



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 39 OF 2014 AS CONSOLIDATED WITH PETITION NOS. 45, 61 AND 63 OF 2014

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 10, 20, 21, 22, 23, 26 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ARTICLES 10 AND 201 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010 AND RULES 2, 4, 8, 11 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: PART VII OF THE COUNTY GOVERNMENT ACT, NO. 17 OF 2012

AND

IN THE MATTER OF: SECTIONS 102, 117, 125, 128, 129 OF THE REPUBLIC FINANCE AND MANAGEMENT ACT NO. 18 OF 2012

AND

IN THE MATTER OF: THE KWALE COUNTY FINANCE ACT, NO. 1 OF 2014

BETWEEN

DIANI BUSINESS WELFARE ASSOCIATION AND OTHERS.....PETITIONERS

AND

THE COUNTY GOVERNMENT OF KWALE.....RESPONDENT

RULING

INTRODUCTION

1. On 28th March, 2014, the County Assembly of Kwale passed the Kwale Finance Act, 2014. The enactment inspired the various Petitioners herein being stakeholders in different industries to seek redress from this court. Three separate petitions, Petition Nos. 45, 61 and 63 all of 2014 were filed and were later on consolidated in Petition No.39 of 2014.

THE CLAIM

2. Petition 39 of 2014 was filed by Diani Business Welfare Association on 23rd June, 2014 through M/s Oduor Okumu & Company Advocates. The Petitioner is a welfare association whose members are residents of Kwale County carrying on business within Kwale County. They are aggrieved by the Kwale County Finance Act No. 1 of 2014 (the Act), and in particular Part II, the schedule of revised fees and charges applicable for single business permits. The revised rates reflect an increase by approximately 400% and the petitioners claim they have insufficient means to raise the same and fulfill their duty by paying business premises rates as residents and business people in Kwale County. They term the increase as unreasonable and unlawful. As a result of the increase, the Petitioners' constitutional right to life and livelihood is threatened. They fault the Act as having been passed without participation of the Petitioners who are stakeholders. They seek to have Part II of the Act relating to charges, licenses fees, permit fees and rent applicable to Kwale County residents declared unconstitutional, and a declaration that they possess a fundamental right to participate in governance issues within Kwale County.

3. The Petition was supported by the Verifying Affidavit of Obadia Osoro Ongaga who is the chairman of the Petitioner Association. The Petitioner has annexed to the affidavit a list of about 255 signatures of residents of Ukunda within Kwale County indicating their opposition to the Act. The Petitioner complains that for instance, supermarkets that used to pay Kshs.19,000/= for single business permits are now required to pay Kshs.90,000/= while tour operators and transporters who would pay Kshs.10,500/- now have to pay Kshs.44,900/=.

4. Petition 45 of 2014 was filed on 10th July, 2014 by 5 petitioners, Milly Glass Works Limited, Shreeji Chemicals Limited, Eastern Chemical Industries Limited, Anaida Investment Limited and Salim Hamisi Mwahindo through M/s Areba & Co. Advocates. The first 4 limited liability companies are duly registered in Kenya and are traders dealing with silica sand and silica sand products within Kwale County and other parts of Kenya. The Fifth Petitioner is a male adult petitioning on his own behalf and on behalf of all land owners owning such land for the purposes of harvesting/ mining of silica within Kwale County.

5. The Petitioners were aggrieved by the enhanced levies and charges in the Act, particularly as relates to silica mining. Part II- 3 of the Act enhanced the levies for the mining of silica sand per tonne from Kshs.85.71 per tonne to Kshs.700.00 per tonne. Under the same Act, these regulations came into operation retrospectively from 1st January, 2014. The Petitioner therefore prays for orders that the Part II – 3 of the Schedule to the Act relating to silica mining levies be declared to be unconstitutional; the Kwale County (the Respondent) be restrained from implementing it; the respondent do refund the Petitioners and all other members of the public any monies paid to it pursuant to the same. Various Petitioners annexed copies of receipts of payments made under the levy at different points in the period 2012 – 2014.

