



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 17 OF 2019

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF THE TERIK PEOPLE THROUGH

THE TERIK WARD ELDERS FOR DEVELOPMENT.

AND

IN THE MATTER OF ARTICLES 2(1), 3(1), 10(1), (2)a, b, c, 27 & e OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 21(1), 22(1), (2) & (3) (a), (b), (c) OF THE CONSTITUTION

IN THE MATTER OF PRINCIPLES OF PUBLIC FINANCE: OPENNESS,

EQUALITY, FAIRNESS, PRUDENCE AND PUBLIC PARTICIPATION

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 196, 201 AND

203 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE FINANCE MANAGEMENT ACT, NO.18 OF 2015

AND

IN THE MATTER OF COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

AND

IN THE MATTER OF THE NANDI COUNTY ESTIMATES FOR THE

FINANCIAL YEAR 2019/2020 AND NANDI COUNTY APPROPRIATION ACT

AND

IN THE MATTER OF ARTICLES 165(a), (b), (d) i & ii & 4 OF THE CONSTITUTION

AS READ WITH SECTION 4 OF KENYA PROTECTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

TERIK ELDERS FOR DEVELOPMENT.....PETITIONER

AND

COUNTY GOVERNMENT OF NANDI.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF NANDI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The petitioner filed this petition under a notice of motion dated 8th August, 2019 seeking for orders: -

a. That this honorable court be pleased to suspend the implementation of vote 4418 as amended of the Nandi County estimates for the financial year 2019/2020 by the county government of Nandi pending the hearing of this application inter parte.

b. That this honorable court be pleased to suspend the implementation of vote 4418 as amended of the Nandi County estimates for the financial year 2019/2020 by the county government of Nandi pending the hearing of this petition.

2. The application is based on the grounds that the amendment by the county assembly of Nandi did not conform to the law with respect to subjection to public participation, did not conform to the Public Finance Management Act and that it did not conform to the County Governments Act of the budget making process.

3. That if the same is implemented, it will go ahead to further marginalize the people of Terik. The petitioner also filed a petition dated 8th August, 2019 seeking for orders that:-

a. A declaration that a motion by the County Assembly of Nandi to amend vote 4418 was unconstitutional, null and void.

b. A declaration that the action of the County Assembly of Nandi to reallocate development funds for a vocational training institute Terik ward to Kosirai and Kabiyet wards without subjecting it to public participation was unconstitutional, null and void.

c. A declaration that the amended vote of the Nandi County estimates for the financial year 2019/2020 vote 4418 did not follow the due process of budget making and is therefore null and void.

d. A declaration that the position obtaining the amendment of vote 4418 by the County Assembly of Nandi be reverted to by the County Assembly of Nandi and the County Government of Nandi.

e. An order of Mandamus compelling the County Government of Nandi and controller of budget to implement the budget only to the extent to which is constitutional and conforms to the Public Finance Management Act.

f. An order of Mandamus compelling the county assembly of Nandi to reverse vote 4418 allocating the resources of Terik ward in the Nandi County estimates for the financial year 2019/2020.

4. The 2nd respondent filed a preliminary objection that:-

a. The suit herein is totally defective, incompetent and bad in law and the same ought to be struck out ab initio.

b. The petition, application and the attached pleadings are legally untenable and incurably defective.

c. That, the petitioner lack locus standi to bring this petition since its leadership and member has not been brought to the attention of the court through filed pleadings.

d. That, the names of persons who allege to give authority to one Ezekiel Kipkesio Mengich does not in any way nexus to Terik Ward Elders for Development, neither has any document been filed to show that they are residents of Terik and are from Terik Community.

5. The 2nd respondent also filed a replying affidavit sworn by BARNABA G.K. KOSGEI on the grounds that the budget making process followed due process as provided for by the *Public Finance Management Act, 2012, County Government Act 2012* and the *Nandi County Assembly Standing Orders*.

