



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CONSTITUTIONAL PETITION NO. 2 OF 2015

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

**IN THE MATTER OF ARTICLE 1, 2(1), 2(2), 5, 3(1), 3(2), 4(2),10, 19, 201, 21, 22(1) 2(B), 2(C),
23(1), 165(3),(D) (1) (IV), 174 AND 224**

OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF SECTION 87 (A) AND 87 (B) OF THE COUNTY GOVERNMENT ACT
2012**

AND

**IN THE MATTER OF SECTION 102(1) OF THE PUBLIC FINANCE MANAGEMENT ACT
2012**

AND

**IN THE MATTER OF SECTION 3 DO1 OF THE KIRINYAGA COUNTY
SUPPLEMENTARY APPROPRIATIONS ACT 2015**

BETWEEN

RICHARD KARIUKI KIBUCHWA.....1ST PETITIONER

GICHIRA KAMUTI.....2ND PETITIONER

-VERSUS-

THE GOVERNOR, KIRINYAGA COUNTY.....1ST RESPONDENT

COUNTY ASSEMBLY OF KIRINYAGA.....2ND RESPONDENT

THE CONTROLLER OF BUDGET.....3RD RESPONDENT

RULING

1. RICHARD KARIUKI KIBUCHWA and GICHIRA KAMUTI, the petitioners herein have

- filed a constitutional petition herein against the **Governor Kirinyaga County, County Assembly of Kirinyaga and Controller of Budget**, the respondents herein for what they termed as violation of their constitutional rights brought about by the alleged decision of the respondents to utilize public finances to put up a County Administration Assembly Block, a decision they alleged does not amount to prudent use of public finance and also a decision made without public participation.
2. The petition filed posed the following constitutional questions for interpretation by this Court:
 - i. *Whether the 1st and 2nd Respondents' action of enacting the County Supplementary Budget Act, 2015/2016 without involving the Petitioners violated the Constitution.*
 - ii. *Whether the 1st and 2nd Respondents' action of allocating public finance for the construction of the County Assembly Administration block adhered to the principles enshrined under Article 201 of the Constitution and Section 102 of the Public Finance and Management Act.*
 - iii. *Whether while allocating public finance the 1st and 2nd Respondents should be guided by the principle of priority.*
 - iv. *Whether the 1st and 2nd Respondents are duly bound to conduct concurrent public participation exercises pursuant to Article 10, 196(2) (b) and 201 (a) of the Constitution and*
 - v. *Whether the County Government Supplementary Budget Finance Act Section 3 (d) (i) is inconsistent with Article 201 (a) (b), (iii)d of the Constitution and Section 102 of the Public Finance and Management Act.*
 3. In the light of the above, the Petitioners sought the following reliefs in the petition:-
 - i. *A declaration that the 1st and 2nd Respondents' enactment of the County Supplementary Budget Act 2015/16 without involving the Petitioners violated the cited provisions of the Constitution and the law.*
 - ii. *A declaration that the 1st and 2nd respondents' action of allocating public finance for the construction of the County Assembly Administration block did not adhere to the principles enshrined under Article 201 of the Constitution and Section 102 of the Public Finance and Management Act.*
 - iii. *A declaration that while allocating public finance the 1st and 2nd Respondents should be guided by the principle of priority.*
 - iv. *A declaration that the 1st and 2nd Respondents are duty bound to conduct concurrent public participation exercises pursuant to Article 10, 196(2) (b) and 201(a) of the Constitution.*
 - v. *A declaration that the County Government Supplementary Budget Finance Act Section 3 (d) (1) is inconsistent with Article 201 (a), 1b (iii) (d) of the Constitution and Section 102 of the Public Finance and Management Act and*
 - vi. *Costs of the Petition.*

The 2nd and 3rd Respondents filed replying affidavits which have extensively and substantially responded to the issues raised by the Petitioners and disapproved them by demonstrating in the annexures that the public were involved in the decision-making and that due process was followed in the enactment of the impugned legislation. This Court has however, not been called upon to determine or entertain the Petition herein. So I will not go much into the details of the petition and the responses thereto.

