



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 6 OF 2020

IN THE MATTER OF

ARTICLES 1, 2(1), 3(1), 10, 22, 35(1) & (3), 129, 159(2)(e), 165(3)(d) and 259

AND

IN THE MATTER OF

BREACH OF THE PROVISIONS OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

AGRICULTURE AND FOOD AUTHORITY ACT NO. 13 OF 2013

AND

IN THE MATTER OF

ACCESS TO INFORMATION ACT, 2016

AND

IN THE MATTER OF

COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF

FARMERS WITHIN NZOIA SUGAR BELT

AND

IN THE MATTER OF

PLANNED LEASING OF NZOIA SUGAR COMPANY LIMITED.

BETWEEN

JACK MUKHONGO MUNIALOPETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF

AGRICULTURE, LIVESTOCK, FISHERIES &

IRRIGATION2ND RESPONDENT

CABINET SECRETARY

MINISTRY OF FINANCE.....3RD RESPONDENT

DIRECTOR GENERAL AGRICULTURE

AND FOOD AUTHORITY.....4TH RESPONDENT

CHAIRMAN NZOIA SUGAR

COMPANY LIMITED.....5TH RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA.....6TH RESPONDENT

JUDGEMENT

The petitioner herein, Jack Mukhongo Munialo, describes himself as a Sugar cane farmer and a resident of Bungoma County supplying cane to Nzoia Sugar Company Limited.

The 1st respondent is an office established under Article 156(1) of the Constitution and is the principal legal advisor to the government and the representative of the national government in court or in other legal proceedings other than criminal proceedings, as provided by Article 156(4) of the constitution, the 2nd respondent is the cabinet secretary in charge of agriculture, livestock and fisheries and is the relevant cabinet secretary in relation to Agriculture and Food Authority Act, 2013 while the 3rd respondent is the cabinet secretary ministry of finance.

The 4th respondent is the head of the Authority established under Section 3(1) of the Agriculture and Food Authority Act, 2013.

The 5th respondent is the head of Nzoia Sugar Company Limited, a company registered under the provisions of the Companies Act Cap. 486 and the 6th respondent is an entity established under the Constitution and the County Governments Act, 2012.

In his petition dated 15th September, 2020, the petitioner seeks;

a. A declaration that the rights of farmers, who supply their sugar cane to Nzoia sugar factory, of public participation before the decision to lease Nzoia sugar company ltd have been infringed by the decision of the respondents jointly and severally to lease out the company for 25 years.

b. A declaration that the process of intended leasing of Nzoia Sugar Company Limited is unconstitutional for offending the provisions of the Constitution of Kenya as contained in Articles 3(1), 10, 35(1), (3) and 129 of the Constitution of Kenya and that the same be declared illegal, null and void.

c. An order of prohibition stopping the leasing of the Nzoia Sugar Company until there has been sufficient public participation in the process.

d. Any other order that the honourable court may deem just and fit to ensure that law and order is maintained and that promotes rule of law.

e. Costs of the petition.

The petitioner states that on the 9th July, 2020, the Chairman Lake Region Economic Block Chairman and the Governor Kisumu County on behalf of the Sugar Task Force members issue a newspaper press statement recommending the leasing out of Nzoia sugar mills and followed it up with an international expression of interest advert the following day for leasing and operation of Nzoia Sugar Mills among other sugar factories.

The petitioner avers that there was no public participation involving sugar cane farmers to discuss the intended leasing. That a meeting held on 13/3/2019 did not meet the Constitutional threshold as it did not involve a sample size sufficient for farmers to give their views. Farmers who attended the hurriedly convened meeting gave views on reviving the miller and no issue regarding leasing out was raised therefore no views were given.

That he was shocked to read in the newspapers of the intended lease. He depones that public participation ought to be inclusive, wholesome

and participatory. He further states that public participation strengthens democracy and governance, improves process quality as well as increasing transparency and accountability.

That the petitioner's requests to the task force members for the report on revival of the sugar sector has never yielded any fruits and is contrary to the provisions of Article 35 of the Constitution and the Access to Information Act, 2016.

