



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**PETITION NO. 1 OF 2020**

**IN THE MATTER OF ARTICLES**

**1,2,3,10,19,20,22,24,25,27,28,33,35,48,50,52 & 165 OF THE NEW CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT OF THE FUNDAMENTAL RIGHTS OF THE PETITIONERS**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT NO. 17 2012 SECTIONS**

**87,88,89,91,93,94,95,96,98,99,100,101,102,116 & 117,**

**AND**

**IN THE MATTER OF: KISII COUNTY GOVERNMENT**

**IN THE MATTER OF: ABUSE OF THE PRINCIPLES, VALUES OF OBJECTS OF THE CONSTITUTION OF KENYA CONTRARY TO ARTICLES 10,174 (C), 190 (2), 201, 202(1), 203, 209 & 210 OF THE NEW CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF: KISII COUNTY FINANCE ACT, 2019 (SPECIAL ISSUE) KENYA GAZETTE SUPPLEMENT NO. 3 KISII COUNTY FINANCE BILLS, 2019 DATED 18<sup>TH</sup> JUNE 2019.**

**IN THE MATTER OF: ARBITRARY & UNCONSTITUTIONAL IN IMPOSING TAXES AND CHARGES TO INNOCENT CITIZENS**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULE 2013**

**BETWEEN**

**THOMAS KERONGO.....1<sup>ST</sup> PETITIONER/APPLICANT**

**RIGENA HUMAN RIGHTS WATCHDOG ORGANISATION.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**JAMES E.O.ONGWAE- GOVERNOR KISII COUNTY.....1<sup>ST</sup> RESPONDENT**

**KISII COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**KISII COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioner (“the applicants”) have filed a petition dated the 27<sup>th</sup> January 2020. By a Notice of Motion dated 27<sup>th</sup> January 2020 filed simultaneously with the petition the applicants seek the following orders;

i. Spent

ii. The honourable court be pleased to grant an order of temporary injunction prohibiting and /or restraining orders under Article 23 (3) ( b) of the new Constitution of Kenya 2010 against the 2<sup>nd</sup> respondent either by herself, her agent, servants and/or employees, workers and/or any board or any board from demanding any levies, tax, charges, cess, permits or any other monies in respect of the business permits or revenue collection from any Kisii county traders and/or from victimising any business persons from the impugned enacted Finance Act, 2019 whatsoever pending the hearing of the instant petition.

iii. A declaration that the process of issuing invoices to the Kisii traders in respect of collecting levies, charges, taxes or cess be stayed or suspended in the interest of justice pending the hearing and determination of the instant petition.

iv. That pending the hearing and the determination of the instant petition the Honourable Court be pleased to grant an interim order of mandatory injunction directing the respondents either by themselves, agents, servants and/or employees, workers, assigns from implementing the Kisii County Finance Act, 2019 with a view to executing, collecting revenues and demanding levies, tax, cess, charges and/or business permits from the residents of Kisii county more particularly the traders.

v. That pending the hearing and determination of the application inter partes , the County Secretary of the 2<sup>nd</sup> Respondent be compelled by this court within 30 days or as the court may direct to produce, file and serve the petitioners with the information on how they advertised the public participation and when it was done by which criteria used and the minutes pertaining the impugned Finance Bill, 2019 special Kenya gazette supplement no. 3 Kisii county bills no. 2 and the total amount of money budgeted for facilitation.

vi. That the costs be borne by the respondents.

2. Parties agreed to canvass the application by way of written submissions. Parties relied on their affidavits filed in support of and against the application. The Court did not grant any interim orders.

