approved on 28th July 2014, were not subjected to public participation and did not conform to the County Fiscal Strategy Paper approved by the County Assembly on 13<sup>th</sup> March 2014. That the Bill was taken through the first reading, second reading, committee stage and third reading all in one evening session. In addition, that the mutilation of the Budget and Appropriation Committee report took place while both the Chair and the Vice Chairperson of the Committee were absent and the Governor of Bomet County was following the proceedings as he was within the precincts of the County Assembly.

24. He claimed that the Budget for Bomet County for 2014/2015 financial year which has been uploaded in the Integrated Financial Management System (IFMS) and which is in operation does not bear any resemblance to any budget that has been passed by the Bomet County Assembly.

25. It was also the 2<sup>nd</sup> Respondent's submission that the 5<sup>th</sup> Respondent, the Controller of Budget, has abdicated her constitutional duty by approving withdrawals from the Bomet Revenue Fund without any law or by establishing the legality of that law. That the withdrawals from the Fund had also been approved and made based on a law that has never been gazetted as required by **Article 199** of the **Constitution**.

26. In the end, the 2<sup>nd</sup> Respondent supported the Petition but opposed the Petitioner's prayer for costs and urged that the same be borne by the 3<sup>rd</sup> and 5<sup>th</sup> Respondents as they bear the greatest responsibility for the bungled budget process.

### **The 5<sup>th</sup> and 6<sup>th</sup> Respondents' case**

27. The 5<sup>th</sup> and 6<sup>th</sup> Respondents opposed the Petition through the Affidavit of Waweru Tuti, the Legal Officer in the office of Controller of Budget, sworn on 3<sup>rd</sup> October 2014.

28. He deponed that his office undertook investigations into the budget making process in Bomet County for the financial year 2014/2015 and that he was a member of the investigation team. The team conducted a desk review to examine the policy documents that guided the budget process in Bomet County and from their investigations, they were able to find that the CECF issued a budget circular to all accounting officers of all County entities save the Clerk of the County Assembly who denied having received the circular. He stated that the Circular was not dated and therefore it was impossible to establish whether it was issued within the statutory timeline of 30<sup>th</sup> August 2013. That the circular also complied with the requirements of **Section 128** of **PFMA** but did not outline the procedures to be followed for public participation in the budget making process.

29. He also stated that the Bomet County Government did not prepare the Annual Development Plan as required to guide the budget for the financial year 2014/2015 and that the County Assembly passed the Annual Development Plan on 7<sup>th</sup> August 2014 in breach of the law. Further, that the County Fiscal Strategy Paper approved by the County Assembly differed from the one printed by the CECF. The investigative team could not however establish when the Debt Management Strategy Programme was submitted to the County Assembly or passed by the Assembly but as at 13<sup>th</sup> March, 2014, there was no evidence that it had been submitted to the County Assembly.

30. He deponed that the County submitted the cash flow projections to the 5<sup>th</sup> Respondent on 12<sup>th</sup> June 2014 with copies to the National Treasury and the Intergovernmental Budget and Economic Council as required under **Section 127(1)** of **PFMA** and the CECF had submitted the Budget Estimates for the financial year 2014/2015 while the Clerk of the County Assembly had also submitted the Assembly's Budget Estimates for the same financial year to the County Assembly.

on 30<sup>th</sup> April, 2014 as required by law. He stated that during the investigations, they established that before the submission of the Budget Estimates on 30<sup>th</sup> April 2014, the County Treasury had conducted public participation forums in Chepalungu sub-County at Sigor Market, Bomet East sub-county at Longisa market, Sotik sub-County at Sotik market, Konoin sub-county at Mogogosiek Pavilion and Bomet Central sub-county at Silibwet market center, between 22<sup>nd</sup> April, 2014 and 24<sup>th</sup> April, 2014.

31. It was also his position that the budget estimates submitted on 30<sup>th</sup> April 2014 were a line budget and contravened the provisions of the PFMA and were further not aligned with the County Fiscal Strategy Paper approved by the County Assembly. That the investigations also established that the budget process as stipulated in law was not strictly adhered to in Bomet County as statutory timelines were not met and some policy documents were not prepared and therefore concluded that the Bomet County Appropriation Act, the product of that flawed process, is irregular and therefore its implementation was contrary to the law.
32. On the Amendment of the Appropriation Act, Mr. Waweru stated that an Appropriation Act can only be amended in special circumstances such as those envisaged under **Section 135** of the **PFMA** and by way of a Supplementary Act. Even so, he stated that the Bomet County Appropriation (Amendment) Act did not comply with **Section 135(1)** of the **PFMA** and consequently was not in conformity with the law.
33. Lastly, Mr. Waweru claimed that had the Petitioners raised their complaints with the 5<sup>th</sup> Respondent before commencing the instant proceedings, they would have recommended for further investigations and that the Annual Development Plan would have been put in place and Budget Estimates for the financial year 2014/2015 reviewed with the aim of aligning them with the Annual Development Plan and the County Fiscal Strategy Paper approved by the County Assembly. He stated that the 5<sup>th</sup> Respondent authorizes withdrawal of funds from the County Revenue Fund based on an Appropriation Acts and she acted in good faith and on the assumption that the Appropriation Act had been enacted following proper budget process and evidence of a letter forwarding the Act to the Government Printer presupposes its legality and constitutionality.
34. In its written submissions, the 5<sup>th</sup> Respondent submitted that from the Investigation Report filed in Court by the 5<sup>th</sup> Respondent, it was clear that the Bomet County Budget in issue was not prepared according to the law and the budget process was flawed since the statutory timelines had not been not adhered to prior to its enactment.
35. On the issue of public participation, the 5<sup>th</sup> Respondent submitted that the Investigation Report established that there was public participation in the process of preparation of the budget in Bomet County contrary to the allegation by the Petitioners. They relied on the case of **Association of Gaming Operators Kenya & 41 Others v Attorney General & 3 Others Petition No. 56 of 2014** and **Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (2006) (2) SA 311 (CC)** in that regard.
36. On the issue of two Appropriations Act, the 5<sup>th</sup> Respondent submitted that by operation of the law, it is not practical to have two Appropriation Acts but that an amendment to an existing Act is permissible. Further, that the Appropriation Act can only be amended through a Supplementary Act which is only enacted where the amount appropriated for a certain program is insufficient or money has been withdrawn from the emergency fund. In addition, that under **Section 135** of the **PFMA** an amendment to the Appropriation Act should not exceed 10% of the budget. That the Bomet County Appropriation (Amendment) Act adhered to that provision as the amendment was limited to 4% of the total budget but it did not otherwise comply with **Section 135(1)** of the **PFMA** as earlier stated and consequently it did not comply with the law.
37. On the legal effect of non-compliance with the statutory budgetary timelines and procedures, the

