



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

PETITION NO. 4 OF 2018

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24, 27, 35, 36,

38, 81, 174, 201, 232, 236, 258, 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT OF 2012

AND

IN THE MATTER OF THE URBAN AREAS AND CITIES ACT 2012

BETWEEN

STANLEY KIPROTICH BIL.....1ST PETITIONER

KIPKIRUI ROBERT MUTAL.....2ND PETITIONER

VERSUS

THE GOVERNOR BOMET COUNTY.....1ST RESPONDENT

THE COUNTY SECRETARY BOMET COUNTY.....2ND RESPONDENT

THE EXECUTIVE COMMITTEE MEMBER LANDS.....3RD RESPONDENT

THE COUNTY ASSEMBLY BOMET.....4TH RESPONDENT

JUDGMENT

1. This Petition dated 17th May 2018 seeks the following orders:

a) A declaration that the Respondents have violated the Constitution and the provisions of section 9 and 10 of the Urban Cities Act and the creation of the Municipal Charter and town status is null and void.

b) A declaration that the Respondents are bound by the national values and principles pursuant to articles 10 and 232 of the Constitution to with race of law democracy, integrity, good governance, transparency, accountability and public participation in public matters.

c) A declaration that by dint of article 73 of the Constitution, the 1st, 2nd and 3rd Respondents are bound to exercise public authority in a manner that is constituent with the purposes and objects of the Constitution and which provides public confidence.

d) A declaration that the Respondents have violated the Constitution and the law and the creation of a Municipal Charter and town status and subsequent appointment of board members be declared null and void.

e) A declaration that the 1st and 2nd Respondents acted ultra vires and breached the provisions of articles 10 and 73 of the

Constitution.

f) A declaration that the 4th Respondent's committee on urban planning, land and housing failed in their duty to make proper recommendation to the 4th Respondent and the subsequent proceedings leading to the appointment of the board members be declared null and void.

g) A declaration that the 4th Respondent failed to exercise their oversight duty as envisaged in article 185 (3) of the Constitution resulting in breach of provisions of articles 10, 73 and 232 of the Constitution.

h) An order of mandamus compelling the 1st, 2nd, 3rd and 4th Respondents to comply with the Constitution and conduct a proper public participation in a procedural, transparent and legal manner.

i) That there be an order as to costs.

2. The Petitioners also filed an application dated 17/5/2018 under certificate of urgency seeking the following orders:

i. That the application herein be certified urgent and service thereof be dispensed with in the first instance.

ii. That pending the hearing and determination of this inter-parties this Honourable court be pleased to issue interim injunctive orders restraining the respondents from proceeding with the appoint or issuing of letters of appointment to any candidate for the Bomet Municipal Board and Sotik Town Board and the Respondents be barred from facilitating and or allowing the Board Members from assuming office.

iii. That pending the hearing and determination of this Petition this Honourable Court be pleased to issue interim injunctive orders restraining the respondents from proceeding with the appointment or issuing of letters of appointment to any candidate for the Bomet Municipal Board and Sotik town board and the Respondents be barred from facilitating and or allowing the board Members from assuming office.

iv. That the cost of this application be provided for.

3. The Petitioners in their supporting affidavits to both the petition herein dated 17/5/2018 and the application of even date deposed as follows:

i. That on or about December 2017, the County Government of Bomet came up with a charter seeking to convert Bomet town into a Municipal and also granting Sotik and its environs a town status.

ii. That the 4th Respondent in one of its sittings approved the granting of the said Municipal status and subsequently reminded board members.

iii. That the 1st, 2nd and 3rd Respondents did not involve the County Residents in the said decisions.

iv. That Bomet Town does not meet the criteria set down in section 9 of the Urban Area and Cities Act.

v. That Bomet Township which comprises of Chepngaina, Kapsimotwo, Kapsimbiri and Silibwet has a total population of 29,038 while section 9 (3) of the Urban Areas and Cities Act provides that a town eligible for conferment of Municipal Status has to have a population of at least between seventy thousand and two hundred and forty nine thousand residents.

vi. That Sotik has a population of 5,891 and does not qualify to be a town as section 10(2) the Urban Areas and Cities Act provides that an area shall be eligible for grant of the status of a town if it has a population of at least ten thousand residents.

vii. Further that the 4th Respondent did not comply with the Constitution in approving names of persons submitted by the 1st Respondent to sit in the Bomet Municipal and Sotik Town Boards as there was no public participation.

viii. That section 13 and 14 of the Urban Area and Cities Act requires that the recruitment be done competitively which was not the case when the names were nominated and vetting conducted without background check.

ix. That the creation of the Municipal Charter and subsequent recruitment generally violated the Constitution and should be declared null and void as they violate Article 196 of the Constitution.

x. That the 4th Respondent acted contrary to the law and contravened Article 10 and 232 of the Constitution with regard to National Values and Gender Equity.

xi. That Article 73 (2) on leadership and Integrity was also contravened as well as the County Government Act and the Urban Areas and Cities Act.

