



Nyendwe v Clerk, Nairobi City County Assembly & 3 others; Nairobi City County (Interested Party) (Petition E020 of 2023) [2023] KEHC 22328 (KLR) (Constitutional and Human Rights) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E020 OF 2023
HI ONG'UDI, J
SEPTEMBER 22, 2023**

BETWEEN

LEONARD NYENDWE PETITIONER

AND

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY 1ST RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT

THE GOVERNOR, NAIROBI CITY COUNTY 4TH RESPONDENT

AND

NAIROBI CITY COUNTY INTERESTED PARTY

JUDGMENT

1. The original petition dated 23rd January 2023 was amended with leave of the court granted in the Ruling dated 29th March 2023. In the amended petition dated 26th January 2023 the petitioner seeks the following orders:
 1. A declaration be and is hereby issued that the Supplementary Appropriation Act Number 1 of 2023 is unconstitutional illegal and null and void for being in violation of Articles 10, 23, 27, 28, 29, 33, 38, 43, 47, 53, 54, 55, and 56 of *the Constitution* of Kenya, 2010.
 - 1A. A declaration that the respondent's conduct of enacting the Supplementary Appropriation Act Number 1 of 2023 as contained in the Kenya Gazette Supplement



No. 2 is contrary to and inconsistent with the provisions of Articles 10, 47, 73 and 232 of *the Constitution*.

- 1B. A declaration that the Respondents, jointly and severally, have violated the Constitutional rights of the petitioner guaranteed and protected under articles 27, 43, 47 and 50 of the Constitutional of Kenya, 2010.
 - 1C. An order of certiorari to remove into this court for purpose of quashing forthwith and to quash the Supplementary Appropriation Act Number 1 of 2023 as contained in the Kenya Gazette Supplement No.2.
 - 1D. An order that the Respondents do pay the petitioner general damages for breach of his constitutional rights.
2.
 3.
 4. The 1st to 4th Respondents be and are hereby directed bear the costs of this Petition jointly and severally.

Any other orders that the court shall deem fit and just to grant.

The Petitioner's case

2. The amended petition is supported by the petitioner's affidavit sworn on 26th January 2023, plus a copy of the impugned supplementary Appropriation Bill Gazette No.1 of 2023, which sought to supplement the Country Government's Revenue Fund to service the year ending on 30th June 2023 to the tune of Kshs.39,363,916,279/= (Thirty Nine billion, three hundred and sixty three million, nine hundred and sixteen thousand, two hundred and seventy nine). The said bill is said to have been considered debated and passed by Nairobi City County Assembly on 19th January 2023 before being forwarded to the County Governor on 23rd January 2023.
3. The petition seeks to impugn the decision making process which allegedly flouted provisions of *the Constitution*, the *Public Finance Management Act* of 2012 and the County Government Act of 2012. He points out the following as errors in the Bill:
 - i. Budgets for the Nairobi Metropolitan Services (NM) which is defunct
 - ii. Allocation funds for animal health and safety which are non existent.
 - iii. Double provisions for the offices of the Governor and deputy Governor.That in so acting the 1st, 2nd & 3rd respondents have breached Article 201 of *the Constitution* by passing a law that is in clear violation of the provisions of Sections 125, 126, 128, 129, 130 & 131 of the *Public Finance Management Act*. That no public participation on the budget estimates for the financial year ending 30th June 2023 had been conducted. He argues that there was no 1st reading, committee stage, public participation, 2nd reading and 3rd readings, debate and voting before it was passed.
4. He argues that the respondents have acted without transparency, accountability and/or involvement of the people of Nairobi or their chosen representatives thus violating Articles 10, 73 & 232 of *the Constitution*. That the respondents by their conduct have violated Articles 21, 27, 28, 29(d), 38, 43, 47(1), 54, 55, 56, 57, & 174 of *the Constitution*, Sections 4, 5, 6 of the Fair Administrative Actions Act No.4 of 2015. That they also breached his legitimate expectation.



5. He averred that as a result of the respondents actions he finds himself humiliated, distraught, helpless and hopeless.