6. Petition 61 of 2014 was filed on 2nd October, 2014 by Coast Calcium Limited through M/s A. B. Patel & Patel Advocates. The Petitioner is a limited liability company duly registered in Kenya and engaged in the mining and sale of homa lime produce from Kwale County. The Petitioner's grievance is centered on the increase of cess levied on Home Lime Produce by 400% from Kshs.100.00 per tonne to Kshs.500.00 per tonne. The Petitioner prayed that the Act, in particular the schedule on fees as regards the levy of cess on homa lime produce be declared unconstitutional and the respondent be restrained from enforcing the levy under the increased rates.

7. Petition 63 of 2014 was filed on 6th October, 2014 by Charpenel Enterprises Limited, a limited liability company duly incorporated in Kenya through M/s Areba & Co. Advocates. The Petitioner is a transporter dealing with the mining and transporting of silica sand from the County of Kwale. The Petition sought for the declaration that the levy charged on mining of silica sand as contained in the Act was unconstitutional and the Respondent be accordingly restrained from levying them. It also sought for the refund of monies paid to the Respondent pursuant to the Act.

THE RESPONSE

8. All the Petitions were opposed. The Kwale County Director of Legal Services, Kevin Dzumo, swore affidavits in reply to each Petition at various times through M/s Madzayo Mrima & Jadi Advocates. He termed the Petitions as unmerited and brought in bad faith since the Petitioners were informed of the public participation fora at which the subject rates were discussed, but chose not to participate. He stated that he was aware public participation fora were indeed held in all the five sub-counties whereof the public duly participated. The announcement of the public fora were made through Radio Kaya, being the most popular radio station with wide coverage within the County, inviting the public to participate on various dates. The same invitation was published in the Star Newspapers and also pasted on the Notice Boards of every sub-county. (Although referenced to as KD-2(a) and (b) a copy of the newspaper extract and the notice board advertisement was not attached). Copies of the receipts for the public fora, along with the list of attendants and a report of the committee compiling the views gathered in the forums were attached. The said fora were held on 16th and 17th January, 2014 where the public was allowed to discuss the Finance Bill and raise any questions or give their input before the Bill was enacted. The Bill was thereafter published in the Kenya Gazette on the 28th March, 2014 before enactment and objections invited from the public. As there were none, the Bill was duly enacted into law.

9. The increments were said to be fair, adequate and reasonable in the circumstances to enable the County Government adequately provide services to the public. In addition, the Petition was challenged as having been brought after the lapse of 90 days period for raising objections after gazetting of a Bill as required in law. He added that the Petitions were an afterthought aimed at frustrating the County Government in its efforts to charge levy and raise revenue. The Respondent denied that it has violated any constitutional provisions as alleged.

THE PETITIONERS' SUBMISSIONS

10. Petition 39/2014 Petitioners filed their written submissions dated 15th May, 2015 maintaining that no form of public participation was carried out. They urged that the order form from Radio Kaya annexed as KD-1 does not provide for the nature of the advertisement, the newspaper advertisement was not annexed and further, that the Star Newspaper is not one of the leading local dailies with wide circulation like the Nation or Standard. The public are required to be involved in financial matters under Articles 10, 174 and 201 of the Constitution. Sections 87 and 155 of the County Government Act (No. 17 of 2012) also provide for the participation of residents of a County in the running of the county government. The case of **Robert Gakuru & Others vs. Governor Kiambu County and 3 others** was cited for reference. The increase by 400% was said to be unreasonable. In addition, the County was faulted for double taxation of hotels which are required to pay levies as well as business permits, thus making them unable to effectively compete with other hotels in the Coastal region. The Respondent was said to be imposing and exercising its power of levying charges in a way that prejudices national and economic activities contrary to Article 209(5) of the Constitution. The Respondent has also **introduced mining levies** which is a preserve of the National Government, a move that will affect the investment channeled in the county through roads and employment for locals.

11. Petition 61/2014 Petitioner filed its submissions on 27th May, 2015. The Petitioner referred to the cases of **North Rift Motor Bike Taxi Association v The Uasin Gishu County Government (2014) eKLR** and **Joseph Kiguru & 3 Others vs. County Government of Laikipia (2014) eKLR**. The Petitioner submitted that the Respondent's attempt to establish that public participation fora were held did not meet the threshold to discharge its burden. First, Radio Kaya is a vernacular radio station which does

not have wide coverage and its predominant audience is the local natives of the County. The public notices placed on notice boards were insufficient as they gave only 2 days notice, from the time they were published between 14th – 17th January, 2014 to the time the fora were held on 16th – 17th January, 2014. The receipts for the hire of the hall were faulted because one cannot tell whether the payments were made in connection with the public participation fora for the discussion of the Finance Act, as such there was no sufficient proof that the fora were held. It was further submitted that the increase of 400% cess levy from Kshs.100/= per tonne to Kshs.500 per tonne was unconstitutional for the reason that the Act purports to apply **retrospectively** and such increase in any event erodes the viability of the Petitioner's business and is contrary to the spirit of the Constitution.