4. The 1st, 2nd and 3rd Respondents filed a Replying Affidavit sworn on 6/6/2018 by DR. RICHARD SIGEI who is the Chief Officer , Urban Planning, Lands and Housing of the 1st Respondent and who stated that he is duly authorized by the 1st, 2nd and 3rd Respondents to make the Affidavit. He deposed as follows:

- i. That the Petition and Application dated 17/5/2018 should be dismissed for lack of clarity as they do not state what provisions of the Constitution and the law have been violated.**
- ii. That the Petitioner failed to disclose the source of information and they attached documents which are not authenticated or certified as required by law.**
- iii. That the documents are in violation of Article 31 and 35 of the Constitution and section 80 of the Evidence Act and they ought to be expunged from the record.**
- iv. That the Petition and the Application offend Article 50 (4) of the constitution as the laid down procedure on access to public information and production of public documents was bravely and blatantly violated.**
- v. That the Respondents conducted public participation in the granting of Municipal status to Bomet Town and appointment of Board members.**
- vi. Further, that under section 9 (4) of the Urban Areas and Cities Act No.13 of 2011 as revised in 2016, the Governor is obligated to grant a Municipal Status of a Special Municipality to the Headquarters of the County of Bomet Town.**
- vii. That the current law with regard to grant of township status revised in 2016 capped the population at 2,000 Residents according to the last population census.**
- viii. That there were shortlisted candidates for the positions of Bomet Municipal Board and Sotik Town Committee in the Standard Newspaper on 17/2/2018 and nothing was done in secret.**
- ix. That the stake holders and members of the public were invited during the entire exercise and further, that the Petitioners have personal interest disguised as public interest since the 4th Respondent is mandated to vet all nominees.**
- x. The Deponent also stated that the orders sought have been overtaken by events as the members of the Bomet Municipal board and Sotik Town committee were appointed to office on 14/5/2018 before the said Petition and application were filed on 17/5/2018.**

5. The 4th Respondent also filed a replying Affidavit sworn by David Shadrack Rotich who is the Speaker County Assembly of Bomet.

He deposed as follows:-

- i. That on 22/12/2017, the County Assembly through the office of the Clerk received a request form the Executive seeking for the approval of the Bomet Municipal Charter.**
- ii. That the Charter was committed to the relevant Departmental Committee for scrutiny and to provide recommendations to be adopted by the County Assembly.**
- iii. That the Charter was subjected to public participation on 23/12/2017 with the sole aim of engaging the public to get their views on the same.**
- iv. That the departmental retreated to engage further and come up with a report for tabling in the county Assembly and the same was adopted on 27/12/2017 by the Count Assembly and passed as Bomet Municipal Charter.**
- v. That upon approval of the Charter, it was transmitted to the Governor for assent and further action and it became fully operational.**
- vi. That subsequently, the County Executive forwarded names of nominees for the positions of Bomet Municipal Board and Sotik Town Board. Further that the names were subjected to a vetting process and they were all approved and reported back to the Governor for formal approval.**
- vii. That the allegations by the Petitioners that the County Assembly did not conduct public participation is not true as the County Assembly invited stakeholders including citizens of Bomet to a public participation forum to discuss the Charter and the same received overwhelming support and it is sound, valid and legal.**

6. The parties filed written submissions in the Petition and the Application dated 17/5/2018 which I have duly considered. I find that it is not in dispute that the Bomet Municipal Charter was passed on 27/12/2017 by the Bomet County Assembly.

7. It is also not in dispute that the Nominees to the Bomet Municipal board and Sotik Town Committee were appointed on 14/5/2018, three days before this Petition and application were filed on 17/5/2018.

8. The issues for determination in the Petition and application dated 17/5/2018 are as follows:

- i. Whether the interim injunctive orders should issue restraining orders to Respondents from the appointment or issue of letters of appointment to the Bomet Municipal Board and Sotik Town Boards and further barring the Respondents from facilitating or allowing the board members from assuming office.**
- ii. Whether the declaratory orders should issue that the Respondents violated Articles 10, 73, 185 (3) and 232 of the constitution and section 9 and 10 of the Urban Areas and Cities Act.**
- iii. Whether an order of mandamus should issue compelling the 1st, 2nd, 3rd and 4th Respondents to comply with the Constitution and to conduct a proper public participation in a procedural, transparent and legal manner.**
- iv. Who pays the costs of the Application and the Petition.**

9. On the issue as to whether interim injunction orders should issue against the Respondents to bar them from appoint members of Bomet Municipal and Sotik Town Boards, I find that the said members assumed office on 14/5/2018 three days before these Petition and application both dated 17/5/2018 were filed. For that reasons I will not go into the details of stating the conditions for granting injunctions since the application has been overtaken by events.

10. On the issue as to whether the declaratory orders sought should be granted, I find that the petitioners in their affidavits and submissions maintained that there was no public participation before the Charter declaring Bomet a Municipal was approved.

11. The Petitioners also urged this court to expunge the Replying Affidavit by Dr. RICHARD SIGEI filed on behalf of the 1st, 2nd and 3rd Respondents from the record on the basis that he had no authority to swear and that he did not attach the said authority.

