



Issak & another v Marsabit County Assembly & 2 others; Marsabit County Government & 2 others (Interested Parties) (Constitutional Petition E003 of 2024) [2025] KEHC 6282 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CONSTITUTIONAL PETITION E003 OF 2024**

FR OLEL, J

MAY 8, 2025

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
UNDER, ARTICLES 1,2,3,4,10,19,20,21,22,23,27,48,73,159,165,176,183,185,196, AND 259 OF THE CONSTITUTION OF KENYA 2010,
AND PART 2 OF THE FORTH SCHEDULE OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
20,174, AND 185 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE PROVISIONS OF THE COUNTY GOVERNMENT ACT 2012

BETWEEN

BASHIR ADAN ISSAK 1ST PETITIONER

ADBI DIMA YUKUB 2ND PETITIONER

AND

MARSABIT COUNTY ASSEMBLY 1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF MARSABIT 2ND RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF MARSABIT 3RD RESPONDENT

AND

MARSABIT COUNTY GOVERNMENT INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

THE DIRECTOR OF CRIMINAL INVESTIGATIONS INTERESTED PARTY



JUDGMENT

A. Background of the Petition

1. The Petitioner filed this petition dated 13.05.2024 seeking for the following orders;
 - a. A declaration that the Respondents' failure to table the sectoral committee Reports herein is un-procedural, unconstitutional, and is in violation of Articles 1, 2, 3, 4, 10, 19, 20, 21, 22, 23, 27, 48, 73, 159, 165, 174, 175, 176, 183, 184, 185, 196, and 259 of the Constitution.
 - b. A declaration that the respondents breached the provisions of Articles 196(1),(b) and 201(a) by failing to afford the Public adequate opportunity to participate in the passing of the Marsabit supplementary Budget Act.
 - c. A declaration be and is hereby issued that the actions of the 2nd and 3rd respondents, their representatives or assigns, contravenes the Constitution of Kenya, County Government Act, Leadership and Integrity Act, 2002, and therefore prohibited by law.
 - d. A declaration that the 2nd respondent is not fit to hold any public office as his actions are contrary to the provisions of chapter six of the Kenyan constitution and the Leadership and Integrity Act, 2002.
 - e. A declaration that the 3rd Respondent is not fit to hold any public office, as his actions are contrary to the provisions of chapter six of the Kenyan constitution and the Leadership and integrity Act, 2002.
 - f. The Respondents be condemned to pay the costs of this petition.
2. The said petition is supported by the grounds advanced on the face of the said petition and the supporting Affidavit of the 1st Applicant dated 13.05.2024, where he depones that the Marsabit county executive committee presented to the county assembly its supplementary budget in December 2023 mostly containing pending bills from the periods between 30th October 2023 and 7th November 2023. Thereafter, the county assembly in its wisdom decided to form sectoral member committees to inspect projects undertaken and verify work done before any payments could be approved. This process took about a month, and at the end, each sectorial committee compiled their report/findings for subsequent debate and adoption by the whole Assembly.
3. The applicants analyzed the said reports and summarized them as follows;
 - a. The Health services committee, observed that out of 179 projects for the three years, only 11% were considered done, while 31% were not done, and a further 18% had an unclear implementation status. Donor funded projects, which accounted for 6%, were generally done, but there was an apparent incongruence between the budget and the done projects.
 - b. The committee on Administration, coordination of county Affairs and ICT, scheduled a total of 21 budgeted projects for review. The committee managed to reach and assess only 16 projects of the possible 21.
 - c. The committee on Transport, Roads and Public Works Department, scheduled a total of 28 projects for review, and they managed to reach and assess only 18 projects out of the possible 28.