The petitioner avers that the decision to lease out the company for 25 years was a unilateral decision by the respondents without any public participation and contravenes the Constitutional provisions.

That the land where the factory stands was once communal land and residents gave out their lands for the establishment of the factory and their voice is worth being considered before such a drastic investment plan is undertaken.

That the 6th respondent ought to safeguard the residents' interests yet it is at the forefront supporting the intended lease out.

The petitioner depones that the intended lease is in breach of the Constitution and shrouded in secrecy particularly because the task force has not given reports and documents to the public for scrutiny and input.

He avers that the intended lease contravenes the Constitutional provisions contained in Articles 3(1), 10, 35(1), (3) and 129 of the Constitution. That the 1st respondent failed to counsel the 2nd, 3rd and 4th respondents that failure to carry out public participation breached the Constitution thus failed in his duty as the chief Government legal advisor.

The 4th respondent filed its replying affidavit on behalf of the 1st-4th respondents through Rosemary Owino, the interim head of the Sugar Directorate. She depones that the Task Force of Sugar Industry Stakeholders was created vide Gazette Notice 11711 on 9/11/2018 which invited members of the public to submit memoranda, considered views from expert presentations and extensively reviewed successful sugar models from COMESA countries and held public participation meetings in all the sugar growing areas and there was more than sufficient public participation before the decision to privatize was arrived at.

That from the recommendations of the task force, a majority of the stakeholders supported privatization of the state-owned sugar mills after debt write off and identification of strategic investors to take over the mills on condition that the land is used for cane development only.

That the cabinet adopted the report after write off of debts due to the Government from Kenya Sugar Board, write off growers' debts owed to the Kenya Sugar Board and tax penalties and interest as at 30th June, 2009.

That the 4th respondent in execution of the government's policy in relation to the 5 state-owned sugar factories engaged world-class experienced investors to redevelop the factories and manage them for 25 years.

The 2nd respondent through the 4th respondent advertised the International Expression of Interest (IEOI) for leasing assets including land for Nzoia Sugar Company in accordance with the Public Procurement and Assets Disposal Act, 2015. The advertisement ran on the standard newspaper of 4th August, 2020 where only prequalified firms would be invited to submit proposals for leasing of each of the sugar factories.

That of the 5 factories, 2 are under receivership thus have functional boards while the remaining 3 had the appointment of their board members revoked by the 2nd respondent vide Gazette Notice of 3rd August, 2020.

That the leasing of the sugar mills will inject fresh investment in the mills, leading to higher productivity and subsequent employment of more workers and steady farm gate prices to the farmers.

That the advertisement simply invited interested investors both local and international familiar with the sugar industry to express their interest by submitting information on their commercial and technical capacity to provide the service whereupon prequalified investors would be considered in the process of Request for Proposals (RFP).

That pursuant to the advertisement, 29 entities submitted their bids after which the qualified bidders would be asked to present their proposals from which the tendering committee would select the winners.

That the decision to lease the factories is a sole preserve of the board of directors and the petitioner is neither a minority shareholder nor a fiduciary in any way and therefore need not be consulted or that the decision requires public participation.

That the petitioner lacks locus in the proceedings as he is not bringing the suit on behalf of Nzoia sugar company or that he has any specific interest in the subject parcels of land or in Nzoia sugar company.

That Nzoia sugar company is a separate legal entity capable of owning land and has rights to deal in lease or even transfer the land without any reference to the petitioner. That the petitioner has not satisfied the conditions of Article 63 of the Constitution which requires identification of communities before land can be deemed ancestral.

That the petitioner has not set out any specific rights and how they have been violated and that the procedure adopted by the petitioner is erroneous as he ought to have moved court by way of Judicial Review as opposed to a Constitutional Petition.

She further depones that under the Public Procurement and Asset Disposal Act, 2015, there is no requirement for public participation in

preparation of tender documents or for any other operational matters.

That the taskforce report was handed over to the President of the Republic of Kenya on 24th February, 2020 hence a public document available on request.

That the 4th respondent acted on instructions from the Government and advise from the 1st respondent and finally that the court lacks jurisdiction to entertain this matter as it is a preserve of the Public Procurement and Asset Disposal Appeals Board and ultimately to this court by way of judicial review.