5<sup>th</sup> Respondent submitted that the processes are not fatal and can be cured through the recommendations made in their report. She therefore urged the Court to not to stop the withdrawal of funds to the County but to allow the County Government to correct the anomalies in the process as per the recommendations made within a timeframe and it submitted so because of the dire consequences a decision to suspend funds would have on the County. On that point he relied on the decision of the Supreme Court in **Advisory Opinion Reference No. 2 of 2013, The Speaker of the Senate and Another v The Hon Attorney General & 3 Others**. He therefore urged the Court to specifically order that Counties should adhere to the Constitution and all relevant statutes in the budget making process.

### **Determination**

38. Having set out the Parties' submissions as above, I am of the view that there are only three issues to determine in this Petition and they are as follows;

- i. Whether the Bomet County Appropriation Act 2014 and the Bomet County Appropriation (Amendment) Act 2014 are unprocedural, unconstitutional and therefore null and void.
- ii. Whether the 5<sup>th</sup> Respondent had abdicated her constitutional duty by approving withdrawals based on non-existent law.

iii. What reliefs are available to the Petitioners?

39. Other issues raised in the Petition will be determined within the above three main issues but before I do so, I recall that there were two other issues raised by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent that require determination *in limine*; firstly, that Petitioners have no *locus standi* to institute this Petition and secondly, that the Petition does not meet the constitutional threshold established in the case of **Anarita Karimi v Republic (supra)**, for it has not pleaded with precision how the Constitution has been violated. I shall pause here to address those two issues.

40. On the issue of *locus standi*, **Article 258(2)** of the **Constitution** is to the effect that a person acting on his own behalf or on behalf of another person has a right to institute court proceedings claiming that the Constitution has been violated. In that regard, the Petitioners have filed this Petition claiming a violation of **Articles 10, 174, 176, 196, 199, 201, 202, 203, 207 and 126** of the **Constitution** in respect of the Bomet County budgetary process for the financial year 2014/2015. In the circumstances, I do find that the Petitioners have the *locus standi* to file institute a claim alleging that the Constitution has been violated and there is little more to say on the matter.

41. Secondly, it is now an established principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision the Article (provision) of the Constitution that he alleges to have been violated, the manner in which it has been violated, the facts in support of that allegation and the reliefs he is seeking from the Court - See **Anarita Karimi Njeru v Republic (supra)** and **Trusted Society of Human Rights v Mumo Matemu and Another (2013) e KLR**.

42. The Petitioners in the Petition before me have at pages 2 to 6 of their Petition, set out the legal foundation of the Petition and have set out the specific provisions of the Constitution as well as the PFMA on which the Petition is founded. At pages 6 to 9, they have pleaded the factual background to the Petition and at page 9, they have set out the particulars on the manner in which the Respondents have allegedly acted in violation of the Constitution and lastly, the reliefs they are seeking in this Court are set out at page 10. Looking at the Petition therefore, it is clear that the Petitioner has fulfilled the rule established in **Anarita Karimi Njeru (supra)**. In any event, the Respondents did not seem to have any difficulty in understanding the allegations of violation of the Constitution made by the Petitioners against them and it was on that understanding that they all replied to the Petition and answered the allegations made against them. I am therefore satisfied that the rule in **Anarita Karimi Njeru (supra)** has been met by the Petitioners. Having so held, I

now turn to determine the issues framed elsewhere above.

**Whether the Bomet County Appropriation Act 2014 and the Bomet County Appropriation (Amendment) Act 2014 are unprocedural, unconstitutional and null and void**

43. It appears to me that this Petition spins largely around the issue of constitutionality of the **Bomet County Appropriation Act, 2014** and also the **Bomet County Appropriation (Amendment) Act, 2014**. To determine the constitutionality or otherwise of the said County Statutes, I will have to consider the budgetary process in Bomet County which led to the enactment of the impugned Statutes and determine whether the said process adhered to the provisions of the Constitution and the PFMA. I will also consider the documents prepared in the budgetary process against the yardstick of the strict statutory timeframes envisaged under the PFMA. I will further resolve the issue whether the Bomet County Government has an Appropriation Act governing its financial management for the financial year 2014/2015 and lastly I will address my mind to the issue of public participation as a corollary to the above issue.

44. The starting point would be the provisions of **Section 104(1)(a)(b)** of the **PFMA** which provides that it is the responsibility of the County Treasury to prepare the Annual Budget for a County and co-ordinate the preparation of Estimates of Revenue and Expenditure of a County Government. The procedure for the budgetary process is then provided for in **Section 117** of the **PFMA**. It starts with the preparation of a County Fiscal Strategy Paper which is then submitted for approval to the County Assembly by 28<sup>th</sup> February of each financial year. In preparing the County Fiscal Strategy Paper, the County Treasury is obligated to specify the broad strategic priorities and policy goals that will guide the County Government in preparing its budget for the coming financial year. Thereafter, under **Section 118** of the **PFMA**, the County Treasury prepares a County Budget Review and Outlook Paper in respect of the County for each financial year and submits the paper to the County Executive Committee by 30<sup>th</sup> September of that year. The County Executive Committee is then obligated to discuss that Outlook Paper and after approval, it is laid before the County Assembly before it is published and publicised.

57. The County Government budget process therefore consists of the following stages as stipulated under **Section 125(1)** of the **PFMA**;

“(1) ...