12. Petitions 45 and 63 of 2014 Petitioners filed joint submissions on 28th May, 2015. It was submitted that the Respondent had failed to establish that the public had been given fair notice to attend the public participation fora if any. The Act imposes an unauthorized charge over minerals since Parliament is required to sanction such charges under Article 209 (3) of the Constitution. The Petitioners urged that the Respondent's entitlement to raise revenue must be exercised in accordance with the law and the Constitution. The court was urged to find that the Act was unconstitutional and order the monies paid to the respondent in excess under the Act be refunded to the Petitioners with interest.

13. In summary, the Petitioners claim that the Act infringes on their constitutional rights and freedoms and are otherwise unconstitutional because:

- a. The Act was drafted and passed without public involvement/participation contrary to Article 174 and 196 of the Constitution, the provisions of the Public Finance Management Act and Sections 87 and 115 of the County Governments Act.
- b. The Act was passed against national values and principles of governance under Article 10 of the Constitution.
- c. The Act was passed against the principle of openness, accountability and public participation under Article 201 of the Constitution.
- d. The Contents of Part II – 3 on the Schedule of Fees and Charges as far as silica sand, homa lime product is concerned is unconstitutional as the same was passed without authorization from Parliament/ National Assembly and in breach of Article 209 of the Constitution.
- e. The increment erodes the viability of the petitioners' respective businesses.
- f. Its retrospective application is illegal, and;
- g. The respondent failed to provide timely access to information, data, documents and relevant information related to the formation of the law.

THE RESPONDENT'S SUBMISSIONS

14. The Respondents filed submissions dated 18th June, 2015. The Respondent asserted that it had mandate under Article 209 of the Constitution and the Public Finance Management Act to raise revenue by imposing taxes in order to govern and deliver services to county members. Section 21 of the County Government Act 2012 provides for the procedure for the exercise of legislative powers. The court was urged to take judicial notice that the Petitioners have been enjoying the provision of basic services such as garbage collection, parking facilities, street lighting, drainage and roads maintenance among others in the course of carrying out business within the respondent county although it is sometimes tempting to take the said services for granted. The Respondent also maintained that as deponed by Kevin Dzumo, the Kwale County Director of Legal Services, the public was duly invited to participate in public fora organized to discuss the Act before it was enacted. Interested members of the public attended the fora, but the **Petitioners deliberately chose** not to attend the fora.

15. The announcements were made via Radio Kaya, the most popular radio station in the County, and broadcast in Kiswahili which is how those who attended the public fora heard about it. Notices were also

posted on notice boards in all ward offices.

16. The Petitioners have an obligation to be vigilant and cannot blame the Respondent if they chose not to take heed of the notices, especially since they ought to have been aware that the County Government was in the process of taking over the services of the defunct Council. Owing to their status as business people they should have been anticipating the fora and kept vigilant so as not to miss the notices. The Petitioners were challenged for failing to establish that they had taken steps to keep themselves informed on matters of the County so that such notices would not have escaped their attention.

17. The County Government Act grants the Petitioners in section 15 and 88 a right to raise their objections in writing, after which the Respondent would have a duty to respond to the same under section 89. The Petitioners elected not to pursue this right and instead instituted these various proceedings sometime in June - October 2014, about 3 - 7 months after the Act was passed on 28th March 2014. This apparent indolence should not be condoned by the court. The case of **Robert Gakuru & Others v Governor of Kiambu County and 3 Others** was distinguished from this case, since in that matter, the Petitioners had indeed participated in the public fora and only protested that their views were not taken into account. The Respondents further submitted that the charges stipulated in the Act were fair and reasonable and not at all oppressive under or contrary to Article 209(5) of the Constitution.