The Respondent's and Interested Party's case

6. The 2nd respondent (Speaker of the Nairobi City County Assembly) filed a response to the amended petition. He averred that under Article 209 of *the Constitution*, Section 161 of the *Public Finance Management Act* and other enabling provisions of the law the counties are allowed to pass and implement legislation on various forms of levies and taxes and how to spend the revenues generated by the counties. That the impugned Supplementary Appropriation Act No. 1 of 2023 is one such legislation. It did not therefore require public participation. Citing Article 223 of *the Constitution* he made mention of a situation where the government is allowed to spend money under supplementary appropriation. These are where:

- a. The amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Act or
- b. Money has been withdrawn from the Contingencies Fund.

That the approval for such spending is sought from Parliament or Assembly within 2 months after the first withdrawal of the money. Once approved then an Appropriation Bill is introduced for the money spent.

7. He depones that he carried out his duties diligently and the petition herein is in direct violation of *the Constitution* and *Public Finance Management Act*. That supplementary Appropriation Bills/Acts are presented to the Assembly and enacted on the basis of money already appropriated and any declaration of the same as null and void without declaring the main Appropriation Act null and void would not work.

The 3rd Respondent's case

8. A replying affidavit by Edward Gichana sworn on 27th April 2023 was filed on behalf of the 3rd respondent in opposition to the amended petition. It raises the following issues:
 - i. The amended petition lacks specificity and therefore falls below the threshold test set out in the Anarita Karimi Njeru case.
 - ii. The Nairobi City County Supplementary Appropriations Act 2023 contained the budget for the county government for the period ending 30th June 2023. It has been fully implemented thereby rendering the entire petition overtaken by events and is purely academic.
 - iii. The impugned Act was enacted pursuant to the legislative power of the county Assembly donated by *the Constitution* and for purposes of providing funding to the county government to deliver on the mandate required of it by *the constitution* and so the Court should exercise restraint and not interfere with a legitimate constitutional function of another arm of Government.
 - iv. The jurisdiction of the court under Article 23 should not be exercised in vain.

The Parties submissions

The Petitioner's submissions



9. These are dated 26th January 2023 and were filed by Shisanya & company advocates. Counsel's first issue is whether there was public participation. He submitted that there was no public participation in violation of Articles 10, 10(2), 174(c), 196(1)(b), 20(a) sections 87 & 115 of the County government Act No. 17 of 2012. To him public participation entailed, giving the public access to the supplementary Appropriate Bill 2023, or informing them on where and how they should get it disseminate information, publicise it, provide appropriation time, for studying and preparing submissions. This he argues was not done. Reliance was placed on the case of Robert N. Gakuru and others vs. Governor Kiambu County & 3 others [2014] eKLR which quoted with approval the case of Genister vs. President of the Republic of South Africa & others (CCT 48/10) [2011] ZACC 6, 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) where it was held:

“For the opportunity afforded to the public to participate in legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken.”

10. He further relied on the case of Richard Ncharpi Leiyagu vs. Independent Electoral Boundaries Commission & 2 others [2013] where the Court stated thus:

“The standard to be applied in determining whether parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”

He contends that the respondents did not adhere to these requirements.

11. Counsel has submitted that the impugned Act is inconsistent with the constitutional rights. It has a number of loopholes including budgeting for a non-existent entity and denying the people of Nairobi their Constitution. To support him reliance was placed on the case of Republic vs. Big M Drug Mat & Samuel H. Momanyi vs. Attorney General and another [2016] among others.

1st Respondent's submissions

12. These are dated 28th May 2023 and were filed by Ashioya Mogire & Nkatha advocates. Counsel addressed only one issue which is whether the petition meets the threshold of a Constitutional Petition. Relying on the cases of Anarita Karimi Njeru vs. the Republic [1979] eKLR and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. He submitted that the petitioner's complaints have arisen from the decision making process undertaken by relevant organs of the Nairobi City County Government. That the said process flouted provisions of *the Constitution*, *Public Finance Management Act* 2012 and the County Government Act 2012. This issue is how such a decision making process became a Constitutional matter.