- a. ***Integrated development planning process which shall include both long term and medium term planning;***
- b. ***Planning and establishing financial and economic priorities for the County over the medium term;***
- c. ***Making an overall estimation of the County Government’s revenues and expenditures;***
- d. ***Adoption of County Fiscal Strategy Paper;***
- e. ***Preparing budget estimates for the County Government and submitting estimates to the County Assembly;***
- f. ***Approving of the estimates by the County Assembly;***
- g. ***Enacting an appropriation law and any other laws required to implement the County Government’s budget;***
- h. ***Implementing the County Government’s budget; and***

i. *Accounting for, and evaluating, the County Government's budget revenues and expenditures.*

**(2) *The County Executive Committee member for Finance shall ensure that there is public participation in the budget process.***"

58.As can be seen from the law above, it is within the mandate of the County Treasury, the County Executive and the County Assembly to prepare and approve budgets for a County. However, all the above actions must be taken within the set and strict timelines. In that regard, under the provisions of **Sections 117, 125, 129 and 133** of the **PFMA**, the following instruments must be passed during the budgetary process in each financial year;

- i. On 30<sup>th</sup> August of each year, the County Executive Committee member for finance issues a budget circular to all county entities. **(Section 128 of the PFMA, 2012)**. The circular should contain key dates in the budget cycle; limits of each sector as recommended and key policy areas and issues to be taken into consideration when preparing the budgets.
- ii. By 1<sup>st</sup> September of each year, the County Executive Member for Planning submits an Annual Development Plan to County Assembly for approval, with a copy to the **Commission on Revenue Allocation (CRA)** and the **National Treasury, (Section 126(3) of the PFMA, 2012)**.
- iii. On 30<sup>th</sup> September, the County Executive Member for Finance prepares and submits the County Budget Review and Outlook Paper to the County Executive Committee **(Section 118 PFMA 2012)**.
- iv. The County Treasury shall prepare and submit to the County Executive committee the County Fiscal Strategy Paper (CFSP) for approval and the County Treasury shall submit the approved Fiscal Strategy Paper to the County Assembly, by the 28<sup>th</sup> February of each year. In preparing the CFSP, the County Treasury shall ensure that the CFSP is aligned with the national objectives in the Budget Policy Statement. **(Section 117 PFMA, 2012)**. Not later than fourteen days after submitting the CFSP to the County Assembly, the County Assembly shall consider and may adopt it with or without amendments. The County Treasury must consider any recommendations made by the County Assembly when finalizing the budget proposal for the financial year concerned. The County Treasury shall publish and publicise the County Fiscal Strategy Paper within seven days after it has been submitted to the County Assembly.
- v. On or before the 28<sup>th</sup> February in each year, the County Treasury shall submit to the County Assembly a statement setting out the debt management strategy of the County Government over the medium term with regard to its actual liability and potential liability in respect of loans and its plans for dealing with those liabilities. **(Section 123 PFMA, 2012)**
- vi. Not later than the 15<sup>th</sup> June of each financial year, every County Government shall prepare an annual cash flow projection for the County for the next financial year, and;
- vii. Submit the cash flow projection to the Controller of Budget with copies to the Intergovernmental Budget and Economic Council and the National Treasury.
- viii. Following approval by the County Executive Committee, the County Executive Committee Member for Finance shall by the 30<sup>th</sup> April submit to the County Assembly the budget estimates, supporting documents, and any other Bills required implementing the budget, except the Finance Bill. The CECF ensure that the estimates submitted are in accordance with the resolutions adopted by the County Assembly on the County Fiscal Strategy Paper.
- ix. Each County Assembly Clerk shall prepare and submit to the County Assembly the budget estimates for the County Assembly and a copy shall be submitted to the County Executive Committee Member for finance. **(Section 129(3) PFMA, 2012)**. The County Executive

Committee Member for Finance shall prepare and present his comments on the budget estimates presented by the County Assembly clerk.

- x. The CECF shall within reasonable time after submission publish and publicise the budget estimates.
- xi. Upon approval of the budget estimates by the County Assembly, the County Executive Committee Member for Finance shall prepare and submit a County Appropriation Bill to the County Assembly of the approved estimates.
- xii. The County Assembly shall consider the County Government budget estimates with a view to approving them, with or without amendments, in time for the relevant appropriation law and any other laws required to implement the budget to be passed by the 30<sup>th</sup> June in each year. (**Section 131 PFMA, 2012**)

59. In the above context, I must then determine whether the relevant Committee of the County Assembly discussed and reviewed the Budget Estimates prepared by CECF and whether, subsequently the same were properly tabled before the County Assembly and whether the Assembly then considered the Budget Estimates.

60. From the investigation report produced in evidence by Mr. Waweru Tuti, the following facts are evident;

- a. The CECF issued the budget circular to all accounting officers of the County entities as provided for under **Section 128** of the **PFMA**. However the alleged Circular was not dated and it is difficult to discern that it was issued within the statutory timeframe i.e. by 30<sup>th</sup> August 2013. Its contents however, have complied with the requirements of **Section 128** of the **PFMA** as it included key dates in the budget cycle, limits of each sector as recommended and key policy areas but did not include the procedures to be followed for public participation.
- b. That Bomet County did not prepare the Annual Development Plan within the strict timeline as required by **Section 126** of the **PFMA**, to guide the budget for the Financial Year 2014/2015.
- c. A review of the County Budget Outlook confirms compliance with **Section 118** of **PFMA** as it gave details of the actual fiscal performance against the budget appropriation for the financial year 2012/2013. It also noted that the County Budget Outlook was for the period March to June 2013 as the County Government came into existence on 4<sup>th</sup> March 2013.
- d. The County Fiscal Strategy Paper approved by the County Assembly differed from the one printed by the CECF.
- e. The County Government Debt Management Strategy had not been submitted to the County Assembly as required by **Section 123** of the **PFMA**.
- f. The CECF submitted budget estimates for the County Government on 30<sup>th</sup> April 2014 as required by **Section 129(2) (a)** of the **PFMA** to the Clerk of the County Assembly and the Clerk submitted budget estimates for the County Assembly for the financial year 2014/2015 to the County Assembly with a copy to the CECF as provided by **Section 129 (3)** of the **PFMA**.
- g. There were public participation forums between 22<sup>nd</sup> April to 24<sup>th</sup> April 2014 on the budget estimates.
- h. The budget estimates submitted on 30<sup>th</sup> April 2014 were a line budget and therefore contravened **Section 12** of **Schedule 2** of the **PFMA**. The Budget and Appropriation Committee on 19<sup>th</sup> May, 2014 resolved that the CECF should re-submit a programme-based budget. A programme-based

budget was thereafter resubmitted on 5<sup>th</sup> June 2014 in line with the recommendations made by the Controller of Budget.