18. On the accusation of double taxation, the Respondent stated that the business permit being paid yearly is only a permission for the Petitioners to conduct their business within the county and should not be understood to be a levy at all. The respondent was only charging a levy from the daily business operations of the Petitioners which is a normal levy. In any event, the Petitioners had failed to demonstrate how this amounts to a constitutional violation. On whether the Act is retrospective in operation, the Respondent stated that there is no way that the County had commenced charging the fees in January, 2 months before its assent by the Minister.

19. Finally, the Respondent contended that following a court order, the Petitioners have been paying the rates previously charged by the defunct County Council to date. As a result, the Respondent has lost a lot of revenue, hence affecting its service delivery. The Respondent has in the meantime, been preparing a new Finance Act for the year 2015 – 2016 which was at the time at the County Assembly for debate, having conducted all the preliminaries including public participation. It was alleged in the submissions that the Petitioners had refused to participate in its enactment despite several invitations to attend the public fora. The court was urged to find that the Petitions herein have since been overtaken by these developments and ought to be dismissed.

ANALYSIS AND DETERMINATION

20. Public participation is recognized in Section 87 of the County Governments Act which provides for the relevant principles upon which citizen participation ought to be based such as timely access to information, reasonable access to the process of formulating and implementing policies, protection and promotion of the interest and rights of minorities among others.

21. The establishment of modalities and platforms for citizen participation is provided for both in Section 91 of the County Governments Act and section 137 of the Public Finance Management Act, 2012 (No. 18 of 2012). The Acts identify certain structures which the County Government may establish to facilitate citizen participation such as, town hall meetings, citizen fora, ICT based platforms, etc. Section 115 of the County Governments Act provides that public participation in the County planning process shall be mandatory. In recognizing the uniqueness of each county, the section further provides that each County Assembly shall enact regulations giving effect to effective citizen participation within the County, and which regulations shall adhere to minimum national guidelines. Article 201 of the Constitution provides the principles to guide all aspects of public finance. They include openness, accountability and public participation.

22. Odunga, J in the case of **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR** in defining what public participation entails expressed the following opinion:

“75. In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfillment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forum as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

23. **Lenaola J in Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others (2013) eKLR** also opined on public participation that,

“...it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

24. Similar sentiments were expressed by the courts in **Kenya Small Scale Farmers Forum and 6 Others v Republic Of Kenya and 2 Others, Petition No 1174 of 2007, John Muraya Mwangi & 495 others v Minister for State for Provincial Administration & Internal Security and 4 Others (2014) eKLR and Coalition for Reform and Democracy and Others v Attorney General, Petition No 628 of 2014** on the issue of public participation.

DETERMINATION

25. Though sections 87 and 91 of the County Governments Act respectively establish detailed principles and modalities and platforms for citizen participation in policy formulation and legislation, the modalities of quantitative and qualitative participation is still wanting. By quantitative participation, I refer both to the amount or extent of information disseminated by a County Government; such as the Respondents herein, and also to the widest possible extent to the citizens concerned. By qualitative participation, I mean the extent of both the information and the array of citizens who would engage in meaningful debate of the proposals for legislation by the County Government. This is to avoid the cynical attitude, if Professor Fulani has read in, then it, or the proposals are in order.

26. Without taking away the sting in Judge Sacks judgment in **Minister of Health vs. New Clicks South (PTY) Limited (supra)**, that what matters **is that at the end** of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say, what amounts to reasonable opportunity does not only depend on the circumstances of each case, but more importantly also, the manner (quality) of presentation of both the opportunity and the material of the proposals to be considered.

27. Despite the provisions of section 137(1) of the Public Finance Act, 2012, that every country do

establish County Budget Forum comprising of a number of representatives, not being public officers, equal to the number of executive committee members appointed by the Governor from persons nominated by organizations representing professionals, businesses, labour issues, women persons with disabilities, the elderly and faith based groups at the County level, no or little information is availed to the citizens on the role of such For a, despite their important purpose to provide a means for consultation by the County Government on –

(a) preparations of the County plans, the County Focal Strategy Paper, and the Budget Review and outlook Paper for the County, and

(b) matters relating to land getting, the economy and financial management at the County level.

All in account with the law relating to County Governments – that is to say the County Governments Act.