13. After laying out all that is stated and outlined by the petitioner counsel submits that the petitioner has not told the court what provision of the law requires and /or directs the County Executive and/or the Assembly to undertake public participation in the deliberation and passage of a supplementary bill.
14. Counsel therefore submits that this petition is simply disguised as a constitutional petition seeking to enforce the bill of rights. That enforcement of procedures adopted by the Country Executive and Assembly in the passage of a bill is not for this court but for the civil courts. He relied on the cases of Abraham Kaisha Kanziku v. Governor of Central bank & others [2006] eKLR, (ii) Patrick Mbau Karanja v. Kenyatta University [2012] eKLR (iii) Francis Waithaka vs. Kenyatta University, Petition No. 633 of 2011.

The 2nd Respondent's submissions

15. These are dated 12th May 2023 and filed by Otieno Okeyo and company advocates. Counsel's issue is whether the Supplementary Appropriation Act requires public participation. He has submitted that the enactment of Supplementary Appropriations is provided for under Article 223 of *the constitution*. He thus contends that the 2nd respondent's duty is to approve the Interested Party's Supplementary Appropriation Bill in accordance with Article 223(1) – (5) of *the Constitution*. There is therefore no requirement for him to subject the bill to public participation.
16. While relying on the case of Okiya Omtatah Okoiti & 2 others vs. The Attorney General & 3 others [2014] eKLR he submits that a person seeking to institute a claim for the violation of *the Constitution* must do so based on a bonafide and genuine claim. In this case he argues that the claim in the amended petition is neither genuine nor bonafide based on the expenses provisions of Article 223 of *the Constitution*. Further relying on the case of National Conservative Forum vs. The Attorney General [2013] eKLR counsel submits that the court should not engage in determination of a matter for an academic reason. That in this case the issues have already been overtaken by events.
17. He admitted that the NMS is defunct but there are pending bills and ongoing projects which must be dealt with by the Interested Party. Such payments can only be appropriated under NMS and not otherwise. On the issue of budgeting for animal health and safety he referred to the Nairobi County Dog Control Welfare Act 2015 in operation and Nairobi City County Animal Control and Abattoirs Management Act operation all which are under the offices of the deputy director veterinary services (Animal Health). There is therefore nothing about Zoos as referred to by the petitioner he submits.
18. Counsel has argued that the petitioner has failed to show how the Act discriminated against him. That he did not even plead on how this was done, neither did he demonstrate how the 2nd respondent breached Article 196 in the enactment of the Supplementary Appropriation Act of the Interested Party.

The 3rd respondent's submissions

19. These are dated 12th May 2023 and have been filed by Bryan Khaemba, Kamau Kamau & company advocates. Counsel submits that the petition lacks specificity and is full of generalizations and contradictions. This to him is not what the case of Anarita Karimi Njeru vs. Republic (No.1) [1979] 1 KLR 154 provides for. Counsel has outlined from the amended petition paragraphs 21, 23, 24, 27, 28, 29, 30, 31, 32, 33 – 37 as simply citing the provisions of *the constitution* allegedly violated. At paragraph 11 of the amended petition he cites alleged errors which allegedly expose the petitioner's ignorance. He gives the reasons for stating so. The said reasons are similar to those submitted on by the 2nd respondent's counsel and I shall not rehash them here.



20. Counsel makes reference to paragraphs 40 – 46 of the amended petition where the petitioner alleges violation of rights under the Fair Administrative Actions Act. He submits that the petitioners lamentations are hollow for the reason that:
- a. Funding for the Nairobi Metropolitan Services is not towards the defunct entity but rather towards the services preciously provided by the entity and which were reverted back to the County Government. The NMS also left behind a mountain of pending Bills which have to be paid.
 - b. The petitioner ignorantly contends that funding for Animal health & Safety relates to wild animals yet the County has no known zoos. The truth is that the funding relates to domestic animals which Nairobi residents have in plenty.
 - c. The alleged double allocation for the governor’s office is not a double allocation but is funding for two different votes being development and recurrent expenditure.