61. The above findings of the investigations by the 5<sup>th</sup> Respondent were also confirmed by the Petitioners in the Affidavit of the 1<sup>st</sup> Petitioner as well as the 2<sup>nd</sup> Respondent in the Affidavit of Mr. Kipng'etich. In addition, from the Affidavit of Mr. Kipng'etich, the Speaker of the County Assembly, the following facts are discernible;

- i. After the resubmission of the budget estimates on 5<sup>th</sup> June 2014, a report recommending amendments to the Budget estimates was made by the Budget and Appropriation Committee to the Assembly on 24<sup>th</sup> June 2014. The County Assembly approved the proposed amendments.
- ii. The CECF did not publish the budget estimates as approved by the County Assembly in violation of **Section 129(6)** of the **PFMA**.
- iii. On 30<sup>th</sup> June 2014, the Bomet County Appropriation Bill dated 27<sup>th</sup> June 2014 was tabled in the County Assembly and it was passed with amendments in order to bring it to conformity with the budget estimates approved by the County Assembly.
- iv. On 2<sup>nd</sup> July 2014, the Governor of Bomet County referred the Bomet County Appropriation Bill passed on 30<sup>th</sup> June 2014 back to the County Assembly with a memorandum indicating reasons why he could not assent to it.
- v. The County Assembly considered the Memorandum on 16<sup>th</sup> July 2014 and passed the Bomet County Appropriation Bill, 2014, for a second time without taking into considerations the concerns raised by the Governor.
- vi. The Bill was resent to the Government on 17<sup>th</sup> July 2014 for assent.

62. The Petitioners, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents are therefore in agreement that the Budget process as stipulated in law was not strictly adhered to in Bomet County. The thorny issue however relates to the allegation that there are two Appropriations Acts for the financial year 2014/2015 in Bomet County.

### **Whether there are two Appropriation Acts for Bomet County**

63. In that regard, **Section 129 (7)** of the **PFMA** provides that after the budget estimates are approved by the County Assembly, the CECF shall prepare the Appropriation Bill of the approved estimates. It is not disputed that the Bomet County Appropriation Bill was tabled in the County Assembly on 16<sup>th</sup> July 2014 for the second time without taking into consideration the concerns raised by the Governor. It is also not disputed that the 2<sup>nd</sup> Respondent thereafter immediately submitted the said Bill to the Bomet County Governor for assent but he failed to do so. The question therefore is whether the said Bill had become law?

64. The law on the manner that a County Bill becomes law is contained in **Section 24** of the **County Government Act** and it provides as follows;

***“(1) The Speaker shall, within fourteen days, forward a Bill passed by the County Assembly to the Governor***

***(2) The Governor shall within fourteen days after receipt of a Bill –***

***(a) assent to the Bill; or***

(b) refer the Bill back to the County Assembly with a memorandum outlining reasons for the referral.

(3) If the Governor refers a Bill back to the County Assembly, the County Assembly may, following the appropriate procedures under this Section –

(a) amend the Bill taking into account the issues raised by the Governor; or

(b) pass the Bill without amendment.

(4) If County Assembly amends the Bill taking into consideration the issues raised by the Governor, the Speaker shall within fourteen days submit the Bill to the Governor for assent.

(5) If a County Assembly passes the Bill a second time, without amendment, or with amendments which do not accommodate the Governor's concerns by a vote supported by two-thirds of members of the County Assembly, the Speaker shall within seven days re-submit the Bill to the Governor and the Governor shall within seven days assent to the Bill.

(6) If the Governor does not assent to a Bill or refer it back within the period referred to under this Section, the Bill shall be taken to have been assented to on the expiry of that period." (Emphasis added)

65. Applying the law above in the instant Petition, it is clear that the Speaker of the County Assembly should have forwarded to the Governor the Appropriation Bill within seven days of its assent and the Governor had seven days upon receipt of the Bill to assent it to the law. I have seen a letter dated 17<sup>th</sup> July 2014 and annexed to the Affidavit of Mr. Kipyegon forwarding the Bill to the Governor. That letter was received in the office of the Governor on 18<sup>th</sup> July 2014. The letter reads thus;

*"Ref. BCA/GOV/13/8/14*

*17<sup>th</sup> July, 2014*

*The Governor*

*County Government of Bomet*

*P.O. Box 19-20400*

**BOMET.**

*Dear*

**REF: THE BOMET COUNTY APPROPRIATION BILL 2011**

*The aforementioned subject matter refers.*

*Following the tabling of the memorandum urging the County Assembly to reconsider the appropriation bill on the grounds set out therein, the County Assembly at its Morning Sitting of the 16<sup>th</sup> July 2014 at 9.00 a.m. resolved to reject the memorandum and subsequently passed the Bill without any amendments. Attached herein are the votes and proceedings of the hansard and the order*

*paper of the sitting.*

*I therefore forward the same for your further action.*

*Yours*

**SIGNED**

**G.K. KIPNG'ETICH**

**SPEAKER OF THE COUNTY ASSEMBLY**

66. Upon receipt of the Bill, the Governor did not assent to the Bill but referred it back to the Assembly. In his letter dated 22<sup>nd</sup> July 2014, he therefore wrote as follows;

*“22<sup>nd</sup> July, 2014*

*Hon. Speaker*

*County Assembly of Bomet*

*P.O. Box 590-20400*

**BOMET.**

*Dear*

**VOTE ON ACCOUNT**

*The Assembly in its sitting on the 30<sup>th</sup> June 2014 passed the Appropriation Bill 2014 with amendments. The Assembly on the same day passed the Vote on account based on the estimates done and passed by the Assembly. The same was done without regard to the PMF Act specifically Section 134. Accordingly the estimates attached are not the estimates the Executive forwarded to the Assembly as required by the said Section.*