#### **PETITIONERS/APPLICANTS CASE**

3. The 1<sup>st</sup> Applicant filed a supporting affidavit dated the 27<sup>th</sup> January 2020, written submissions dated 9<sup>th</sup> March 2020 and supplementary written submissions dated the 1<sup>st</sup> April 2020. The applicants 2 main issues are; the alleged public participation done by the respondents before the Finance Act 2019 was enacted and the charges, taxes, cess fees being levied as per said Act to the various traders and business persons in Kisii County. The 1<sup>st</sup> applicant swore the supporting affidavit. In brief this is what he deposes in support of the 2 issues ; that the 1<sup>st</sup> and 2<sup>nd</sup> respondent are implementing the Kisii Finance Act 2019 which has never been subjected to public participation as per section 87 of the County Government Act No. 17 of 2012. That the Kisii county Assembly enacted the impugned Finance Act blindly without the due process followed into law. That subsequently the 2<sup>nd</sup> respondent's agents has issued invoices to the resident of Kisii county more particularly the traders with inflated prices demanding them to pay and that this has left the residents of Kisii county with deep shock where to raise their grievances hence their resort to this court. That the increase of charges, taxes, levies, cess, collection of revenue and any related matters by 408% to business permits to the traders of Kisii County is not only prejudicial but it's unethical , illegal and an affront to the constitution. That as per the impugned Kisii County Finance Act, 2019 the small trader in farm implements / machineries business code no. 1-1018 in 2018 the residents more particularly the traders paid Kshs. 4,900 increased to Kshs. 20000/- this financial year and this constitutes to unfair practices which the county government are perpetuating with impunity with an aim of afflicting the traders of Kisii county at large. That the imposed Environment assessment fee of Kshs.500 is under the docket of the National Government therefore the implementation is unconstitutional. That the approval of the Kisii County Finance Act 2019 was full of fraught with irregularities and malpractices which naturally should attract serious violations of the constitution of which the respondent had acted naively and recklessly without any legal backing in law. That if the court allows the implementation of the Kisii County Finance Act 2019 to proceed as enacted the residents of Kisii at large more particularly the traders will be prejudiced financially which monetary funds will never be recovered at any stage whatsoever. That the manner in which the impugned Kisii County Finance Act 2019 was enacted contrary to and in contravention of the provisions of the new constitution of 2010 and the County Government No. 17 of 2012. That this is a fit and proper case to grant conservatory orders sought so as to protect and vindicate their constitutional and fundamental rights of the traders by extension the rule of law. That he is ready to give an undertaking as to damages where necessary and/or appropriate pursuant to granting of the conservatory orders.

4. The petitioners submissions raised the followings issues for determination; *whether the application dated the 27<sup>th</sup> January 2020 is tenable in law, whether the petitioners have established a case to enable the court grant the orders as sought and whether the enactment process of the impugned Kisii County Finance was subjected to public participation.* It is submitted that the application was brought without delay as the traders were issued with invoices sometimes in December 2019. That the applicants have established a case to warrant the orders sought. That the applicants have established a prima facie case to warrant the injunctive orders. Reliance was made on the case of **Giella vs Cassman Brown & Company Limited (1973) E.A 358** and **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR**. It was further submitted that the advertisement done by the respondents was not adequate but rather illusory ( *see Civil Appeal No. 200 of 2014*) and that if the charges are collected from the traders and business persons they will suffer substantial loss which the respondents will be unable to remedy in the event the petition succeeds. That the onus lies on the respondent to show proof of ability to refund the sum ( *see Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & another (UR)*). On the limp of balance of convenience it was submitted that if the injunction is not granted it will inflict greater hardship on the Kisii County Residents especially the business stakeholders being that the citizens are already overtaxed, the bad prevailing economic situation and this lead to paralysis and shut down of many business.

#### **1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS CASE**

5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed an affidavit sworn by Bernard Mr. Omosa the officer in charge of Revenue and the 3<sup>rd</sup> Respondent filed an affidavit sworn by Mr. James Nyaoga the Clerk to the 3<sup>rd</sup> Respondent and the Accounting Officer. They deposed as follows in brief; that

the Kisii County Finance Act 2019 was subjected to the public participation process as required by section 87 of the County Government. There was an advertisement in the Daily Nation Newspaper on the 5<sup>th</sup> June 2019. The meetings were held as per the schedule and there was public participation as per the annexures. As a result of the participation some changes as proposed by the participants were made in the Draft Finance Bill 2019. That after the views of the public and stakeholders were consolidated they were subjected to a comprehensive analysis and the Draft Bill was generated and it was submitted to the County Assembly for consideration as required by law. That the draft Bill was subjected to public participation and the enacted Finance Act 2019 is a product of public participation.