To support this point of lack of precision and specificity counsel cited the case of David Mathu Kimingi vs. SMEC Internal PTY Limited [2021] eKLR.

21. Counsel further submits that the allegations of violation of rights were not proved as is required. Reference was made to the case of Leonard Otieno vs. Airtel Kenya Limited [2018] eKLR where the Court held:

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

22. Counsel contends that the petition is a disguised attempt to atone personal emotions which cannot stand. Not every person within Nairobi City County can be satisfied by the decisions made. To support this counsel cited the case of (i) Karuri & others vs. Dawa Pharmaceuticals Company Limited and others [2007] 2 E.A. 235 cited in Muema Mativo vs. Director of Criminal Investigations & 2 others [2021] eKLR.
23. It is further counsel’s submission that the impugned Act has largely been implemented through requisitions and drawing funds from the County Revenue Fund to Finance provisions of the various services and programmes as set out in the Act. The Act was meant to last until 30th June 2023 before the Nairobi City County Finance Act 2023 lacks effect. He urged the court not to act in vain by annulling an Act that has already been implemented and ceased effect. Reference was made to the case of Daniel Kamunya & 3 others (suing as Westland Environmental Caretaker Group) vs. County Government of Nairobi [2019] eKLR where the Court opined as follows:

“No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.



Applying the principles in the above authority to the instant case, it is obvious that all the prayers in the petition have been overtaken by events and therefore, there remains no unresolved justiciable controversy in this petition. Because courts generally only have subject-matter jurisdiction over live controversies, when a case becomes moot during its pendency, the appropriate first step is a dismissal of the case. On this ground alone, this case falls for dismissal.”

24. He further urged the court not to grant the certiorari order sought since the Act was enacted to benefit the wider public and not individuals. Reliance was placed on the case of *Nelson Kinyua Wambutu vs. County Government of Nyeri & another* [2016] eKLR.

The 4th Respondents and Interested Party’s submissions

25. These are dated 12th may 2023 and filed by Okatch & Partners advocates. Counsel has submitted that when the constitutionality of a statute or provision of a statute is called to question, the court is under obligation to employ the constitutional mirror laying the impugned legislation or provision alongside the Article(s) of *the Constitution* and determine whether it meets the constitutional test. The court must also check both the purpose and effect of the section or the Act to see whether any of the two could lead to the provision being declared unconstitutional. He referred to the case of *Republic vs. Big M. Drug Mart limited* (supra) where the Court stated:

“Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intend to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”

26. He submits that the general rule or principle guiding unconstitutionality of a statute was restated by the Supreme Court of India in *Hambardda Wakhana vs. Union of India* Air [1960] AIR 554 where it was stated:

“In examining the constitutionality of a statute, it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment.”

Further the Court of Appeal Tanzania in *Ndyanabo vs. Attorney General* [2001] E.A 495 which was a restatement of the law in the English case of *Pearberg vs. Varty* [1972] 1 WLR 534 held:

“Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative.”

27. Counsel has submitted that through Article 1 of *the Constitution* of Kenya 2010 sovereign power is delegated to Parliament and the legislative assemblies in the country governments; the national executive and the executive structures in the country governments; the Judiciary and independent



tribunals; and the said organs must perform their functions in accordance with the constitution. Further that any law including customary law that is inconsistent with the constitution or any act or omission in contravention of the Constitution must be recalled. He relied on this court's decision in Re Kadhis Court: Very Right Rev. Dr. Jesse Kamau & others Nairobi HCMCA No. 890 of 2004 where it was held that:

“The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavor to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with lofty purposes for which its makers framed it. So, construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.”