28. Nick Cheeseman, Professor of African Politics at Oxford University in an Article published in the Sunday Nation of September 20, 2015 postulates that due to historical circumstances, citizen participation is still looked at a distance. These are his reasons.

29. There is **firstly** the culture of secrecy in the budgeting process. This, Professor attributes, to a carryover from the One-Party days. **Secondly** County Governments are cautious about public participation. If they meet with a few people they risk court action for not casting the net wide enough (**Robert N. Gakuu & Others vs. Governor, County Government of Kiambu** (supra)). **Thirdly**, if they engage with a broad section of the population, they will be subject to diverse and pressing demands that the counties may not be in a position to meet. Professor Cheeseman sees four challenges –

(i) the challenge of timing;

(ii) the challenge of aggregating public opinion; and

(iii) ensuring public participation, and

(iv) managing public participation.

30. On the challenge of timing Article 209 of the constitution and section 132 of the Public Finance Management Act mandate the County Governments to raise revenue by imposing taxes in order to pay for the cost of services to the county constituents. Similarly, the Constitution imposes the obligation to promote open government by public participation. The issue which has not been entirely internalized by the County Governments is at what stage of the governance process is the process of public participation most beneficial, given the fact that County Governments make decisions throughout the year. It may not be possible to engage the constituents all the time though ideally, public participation should be a continuous process throughout the year.

31. I agree with Professor Cheeseman that such **“extensive participation”** may not be possible (over the first five years of the Constitution and devolution), that this be achieved incrementally over the decade, that it is accepted in Kenya as well as globally, as best practice, **“that the budgetary planning process represents an opportunity to engage with citizens because it also represents an opportunity to engage with multiple groups in a focused way, and because this is when key decisions are made over the way in which resources are distributed.”**

32. The second challenge advanced by Professor Cheeseman is the challenge of aggregating public opinion, that even where effective participation takes place, County Governments face the challenge of aggregating public opinion into specific set of actionable ideas. Citizens may not agree on all ideas, particularly as consultation does not take place in one meeting but often different groups, select different priorities.

33. The principle of public participation is not merely to allow voters to have their voices heard, but to

allow them shape policy proposals. Consequently, County Governments must develop mechanism (under section 87 of the County Governments Act) through which outcomes of public participation are translated into budget planning processes. Such questions as to how much weight should be attached to public participation, and how to accommodate divergent views must be considered and answered. In as much as citizens' views must not be ignored, the citizens and public at large also needs to understand that counties like the national government will not be able to respond to all their demands. So how does a County ensure public participation?

Ensuring Public Representation

“Ideally, public participation processes should be genuinely representative of diverse interests.”

34. Again, I agree with Professor Cheeseman, and with his reasons. This is so not merely from the requirement to fulfil legal obligations, but more importantly it enables the County Government to better respondent to the needs of the citizens and to earn their trust, confidence and support. To achieve this requires a lot of creative thinking on how to engage citizens and their various demands.

35. The modalities set out in section 91 of County Governments Act for citizen participation include town hall meetings, budget preparation and validation fora, notice boards, project development sites. A meeting in a 5 Star Hotel would not be open to all and sundry, a notice by “tweeting” [would not be inclusive as the “tweet” goes to an individual] (**Robert N. Gakuru & Others vs. Governor, County Government of Kiambu**). A paid advertisement in any of the popular (by circulation and readership), and by radio listened to by citizens of the County is adequate information to the citizens.

36. These are however merely logistical steps. The strategic logistics are even more important. There are gender issues, equal ear to women and youth groups, minorities and the marginalized. There are also individuals from the full range of economic, trade and commercial activities, hoteliers and industrial interests, not to mention ethnic, marginalized and religious backgrounds whose participation is necessary in the budgetary planning process. In other words if public participation does not include large sections of society, it may fail the test of legitimacy. This however begs answers to the next question, how to manage public participation.

Managing Public Participation

37. There is no one-size-fits-all model for civic engagement and public participation –

“the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variations – Sacks J. in MINISTER FOR HEALTH VS. NEW CLICKS SOUTH AFRICA (PTY) LIMITED (supra)”

38. Consequently a flexible approach is important to account for the significant variations which exist among and between counties such as population density, literacy trends, media use, geographical location and distance from the centre, community interests and levels of income. Investment in effective units of communication (as envisaged in the modalities referred to in section 91 of the County Government Act) is required to strengthen capacities for effective public participation to fit local realities.