6. It was further deposed that there is no affidavit by any member of the public that the residents or traders will be prejudiced financially. That the applicants have failed to disclose the source of the documents attached and therefore the said documents cannot be relied on (*see Petition No.295 of 2018: Philomena Mwilu vs. DPP & 3 Others (2019) eKLR*). That the orders sought will adversely affect the 2<sup>nd</sup> Respondent's constitutional mandate as envisioned under Article 174 of the Constitution of Kenya. That the applicants have not provided any evidence to back their claim that there exists any illegal tax, levies, charges, cess and/or other revenues. That the 2<sup>nd</sup> respondent collects revenue within the parameters of Kisii County Finance Act 2019, the Constitution of Kenya 2010, the County Government Act 2012 and the Public Finance Management Act the enabling legislations to the impugned taxation measures. That the applicants have not satisfied the conditions upon which a temporary injunction can be granted as illustrated in the case of *Giella vs Cassman Brown & Company Ltd (1973) E.A 38* and that the application should be dismissed.

7. The 1<sup>st</sup> and 2<sup>nd</sup> respondent submitted as follows; that the petitioner is seeking an order of judicial review under Article 23 (f) for quashing the Kisii County Finance Act 2019 and that the same be declared unconstitutional, null, void, unlawful, illegal and illegitimate on the ground that the same was not subjected to public participation and that it cannot be implemented by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. That though the petitioner alleges that there was no public participation he acknowledges that public participation was done only that he is not personally satisfied how it was done. That the Kisii County Finance Act 2019 is a public document having been gazetted in the Kenya Gazette on the 29<sup>th</sup> November 2019 and is and has been in use by millions of citizens in Kisii County in various sectors *inter alia* transport, business community, banking institutions, building sector etc and that they have not raised any complaint about the Finance Act. That the alleged petition and the allegations has been raised by the petitioner after several months of operationalization of the Finance Act, 2019. That the petitioner has not demonstrated that he is a businessman or consumer of any services from the County Government of Kisii. That the petition as mounted is not a representative suit and has not complied with the procedure of filing a class suit or a representative suit. That the Kisii County Finance Act 2019 like all other County laws was duly subjected to the public as required by section 87 of the County Government Act 2012 and the Constitution of Kenya 2010.

8. It was further submitted that the court lacks the jurisdiction to hear and determine this petition as the petition was filed prematurely. That the complaint was to be lodged before the Kisii County Assembly afore and its subsequent referral to the Court upon exhausting all the administrative procedures. That Part (VIII) Regulation 14 (j) of the Kisii County Finance Act provides that any dispute or complaint arising out of this Act shall be referred to the Budget and Appropriation Committee of the county Assembly for hearing or redress before being referred to court of law for determination. That no such complaint lodged with the Committee, hence the Finance bill was enacted into law as per sub rule (k) thereof. That no single member of the general public who are affected by the implementation of the Kisii County Finance Act 2019 has filed any affidavit or a sworn statement complaining about the said act and filed in court. That the petition is shallow and is a waste of the court's time. That the Finance Act 2019 is in last quarter of implantation period hence the same cannot be declared null and void. Reliance was made on the following case; **Petition No 486 of 2013 Nairobi Metropolitan Psv Saccos Union Limited 2 others vs. County of Nairobi Government & 3 others and Petition No. 427 of 2019 Kariuki Ngari & Another vs. Judicial Service Commission & 2 Others ( Interested Parties) (2020)eKLR.**

9. In a supplementary submission dated the 1<sup>st</sup> April 2020 in response to the 1<sup>st</sup> and 2<sup>nd</sup> respondents that petitioner argues that every person has a right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights had been denied, violated or infringed or is threatened as provides by Article 22 of the Constitution. That the court should make reference to definitions of public participation as provided under the interpretation section under Part 1 of the Kisii County Public Participation Act, 2015. The petitioners relied on the case of *Damian Belfonte vs The Attorney General of Trinidad and Tabago C.A. 84 of 2004* where the court held that where there is a means of redress that is inadequate the court should not exercise restraint and that there was a need to examine the purpose for which an application is made in order to determine whether it is an abuse of process where there is unavailable common law remedy. It was further submitted that the Budget and Appropriation Committee of the Assembly does not have the jurisdiction to determine the violations of the Constitution and that the said Committee has no powers to quash the Impugned Act.