6. The applicant has not proved any nexus either through directorship or membership to the organization and therefore no locus standi to bring up this suit.
7. The amendment to budget estimates for F/Y 2019/2020 was legal since it was guided by Nandi county Standing Order Number 210 which allows report writing and its adoption with or without amendments.
8. The people of Terik were represented in the house by *Hon. Asbon Komen* when the amendments were done as indicated in the Hansard report.
9. The people of Terik Community has not been documented as a minority or marginalized group and thus they should not purport to be one.
10. Lastly, that the county assembly is functus officio and thus should not be affected by the prayers sought.
11. Parties agreed to canvass both the petition and the preliminary objection by way of written submissions. However, it is only the petitioners who filed their written submissions. The petitioner submitted that the county assembly of Nandi did not follow the requisite budget making process.
12. The county government is supposed to submit the budget estimates to the house for consideration which was done.
13. The issue on contention is that the county assembly of Nandi removed the allocation set for a vocational training center in Terik and allocated the same to Kosirai and Kabiyet wards.
14. The said charge was allegedly done contrary to public policy and was not subjected to public participation.
15. As regards the preliminary objection, the enabling provisions of *Article 22* of the *Kenyan Constitution* gives rights to individuals or other parties other than those offended to seek enforcement of their rights.

Issues for determination.

- i. Whether the Nandi County Government estimates for the financial year 2019/2020 was unprocedural, unconstitutional and therefore null and void.
- ii. Whether the 2nd Respondent had abdicated her constitutional duty by amending the budget without involving the public.
- iii. What reliefs are available to the Petitioners?

16. On the issue of *locus standi*, **Article 258(2)** of the **Constitution** is to the effect that a person acting on his own behalf or on behalf of another person has a right to institute court proceedings claiming that the Constitution has been violated. In that regard, the Petitioners have filed this Petition claiming a violation of **Articles 2(1), 3(1), 10(1), 21(1), 23(1) & (3) and 73** of the **Constitution** in respect of the Nandi County budgetary process for the financial year 2019/2020. In the circumstances, the Petitioner has the *locus standi* to file and institute a claim alleging that the Constitution has been violated

17. It is now an established principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision the Article (provision) of the Constitution that he alleges to have been violated, the manner in which it has been violated, the facts in support of that allegation and the reliefs he is seeking from the Court. In the case of *Annarita Karimi Njeru v Republic (supra)* and *Trusted Society of Human Rights v Mumo Matemu and Another (2013) e KLR*, it was so held.

18. The Petitioners have set out the legal foundation of the Petition and have set out the specific provisions of the Constitution. They have pleaded the factual background to the Petition and have set out the particulars on the manner in which the Respondents have allegedly acted in violation of the Constitution.

19. It has been alleged that both the amendments were enacted without public participation. On their part, the 1st Respondent submitted that public participation was not necessary since the Nandi County Assembly Standing Order Number 210 allows report writing and its adoption with or without amendments.

20. Public participation as a national value under Article 10 of the Constitution is an expression of the sovereignty of the people articulated under *Article 1* of the *Constitution*. *Article 185* vests legislative authority of a County Government in a County Assembly. *Article 196 (1) (b)* obligates a County Assembly to facilitate public participation in its legislative business.

21. Public participation in matters of public finance is also reinforced under *Article 201 (a)* in that it provides that there shall be openness and accountability, including public participation in financial matters. The *County Government Act* has also set out elaborate parameters on public participation at the County level.

22. The High Court has also held that the mode and the manner of giving effect to public participation will vary from case to case and there must be some clear and reasonable level of participation afforded to the public - See the decisions in *Nairobi Metropolitan PSVs Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others (2013) e KLR*;

23. A written report and its adaptation is of no consequence given that the amendment was unlawful in any event due to absence of public participation. In Law Society of Kenya v Attorney General Nairobi Petition No.318 of 2012 [2013] e KLR 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.”

24. It therefore follows that the application has merit and is granted as prayed.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of March, 2020.

In the presence of;

Mr. Maritim for the Petitioner

Mr. Mwasei holding brief for Mr. Kirui for the Respondent

Mr. Eululo - Court assistant