39. These Petitions are largely focused on the legitimacy of the Respondent's Finance Act, 2014. The Petitioners' complaint is that there was not public participation as required both under the Constitution, and the County Governments Act. The question is how is public participation to be conducted? Sacks J says, that public participation may be conducted in an infinite variety of ways. Professor Cheeseman advocates at least three stages –

- (a) participatory budgeting,
- (b) budget approval and communication, and

(c) budget review and audit

40. I agree with Professor Cheeseman that participation should occur at all the three stages, both from the point of view of public oversight as well as to obviate incidents or occasions for corruption. Review and audit should be a continuous exercise, but budget participation (stage (a)), and budget review and audit (stage (c)), should occur together so that as the prospective budget proposals are discussed, the implementation of the previous budget policies and action plans are reviewed and audited before engaging in the new budget circle.

Stages (a) and (c) – Participatory Budgeting and Budget Review

41. **“For the participation to be meaningful, citizens must have the capacity to engage in the budget process before the Executive has finalized its process. The public must be able to assess whether or not previous agreements have been implemented.”** This means that before new budget proposals are made the citizens and the public must be empowered to review progress against policies set out in the previous budget and thus enhance performance tracking process and therefore ensure they play an informed role in participatory budgeting. It is the duty of the County Executive to present clear choices to the constituents, as against a clean slate from scratch, where a review and audit will not be possible.

42. The County Executive should provide a simplified version of the proposed budget for participants together with information about budget constraints (if any). Constituents from each ward as a unit of participation and the larger interest groups (referred to in paragraph 35 above), would then provide feedback on whether they fully share spending priorities in the proposed budget or believe other issues should take priority. This encourages constituents to be realistic in their demands, and thus make suggestions which are compatible with both the economic and political strategy of the County concerned.

Stage 2 – Budget Approval and Communication

43. **“To ensure constituents are able to follow the budget process and to engage with the final budget rather than the proposed budget, it will also be important to allow participation once an Assembly has debated the budget and final draft has emerged from the dialogue between the Executive and County Legislative Assembly.”** This would be the final episode of participation. The final product of the process the Budget Plan should be taken back to the constituents to inform and elicit feedback. Such meetings and communication would offer the constituents and interest groups an opportunity to –

(a) demonstrate to the constituents that all or some of their concerns are affected in the final document;

(b) explain to the constituents why some of the issues that were raised could not be accommodated.

BENEFITS OF PUBLIC PARTICIPATION

44. Effective public participation and communication means that County Governments are likely to implement policies that match the preferences of constituents, and are likely to get credit. Not so obvious, is the fact that public participation would boost support of the County Government and for local revenue generation, more so, because of the outcry by Governors for more resources from the national government in order to implement devolved functions.

45. As clearly stated by Lenaola J. in **Nairobi Metropolitan PSC Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others (supra)** –

“It does not matter how public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation ...”

45. Ideally as discussed in the foregoing paragraphs, public participation to be meaningful has to be staggered into three stages. Stages 1 and 3 to be combined where stage 1 will comprise a simplified synopsis (outlines) of the budget proposals. Stage 3 would comprise a meaningful summary of the previous year's budget plan as approved and level of implementation. When presented to ward groups (in my suggestion) and interest groups including women and youth groups, and others already described, such as the Petitioners, valuable oversight would be gained and how the new budget would enhance or impact on those previous plans. The issue in my opinion is not merely participation, but effective participation, and the fact of such participation must be documented of the actual meetings and acknowledgement of memoranda from constituents.