### **ANALYSIS AND DETERMINATION**

10. The petitioner seeks injunctive orders as set out in the application and this ruling. The orders sought relate to the Kisii County Finance Act 2019. After considering the affidavits and submissions I have narrowed down the issues as follows;

- i. Whether there public participation before the enactment of the Kisii County Finance Act 2019.
- ii. Whether the charges, levies, taxes, cess fees raised by the County government are exorbitant and whether the court has the jurisdiction to deal with this complaint.

The answer to these 2 issues will determine whether the applicants have a prima facie case to warrant the orders sought in line with the legal principles in the case of *Geilla vs. Cassman Brown (supra)*. The date of Assent of the Kisii County Finance Act is 6<sup>th</sup> November 2019 and its commencement date is per section 1 which state as follows; “**This Act may be cited as the Kisii County Finance Act 2019 and shall come into operation on the seventh day after the date of publication in the Gazette, The County Executive Member for Finance may through a notice in the County Gazette appoint different dates for different provisions**”. This Act has been in operation from about November 2019. Section 87 of the County Finance provides the principles of citizen participation in counties.

11. The applicants have to demonstrate that they have established a prima facie to warrant the injunctive orders. They claim that the Kisii

Finance Act 2019 was not subjected to publication participation and that if any public participation was done then it was an in house move by the 1<sup>st</sup> respondent. That the Act was enacted blindly without any due process followed into law. To counter this the respondents aver that there was compliance with section 87 of the County Government Act 2012 and that public participation was done. That on the 5<sup>th</sup> June 2019 the 2<sup>nd</sup> respondent placed an advertisement in the Daily Nation Newspaper at page 30 requiring members of the public to attend public hearing. That the advertisement clearly indicated that the sub-county, venues and the time the members of the public were to attend and make their contributions in the public participation forums/ meeting (see paragraph 11 of the B. Omosa replying affidavit ). That the public participation exercise began on the 20<sup>th</sup> June 2019 up to 25<sup>th</sup> June 2019 nine sub counties were covered public the municipalities hence the public views were collected. That at the venues all members of public attending to the said public participation forums were given opportunities to peruse the proposed Finance Bill and were taken through item by item. Their views were recorded and properly documented for consideration during the amalgamation of views process. That a report from each venue was prepared by the 2<sup>nd</sup> respondent's officers and forwarded to the consolidation process. That a list of members of public who attended the public participation process at all the venues was taken and the attendees signed by indicating their identity card numbers, signature and phone numbers and the various sectors they represented. That the views collected was subjected to a comprehensive analysis and the document generated was submitted to the County Assembly for consideration as required by law. That the changes were made as per the views received (see samples at paragraphs 20 & 21 of Mr. Omosa's affidavit).

12. I have perused the documents annexed and referred to by the respondents and note the following; the advertisement was made in the Daily Nation Newspaper on the 5<sup>th</sup> June 2019. The advert called for public participation for the Kisii County Finance Bill 2019. The advert indicated the dates, the sub counties, the venue and time. It also indicated that the Kisii County Government was in the process of enacting the County Finance Bill for the year 2019 and that members of the public were invited to attend the scheduled hearings as from the 20<sup>th</sup>, 21<sup>st</sup>, 24<sup>th</sup> and 25<sup>th</sup> June 2019 and make contributions / submissions at the consultative meetings as per the schedule. The Daily Nation Newspaper is a newspaper that has wide circulation in this nation and in Kisii County too. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' annexures from pages 10 to pages 122 show the places the meetings were held as indicated in the affidavit of Mr. Omosa at paragraph 11. The Court of Appeal in **Civil Appeal no. 200 of 2014 Kiambu County Government & 3 Others vs Robert N. Gakuru & Others eKLR** held that, "Public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legalisation" [Emphasis added]. It has been demonstrated by the respondents that there was public participation and in my view it was real and not illusory. The respondents have also shown that they did whatever was reasonable to ensure that as many of their constituents were aware of their intention to pass legalisation that was to affect their county. From the annexures showing the meetings held what happened was not a mere formality for the purposes of what the law requires. The applicants' allegation that there was no public participation has been sufficiently rebutted. I find that the applicants have failed to show that the Respondents failed to comply with the law. I find the petitioners' allegations that the 1<sup>st</sup> respondent had bad intention against the residents of Kisii has not been proved. In my view the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have sufficiently shown that there was adequate public participation as required by section 87 of the County Assembly Act No. 17 of 2012.