12. I find that the said DR, RICHARD SIGEI states that he is the Chief Officer, Urban Planning, Lands and Housing of the 1st Respondents and I accordingly find that he is competent to depone on the issues before this court.

13. The Petitioners stated that Articles 10, 73 and 185 (3) and also Article 232 were violated by the Respondents. Article 10 of the Constitution requires that national values and principles of governance be complied with in the application of the Constitution and in making public policy decisions. The said Article states as follows:

“ (1) The national values and principles of governance in this Article bind all State organs, State Officers, Public Officers and all persons whenever any of them-

- a) Applies or interprets this Constitution;***
- b) Enacts, applies or interprets any law; or***
- c) Makes or implements public policy decisions.***

(2) The national values and principles of governance include-

- a) Patriotism, national unity, sharing and devolution of the power, the rule of law, democracy and participation of the people;***
- b) Human dignity, equity, social justice, inclusiveness, equality;***
- c) good governance, integrity, transparency and accountability; and***
- d) Sustainable development.”***

14. Article 73 provides for leadership and integrity as follows:

“73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

- (i) is consistent with the purposes and objects of this Constitution;***
- (ii) demonstrates respect for the people;***
- (iii) brings honour to the nation and dignity to the office; and***
- (iv) promotes public confidence in the integrity of the office; and***

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.”

15. Article 185 (3) also provides that;

“(3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.”

16. The Petitioners also said in their Affidavits and submissions that the actions of the Respondents were not in line with section 9 and 10 of the Urban Areas and Cities Act which provides as follows:

“Section 9: 1. The County Governor may, on the resolution of the County Assembly, confer the status of a municipality on a town that meets the criteria set out in subsection (3), by grant of a charter in the prescribed form.

2. The procedure set out under section 8 (1) to (4) shall apply with necessary modifications to the conferment of municipal status to a town, except that the conferment shall be done by the county governor.

3. A town is eligible for the conferment of municipal status under this Act if the town satisfies the following criteria-

a) has a population of at least two hundred and fifty thousand residents according to the gazetted results of the last population census carried out by an institution authorized under any written law, preceding the grant;

b) has an integrated development place in accordance with this Act;

c) has demonstrable revenue collection or revenue collection potential;

d) has demonstrable capacity to generate sufficient revenue to sustain its operations.

e) has the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule;

f) has institutionalized active participation by its residents in the management of its affairs;

g) has sufficient space for expansion;

h) Has infrastructural facilities, including but not limited to street lighting, markets and fire stations; and

i) Has a capacity for functional and effective waste disposal.

Section 10; 1) the county governor may, in consultation with the committee constituted under section 8 (2), confer the status of a town on an area that meets the criteria set out in subsection (2).

2) An area shall be eligible for the grant of the status of a town under this Act if it has-

a) a population of at least ten thousand residents according to the final gazetted results of the latest population census carried out by an institution authorized under any written law, preceding the grant;

b) demonstrable economic, functional and financial viability;

c) the existence of an integrated development plan in accordance with this Act;

d) the capacity to effectively⁷ and efficiently deliver essential services to its residents as provided in the Frist Schedule; and

e) sufficient space for expansion.”

17. The Petitioners said no public participation was conducted by the Respondents and national values which require transparency were not complied with as the exercise was shrouded with secrecy.

18. They also said that the 4th Respondent failed to exercise oversight duty as envisaged in Article 185 (3) of the Constitution.

19. The Respondents on their part said in their Replying Affidavits and submissions that they complied with the law and further that they conducted public participation in respect of the approval of the charter and the appointment of Board Members to serve in the Bomet Municipal and Sotik town boards.

20. The dates for the said public meetings were supplied.

21. The 1st, 2nd and 3rd Respondents in their affidavit sworn by Deputy Registrar, Richard Sigei stated that the Urban Areas and Cities Act was revised in 2016 and obligated the Governor to grant Municipal Status to a Special Municipality to the Headquarters of a County which Bomet Town qualify as it is the Headquarters of Bomet County.

22. The Respondents also submitted that section 10 (2) of the Urban Areas and Cities Act was revised in 2016 and the population for a township was capped at 2,000 Residents according to the last population census.

23. I find that the Petitioners have not established why they waited until the approval of the Bomet Municipal charter and the appointment of members to the Bomet Municipal and Sotik Town Boards before moving the court.

24. Equity does not assist the indolent but it comes to aid of the vigilant. I find that the Respondents gave dates when public participation was done.

25. In view of the absence of a legal framework as to what exactly entails public participation, I find that the Respondents made an attempt to comply with the Constitution and with the law.

26. On the issue as to whether an order of mandamus should issue to compel the 1st, 2nd, 3rd and 4th Respondents to comply with the Constitution and to conduct a proper public participation, I find that the Respondents have shown that they conducted public participation and vetting of the Nominees to the Bomet Municipal and Sotik Town Boards.

30. I find that both the Application and Petition herein dated 17/5/2018 lack in merit and I dismiss them with no orders as to costs.

31. Each party to bear its own costs of the Petition and Application dated 17/5/2018.

Dated, Signed and delivered at Bomet this 1st day of July, 2020.

A. ONGERI

JUDGE