46. In these Petitions, a Report, (though unsigned and undated) was attached to the Replying Affidavit of Kevin Dzumo, the Respondent's Chief Legal Officer. There was a list of about 144 participants in the fora held. Although referred to in his Affidavit, the Chief Legal Officer however omitted to attach a copy of the notice sent out inviting constituents to public meetings. There are however attached to the said affidavit bundles of copies of receipts being payments for the hiring of public halls of the Kenya Red Cross Society, the Kenya School of Government, Darajani and Youth Initiative, inviting constituents to public meetings. There was an advertisement in the Star Newspaper – probably the paper with the third widest circulation in the country, and county. In addition there was a Radio Announcement through **Kaya Radio**, (the trading name of Southern Hills Development Agency Limited) made on 14th, 15th, 16th and 17th January, 2014, being on a Tuesday, Wednesday, Thursday and Friday respectively. Radio Kaya is said to be a popular Radio Station in the County and most of the Respondents constituents would at one time or another in the course of those four days, listen to it. It is no derogation to say that it is a vernacular Radio Station. There was no evidence to show that its broadcasts are all in the local vernacular language, and not Kiswahili the **lingua franca** of the County and indeed all of the Coast Region of Kenya. None of the Petitioners or their agents and representatives can plead ignorance of that language. There is thus credence in the deposition of Kevin Dzumo that the Petitioners were aware of the notice for the public meetings but chose to ignore them. There was no rejoinder from any of the Petitioners to that deposition. It is an indictment against the Petitioners that they would chose to ignore an important civic and constitutional duty to shape the financial and budgetary policy, the implementation of which would affect them in terms of revenue measures and the utilization of that revenue.

47. There is also the small but significant point about the timing of the Petitions herein. Sections 15 and 88 of the County Governments Act 2011, grant the Petitioners the right to raise objections by way of petitions to the Respondent about affairs or operations of the Respondent. Though sections 15(2) requires each County Assembly to prescribe a procedure for exercising the right to petition a County Assembly, or the County Government under section 88, and the County Government has a duty to respond to such petition(s), no procedure has apparently been established for such petitions. However, under the provisions of both the Constitutional Article 259(8) and Interpretation and General Provisions Act, (Cap 2, Laws of Kenya), Section 59), where an act is specified to be done, and no time is prescribed within which such act shall be done, the presumption is that it will be done within a reasonable time. Section 89 of the County Governments Act imposes a duty upon the County Government to respond to any inquiry or objection within a reasonable time.

48. The Chief Justice of Kenya, the Hon. Willy Mutunga caused laughter when he asked Kenyans to take some of their disputes to "*witch-doctors*". We misunderstood him. All he was reminding Kenyans is that there are alternative means of dispute resolutions as envisaged under Article 159(2)(c) of the Constitution of Kenya 2010. The Petitioners elected not to pursue that right and instead opted to institute the various petitions between June – October, 2014 some three to seven months, after the Finance Act was passed on 28th March, 2014.

49. Though the procedure of petitioning the County Assembly (section 15(1)) or the Government (section 88) of the County Assembly Act is not a bar to an action, an action or petitions filed some three to seven months after the enactment of the Finance Act, may well be construed as an afterthought, and unless good grounds are given for such delay, will be construed strictly against the Petitioners as an abuse of the process of court.

50. The reasons for this are simple. The Finance Act is the heart and soul of the Government both at the national and county levels. Any delay in its implementation constitutes a serious challenge to the provision of services of the citizens or constituents of the county. That is why for instance under Article 222 of the Constitution moneys may be withdrawn before the budget proposals are approved by the National Assembly, and even certain levies and taxes take effect immediately from midnight of the day the budget proposals are read. Exercise of diligence is not curable by court petitions. To allow petitions of this type is to constitute recalcitrant Petitioners and citizens at large into a veto exercising block and defeat the very purpose of citizen participation, a civic duty in the governance of the county especially at the budget stage.

51. For all these reasons, I am satisfied that there was public participation, and the Petitioners ignored to present their views during the public participation stage of the budget proposals. They were granted opportunity and they failed to take advantage thereof.

52. On the question whether the charges and levies were fair and reasonable, Article 209(5) of the Constitution restricts a County Government from raising any taxes which would be prejudicial to either national economic policies, economic activities across the county or the national mobility of goods, services, capital or labour. There was no plea on the part of the Petitioners that the Finance Act of the Respondent breached any of those provisions. In any event there was no evidence as to why the rates of levies under the Finance Act were either unfair or unreasonable in the circumstances of the County of Kwale.

53. On the question of the Retrospective Operation of the Act, the law is set out in section 9 of the Interpretation and General Provisions Act [Cap 2, Laws of Kenya] which provides –

“9(1) Subject to the provisions of subsection (3), an Act shall come into operation on the day on which it is published in the Gazette.

(2) [repealed in 1968]

(3) If it is enacted in an Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day. The Act or, as the case may be, that provision shall come or be deemed to have come into operation accordingly.”