13. The applicants other complaint is that the 3<sup>rd</sup> respondent enacted the Kisii County Finance Act issued invoices to the residents of Kisii County to traders with inflated prices demanding them to pay them and that the residents are in deep shock. That the increase of charges, taxes, levies, cess collection of revenue and any related matters by 408% to business permits to the traders of Kisii County is prejudicial and improper. The Respondents response to this complaint is that the applicant has no evidence of the allegations made that there is no affidavit by any member of public to support the allegation. That there is no evidence to back their claim of illegal taxes, levies, charges, cess and other revenues. That the 2<sup>nd</sup> respondent collects revenue within the parameters of the Kisii County Finance Act 2019, the Constitution of Kenya 2010, the County Government Act 2012 and the Public Finance Management Act which are the enabling legislations to the impugned taxation measures. That the orders sought have adverse effect on the 2<sup>nd</sup> respondent's constitutional mandate as envisioned under Article 174 of the Constitution of Kenya and are aimed at crippling the operations of the County Government of Kisii and that Article 175 (b) of the Constitution requires the 2<sup>nd</sup> respondent to have reliable sources of revenue to enable her govern and deliver services effectively. That no trader has raised complaints after the enactment of the Finance Act 2020 since hence the applicants are not entitled to the injunctive orders.

14. This issue seems to be what triggered this application and petition. In my view the applicants have failed to demonstrate that there is a complaint/s from the traders or business community that they have been over charged. What is annexed by the applicants in their petition are invoices with no explanation how they were obtained nor an affidavit from the persons who were invoiced. To attach invoices and permits in a petition and claim that persons are aggrieved without an affidavit from any of the said persons or traders is inadequate. The source of the said invoices and permits have not been disclosed. As stated by the respondents if the issue is on the charges or levies the applicants have a remedy in section 14 (j) of the Act which states that "Any dispute or complaint arising out of the Act shall be referred to the Budget and Appropriation Committee of the County Assembly for hearing or redress before being referred to Court of Law for determination". Hence the argument raised that the court has no jurisdiction to handle the application and petition. In my view the argument that the Court lacks the jurisdiction to handle the petition at this stage is without merit. The petitioners in their petition seek an order of judicial review under Article 23 (f) to quashing the entire Kisii County Finance Act 2019 and to declare it as unconstitutional, null, void, unlawful, illegal and illegitimate. Any complaint on the charges and or levies must be challenged to the Committee as provided in section 14 (f) of the Kisii Finance Act 2019.

15. Before I conclude I find that though the applicants have a right to challenge the constitutionality of the Kisii Finance Act 2019, the applicants have failed to show that their rights that have been infringed. An applicant seeking reliefs under various Articles of the Constitution has to clearly illustrate the constitutional right that has been infringed and or violated. The applicants in **Civil Appeal No. 200 of 2014 Kiambu County Government & Others vs Robert Gakuru ( supra)** unlike the applicants in this case were able to demonstrate to the court through their affidavits that the Bill had directly affected them and that they were not present in the alleged town hall meetings. They were also able to demonstrate the nature and importance of the legislation and the intensity of the Bill's impact in their case. Lastly the Finance Bill in the said county was also challenged because after it was rejected at the County Assembly it was subjected to a further public participation. In this case the County Assembly did not reject the Finance Bill.

16. The end result is that I find the applicants have failed to demonstrate that they are entitled to the injunctive orders sought. They have failed to establish a prima facie case, the applicant has also failed to show the irreparable loss they will suffer. The balance of convenience tilts in favour of the respondents. I therefore decline to grant the injunctive orders. Costs to the respondents.

**Dated, signed and delivered at KISII (via Zoom) this 21<sup>st</sup> day of May 2020.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Mosa For the Applicant**

**Mr. Oirere For the 1st and 2<sup>nd</sup> Respondent**

**Mr. Oirere h/b for Mr. Onsembe For the 3<sup>rd</sup> Respondent**

**Ms. Rael Court Assistant**