28. Referring to the Petitioner's contention that the process of enactment of the Act was unconstitutional due to lack of public participation he raised issue with what amounts to public participation. On this he referred to the case of Doctors for Life international vs. Speaker of the National Assembly & others CCT 12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 (CC) 2006 (6) SA 416 (CC).
29. Counsel submits that in paragraph 9 of the amended petition is found the definition of “public participation” which clearly states that the Bill was considered, debated and passed by the Nairobi City County Assembly on 19th January 2023. For him the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It is not about a personal hearing.
30. Additionally counsel has submitted that he who alleges a fact must prove it as envisaged under Section 107 (1) of the Evidence Act. This was also the position taken in the Anarita case (supra) and Mumo Matemu case (supra). Its counsel's submission that the petitioner has not proved any of the allegations on violation of his constitutional rights.
31. Finally on costs he submits that costs follow the event as provided for under Section 27 of the Civil Procedure Act, and Halsbury's laws of England (4th Edition) Vol 37 at page 559.

Determination

32. I have carefully considered the pleadings, responses, parties' submissions, cited cases and the law. The main issue for determination is whether the supplementary Appropriation Bill was enacted in accordance with the law and legal process. The sub-issues that come up and which I shall deal with are as follows:
 - i. Does a Supplementary Finance Appropriation Bill at the county level require public participation?
 - ii. Can the public participation conducted in the main Act sustain the supplementary one?
 - iii. What is the process that occurs in the National Assembly?



33. So what is supplementary appropriation? It is an appropriation enacted subsequent to a regular annual appropriation act. When the need for funds is too urgent to be postponed until the next regular annual appropriation a supplementary appropriation is brought up. Supplementary expenditure is the additional grant required to meet the required expenditure of government. A supplementary budget is a request by state departments and agencies for additional funding in the course of a financial year. It is meant to take care of expenditure that was not factored in during the budget process.

34. Article 224 of *the Constitution* provides that:

County appropriation Bills

On the basis of 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.

35. The Statute is the *Public Finance Management Act* No. 18 of 2012. This Act under Part IV provides for ‘County Government responsibilities with respect to management and control of public finance.’ With reference to the matter at hand, Sections 125 – 146 of the Act provide for the ‘County government budget process.’ Section 125 provides as follows:

Stages in county government budget process

1. The budget process for county governments in any financial year shall consist of the following stages:
 - a. integrated development planning process which shall include both long term and medium term planning;
 - b. planning and establishing financial and economic priorities for the county over the medium term;
 - c. making an overall estimation of the county government’s revenues and expenditures;
 - d. adoption of County Fiscal Strategy Paper;
 - e. preparing budget estimates for the county government and submitting estimates to the county assembly;
 - f. approving of the estimates by the county assembly;
 - g. enacting an appropriation law and any other laws required to implement the county government’s budget;
 - h. implementing the county government’s budget; and
 - i. accounting for, and evaluating, the county government’s budgeted revenues and expenditures.
1. The County Executive Committee member for finance shall ensure that there is public participation in the budget process.

36. Part III of the Act provides a similar structure for the National Assembly save for the fact that Section 35(2) provides that the Cabinet Secretary shall ensure that there is public participation in the budget process.

37. This process culminates into the approval of the Finance Bill under Section 133 of the Act which states as follows:



Approval of the Finance Bill

Not later than ninety days after passing the Appropriation Bill, the county assembly shall consider and approve the Finance Bill with or without amendments.

- b. The Act contemplates and provides for supplementary appropriation as follows under Section 135:

County government to submit to county assembly supplementary budget in certain circumstances

1. A county government may spend money that has not been appropriated if the amount appropriated for any purpose under the County Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act, or money has been withdrawn from the county government Emergency Fund.
 2. A county government shall submit a supplementary budget in support of the additional expenditure for authority for spending under subsection (1).
 3. In complying with subsection (2), a county government shall describe how the additional expenditure relates to the fiscal responsibility principles and financial objectives.
 4. Except as provided by subsection (5), the approval of the county assembly for any spending under this section shall be sought within two months after the first withdrawal of the money.
 5. If the county assembly is not sitting during the time contemplated in subsection (4), or is sitting but adjourns before approval has been sought, approval shall be sought within fourteen days after it next sits.
 6. When the county assembly has approved spending under subsection (2), a supplementary Appropriation Bill shall be introduced for the appropriation of the money spent.
 7. In any financial year, the county government may not spend under this section more than ten percent of the amount appropriated by the county assembly for that year unless that county assembly has, in special circumstances, approved a higher percentage.
38. The Court in the case of *Tyson Ng'etich & another v Governor, Bomet County Government & 5 others* [2015] eKLR while answering a comparable question observed as follows:

“The evidence before me is clear that there was public participation in the budget estimates forming the Appropriation Act which became law on 25th July 2014. Indeed, the 5th respondent in his investigative report confirmed that fact and concluded firstly, that between 22nd April 2014 and 24th April, 2014, the County Treasury conducted public participation forums in Chepalungu sub-County at Sigor Market, Bomet East sub-County at Longisa market, Sotik sub-County at Sotik market, Konion sub-County at Mogogosiek pavilion and Bomet Central sub-County at Silibwet market center on budget estimates and views of the public were collected which were taken into account during the preparation of the Budget



Estimates tabled before the County Assembly. Similarly, between the 10th and the 12th of June 2014, the Committee on Budget and Appropriation held five public participation forums in the five sub-counties of Bomet County where members of the public gave their views on budget estimates. I have seen the list of attendees in those forums and the newspaper advertisements informing the members of the public about the planned public forums and I have no reason to disbelieve the fact that indeed those meetings were held.”

39. The Court went on to state as follows:

“...in *Law Society of Kenya v Attorney General Nairobi* Petition No.318 of 2012 [2013] eKLR the Court observed that,

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

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

“We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation.”

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

40. Whereas amendments to the Appropriation Act may differ from the purpose of a supplementary appropriation, the essence is that they all stem from the county government budget process which is deemed as a uniform continuous process. This is to say that one part cannot be considered separate from the whole process. This is why the Court in the case of *Law Society of Kenya* (supra) observed that a Court in answering such a question must interrogate the whole process.
41. What is clear from Section 135(3) of the Act is that the purpose of the supplementary appropriation must relate to the already determined year’s fiscal responsibilities and objectives. This way it would then be reasonable to argue that the Supplementary Appropriation Bill duly underwent public participation as observed in the case of *Institute of Social Accountability and Another* (supra).
42. The petitioner herein has raised issues to do with public participation which was undertaken when the main Act was enacted. It is not every small lawful act undertaken by the county that has to be subjected to public participation. Infact the petitioner has stated in his pleadings that the bill was considered, debated and passed by Nairobi City County Assembly on 19th January 2023. Thereafter the Bill was forwarded to the County Governor for assent. The county Governor gave his assent to the Bill on 23rd January 2023.
43. Who does the County Assembly comprise of? It comprises of members of the County Assembly (MCAs) who are elected leaders representing the petitioner among others. If the petitioner had issues



he should have passed them onto his member of the County Assembly or even any other MCA for purposes of it being presented to the County Assembly for debate.

44. As things stand now the bill was assented to and money has been appropriated. It is true that *the constitution* provides for public participation but the same should not be misused to the point that National and County projects are made to stall because somebody somewhere is claiming he/she was not personally involved or contacted when a certain decision was being made.
45. In the case of Community Advocacy & Awareness Trust & 8 others Attorney General & 6 others [2012] eKLR it was held that it had never been the intention of *the Constitution* to subject decision making to the tyranny of tabulated legalism. That there is a margin of discretion conferred by *the constitution* and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confirmed within the purposes set by the law.
46. In this case as admitted by the petitioner, the Bill was presented to the County Assembly and due process undertaken. It is not for this Court to get the same and start poking holes and sieving the various provisions which were well discussed by the County Assembly and assented to by the 4th Respondent.
47. The upshot is that there is no unconstitutionality exhibited in the supplementary Appropriation Act No. 1 of 2023 for the Nairobi County. Let the Respondents and the Interested Party be allowed to carry on the duties and serve the people of Nairobi County. The petition is dismissed with costs.
48. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22ND DAY OF SEPTEMBER 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