*Section 134(2)(b) of the Public financial Management Act which provides thus;*

*“(b) Money withdrawn under sub-section (1) may not exceed, in total, one-half of the amount included in the estimates of expenditure submitted to the County Assembly for that year”.*

*It is my contention that the Assembly did not correctly interpret the law and the circular issued by Commission on Revenue Allocation setting the ceilings for Assemblies.*

*I therefore do not agree with the adjusted budget and the reduction on budget submitted based on the exact figures in the critical sectors such as health, Roads, Education and Social Services. The thirty Eight Million Shillings reduced in Health for example, is equivalent to the cost of drugs for a whole quarter. On roads there is a likelihood of heavy rains this season and roads will require heavy maintenance that will cost the County substantial sums of money. The Education and Social sectors are based on actual figures that cannot be reduced. (Attached please find the tabulated list of differences made on the submitted budget).*

*The Assembly therefore should note the following:*

1. *That the allocation to the County Assembly remain at 265 Million as per the ceiling set by CRA and not 699 as passed by the Assembly.*
2. *That in the last financial year the Assembly spent only 256 Million shillings and were able to execute its functions effectively;*
3. *Employment of staff should be maintained at the same figure of 32 employees as captured in the last Financial year budget which is inclusive of subordinate staff;*
4. *That Car loan and Mortgages and building of the chamber and other development is outside the 265 Million ceiling and will be dealt with separately;*
5. *That in the appropriation Bill, the recurrent amount for the Assembly of Kshs.265 Million is already factored in the total figure of R 101 because salaries and allowances are maintained in the County centrally and therefore the figure contained in R103 and R104 has not been included in the final tally of 4.6 billion.*

*In view of the foregoing the Assembly ought to pass a vote on account that tallies with the estimates submitted.*

*However, I still believe that the Assembly should pass the Appropriation Bill because it would be selfish for the people of Bomet not to receive services while we are paid salaries. Service in the critical sectors should continue. Drugs in our hospitals are getting depleted. Old people are expecting to be paid and many other sectors will greatly suffered if the Bill is not passed. I therefore urge the Assembly to consider passing the Bill.*

**SIGNED**

**H.E. ISAAC RUTO, EGH**

**GOVERNOR**

**COUNTY GOVERNMENT OF BOMET.”**

67.The above letter was received by the County Assembly on 23<sup>rd</sup> July 2014 and the Speaker replied through a letter of the same date explaining the chronology of events leading to the enactment of the Appropriation Bill and the delays caused by the County Executive on the same. The Governor replied in a letter dated 24<sup>th</sup> July 2014 forwarding adjusted budget estimates for consideration by the County Assembly. The Speaker responded through a letter dated 28<sup>th</sup> July 2014 explaining to the Governor that the Bill had already become law once it was passed for the second time by the County Assembly.

68.At this juncture, I must revisit my initial question; had the Bill become law once the County Assembly passed it a second time and the Governor refused to assent to it but instead sent his letter of 22<sup>nd</sup> July 2014? The answer to that question is straight forward; the Bill was first passed on 30<sup>th</sup> June 2014. It was sent to the Governor for assent but on 2<sup>nd</sup> July 2014, he declined to do so but instead sent it back with a memorandum explaining his reasons for not passing it. On 16<sup>th</sup> July 2014, the County Assembly rejected his reasons for non-assent and passed the Bill for a second time and on 17<sup>th</sup> July 2014, it was sent back to the Governor for assent, a second time. So far as I can see, all those processes were well within the provisions of **Section 24(1) – (4)** of the **County Government Act**. Once it was sent to him a second time, then under Section 24(5) of the said, he had seven days to assent to it and failure to do so would mean that the Bill would become law under **Section 24(6)** aforesaid.

69.Because the Governor did not assent to the Bill by 25<sup>th</sup> July 2014 but instead chose to write his letter of 22<sup>nd</sup> July 2014 in rejection of the Bill, there is no doubt that the Bill became law by that date subject to what I shall say later about its gazettelement or lack of thereof.

70. But that is not the end of the matter because fresh budget estimates were submitted to the County Assembly on 24<sup>th</sup> July 2014 including those of the County Assembly prepared allegedly without the involvement of the Clerk. The said budget estimates were then committed to the Committee on Budget and Appropriations. On 28<sup>th</sup> July 2014, there was a special sitting of the Assembly whereupon the Committee on Budget and Appropriations presented its report rejecting the estimates as being unlawful. On the same date, a Bill titled Bomet County Appropriation (Amendment) Bill 2014 was tabled before the County Assembly and the Speaker gave his ruling that there was already in place an Appropriation Act and as such there could only be an amendment to that Act through a Supplementary Appropriation Bill.
71. From the facts on record, it is evident that the County Assembly reconvened during the course of the day and the Leader of the Majority moved a motion for revisiting the Budget Estimates which motion was overwhelmingly supported by a majority of the members. The Budget and Appropriation Committee's report and its recommendations earlier tabled was expunged and the Budget Estimates were approved as submitted and the Bomet County Appropriation (Amendment) Bill, 2014 was purportedly passed.
72. Having found that the Bomet County Appropriation Bill originally passed on 16<sup>th</sup> July 2014, although not assented to, had become law, can it therefore be said that there are two Appropriations Act for Bomet County?
73. My reading of **Section 24** of the **County Government Act** would show that the said law envisaged a situation where the Governor could on two occasions refuse to assent to a Bill becoming law. However, on the second occasion, he has no choice but to assent to a Bill referred to him "without amendment or with amendments which do not accommodate" his concerns and which Bill has been supported by two-thirds of members of the County Assembly. Failure to do so would render the Bill as law by virtue of the provisions of **Section 24(6)** of the **County Government Act**. The obvious reason for that provision is that there must be an end to the legislative process and more specifically, when it relates to the budget making process which as shown above, has strict timeframes embedded in the law.
74. I should pause here and state that the Governor of Bomet County's objection to the Appropriation was partly because of the failure by the County Assembly to adhere to the ceilings set by the Commission on Revenue Allocation and his insistence that the Assembly ought to pass a vote on account that tallies with the estimates submitted.
75. The Court in **Speaker County Assembly of Nakuru & 46 Others v The Commission of Revenue Allocation & 2 Others Petition No.368 of 2014** addressed the issue of the CRA ceilings and the Governor's position was vindicated but that is all that can be said of his decision to act as if he had the mandate to superintend, supervise or direct the County Assembly on the exact law to enact. Although a Governor is entitled to disagree with the County Assembly, he must do so within the law as set out in **Sections 24** and **30** of the **County Government Act** and that is by a memorandum outlining his reasons for referral of a Bill back to the Assembly.
76. Having so said, what options then did the County Assembly have when it received the fresh budget estimates on 24<sup>th</sup> July 2014? According to the 2<sup>nd</sup> Respondent, there was no other option available because there was already in place an Appropriation Act and as such there could only be an amendment of that Act through a supplementary appropriation. This argument, as attractive as it may sound, is only partly true. I say so because a reading of **Section 135** of the **PFMA** reveals that it provides for supplementary budgets. For avoidance of doubt, the Section provides thus;