4. The Petitioners had filed a Notice of Motion under Certificate of Urgency dated 28th January, 2015 seeking *inter alia* preservative orders to stop the Respondents from allocating funds to the construction of County Assembly Administration block pending the determination of the petition herein. The orders were granted by this Court on temporary basis and the Petitioners were ordered to serve all the Respondents. The hearing of the Notice of Motion was scheduled for hearing on 2nd February, 2015, 16th March, 2015 and 26th March, 2015 but could not proceed for one reason or the other. What is however, material is that on 26th March, 2015 when the Notice of Motion could not be heard, this Court ordered and directed the Petitioners' counsel to issue notice to the 1st Respondent and notify them that the matter would be heard on 10th April, 2015 and in default

- of service the interim orders were not going to be extended. This was informed by the fact that in the two previous occasions on 23rd February, 2015 and 16th March, 2015 this Court had directed the Petitioners' counsel to serve the 1st Respondent in vain.
5. On 10th April, 2015, when the Notice of Motion dated 28th January, 2015 was scheduled for hearing the Petitioners' counsel was absent and instructed Advocate Magee to hold his brief and apply for adjournment. He however, told the Court that the 1st Respondent had not been served contrary to this Court's earlier directives. This Court allowed the application for adjournment as Mr. Ndegwa was said to be involved in the Court of Appeal in Mombasa on the same date but the interim orders were not extended.
 6. This prompted the Petitioners to file an application dated 8th May, 2015 seeking to revive the interim orders. When the matter came up for hearing on 22nd May, 2015, Mr. Ndegwa made an oral application for this Court to recuse itself citing that the impartiality of this Court was suspect. However, the Respondents added another twist to the whole petition by stating that Mr. Ndegwa Advocate and Mr. Mburu both of who were appearing for the Petitioners were in fact unqualified to act as advocates and that the petition and all the applications connected therewith and incidental thereto should be struck out with costs. This prompted this Court to establish first if the Petitioners' advocates were indeed qualified to act as such.
 7. Mr. Ndegwa and Mr. Mburu both asked for time on 22nd May, 2015 to show that they were qualified to act as advocates and requested to be given time upto Monday the 25th May, 2015 to avail practicing certificates or documents from Law Society of Kenya or Chief Registrar High Court confirming that they were licensed to practice law as advocates of this Court. This Court was shown a letter dated 9th April, 2015 from the Law Society of Kenya, Deputy Secretary Compliance and Ethics stating that Ndegwa Marclus Njiru (p.105/8285/11) did not hold a current practicing certificate. The same letter was shown to Mr. Ndegwa on 22nd May, 2015 and therefore this Court saw it fit and just to give him and Mr. Mburu the time they requested to enable them establish their status as advocates of this Court.
 8. On 25th May, 2015, neither Mburu nor Ndegwa appeared in Court to establish whether they are actually qualified instead they instructed a Mr. Mwangi Advocate to hold their brief and requested for more time. The Respondents opposed the application saying that if the Petitioners' Advocates were unqualified to act as advocates they could not competently instruct a qualified advocate to hold their brief. Mr. Okach Advocate also contended from the bar that information concerning the status of Mburu and Ndegwa was readily available and that in fact he had been able to obtain information from Law Society of Kenya vide a letter wrongly dated 22nd April, 2015 showing that both Mr. Ndegwa and Mr. Mburu had not taken out their practicing certificates for this year. Mr. Okach also showed a letter he had written on 22nd May, 2015 asking the Law Society of Kenya Secretariat to verify whether the two advocates had taken out their certificates. This Court was shown both letters which demonstrated that the information was indeed readily available. Mr. Mwangi was given time to get further instructions from Mr. Mburu and Mr. Ndegwa. However, he was unable to get anything tangible to even demonstrate that the two had paid for their practicing certificates and were only awaiting the issuance of the actual certificate to enable them practice.
 9. The only irrebuttable assumption that this Court could conclude in the absence of any document from either Mr. Ndegwa or Mr. Mburu was that the two were in fact practicing law without current practicing certificates. The petition herein and the applications before Court were drawn and signed by Mr. Ndegwa for Ndegwa & Ndegwa Advocate. Mr. Ndegwa himself admitted that he is a sole practitioner in Ndegwa & Ndegwa Advocate though he stated that he had two associates among them Mr. Mburu but had not yet formalized the status of his office with Law Society of Kenya.
 10. The issue that this Court must consider without even considering the merits of the petition is the competency and propriety of the petition presented before this Court and as well as applications dated 28th January, 2015 and 8th May, 2015 respectively. The Respondents' counsels Mr. Okach and Mr. Kuria both argued that under **Section 9** of the Advocates Act the Petitioners' counsel were unqualified to draw the petition and sign the same.