- d. The committee on Agriculture, livestock and Fisheries Development observed that out of 57 projects for the three financial years, 4% were complete, 21% were not completed, and 19% of the projects had unclear implementation status. Donor-funded projects, which accounted for 47% of reviewed projects, were generally completed, but there were apparent incongruences between the budget and the completed projects.
 - e. The committee on lands, Energy, Housing, and Urban Development, observed that out of 58 projects, only 33% were considered complete, while 22% were not complete. Further, 16% had unclear status of implementation. Regarding donor-funded projects, which accounted for 12% of projects reviewed, they were generally completed.
 - f. The Committee on Water, Environment and Natural Resources, managed to inspect the status of 315 projects. Overall, 74 out of 314 projects were found to be complete. 10 were incomplete, and 97 were not implemented. Further, 134 projects could not be verified over three financial years.
 - g. The committee on Budget and Appropriation, scheduled a total of 33 budgeted projects for review. The financial period under review included the 2020/2021 and 2021/2022 periods. The committee could not verify any of the projects due to lack of supporting documents.
 - h. The committee on culture, Gender and social services, scheduled a total of 21 budgeted projects for review. For the financial period 2020/2021, of the 15 projects approved, 3 were completed, 3 were incomplete, and 9 projects not done. For the financial year 2021/2022, 2 projects were budgeted for but not done, and finally for the financial period 2022/2023, 2 budgeted projects were not implemented, and another 2 projects could not be verified.
4. The petitioner faulted the county assembly for debating and passing the supplementary budget without considering committee reports, which had revealed incomplete projects, yet contractors were subsequently fully paid for works not completed. The petitioners further faulted the respondents for misusing public funds, failing to promote accountability in their actions, failing to call out the executive for poor service delivery, passing the supplementary budget which included payments for incomplete projects, and finally for failing to adequately oversight the county government.
 5. The petitioners' further avered that Articles 174(c) and 196(1), (b) of the *Constitution* of Kenya as read with section 87 and 115 of the county government *Act, No 17 of 2012* provided for mandatory public participation in decision making and planning processes which affected the public. The said provisions were buttressed, by standing order 123(3) of the assembly, which provided that whenever a bill was tabled before any sectoral committee, the said committee was legally obligated to take into account the views and recommendations of the public before submitting its report to the county assembly.
 6. The petitioners further faulted the 1st to 3rd respondents for failing to conduct public participation on the supplementary budget and also for failing to discuss or implement the sectoral committee findings before passing the said budget. Overall, the said respondents had failed in their responsibility to enhance/promote financial transparency and accountability as provided for under Article 201(a) of the *Constitution* of Kenya 2010, which was to the loss and detriment of residents of Marsabit County.
 7. The petitioners also pointed out that according to the Auditor General Report, Marsabit county could not account for over 8.2 billion received as the financial statements prepared did not correspond with the available records and as a result of this adverse opinion the county had lost out and could not access funding from Kenya Devolution support programme.



8. The petitioners, therefore, urged the court to find that the respondents had failed in their oversight and governance responsibility, and that their actions were a travesty in law. The court under these circumstances was justified in intervening in order to uphold the Constitution and rule of law. They urged the court to allow the prayers sought.

B. Reply by 1st to 3rd Respondents

9. The respondents relied on the undated replying Affidavit filed by Mr Mato Chare, the clerk to Marsabit County Assembly, who deponed that the petition as filed was frivolous at best and that the prayers sought had been overtaken by events. He also noted that all actions pertaining to the introduction, deliberation, and implementation of the Supplementary Budget for December 2023-2024, whose legitimacy was being contested, had been done in accordance with Articles 2(1), 10, 183, 201, 207(1), (2b), 220(1), 224 and 230(4)(a) of the Constitution of Kenya 2010 and thus they could not be faulted in the duties undertaken.
10. He recalled that the supplementary budget bill was submitted to his office on 17.10.2023, and subsequently on 19.10.2023, tabled before the assembly and committed to the budget and Appropriation committee. On 27.10.2023, the said committee invited departments for consultative meetings, which took place on the 13th and 14th of November 2023.
11. The respondents further submitted that the committee taking into account that they had a duty to be open, accountable and transparent in their dealing with the public did conduct and held stakeholder engagement in accordance with Articles 35, 201, Section 87(a) & 96 of the county Government Act of 2012 and section 33(4) of the Marsabit county Civic Education and Public Participation Act, 2022 and upon successful conclusion of the same complied its report incorporating various recommendations emanating from the consultative engagement's held.
12. Subsequently, the supplementary budget and budget the Committee's report on the supplementary budget were placed before the Assembly on 28.11.2023 and were moved and passed on 29.11.2023
13. The respondents also pointed out that project inspection status reports for the year 2020/2021, 2021/2022 and 2022/2023 (hereinafter referred to as the status report) preceded the supplementary budget as the letters to the various departments by the sectorial committee were sent on 12th October 2023 and field visits conducted between 30.10.2023 to 07.11.2023.
14. They denied the petitioner's averment that the field visits were exorbitant, as they were properly apportioned for, and payments made to facilitate the same in line with the salaries and Remuneration Commission allowances policy guidelines. Once done, the inspection committees retreated to Isolo town to compile their reports, which were subsequently tabled on the floor of the house on 21.11.2023 and discussed on 5th and 6th December 2023.
15. The respondents further pointed out that though the two activities coincided, the supplementary budget process was unrelated to the project inspection, as the latter was carried out by the assembly to help them evaluate, monitor, and hold the county executive to account on projects implemented. There was also no legal requirement linking the two processes, and thus could not be faulted for not merging the two reports.
16. The respondents reiterated that the Supplementary budget 2023/2024 was passed in compliance with Section 135 of the Public Finance Management Act 2012, as read with Regulation 39 of the Public Finance Management (County government) Regulations of 2015. Further, the issues raised in the petition had been overtaken by events, and urged the court to dismiss the petition.



17. The Interested parties though served did not file any reply/response to the petition.
18. The petition was canvassed by way of written submissions. The petitioners, respondents, and 2nd interested parties did file their respective submissions.