***“(1) A County Government may spend money that has not been appropriated if the amount appropriated for any purpose under the County Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act, or money has been withdrawn from the County Government Emergency Fund.***

- (2) *A County Government shall submit a supplementary budget in support of the additional expenditure for authority for spending under subsection (1).*
- (3) *In complying with subsection (2), a County Government shall describe how the additional expenditure relates to the fiscal responsibility principles and financial objectives.*
- (4) *Except as provided by subsection (5), the approval of the County Assembly for any spending under this Section shall be sought within two months after the first withdrawal of the money.*
- (5) *If the County Assembly is not sitting during the time contemplated in subsection (4), or is sitting but adjourns before approval has been sought, approval shall be sought within fourteen days after it next sits.*
- (6) *when the County Assembly has approved spending under subsection (2), a supplementary Appropriation Bill shall be introduced for the appropriation of the money spent.*
- (7) *In any financial year, the County Government may not spend under this Section more than ten percent of the amount appropriated by the County Assembly for that year unless that County Assembly has, in special circumstances, approved a higher percentage.”*

77. From the facts before me, which in any event are not controverted, it appears that the budgetary process was in fact restarted afresh through submission of fresh budget estimates which were referred to the Committee on Budget and Appropriation which in its report tabled on 28<sup>th</sup> July 2014 rejected the estimates. However, the County Assembly Hansard proceedings produced in evidence by the 2<sup>nd</sup> Respondent demonstrate that on the same day, the Leader of the Majority moved a motion for revisiting the Budget Estimates which motion was overwhelmingly supported by a majority of the members. The Budget and Appropriation Committee Report tabled earlier in the House was expunged and the Budget Estimates were approved as submitted and the Bomet County Appropriation (Amendment) Bill, 2014 was passed.

78. It is unmistakable to me that the approach taken to restart the budget process with fresh estimates appeared to have been the most convenient one in the political circumstances obtaining at that time. However, the title of the end product of that process being Bomet County Appropriation (Amendment) Bill was misplaced. I say so because once I have found that the Appropriation Bill had become law, it is inconceivable that before the said Bill had properly become a County Act and monies expended under it, an amendment as envisaged by **Section 135** of the **PFMA** could properly be made.

79. The above finding would then lead me to another issue raised regarding the legality of the **Bomet County (Appropriation) Act**.

### **Public Participation**

80. It has been alleged that both the Bomet County Appropriation and Appropriation (Amendment) Acts were enacted without public participation. On their part, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that public participation was unnecessary in the passage of the Amendment Bill since it was merely an amendment to an existing Act and that in any event there was public participation before the passage of the **Appropriation Act**.

81. Public participation as a national value under Article 10 of the Constitution is an expression of the sovereignty of the people articulated under **Article 1** of the **Constitution**. **Article 185** vests legislative authority of a County Government in a County Assembly. **Article 196 (1) (b)** obligates a County Assembly to facilitate public participation in its legislative business. Public participation in matters of public finance is also reinforced under **Article 201 (a)** in that it provides that there shall be openness and accountability, including public participation in financial matters. The **County Government Act** has also set out elaborate parameters on public participation at the

County level.

82. The High Court has also held that the mode and the manner of giving effect to public participation will vary from case to case and there must be some clear and reasonable level of participation afforded to the public - See the decisions in *Nairobi Metropolitan PSVs Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others (2013) e KLR*; *Moses Munyendo & 908 Others v Attorney General and Another (2013) e KLR*; *Richard Dickson Ogendo & 2 Others v Attorney General & 5 Others (2014) e KLR*; and *Robert Gakuru & Others v Governor Kiambu County & 3 Others (2014) e KLR*.

83. The evidence before me is clear that there was public participation in the budget estimates forming the Appropriation Act which became law on 25<sup>th</sup> July 2014. Indeed, the 5<sup>th</sup> Respondent in his investigative report confirmed that fact and concluded firstly, that between 22<sup>nd</sup> April 2014 and 24<sup>th</sup> April, 2014, the County Treasury conducted public participation forums in Chepalungu sub-County at Sigor Market, Bomet East sub-County at Longisa market, Sotik sub-County at Sotik market, Konion sub-County at Mogogosiek pavilion and Bomet Central sub-County at Silibwet market center on budget estimates and views of the public were collected which were taken into account during the preparation of the Budget Estimates tabled before the County Assembly. Similarly, between the 10<sup>th</sup> and the 12<sup>th</sup> of June 2014, the Committee on Budget and Appropriation held five public participation forums in the five sub-counties of Bomet County where members of the public gave their views on budget estimates. I have seen the list of attendees in those forums and the newspaper advertisements informing the members of the public about the planned public forums and I have no reason to disbelieve the fact that indeed those meetings were held.

