



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 37 OF 2014**

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

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 28, 43, 46 OF THE CONSTITUTION OF KENYA, 201**

**AND**

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

**BETWEEN**

**JOSEPH KIGURU .....1<sup>ST</sup> PETITIONER**

**JAMES WANJOHI NDERITU ..... 2<sup>ND</sup> PETITIONER**

**STEPHEN MURIITHI WAROTHE ..... 3<sup>RD</sup> PETITIONER**

**JANE W. WACHIRA .....4<sup>TH</sup> PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF LAIKIPIA .....RESPONDENT**

**RULING**

1. The Petitioners, **Joseph Kiguru, James Nderitu, Stephen Warothe and Jane Wachira** are residents of Laikipia County. They filed a Petition dated 28<sup>th</sup> May 2014 against the **County Government of Laikipia** (Respondent). The Petition is founded under Articles 43, 46, 174, 196, 201, 209 (5) of the Constitution and allege contravention of their economic and social rights.
2. Together with the Petition, the Petitioners took out a Notice of Motion of even date under a Certificate of Urgency. The Petitioners prayed for:
  - a. **That this application be certified as of utmost urgency and the same be ordered heard at the very first priority without the requirement of service at the very first instance.**

- b. **That pending the hearing and determination of this application inter-partes the honorable court be pleased to issue a conservatory order restraining the Respondent from levying the new rent rates in respect of Kiano, Ngare Narok, Starehe and Lumumba estates as specified in schedule 11 of the Laikipia County Finance Act.**
- c. **That pending the hearing and determination of the application inter-partes the honorable court be pleased to issue a conservatory order restraining the Respondent from publishing the Laikipia Finance Act, No 2 of 2013;**
- d. **That pending the hearing and determination of this Petition inter-partes the honorable court be pleased to issue a conservatory order restraining the respondent from levying the new rent in respect of Kiano, Ngare Narok, Starehe and Lumumba estates as specified under Schedule 11 of the Laikipia County Finance Act;**
- e. **That costs of this application be provided for.**

3. On 29<sup>th</sup> May, 2014, the application was certified urgent and the Petitioners were ordered to serve the Respondent for inter-parte hearing.
4. The Respondent is the County Government of Laikipia established under Article 176 (1) of the Constitution of Kenya whilst the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Petitioners are residents of Lumumba, Kiano, Ngare Narok and Starehe estates within the County. The Petitioners pleaded that the Respondent assented to the Laikipia Finance Bill, 2013 effectively making it the Laikipia County Finance Act, 2013 without subjecting the same to public participation as envisaged under Article 201 of the Constitution.
5. Further the Respondent in exercise of his power to raise revenue, did so arbitrary and in a manner that was prejudicial to the Petitioners' right to accessible and adequate housing under Article 43 of the Constitution. That the new rent rates are exorbitant and oppressive and out of reach for majority of the tenants.
6. The Petitioners aver that the Respondent did not conduct a valuation of rent and therefore the rates contained in the Act are without basis. Moreover the Petitioners have over time raised their grievances relating to rent, security and the deplorable nature of the estates to the defunct Municipal Council of Nyahururu but their grievances were never addressed. According to them the dilapidated state of the houses does not warrant the increase in rent.
7. The Petitioners are apprehensive that the Respondent may issue eviction notices to them due to their inability to pay the new rent and thus urge the court to issues the orders sought in the application.
8. The Respondent opposed the application. It filed two affidavits in reply which are both sworn on 11<sup>th</sup> June, 2014 by **Joel Wamiche**, the County Executive Committee Member in charge of Finance, Planning and Development in the County and **Jasper M. Mutwiri**, the Clerk to the County Assembly of Laikipia.
9. **Mr. Wamichwe**, deposed that the Respondent has a duty to raise revenue and the proposal for the rent increments was in line with that duty and was done in full compliance of the laws. The relationship between the Respondent and Petitioner is purely landlord and tenant relationship and any dispute relating to rent has no constitutional bearing.
10. Further, the rent was adjusted downwards following public participation and the new rent as indicated in the Act is reasonable and commensurate to the market rate.
11. Mr. Mutwiri deposed that the county assembly embraces the principle of public participation in exercise of its legislative authority. That the Finance and County Planning committee invited residents of Laikipia and the public through advertisement in the daily newspaper to discuss the finance bill. The meeting was held at Nyahururu Town hall on 22<sup>nd</sup> February 2014 and the 1<sup>st</sup> Petitioner herein attended and signed the attendance sheet. The public gave their views freely and a report on public participation was forwarded to the County Assembly.
12. According to the deponent the Petitioners' application is devoid of merit, is based on falsehood and should be dismissed with costs.
13. The application came up for hearing before me on 16<sup>th</sup> June, 2014. The learned counsel **Mr. Mbugua** represented the Petitioners whilst the learned counsel **Mr. Mwangi** was for the Respondent.
14. Mr. Mbugua submitted that the Eleventh Schedule to the Finance Act seeks to increase rent for four estates by 66 - 100%. The enactment of the Act offends the mandatory provisions of the