C. Determination

19. This court has considered the Petition, the affidavit filed in support, and in opposition thereto. The court has also read and considered the submissions filed. The issues which arise for determination are;
 - a. Whether the 1st Respondent undertook public participation before passing the supplementary budget 2023/2024.
 - b. Whether it was unconstitutional for the county Assembly to pass a supplementary budget bill without considering the reports on project inspection affecting the said bill.
 - c. Whether the 2nd and 3rd respondents should be sanctioned and be declared to be unfit to hold any public office.
 - d. Who should bear the costs of this petition?

i. Whether the 1st Respondent undertook public participation before passing the supplementary budget 2023/2024.

20. The Supreme Court in *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment)* set out the following guidelines on public participation.

“As a Constitutional principle under Article 10(2) of the [Constitution](#) public participation applies to all aspects of governance.

- i. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- ii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this Constitutional principle using reasonable means.
- iii. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a Constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- iv. Public participation is not an abstract notion; it must be purposive and meaningful.
- v. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.



- vi. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- vii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- viii. Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter”.

21. Beyond our borders, Ngcobo J in *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 CC, held:-

“The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.... Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realized.”

22. The Learned Judge further observed:

Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of



money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process."

23. In view of the foregoing, it can be safely concluded that public participation requires the following bare minimum: -
- i. Proper sensitization on the nature of legislation to be enacted or policy to be effected;
 - ii. Adequate notice, depending on the circumstances, which must however, be reasonable;
 - iii. Facilitation of the public to ensure that members of the public are able to access the information required in a convenient and practical manner, understand the same, have a meaningful opportunity to attend, contribute and provide their views;
 - iv. The views of the public should be considered and where they are to be rejected or declined, reason for such rejection and dismissal should be stated; This will obviate the public participation being a cosmetic or a public relations act;
 - v. Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;
 - vi. There must be integrity and transparency of the process
24. The burden of disapproving the petitioner's assertion that there was lack of adequate public participation fell on the respondents by dint of provisions of sections 109 and 112 of the *Evidence Act*. They simply averred in their response that the supplementary budget bill was forwarded to the budget and appropriation committee on 19.10.2023, and the said committee subsequently invited various departments/stakeholders for consultative meetings, which took place on 13th and 14th November 2023. After the said meetings, they compiled their report incorporating the sector committee recommendations and had the said budget moved and passed on 29.11.2023.
25. The respondents did not file any evidence to show the extent of public participation conducted. i.e, nature and extent of invitation, where the said public participation was conducted, engagements with diverse members of the populace to be affected, no prior access to budgetary information to be discussed, no sensitization, and minutes/Hansard extract from the said meetings. In the absence of such evidence, it is clear that the public participation purported to have been conducted by the respondents was a sham and an insult to the intelligence of the general public/ residents of Marsabit County. I so hold

ii. Whether it was unconstitutional for the county Assembly to pass a supplementary budget bill without considering the reports on project inspection affecting the said bill

26. Article 224 of the *Constitution* provides that, based on the division of Revenue Bill passed by Parliament under Article 218, each county government shall prepare and adopt its own annual budget and appropriation Bill in the form and according to the procedure prescribed in an Act of Parliament.



27. Section 135 of the *Public Finance Management Act*, 2012 also provides that a county government may spend money that has not been appropriated, and subsequently submit a supplementary budget to the assembly to approve support of the said additional expenditure.
28. The supplementary budget 2023/2024(in question) was not tabled before the court by either party to these proceedings. The petitioner's averment that it was wrong for the assembly to pass the said supplementary budget before considering the inspection reports, therefore cannot be interrogated as there is no proof that the expenditure incurred concerned these pending projects, completed or not.

Whether the 2nd and 3rd respondents should be sanctioned and be declared to be unfit to hold any public office.

29. The 2nd and 3rd respondents have limited roles to play in ensuring that bills presented before the assembly are passed in accordance with the law. On public participation, they only facilitate the budget and appropriation committee, who in turn conducts public participation as provided for under the law. Further, they are also not members of the County executive and have no role to play in formulating the supplementary budget. The issue of sanctioning them, therefore, does not arise.

Disposition

30. The upshot is that this petition is partially merited, and I do order as follows;
- a. A declaration be and is hereby issued declaring that the 1st respondent breached provisions of Articles 196, (1)(b) and 201(a) by failing to afford the Public adequate opportunity to participate in passing of the Marsabit supplementary Budget Act (2023/2024).
 - b. Costs of this Petition be borne by the 1st Respondent.
31. It is so ordered.

JUDGMENT DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 8TH DAY OF MAY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 8TH DAY OF MAY, 2025.

In the presence of:-

Mr. Otieno - Petitioner

Mr. Kasimu - Respondent

Mr. Jarso - Court Assistant

Ms Wairimu - 1st Interested Party

Mr. Munene – 2nd Interested Party.