The parties thereafter filed their written submissions.

The petitioner's contention in these proceedings as captured earlier in this judgement mainly revolves around the advertisement by the 4th respondent on 10/7/2020 in the standard newspaper of an International Expression of Interest for the leasing and operation of the 5 state owned sugar factories including Nzoia Sugar Company Limited.

By this, the petitioner argues that no public participation was held in the Nzoia sugar cane growing region. That the meeting held on 13/3/2019 did not meet the Constitutional threshold for public participation.

The petition also complains that he was not given a given a signed copy of the report of the task force thus violated his rights thus violated his rights under Article 10 and 35 of the constitution among other Articles.

Participation of the citizens in public affairs is anchored in the provisions of Article 10(2)(a) of the Constitution, Article 35 which was operationalized by the enactment of the Access to Information Act, 2016 provides for the right to information.

The courts in their decisions have given an interpretation of the phrase public participation. In the case of **Republic Vs County Government of Kiambu Ex parte Robert Gakuru & another (2016) eKLR G.V Odunga J. held;**

However, it must be appreciated that 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 cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that 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 issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

This court in the above cited authority observed that for public participation to meet its test, a section of the members of the public have attended and given their views on the issue at hand. There seems to be no requirement that a certain number of people have attended and their views made it into their final report.

In the instant case, the petitioner's claim that only a handful of farmers gave their views does hold water in the circumstances. He has not indicated what he deems the constitutional threshold. He has not indicated what number of farmers attended as opposed to the number he thinks ought to have attended.

This court has perused through the taskforce report of the sugar industry stakeholders taskforce. At page 23 thereof, it is indicated under paragraph (vii) that;

The taskforce held public participation forums in all the sugarcane growing venues and met sugar cane farmers, millers, farmer organizations, cooperative societies, unions, outgrower institutions, local leaders, elected leaders, cane transporters, cane cutters employee, suppliers and other relevant stakeholders in the following venues.

The report indicates Nzoia Sugar Company stakeholders met at Mabanga FTC. This and the admission by the petitioner that a meeting was held on 13/3/2019 is proof enough that public participation meeting was actually held.

The same position was held in the case of **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others Vs. County of Nairobi Government & 3 Others (2013) eKLR**, in which the Court observed that:

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 issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

Lenaola J. went on to say;

Public participation does not imply that each of the county residents must give their oral views in the public forums or otherwise write their memoranda, respecting that views on a Bill. But simple acts of say conducting random public forums posting programmes, on popular radio stations and publishing the bill in the dailies with wide circulation would do."

It is therefore this court's finding that the mere fact that the petitioner's views were never incorporated into the final report is not a ground to support the finding that his constitutional rights and that of other farmers have been infringed.

On the contention that his rights under Article 35 of the Constitution have been infringed, the Article provides;

- 1) *“Every citizen has the right of access to—*
 - a) *information held by the State; and*
 - b) *information held by another person and required for the exercise or protection of any right or fundamental freedom.*
- 2) *Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*
- 3) *The State shall publish and publicize any important information affecting the nation.*

Section 4 of the Access to Information Act 2016, as far as relevant to this petition provides the procedure to access information. The section provides;

- 1) *Subject to this Act and any other written law, every citizen has the right of access to information held by—*
 - a) *the State; and*
 - b) *another person and where that information is required for the exercise or protection of any right or fundamental freedom.*
- 2) *Subject to this Act, every citizen's right to access information is not affected by—*
 - a) *any reason the person gives for seeking access; or*
 - b) *the public entity's belief as to what are the person's reasons for seeking access.*
- 3) *Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.*
- 4) *This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.*
- 5) *Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information*

Section 8 of the Act provides;

- (1) *An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.*

The petitioner has not demonstrated that he has sought the information from the taskforce or that he sought the information but was denied. All in all, the report forms part of the petitioner's bundle of documents and it cannot therefore be true that his rights under Article 35 of the Constitution have been infringed.

Upon the above findings, this court does not find any form of infringement on the petitioner's rights has been sufficiently demonstrated. The petition is hereby dismissed. Each party to bear his own costs.

DATED AT BUNGOMA THIS 9TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE