



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW APPLICATION NO. 2 OF 2017

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

BETWEEN

JAMES GACHERU KARIUKI & 22 OTHERS.....APPLICANTS

AND

THE KIAMBU COUNTY ASSEMBLY.....1ST RESPONDENT

THE KIAMBU COUNTY EXECUTIVE.....2ND RESPONDENT

THE COMMISSION ON REVENUE ALLOCATION....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. Before me is a Notice of Motion dated 16/01/2017 and expressed to be brought under Section 1A, 1B, 3A of the Civil Procedure Act, Sections 7(2)(a)(i)(ii), (b), (c), (d), (j)(m)(o) 3(c), 9(1), (2) & (3), 10(1) of the Fair Administrative Action Act. The Applicants sought in the main, declarations and a permanent injunction prohibiting the Kiambu County Assembly and the Kiambu County Executive, (the 1st and 2nd Respondents respectively), from imposing or demanding rents in respect of dwellings and business premises owned by the County Government until the necessary legislation was enacted.

2. The Application is premised on the grounds that collection of rent by the County Government of Kiambu is currently based on a repealed law, namely the County Governments Public Finance Management Transition Act and that the Commission on Revenue Allocation (the 3rd Respondent) has failed to advise the County Government of Kiambu in accordance with Article 216(2) of the Constitution. That the rents in respect of the county dwellings and business premises were “repealed” upon the repeal of the County Governments Public Finance Management Transition Act.

3. **James Gacheru Kariuki** swore a supporting affidavit dated 16th January, 2017 on his own behalf and on behalf of his co-Applicants. He deposed therein that the Applicants had before approaching the Court, exhausted internal mechanisms under Section 9(2) of the Fair Administrative Action Act.. He contended that rents charged in respect of dwellings and business premises owned and let by the County were revenue raising measures “re-enacted” under the provisions of section 22 of the County Governments Public Finance Management Transition Act (hereinafter the Transition Act), repealed on 30th September, 2013 by virtue of the provisions of section 31 of the Transition Act. Thus, it amounts to an illegality for the Kiambu County Government to purport to be acting under repealed laws.

4. He deposed further that the 1st and 2nd Respondents had failed or refused to perform their statutory duty to prepare into a money bill the “repealed” rents of the defunct local authorities; that a county government can only be financed in accordance with the provisions of Article 216(2) of the Constitution and that it is unconstitutional to impose tax without legislation; that the 3rd Respondent was in dereliction of its duty in failing to advise the 1st Respondent on the matter and that the court could not turn a blind eye thereon and ought protect the litigants from the Respondents.

5. **David Ngure** swore an affidavit in Reply on 14th February, 2017 on behalf of the 1st Respondent and in his capacity as the Deputy Clerk & Deputy Chief Executive Officer of the 1st Respondent. A second replying affidavit was sworn by **John Gicaci** on behalf of the 2nd Respondent in his capacity as the Chief Executive Officer at the County Government of Kiambu. The replying affidavits were similar in content. They deposed that legislation made by the County Assembly is recognized under Article 260 of the Constitution; that the County Government may impose any licence fee or levy sanctioned by legislation and that on the matter in contest, the County Government of Kiambu enacted the Kiambu County Finance Act.

6. They further deposed that the repeal of the Transition Act did not have an effect of invalidating County legislation enacted in compliance with Article 209 and 210 of the Constitution; that the objects of the repealed Transition Act was to facilitate a smooth transition from the erstwhile local authorities to County Governments; and that therefore, the County Government has not relied on repealed laws. They deposed that in enacting the Kiambu County Finance Act, 2016, procedural requirements of the law were fully complied with. It was contended that in demanding rent the County Government of Kiambu has acted constitutionally. The deponents assert that the present application should not be allowed, as granting it would amount to allowing a backdoor challenge to the constitutionality of the Kiambu County Finance Act of 2016.

7. **George Ooko** swore a reply on behalf of the 3rd & 4th Respondents. He deposed that the present application does not seek any orders adverse against the said Respondents whose names ought to be expunged from the proceedings. He stated that the Commission has a general duty to make recommendations on the financing of and financial management of county governments, but is not under any obligation to take a step further and/or to stipulate specific methods a county government ought to take to enhance its revenue sources. There were additional affidavits filed by the Applicants and the 1st and 2nd Respondents concerning the Kiambu County Finance Act of 2016, as will soon become evident.

8. The application was canvassed by way of written submissions. The main thrust of the Applicants' submission being that the collection of rent as revenue raising measures stood "repealed" on 30th September, 2013 simultaneously with the repeal of the Transition Act. Thereafter, the County Government of Kiambu was under a duty to enact appropriate county legislation through the procedure envisaged in the County Governments Act to enable collection of rent. The Applicants were of the view that such law had to be consistent with the Rent Restriction Act, the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. (Cap 301) Regarding the publication of such legislation, reliance was placed on the decision in **James Gacheru Kariuki & 3 others vs Attorney General & 11 others (2017)eKLR**.

9. The Applicants took issue with published Kiambu County Acts filed into court by the 1st and 2nd Respondents in compliance with the court's order herein, asserting that the proffered supplements are only *prima facie* evidence and their legality disputed as the said evidence consisted of supplements of the Kenya Gazette without the relevant primary Gazette to which the supplement is an addition. Therefore the Applicants took the position that the supplements filed in to court lack authenticity as evidence of publication of the County laws in the Kenya Gazette.

10. For his part, Counsel for the 1st Respondent submitted that Article 185 of the Constitution donates authority to the County Assembly to enact necessary legislation. He submitted that the 1st Respondent had enacted the Finance Act, 2016 in compliance with the law, as authority to impose/collect rents; that tenancies involving the county governments are exempted from the application of the two laws cited by the Applicants. To support this proposition, counsel cited the case of **Doris Wanjiru & 53 others vs Clerk Meru Municipal Council of Meru (2013) eKLR** where it was held that County Governments were not subject to the provisions of the Rent Restrictions Act.

11. On behalf of the 2nd Respondent, it was submitted that the Applicants have admitted that the County Government of Kiambu had in compliance with the law guiding enactment, passed a county legislation, namely, the Kiambu County Finance Act, 2016. Hence, the collection of rents continues to be a valid and constitutional revenue raising mechanism. Counsel quoted the case of **James Gacheru Kariuki & 3 others vs Attorney General & 11 others (2017) eKLR** where it was held that the repealed Transition Act was limited only to the transition period. Further, that a tenancy created between the County Government and its tenant was not a controlled tenancy subject to the provisions of CAP 301 or the Rent Restriction Act as held in **Petition 13 of 2012 Doris Wanjiru & 53 others v Clerk Meru Municipal Council of Meru (2013) eKLR**. The 1st and 2nd Respondents urged the court to dismiss the motion.

12. The 3rd & 4th respondents submitted that the Applicants have not demonstrated any failure by the 3rd Respondent to perform its role as mandated by the Constitution. Further the applicants do not seek any orders against them and as such they should be expunged from the proceedings.

13. The court has considered the material canvassed by the parties in support of the suit and in opposition thereto. I advisedly use the word suit, to describe the proceedings herein in light of the ruling of this court (**Ngugi J**) on 22nd June 2017. In the said ruling the court found that this action was founded on the provisions of the Fair Administrative Action Act (FAA) and consequently dismissed the Respondents preliminary objection. The preliminary objection was based on the Respondents' characterization of the action as one for judicial review under order 53 of the Civil Procedure Rules. They complained that the action was defective as it was commenced without seeking leave of the court, a mandatory requirement under section 9 of the Law Reform Act and Order 53 rules 1 and 2 of the Civil Procedure Rules.

14. Although the Applicants' case appeared to evolve in nuances as parties exchanged affidavits and documents, the gist of the suit was that with the repeal of the County Governments Public Finance Management Transition Act (herein after the Transition Act) in September 2013, the 1st and 2nd Respondents could not lawfully demand or collect rent in respect of its various housing and business premises without enacting the necessary and proper legislation to authorize it to raise revenues through rent and that such legislation must be consistent with the Rent Restriction Act and the Landlord and Tenants (Shops, Hotels and Catering Establishments Act Chapter 301).

15. The Applicants' complained that the 1st and 2nd Respondents were under a statutory duty to enact the enabling legislation or legal framework under the Public Finance Management Act but had neglected, ignored or refused to comply with the said Act. The 3rd Respondent was accused of neglecting its duty to advise the 1st and 2nd Respondents in that regard. These omissions, the Applicants argue, impinge on the Applicants' rights and those of concerned tenants of the 1st and 2nd Respondents, to fair administrative action. Simply stated, what the Applicants sought in prayer (d) was a declaration that neither the repealed Transition Act nor the County Governments Act could be relied on to authorize imposition of rents as revenue raising measures by the Kiambu County Government.

16. Further, the Applicants prayer (e) sought a declaration that the rents in respect of dwelling and business premises owned/leased from the County were not lawfully due until the necessary legislation was passed in accordance with the Public Finance Management Act. In prayer (f) an injunction was sought to prohibit the 1st and 2nd Respondents from imposing, demanding and/or receiving rents in respect of dwelling

and business premises until such legislation was enacted.

17. The 1st and 2nd Respondents' answer was that they had a properly enacted legislation, the Kiambu County Finance Act of 2016 which authorized revenue raising, in particular the imposition of rents in respect of dwelling and business premises owned and leased to tenants by the County. Moreover, that the County's rental dwellings and business premises are exempted from the operation of the Rent Restriction Act and the Landlord and Tenants (shops, Hotels and Catering Establishments) Act (hereinafter Cap 301). By a supplementary affidavit filed on 22.1.18 the Applicants dismissed the Kiambu County Finance Act 2016 as a forgery. The Respondents, in a bid to dispel the allegation filed a supplementary Affidavit on 7th February 2018.

18. Following this exchange of respective affidavits and material, the court (**Ngugi J**) made the following order on 8.2.18:

“The court directs the County Government to file their Republished Acts within 30 days. Mention on 08/05/18”.

In compliance with the order, the 1st Respondent filed on 10/7/18, a sets of 12 published acts of the County Government, including the Kiambu Finance Act of 2015 and the Kiambu Finance Act of 2016.

19. There is no dispute that for purposes of the Public Finance Management Act and the County Governments Act the imposition of rent or other charges by the 1st and 2nd Respondent required statutory sanction as these are in the nature of revenue raising measures. Such measures could be legitimized through the budget process resulting in a Finance bill.

20. Admittedly, the issue relating to legislation passed prior to 2017 by the 1st Respondent, but not gazetted in the Kenya gazette is not a new one, and was litigated in *Petitions No. 52 of 2016 and 308 of 2015* (consolidated) *James Gacheru Kariuki and 2 others V the Hon. Attorney General and 11 others [2017]eKLR*. In that case *Lenaola J* (as he then was) declared that County legislation does not take effect unless it is published in the Kenya Gazette, in accordance with Article 199(1) of the Constitution. Of further interest to this court is the court's disposition order that:

“iii. The Kiambu County Government shall regularize the publication of all its county legislation in the Kenya Gazette within 3 months failure to which such legislation shall lapse and be invalid. For avoidance of doubt, until such an eventuality, the said legislation continue to be operative.”

21. There is no dispute that the Kiambu County Finance Act of 2016 was affected by this order. In my considered view, one broad question requires determination. This key issue is whether the 1st and 2nd Respondents failed in their statutory duty to enact legislation to authorize them to raise revenue through imposition/collection of rents in respect of their dwelling and business premises, or were in so doing relying on a repealed statute and thereby perpetuating an illegality. Corollary to this main issue are questions relating to the procedural and substantive aspects of such enactment, if any.

22. The initial position taken by the Applicants in his suit is well captured in the grounds (2) and (6) support of the suit/motion. These grounds bear repeating in *extenso*:-

“1.

2. That it is an unfair administrative action for the governor of Kiambu County Government and/or the Kiambu County Assembly all of whom are administrators for the purposes of the provisions of section 2 of the Fair Administrative actions Act No. 4 of 2015 to purport to have been and to be acting under repealed laws.

3. ...

4. ...

5. ...

6. That before and/or after 30th September, 2013, the 1st and 2nd Respondents who are administrators for the purposes of the Fair Administrative Actions Act no. 4 of 2015 were and have been under statutory duty under mandatory provisions of Section 133 of the Public Finance Management Act ... to act in relation to the matter of rents as a matter of Financing a county government by way of approving their budgets for the successive years.”(sic)

23. Upon being served with the Replying affidavits by **David Ngure** and **John Gicaci** sworn on behalf of the Respondent indicating the contrary position, the Applicants reiterated the repealed Transition Act, and adverting to the Petition decided by **Lenaola J** asserted that **“all Kiambu county legislations made between March 2013 and 24th February 2017 have been declared by a court of competent jurisdiction to be irregular and not to have taken effect”** and it was illegal for the 1st and 2nd Respondent to demand rent otherwise than is prescribed by a national legislation (Public Finance Management Act and the County Governments Act).

24. Article 209(4) of the Constitution provides as follows:

“The national and county governments may impose charges for the services they provide”.

25. The Public Finance Management Act (sections 128 – 134) and the County Governments Act (Sections 21-25) provide for the procedure by which the county governments may prepare budgets and enact legislation. Article 207 of the Constitution provides that all monies raised or received by or on behalf of a county government is to be paid into the Revenue Fund of the County and only appropriated as authorized by county legislation and national legislation.

26. What I understood the Applicants' pleaded grievance to be was that the 1st and 2nd Respondents had failed to enact necessary legislation, in this case, a Finance Act to enable the raising of revenue through rents, and were instead relying on the repealed law, namely the County Governments Public Finance Management Transition Act of 2013, while the 3rd Respondent had failed to advise the 1st and 2nd Respondents in this regard.

27. The Applicants have not tendered any copy of demand for rents by the 1st and 2nd Respondents which purports that after 2013, the said Respondents were relying on a repealed law and the assertion is possibly based on the surmise that no Finance Bill had been passed in that regard. I think it is important to read the entire repealed County Government Public Finance Management Transition Act for a proper understanding.

28. The preamble of the Act states that it is:

“An act of Parliament to provide for, pursuant to section 15 of the Sixth schedule of the constitution, a framework for establishment and functions of the Transition County Treasurers, the transition budget process, transition revenue raising measures and expenditures for county governments; responsibilities of transition county accounting officers and receivers of revenue and for connected purposes”.

29. The Act commenced on 25th January 2013 and was enacted pursuant to section 15 of the Sixth Schedule and Article 209(4) of the Constitution. Section 3 of the County Government Public Finance Management Transition Act (the Transition Act) states that:

“ The object and purpose of this Act is to provide for –

a.

b.

c.

d.

e. The transition budget process.

f. Budgeting for counties, urban areas and cities and the continuation of revenue raising measures, and

g. ...”

30. Under the Act, the transition county treasuries were set up. The Act also provided for the preparation of county budget estimates and related bills by the Transition Authority in respect of months March to June, 2013 for approval by parliament, with regard to devolved functions. With regard to individual counties, the then existing local authorities were required to prepare estimates of revenue and expenditure for the 2013/2014 Financial Year. There is no evidence that the said 2013/2014 budget and bills in respect of Kiambu County excluded rental income from the dwellings or business premises whose ownership was transferred to the county from the local government pursuant to the transition legislation. Moreover, section 22 of the Transition Act provided that until the “new budgets” of the decentralized units were approved by the county assembly as anticipated under sections 24 and 25 of the Transition Act, the revenue raising measures approved by the Minister for Local Governments for the Financial Year 2012/2013 would remain in force.

31. This would suggest that by dint of sections 22 – 27 of the Transition Act the revenue raising measures existing in 2012/2013 were likely extended to the Financial year 2013/2014. Or in other words there was in place the necessary public legal infrastructure to authorize the collection of or imposition of rent as a way of revenue raising. Whereas the Transition Act stood repealed in September 2013, by dint of section 23 (3) (b) and (c) of the Interpretation and General Provisions Act anything done, liability acquired, accrued or incurred under that law was not affected by the repeal. We shall see the import of this provision in relation to existing tenancy arrangements between the defunct local government and individual tenants.

32. Section 23 of the Transition Act provides that:

“For the avoidance of doubt, until a new law relating to imposition of rates and charges is enacted, county governments, urban areas and cities may, with necessary modifications, continue to impose rates and charges under the law in force in relation thereto.”

33. The County Governments Act, came into force upon the final announcement of the results of the first general election under the 2010 Constitution and the Local Government Act stood repealed on the same date by dint of the provisions of the Transition to Devolved Governments Act. The Applicants have urged a rather legalistic view. That ‘rents’ were ‘repealed’ with the repeal of the Transition Act. The repeal of the Transition Act could not dissolve an obligation to pay rent by a tenant of the county occupying a dwelling or business premises

under a tenancy subsisting during the existence of the former local authority or under the Transition Act.

34. The County Governments are the natural and presumptive legal successors of the defunct local authorities by dint of section 33 of the Sixth schedule to the Constitution. Prayer (e) of the motion indicates that the dwelling houses and business premises the subject matter of this suit fell within the defunct Municipal and Town Councils of Kiambu, Thika, Kikuyu, Limuru, Karuri and Ruiru.

35. Section 58 of the Urban Areas and Cities Act that came into force in 2011 provides that:

“ Existing contracts, etc.

(1) Any act, matter or thing lawfully done by any local authority before the commencement of this Act and any contract, arrangement, agreement, settlement, bequest, transfer, division, distribution or succession affecting any service delivery, trade of any form, sale or dealings on land or any other matter affecting assets, liabilities or property belonging to any local authority whether moveable, immoveable or intellectual property shall, unless and until affected by the operation of this Act, continue in force and be vested in a body established by law.”

36. Whether a tenant entered into a tenancy arrangement prior to or during the transition period, unless he ceased to occupy the premises leased to him by the local authority he was bound by the tenancy agreement to continue to pay the rent agreed on to the authority or the county. In other words, so long as the tenant continued to enjoy the use and occupation of the premises the subject of the contract, he was obligated to pay the set rent to the local government or its successor the county government. The repeal of the Transition Act did not affect the terms of such tenancy as alleged by the Applicants as to ‘delete’ the requirement for payment of rent. Therefore, Section 23 of the Transition Act as read together with Section 58 of the Urban Areas and Cities Act provided a legal basis for the imposition and collection of rent by the County Government in respect of dwellings and business premises rented out by the defunct local authorities in the material period.

37. This suit must be viewed from two dimensions. There is the vertical relationship between the Applicants and the 1st and 2nd Respondents under which the Respondents owed a duty to residents of the county to pass appropriate laws (Finance Act) so as to comply with the Public Finance Management Act, so far as imposition of rents as a revenue raising measure is concerned. That is a statutory duty and the most appropriate remedy for the breach thereof, would lie within public law. A failure to carry out that statutory duty however could not, in light of Provisions of the Transition Act, as read with Section 23(3) of the Interpretation and General Provisions Act, and Section 58 of the Urban Areas and Cities Act, render the collection of rents from tenants already in occupation of the County Premises an illegality.

38. The second relationship between the parties is horizontal and private, based on a tenancy contract which required that the tenant honors his obligation to pay rent so long as he continues in occupation of the premises let to him by the Respondent or its predecessor the local authority. Such a tenant cannot properly conflate the two relationships and refuse to pay rent while enjoying the occupation and use of the leased premises, on the grounds that the Respondents had failed to carry out a statutory duty in relation to public finance management.

39. It is therefore my position that the repeal of the Transition Act is not equivalent to the ‘repeal’ of rents as the Applicants have argued. Nor did it serve to terminate any existing tenancy contracts between the Respondents and tenants in occupation of the Respondents’ dwelling or business premises. A tenant who remained in occupation of premises carrying over a tenancy from the previous local authority was under a contractual obligation to pay the prescribed rent to the landlord. The arguments by the Applicants to the contrary hold no water, and accepting them would lead to an absurd situation with far reaching ramifications for the financial stability of the County Government.

40. It is self-evident from the Applicants’ invocation of the Rent Restriction Act and Chapter 301 of the Laws of Kenya that they recognize the contractual or private nature of the tenancy relationship between the Respondents and those persons, including the Applicants who may be in occupation of the Respondents’ premises as tenants of the Respondents.

41. Moreover, through their replying affidavits, the 1st and 2nd Respondents have sought to demonstrate that indeed the said Respondents passed a Finance Act in 2016 for purposes of providing *inter alia* for the rents payable by tenants occupying county owned dwellings and business premises as a revenue raising measure. They deny that the 1st and 2nd Respondents were relying on a repealed Act. Faced with this response the Applicants’ rebuttal was *inter alia* that in the absence of **“a Kenya Gazette or a supplement to the Kenya Gazette containing rents for the dwelling and business premises owned by the county government ... there was no lawful or constitutional means through which rents become due.”** When the 1st and 2nd Respondent filed into court the re-published County acts including the Finance Act of 2016, the Applicants tore into the authenticity of these Act, terming them a forgery.

42. It is admitted that all acts passed by the Kiambu County Assembly prior to the 2017 decision of **Lenaola J in James Gacheru Kariuki and others V AG and others** 2017 required to be re-published as ordered by the learned Judge. The 1st and 2nd Respondents demonstrated that pursuant to the said order, the County government, by a letter dated 27th April 2017 submitted 14 Acts of the Kiambu County Government, including the Finance Acts of 2015 and 2016 as well as other acts which had been the subject of litigation before **Lenaola J**, for re-publication by the Government printer.

43. The litigation before **Lenaola J** was occasioned by the fact that the legislation enacted by the County prior to the petition were only published in the County gazette. **Lenaola J** found that pursuant to article 199(1) of the constitution such acts could not become law until gazetted in the Kenya gazette. Hence his subsequent orders. This new line of inquiry introduced by the Applicants with the allegation of forgery in discrediting the Finance Act 2016, through introduction of other gazetted national legislation cannot be taken seriously. Save to state the following.

44. The Applicant’s case herein never was about the constitutionality or legal force of the Finance Act 2016 or even 2015, but rather the alleged absence of a law sanctioning the raising of revenue through the collection of rents by the County government, by way of the

budgeting process as anticipated by the Public Finance Management Act. Nonetheless, the Respondents did at the earliest confirm the existence of a Finance Act, enacted in compliance with the County Governments Act. This suit concerned the alleged failure by the Respondents to enact such legislation and even though the Applicants had proceeded in their motion to plead the steps required for the enactment of such legislation, the primary issue was that no law had been enacted.

45. Under section 82(d) (ii)– of the Evidence Act a gazette notice is prima facie evidence of the act enacted by a local authority. In seeking to discredit the Kenya Gazette Supplement No. 19 (Kiambu County Acts No. 5) containing the Kiambu County Finance Act of 2016 the Applicants claim that the same is not connected to or housed within a ‘mother’ gazette as is the case with other sample national legislation provided by the Applicants in their last affidavit. The most comparable supplement in this case would have been one in relation to a county legislation rather than a national legislation. The Kenya Gazette supplement No. 19 (Kiambu County Acts No.5) is on the face of it of a different category from a legislative supplement relating to the Universities Act (national legislation) even if both bear similar serialization. Article 260 of the Constitution defines “Gazette” as the Kenya Gazette published by authority of the national government or a supplement to the Kenya gazette.

46. The front page of the disputed Gazette Supplement reads:

“SPECIAL ISSUE Kenya Gazette Supplement No. 19 (Kiambu County Acts No. 5)”

On the centre face of the said Finance Act of 2016 appears the coat of arms of the government of Kenya below which are the words:

“REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

KIAMBU COUNTY ACTS, 2016

NAIROBI, 21ST DECEMBER 2016

CONTENT

ACT – page

The Kiambu County Finance Act, 2016 .. 1

PRINTED AND PUBLISHED

BY THE GOVERNMENT PRINTER, NAIROBI”

47. It is too late in the day for the Applicants to commence a new line of attack, based on what is clearly conjecture, in respect of an Act demonstrated to have been duly passed and later re-published as ordered by **Lenaola J.** The learned Judge had observed *inter alia* that:

“..... a supplement to the Kenya Gazette is technically a Gazette, the practice being that, a Kenya Gazette supplement is ordinarily used to inter alia publish Bills, Acts of Parliament and Legal notices, with the aim of supporting the weekly publication of the Kenya Gazette. There is therefore no material difference between a Kenya Gazette and a supplement to the Kenya Gazette”

48. As an action under the Fair Administrative Action Act, this suit is not the proper forum to challenge the constitutionality of the Finance Act 2016. In answer to the allegation of dereliction of a statutory duty and illegality, the 1st and 2nd Respondents have proved that the Kiambu County Finance Act 2016 was re-published in obedience to the orders by **Lenaola J** (as he then was).

49. On whether the premises let out by the County Government fall within the definition of controlled tenancies, Section 2 of Cap. 301 exempts tenancies to which the Government or local authority is as party as land lord or tenant. Moreover the Rent Restriction Act does not apply to dwelling houses owned by and let to a tenant by the Government or local authority, *inter alia*, pursuant to the provisions of section 3(1) of the Rent Restriction Act and Legal Notice No. 25 of 1983.

50. In relation to the particular issues raised in this suit, there is no demonstration by the Applicants as to how the 3rd Respondent has failed to play its recommendatory role under Article 216 (2) of the Constitution. No provision in Article 216 of the Constitution and the Commission on Revenue Allocation Act place any duty on the 3rd Respondent to cause a county government to pass specific legislation, related to a specific revenue source.

51. In any event, in this case the 1st and 2nd Respondents have demonstrated that they took the initiative, albeit delayed, to enact legislation regarding the raising of revenue by way of rents in compliance with the Public Finance Management Act, the process culminating in the Finance Act of 2016. The Applicants have not made any tangible case against the Respondents at all. In the result, it is my finding that the Applicant’s action must fail.

52. By their pleadings, the Applicants claimed to have complied with section 9(2) of the Fair Administrative Action Act. The attached

“evidence” of compliance is a so-called “Petition to Public Authorities,” dated 3.7.16, and addressed to the 3rd Respondent, the Cabinet Secretary Finance, the Cabinet Secretary Planning and Devolution and the Law Reform Commission. Although the subject of the petition is principally the alleged imposition or increase of rents in respect of dwellings and business premises owned by the Kiambu County Government, the said County Government was not one of the addressees of the said petition and there is no evidence that prior to filing this suit, the Applicants attempted to exhaust alternative mechanisms as envisaged under section 9(2) of the Fair Administrative Act.

53. Had that been the case, the Applicants would certainly have discovered, prior to filing this suit on 17.1.17 and especially in light of the decision in the concluded case of **James Gacheru Kariuki**, in which the 1st Applicant was also a principal party, that the Finance Act of 2016 had indeed been enacted and re-published. In the circumstances while dismissing this action, I will order that the Applicants pay costs to the Respondents.

DELIVERED AND SIGNED AT KIAMBU THIS 8TH DAY OF FEBRUARY 2019.

.....

C. MEOLI

JUDGE

In the Presence of:

Mr. Gacheru in person

Mr. Muriuki for 1st Respondent

Mr. Ranja for the 2nd Respondent

Court Clerk - Kevin