



REPUBLIC OF KENYA



**Kishushe Ranching Co-operative Society Ltd v Attorney General & another (Constitutional Petition E002 of 2022) [2023] KEHC 23031 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23031 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CONSTITUTIONAL PETITION E002 OF 2022  
GMA DULU, J  
OCTOBER 3, 2023**

**BETWEEN**

**KISHUSHE RANCHING CO-OPERATIVE SOCIETY LTD ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Before me is a petition initially filed by Kishushe Ranching Co-operative Society Ltd against the Attorney General dated August 3, 2022 and filed on the same August 3, 2022.
2. The petition, which was filed through counsel Mwazighe & Company Advocates, was brought under Article 2, 10, 27, 33, 118, 201, 232 and 259 of the Constitution of Kenya, in which the petitioner seeks the following reliefs:-
  1. A declaration be made that the petitioner's fundamental rights and freedoms under Article 27, 33 and 35 of the Constitution have been contravened and or are likely to be contravened and violated by the respondent herein.
  2. A declaration that coming into being of the Finance Act 2022 did not follow the right procedure in coming up with Export Levy Rate for Iron Ores and other concentrates including roasted iron.
  3. A declaration that Section 50 of the Finance Act 2022 on the Export Levy Rate for Iron Ores and other concentrates including roasted iron pyrites is unconstitutional and therefore, is invalid, null and void.
  4. Costs of this petition.



5. Any other orders, writs and directions the Honourable Court considers appropriate and just to grant for purposes of the Petitioner's Constitutional rights.
3. The petition was filed with an affidavit sworn by Narcis Chombo Shete, described as chairperson of the petitioner, in which it was deponed that the petitioner ranch is a major stakeholder in the field of iron ore mining and specifically to magnetite production about 100,000 tonnes per year; that on June 21, 2022 the President assented to the Finance Bill which was enacted but was not proper as it avoided a key step of inviting stakeholders to participate in public participation forums while the said law was meant to affect those concerned; that the Finance Bill amended schedule one of *Miscellaneous Fees and Levies Act* 2016 to include Export Levy rate for iron ores of USD 175 per tonne; that the said levy was too exorbitant and against the economic principles and policies and is meant to economically amputate the petitioner and other key stakeholders as the current market for iron ore is between USD 105 – 110 per tonne; and that the ranch pays taxes and also benefits the community through corporate social responsibility programmes; and that many people will lose jobs; and that the petitioner seeks the exercise of this court's discretion to lift the ban by staying Section 50 of the Act.
4. Though the petition was filed with an application for interlocutory orders, I do not see any ruling on the application issued by this court.
5. I note also that an application dated August 29, 2022 was filed on September 8, 2022 through Mbarak Awadh Ahmed Advocate seeking the joinder of the National Assembly as a 2<sup>nd</sup> respondent, and thus there are presently two respondents herein.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mwazighe & Company Advocates for the petitioner as well as the submissions filed by Mbarak Awadh Ahmed Advocate for the National Assembly. I note that the submissions of the petitioner's counsel were not served on the Attorney General. Also no submissions were filed on behalf of the Attorney General, through Mr. Emmanuel M. Makuto a Senior Litigation Counsel had entered appearance for the Attorney General.
7. In the written submissions, counsel for the petitioner listed two issues for determination. First, whether the principles of public participation were ignored, compromised and or neglected in the process of enactment of the law. Secondly, who is to bear the costs.
8. What constitutes proper public participation in matters that affect the public has been addressed severally by courts in Kenya and courts outside Kenya.
9. In jurisdictions with comparative requirements of public participation like South Africa, the South African Constitutional Court in the case of *Doctors for Life International =Versus= Speaker of the National Assembly and Others* (CCT12/05) (2006) Ngobo J. stated as follows:

“The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements; a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected...”
10. Here in Kenya, since inauguration of the present Constitution in 2010, there is indeed a constitutional requirement for public participation in matters that affect the public. In the case of *Mui Coal Basin*



eKLR the High Court stated as follows:-

“...public participation does not dictate that everyone must give their views on an issue of environmental governance.....Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of the public participation regime, the government agency or public official must take into account the subsidiary principle; those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.”

11. In the present case, the petitioner, a ranch which is also involved in iron ore mining and roasting, claims to have been denied public participation in the national budget preparation and subsequent enactment of the Finance Act of 2022 wherein additional taxes were imposed on raw and roasted iron ore.
12. On the other side, it is contended by the counsel for the 2<sup>nd</sup> respondent the National Assembly that a court decision on public participation in relation to the same Finance Act 2022 has already been made in the case of Mwaura Kabata & Others =Versus= The National Assembly & Others – Nairobi High Court Petition E338 of 2023 in which it was stated as follows:-

129. It is imperative to reiterate the decision as to whether or not to impose a tax and at what rate is within the legislative authority as provided in the Constitution. Evidently, this question as raised by the petitioner revolves around policy issues that are specifically set out for the Parliament by the Constitution. This in effect would prohibit this court from making a finding that revolves around a political question owing to the doctrine of separation of powers.”

13. I note that in the present matter also, the petitioner filed herein a supporting affidavit, with an extract of proceedings of public participation or stakeholders consultations undertaken wherein more than sixty (60) persons or institutions including Kenya Association of Manufacturers gave their views before enactment of the Finance Bill 2022 pursuant to a public advertisement in the newspaper media.
14. Thus when the petitioner comes to this court to complain that the public participation was selective as to whom should participate, that contention is not backed by any evidence, as the press invitation was an open one and not a closed invitation. The petitioner also does not say that they attempted to attend or give their views and were excluded or deliberately frustrated. I thus find no basis to hold that public participation was not conducted, nor that the petitioner was denied the right to participate.
15. In any event, this now being a new financial year 2023/2024 and a new national budget incorporating a new tax regime having been passed in Parliament in June 2023, this petition has been overtaken by events. As courts do not make orders in vain, if I grant any of the orders sought now, this court will be acting in vain.
16. I thus find that the petitioner has not satisfied the threshold for grant of any of the constitutional reliefs sought. I will thus dismiss the petition.
17. With regard to costs, as this is a complaint of a public interest nature, I will order that parties bear their respective costs of the petition.
18. Consequently, and for the above reasons, I dismiss the petition herein. Parties will bear their respective costs of the litigation.

**DATED, SIGNED AND DELIVERED THIS 3<sup>RD</sup> DAY OF OCTOBER 2023 AT VOI.**



**GEORGE DULU**

**JUDGE**

**In the presence of:-**

**Alfred – Court Assistant**

**Mr. Makuto – for the Attorney General**

**Mr. Emaka holding brief for Mbarak for National Assembly**

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