11. **Section 9** of the **Advocates Act** (Cap. 16) clearly stipulates that for one to practice as an advocate he should demonstrate the following:

1. That he has been admitted as an advocate.
2. That his name is for the time being on the roll of advocates.
3. That he has in force a practicing certificate.
4. He has in force an annual licence.

Section 34 of the same Act in fact makes it grave for one to act as an advocate without a practicing certificate. It is an offence punishable by law and **Section 85** of the Act provides for a fine of Kshs.50,000/-. The advocate is also liable to disciplinary proceedings.

12. This Court finds that the petition presented before Court and the applications dated 28th January, 2015 and 8th May, 2015 in addition to the oral application for this Court to recuse itself to have been made, drawn and signed by an advocate who was not qualified under Section 9 of the Advocates Act. The letters dated 9th April, 2015 and 22nd April, 2015 from Law Society of Kenya, the body professionally mandated by law to regulate practice of lawyers in Kenya, have established the two advocates do not hold current practicing certificates. There can never be a legitimate expectation from an illegality despite the assertions that the petition raises weighty constitutional concerns.

13. It is public policy that all citizens obey the laws of the land for order to prevail. Courts of law exist to enforce the law and avoid perpetuating acts of illegality like in the present situation. The end result of an illegality is an illicit outcome which as I have said is against public policy. This scenario is not new in our corridors of justice.

14. In the case of **Kenya Power and Lighting Co. -Vs- Chris Mahinda t/a Nyeri Trade Centre [2005] eKLR** the Court of Appeal dealt with the same issue when an advocate had paid for

the practicing certificate but was yet to be issued with the certificate. The question before the Court was whether the certificate when issued would have a retrospective effect. The court declined and made the following observations:-

“We come to court decision based solely on the undisputed fact that no practicing certificate for 2004 had been issued to the advocate prior to the signing by him of both the Notice of Appeal and the Memorandum of Appeal. When those two acts were done by him the advocate was not qualified to act as an advocate with the effect that the two documents were incompetent. A practicing certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that although it was issued on 22nd September, 2004 it had retrospective effect back to the beginning of 2004. We do not accept this submission. If no practicing certificate had been issued when the act was done the advocate was not qualified to do that act at the time he did.”

15. Similarly in the case of **NGOMENI SWIMMERS LTD. -Vs- KATANA CHARA SULEIMAN [2014] eKLR**. The Respondent filed an application that the appellant’s advocate did not exist in the roll of advocates. The Respondent annexed a letter from the Law Society of Kenya confirming that the appellant’s name was not in their records. In the ruling, the learned judge allowed the application, ordered the suit be struck out with costs to the Respondent and condemned the advocate to bear the said costs personally thus prompting the appeal. The Court of Appeal held the following view:-

“Clearly therefore the firm of Wesley John & Associates which lodged the suit was an illegal outfit in so far as the lodging and prosecuting the suit was concerned as no evidence of practicing certificates in the names of the alleged proprietors of the law firm, if at all, were tendered in evidence. They were thus not qualified advocates in and by purporting to file and prosecute the suit they indeed acted in violation of Section 34 of the Advocates Act.....Having established that the law firm that filed the plaint was an illegal outfit, could the plaint have stood? In our humble view, it could not.”

16. In the light of the above, I am satisfied that the petition filed herein together with all the

applications connected or incidental thereto are incompetent and illegally presented to this Court. They cannot be sustained in any way for the reasons aforesaid. It was incumbent upon the Petitioners to ensure that the advocates they were instructing were authorized to do so and had they checked at the Law Society of Kenya Website the information could have been of assistance to them. It is however, not the end of the road for them as they can still mount a competent petition to enforce their constitutional rights if any but having said that, this Court really has no other option but to strike out the Petition herein with costs to the 2nd and 3rd Respondents. It is so ordered.

Dated and delivered at Kerugoya this 27th day of May, 2015.

R. K. LIMO

JUDGE

27.5.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Mr. Odhiambo holding brief for Okach for 2nd Respondent.

Ndegwa absent for Petitioners

COURT: Ruling signed, dated and delivered in the open court in the presence of Mr. Odhiambo holding brief for Okach for 2nd Respondent and Kuria for 3rd Respondent and in the absence of Ndegwa Mburu for Petitioners.

R. K. LIMO

JUDGE

27.5.15