77. However, that does not dispose of the issue in question. There is still the allegation that the Budget Estimates presented on 24<sup>th</sup> July 2014 and later passed in the Bomet County Appropriation (Amendment) Bill were not subjected to public participation. In that regard, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent maintained that the estimates were mere amendments and as such did not require public participation afresh. To answer address that question, I shall revert to the averments made by Mr. Kipngetich at paragraph 63 of his affidavit that;

***“The Bomet County Appropriation (Amendment) Bill is indeed similar to the Bomet County Appropriation Bill that was rejected two times save that the figures for the executive were broken down”.***

***And that therefore public participation was not necessary in the passage of the former Bill.***

78. That statement is of no consequence since the Appropriation (Amendment) Act was unlawful in any event but turning back to the concept of public participation, in *Law Society of Kenya v Attorney General Nairobi Petition No.318 of 2012 [2013] e KLR* the Court observed that,

***“In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute.”***

79. The words of this Court in the case of *The Institute of Social Accountability and Another v National Assembly Petition No.71 of 2013* also ring true. The Court stated thus;

***“We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board.***

***The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation.”***

80. I adopt the above findings and in the unique circumstances of this Petition I am unable to find that there was no public participation to the extent alleged by the Petitioners and the 2<sup>nd</sup> Respondent and specifically with regard to the enactment of the Appropriation Act.

81. In conclusion and in returning to the question posed earlier, it is obvious by now that only the Bomet County **Appropriation Act, 2014** and not the **Appropriation (Amendment) Act, 2014** that was properly passed subject to what I shall later and to that extent, it is erroneous to argue that there were two Appropriation Acts for Bomet County

**II. Whether the 5<sup>th</sup> Respondent had abdicated her constitutional duty by approving withdrawals based on non-existent law.**

82. It was submitted that the 5<sup>th</sup> Respondent abdicated her constitutional duty by approving withdrawals from the County Revenue Fund based on non-existent law. The 5<sup>th</sup> Respondent while not really challenging that position, presented what I would term as mitigating factors against any harsh decision that may be taken against her or the budget of Bomet County.

83. The 5<sup>th</sup> Respondent claimed that there exists a Bomet County Appropriation Act properly placed before me law by operation of law. I have already stated elsewhere above that indeed that is the correct position. I have also found, based on my understanding of the facts before me as applied to the law, that the Bomet County Appropriation (Amendment) Bill was not lawful.

84. However, **Article 199 (1)** of the **Constitution** is crystal clear that; **“a County Legislation does not take effect unless published in the Gazette”**. In addition, **Section 25 (1)** and **(2)** of the **County Government Act** stipulates that;

***“25.(1) A legislation passed by the County Assembly and assented to by the governor shall be published in the County Gazette and Kenya Gazette within seven days after assent.***

***(2) Subject to subsection (3), the County Assembly legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.”***

85. The law is therefore clear that a County legislation takes effect upon gazettelement. From the evidence before me, the Appropriation Act aforesaid was never gazetted and that strictly means that there was no law that could be used to implement the budget for Bomet County for the 2014/2015 financial year. However, it is true that a budget for the 2014/2015 financial year for Bomet County was uploaded in the Integrated Financial Management System and has subsequently been implemented by the 5<sup>th</sup> Respondent despite the fact of non-gazettelement of the said Appropriation law.

84. In that regard, under the provisions of **Article 228(4)** of the **Constitution**, the mandate of the 5<sup>th</sup> Respondent is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds under **Articles 204, 206** and **207** of the **Constitution**. Under **Article 228(5)**, the Controller of Budget shall not approve any withdrawal from a public fund unless that withdrawal is authorized by law. Further, under **Section 109(6)** of the **PFMA**, the County Treasury shall obtain the approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of an Act of the County Assembly appropriating money for a public purpose, an Act of Parliament or county legislation that imposes a charge on that fund or in accordance with the provision of **Section 134** and **135** of the **PFMA**. The question in my mind therefore is how could the 5<sup>th</sup> Respondent approve withdrawals from the County Revenue Fund for Bomet County without a properly

gazetted Appropriation Act? I do not have an answer to that question save for what Mr. Waweru stated; that he had seen a letter indicating that the Appropriation Act as enacted on 25<sup>th</sup> July 2014 had been sent to the Government Printer for publication and there was therefore a presumption of gazettment. He failed to produce any Gazette Notice to support that presumption.

85. It is of course the responsibility of the 5<sup>th</sup> Respondent to only authorize withdrawals from the County Revenue Fund if the law and the budgetary process as envisaged by the **Constitution** and the **Public Finance Management Act, 2012** have been adhered to. In instances where the 5<sup>th</sup> Respondent is of the opinion that the budget process leading to the enactment of Appropriation Act has been flawed, it must seek a remedy from the Court as the ultimate guardian of the Constitution and not authorize a withdrawal that is based on an equally flawed legislation.

86. What then is the effect of non-gazettment of a County legislation? I have stated elsewhere above that under **Article 199(1)** of the **Constitution**, a County legislation “*does not take effect*” unless published in the Gazette. What does “*take effect*” mean?

**Black’s Law Dictionary, Eighth Edition** defines “*effect*”, if taken as a noun, as “*a result, outcome or consequence*”. If taken as a verb, it means “*to bring about; to make happen*” and more importantly, “*effective*” is defined as “*(of a statute, order or contract etc) in an operation at a given time <effective June 1>*”. “*Effective date*” is also defined as “*the date on which a statute, contract ... becomes enforceable or otherwise takes effect, which sometimes differs from the date on which it was enacted or signed*”. (Emphasis added)

87. I need not go beyond the above definitions because **Article 199(1)** envisages both a date of enactment of a law and the date it takes effect. In the present circumstances, there is all evidence that the Appropriation Act was enacted once it became law by the failure of the Governor to assent to it. However, it could only become enforceable once it was gazetted. “*Enforcement*” means “*the act or process of compelling compliance with a law, mandate, command, decree or agreement*” – See **Black’s Law Dictionary**.