- Constitution, particularly Article 196 (1) (a) and (b) and Article 201 that prescribes for openness and public participation in financial matters. This was not done and the Respondent therefore contravened and infringed on the Petitioners fundamental rights under Article 28, 43 and 46 of the Constitution.
15. Mr. Mwangi submitted that the application is hinged on alleged breach of the right to public participation. According to counsel, there was sufficient participation by the public before the bill was enacted into law. He relied on Annexure 1 which was an advertisement in the Daily Nation Newspaper of 19<sup>th</sup> February, 2014 inviting all residents of Laikipia to Nyahururu Town Hall on 22<sup>nd</sup> February 2014 to submit their views on the bill. The meeting proceeded and the 1<sup>st</sup> Petitioner was one of the participants who signed the attendance sheet. Further the views of the participants were considered before the bill was enacted into law and as such the proposed rent was reduced to conform with the view of the participants. Counsel submitted that the mere fact that the Petitioners views did not prevail does not negate that there was public participation.
  16. In further submission, counsel stated that the Petitioner have failed to demonstrate how their inherent dignity under Article 28 of the constitution was infringed by the Respondent. They also failed to demonstrate they had been deprived their right to housing under Article 43 of the Constitution. He contended that the Respondent had no obligation to provide free housing and that the economic and social rights are to be realized progressively.
  17. Finally, counsel submitted that there was no requirement under the Constitution or any other law that a valuation for rent must be conducted. He contended that the Petitioners failed to prove that the increased rates were exorbitant as they themselves did not file a valuation report in support of the allegation that the new rates were excessive. Moreover the court in exercising its jurisdiction on a constitutional petition cannot be called upon to look into whether the rents imposed were excessive. The court can only enquire whether there was threat and or infringement of fundamental rights as provided by the Constitution.

#### **ISSUES FOR DETERMINATION**

18. After taking into consideration the submissions of both Counsel the following issues emerge for determination;
  - i. Whether a conservatory order is merited?
  - ii. Costs.

#### **ANALYSIS**

19. The principles and threshold set down in the renowned case of **Giella V. Cassman Brown** (1973) E.A. 358 applicable are; the applicant must make out a *prima facie* case with a probability of success; that the Petitioners must demonstrate irreparable loss that cannot be adequately compensated by damages and lastly on which side does the balance of convenience lie.
20. It is not in dispute that the Petitioners are in possession of the houses the subject matter of the rental increments and **Schedule 11** of the **Finance Act**. They are therefore stakeholders who will be affected by rental increments captured in the Act. It is not also in dispute that the Respondent enacted the impugned Finance Act, 2013 and that in the process of enacting the Act public participation was a constitutional obligation.
21. The forms of facilitating public participation are varied and the question that comes into my mind after hearing the submissions of both Counsel, is whether the Petitioners and other interested parties were afforded a reasonable opportunity to have an adequate say on the Finance Bill prior to the enactment of the Act. On this aspect the court is satisfied that the Petitioners have made out a *prima facie* case and arguable case on public duty and process. The full extent and level of public participation, reasonable opportunity afforded and adequate say are issues that are best left for determination by the trial court at a full hearing.
22. On the issue of irreparable loss, it is the courts view that damages for violation of the right to public participation and what would amount to adequate compensation would be a Herculean task to quantify. In short, such damages cannot be quantified.
23. The last question to ask is which party will be greatly inconvenienced if the order sought is not

- granted. It is the view of the court that the Petitioners will be the ones who will be greatly inconvenienced in that if they fail to comply and pay the new rentals and that they may face subsequent eviction. The balance of convenience therefore tilts in favour of the Petitioners.
24. This court is satisfied that the Petitioners have demonstrated that the application has merit and are deserving of the conservatory orders.

### **FINDINGS AND DETERMINATION**

- a. The Application is found to have merit.
- b. Pending the hearing and final determination of this Petition, a conservatory order do hereby issue restraining the respondent from levying the new rent in respect of Kiano, Ngare Narok, Starehe and Lumumba estates as specified under Schedule 11 of the Laikipia County Finance Act;
- c. Pending the hearing and final determination of this Petition the Petitioners and the parties they represent shall continue paying the old rentals.
- d. Parties are at liberty to apply for further orders
- e. Costs shall be in the cause

It is so Ordered.

**Dated, Signed and Delivered at Nakuru this 17th day of September, 2014.**

**A. MSHILA**

**JUDGE**