54. On the issue of the retrospective application of the Act, the Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another V Kenya Commercial Bank Ltd & 2 Others, SCK APP. No. 2 of 2011 [2012] eKLR** held the general rule on this issue to be that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. That court held that,

“[61] As for non-criminal legislation, the

general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsburys Laws of England, 4th Edition Vol. 44 at page 570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden.”

55. Thus, a legislation that is retrospective in nature is not ipso facto unconstitutional as long as it is apparent either by express words or by necessary implication that that was the intention of the legislature and satisfies the conditions above. The Kwale County Finance Act, 2014 was passed on 10th March, 2014

and published on 28th March, 2014. Per Section 1 thereof, was said to come into operation on 1st January, 2014 or on such date as the Executive member for Finance may appoint. All the existing fees and charges were to continue to be levied until such date when the Act was to come into operation. The Respondent has not delivered into the court any document or made any effort to demonstrate that the Executive Member for Finance made any directions as to the commencement of the levies charged in the Act. It would therefore be apparent that the Act was to apply retrospectively.

56. This court however takes judicial notice of the fact that some of the charges levied in the Act were annual charges for the year 2014. In the event that these had not been paid by the beginning of the year, the new rates were meant to have been applicable and not the old 2013 rates. Certain rates, such as property, plot and house rent (sections 6 – 7 of the Act) were to become due on the 1st day of January of each year. A penalty would accrue for rents/ rates unpaid after 31st March of the year. Lenaola J. in **CFC Stanbic Bank Ltd v Kenya Revenue Authority & another [2014] eKLR** finding that in general law cannot be applied retrospectively, states that,

“one of the ingredients of the rule of law is certainty of law. This is an important pillar of law that has been recognized by our Constitution. No one, including the taxman, should be allowed to violate this cardinal principle.”

57. In that case however, he was unable to find evidence that the Respondent applied any aspects of the Income Tax Act retrospectively and to the prejudice of the Petitioner. In this case, the Petitioners have not shown any evidence that the Respondent has demanded back-pay for the new rates, save for the fresh payment of annual rates and permits. In petition 45 of 2014 for instance, the receipts attached indicate that as late as 3rd April, 2014, the Petitioner was paying the old (2013) scale (annexture A-1) and only begun paying the new rate on 8th May, 2014. Similarly in Petition 63 of 2014, the first evidence of payment of the new rates is in September 2014. Without a demand being made by the Respondent for additional payment, this claim fails.

58. In summary therefore in all aspects, I make the following findings –

(a) The Respondent did involve the constituents in all its sub-counties in the enactment of the County of Kwale Finance Act 2014.

(b) The Respondent’s defence that the Petitioners had opportunity to challenge the Finance Act under sections 88 and 89 of the County Governments does not preclude the Petitioners from taking out court proceedings.

(c) The claim that the Act introduced mining levies which are the preserve of the national government is not correct. The levies complained of were not being introduced but rather enhanced; under the transition provisions. The Respondent assumed the role of the defunct local government council who previously received these levies. There was no evidence by the Petitioners that the Respondent had introduced a new mining levy which was not previously charged by the Local Government Council. The question whether the charging of mining levies by County Governments is unconstitutional under the Constitution of Kenya 2010, does not arise. This equally applies to the question of double taxation, and whether the charges are reasonable.

(d) There was no evidence that the rates charged under the County of Kwale Finance Act are either exorbitant or amount to double taxation, and any finding to the contrary would be conjecture and supposition merely. This ground too fails.

(e) Though the Respondent submitted that the Act of 2014/2015 has been overtaken by events, the constitutionality or otherwise of the Act would still remain a proper issue for determination of the court, particularly as parties have in this case made claims for refund of levies and fees paid. The issue of refund does not however arise as I have determined that the Finance Act 2014 of the County of Kwale was properly enacted.

CONCLUSION

59. Having failed on all legs of the Petitions, Petition Nos. 45 of 2014, 61 and 63 of 2014 and consolidated with Petition No. 39 of 2014, are hereby together dismissed with costs against the Petitioners.

60. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 23rd day of October, 2015

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Ondego for Petitioners in No. 61 of 2014

Miss Kimori for Petitioners in No. 39 of 2014

No appearance for Petitioners in No. 63 and 45 of 2014

Mr. Kaunda Court Assistant