88. Without the Appropriation Act being properly gazetted, it could not be acted upon and in effect no withdrawal of public funds could be properly made under it. It may be argued that gazettment is a mere formality but I disagree; a constitutional obligation cannot be a formality and the 5<sup>th</sup> Respondent had no lawful reason to act without the Act being gazetted. That fact renders the Appropriation Act unconstitutional to the extent that it was implemented in breach of **Article 199(1)** of the **Constitution**.

89. In concluding this aspect of the Petition, the office of the 5<sup>th</sup> Respondent is the organ constitutionally created to ensure that the principles of public finance which are stipulated under **Article 201** of the **Constitution** are observed and fulfilled. It must therefore be very keen in performing its function as the watchdog of the people on public finance. Had it observed its duties faithfully, this Petition would perhaps have been avoided and saved the taxpayers money that has already been expended in implementing a budget without a properly effective law in support thereof.

90. Having said so, what remedies are therefore available in this Petition?

### **III. Reliefs available to the Petitioners**

86. I have come to the end of this judgment, but, I am in the very untidy position of having to craft appropriate remedies given the flaws in the Bomet County Budgetary process and the blatant violations of the Constitution and the PFMA as I have shown above.

87. I say so because on the one hand I am concerned about the failure to adhere to the Constitution and the law in preparing the Bomet County budget, and on the other hand I am aware that Bomet

County has implemented the projects it set out to undertake in the 2014/2015 financial year and the County Government has spent money in that regard. I should also not forget the fact that the financial year is coming to an end in a few weeks' time.

88. In addition, I also have in mind the submission made by the 5<sup>th</sup> Respondent in which she urged the Court not to stop funds to the County but allow the County Government to correct the anomalies in the budgetary process in accordance with recommendations made in her report. She also urged the Court in that regard to consider the dire consequences any adverse orders may have on the County Government and the people of Bomet.

89. In the above context therefore and granting appropriate remedies, the beginning would be by recourse to the prayers sought in the Petition.

90. Prayer (a) was worded as follows;

**a. A declaration that the Budget making process of Bomet County for the financial year 2014-2015 be declared unlawful and unconstitutional.**

For reasons given above, the prayer must be granted as prayed.

91. Prayer (b) was worded as follows;

**(b) A declaration that the Bomet County Appropriation Act of 2014 and Bomet County Appropriation [Amendment] Act of 2014 are unprocedural, unconstitutional, null and void.**

Like prayer (a), this prayer must be granted wholly.

92. Prayer (c) was worded thus;

**(c) A declaration that the CEC Finance Bomet County and the Governor of Bomet violated the Constitution by hijacking the budget making process for the year 2014-2015.**

93. Whereas I have found fault on the part of the CECF and the Governor, it cannot be said that they hijacked the budget making process because the greater failing in that process is reserved for every player in the chain of events and I have given the reasons why. The prayer is consequently disallowed and is dismissed.

94. Prayer (d) was worded as follows;

**(d) An order that the Bomet County begins the Budget process afresh in full compliance of the Constitution and the Public Finance Management Act, 2012.**

This prayer, attractive as it sounds, is neither lawful nor feasible taking into account the budgetary process and the relevant statutory timelines. It is therefore disallowed and is consequently dismissed.

97. Prayer (e) was worded thus;

**(e) An order that the Controller of Budget only release one-half of the amount included in the budget estimates submitted to the County Assembly on the 5<sup>th</sup> of June 2014 pending the passing of a new Appropriation Act that complies with the Constitution and statutes.**

This prayer was partly the subject of this Court's preliminary consent orders in **Speaker County Assembly of Nakuru & 46 Others v The Commission of Revenue Allocation & 2 Others Petition No.368 of 2014**. It has also been overtaken by events and I am not inclined to grant it.

98. As for costs, I see no benefit that the Petitioners intended to obtain by filing the Petition and so I shall

not allow costs to be paid from public coffers for public-spirited litigants.

99. Prayer (g) was worded thus;

***(g) Any other or further relief that the Honourable Court may deem just and fit to grant.***

100. I am unable to grant this prayer as it is unclear what further relief this Court can grant in the circumstances of this Petition.

### **Conclusion**

101. It is now obvious that while the Budgetary process in the Bomet County Government for the financial year 2014-2015 was flawed, the said Government has continued to expend public money on the basis of that flawed law. Each player in that process i.e. the County Executive Committee Member for Finance, the Clerk to the County Assembly, the Speaker of the County Assembly, the County Assembly and the Governor have a load to carry in that regard and none should point a finger at another. Despite efforts to ameliorate the situation, the Controller of Budget cannot escape blame either.

102. This Court will not tire in reminding all and sundry in Kenya that our nascent Constitution requires warriors of Constitutionalism whose fire in the belly is to guard it from attack and from vultures intent on sucking its succulent honey by graft, short cuts and impunity. It speaks and acts through its guardian, the Courts, and no matter the culprit, its teeth will bite when violated or threatened with violation.

103. Let the lesson of Bomet County seen in this Petition, be a lesson that devolution was crafted into a living Constitution and no County should act outside the demands and expectations of the Constitution and laws enacted under it. The sanctions for such action may be elsewhere but this judgment may be used by the Petitioners to obtain those sanctions. I digress.

### **Final orders**

104. The final orders to be made are as follows;

- 1. A declaration is hereby made that the Budget making process of Bomet County for the financial year 2014-2015 was unlawful and unconstitutional.**
- 2. A declaration is hereby made that the Bomet County Appropriation Act of 2014 and the Bomet County Appropriation [Amendment] Act of 2014 are unprocedural, unconstitutional, null and void.**
- 3. Prayers (c), (d) (e) and (g) of the Petition are dismissed.**
- 4. Let each Party bear its own costs as this matter was in the best interests of the residents of Bomet County and the Public at large**

105. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 29<sup>th</sup> DAY OF MAY, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Irene – Court clerk

Mr. Matwere for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent and Mr. Sang holding brief for for 2<sup>nd</sup> Respondent

No appearance for Petitioners

No appearance for 5<sup>th</sup> and 6<sup>th</sup> Respondents

**Order**

Judgment duly delivered.

Copies to be supplied to Parties.

**ISAAC LENAOLA**

**JUDGE**

**29/5/2015**