



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 12 OF 2017**

**NYATHUNA QUARRY SELF HELP GROUP.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This petition has been brought by Nyathuna Quarry Self-Help group. The group is registered with the Ministry of Gender, Children and Social Development and carries out mining business at Maili Sita within Nakuru County.
2. The Respondent is the County Government of Nakuru duly established under Article 6(1) and 176(1) of the Constitution and whose functions include raising revenue to finance the budget of the County Government under Article 209 of the Constitution.
3. The petition dated 4<sup>th</sup> April 2017 was subsequently amended and filed on 3<sup>rd</sup> November 2017. The Petitioner's claim against the Respondent is that the Respondent has, through its Finance Bill 2016/2017 raised the trade licence fee for quarries business to Kshs.25,000/- and levied an extra Kshs.4,000/- for fire. The Petitioners claim that the action of the Respondent was contrary to Article 201(b) (i) of the Constitution. They fault the law making process of the Respondent for lack of consultation of and participation by the public.
4. The Petitioners therefore seek orders reproduced verbatim that;-

***“(a) A declaration that the Respondent’s actions are in violation of the Constitution.***

***(b) The Respondents be restrained from charging the current fee of Kshs.25,000 and another charge of Kshs.4,000 for ‘fire’ and be ordered to charge a maximum of Kshs.10,000 being the licence fees for surrounding comparable counties.***

***(c) Any further orders, directions as this honourable court may consider appropriate.***

***(d) The Respondents be ordered to bear the costs of this petition”***

5. The petition is supported by the sworn affidavit of one Maina Kibara, the Chairman of the Petitioner. He deponed that the licence fee of Kshs.25,000/- for quarry business was too high while there was no basis at all for levying Kshs.4,000/- for fire. That the physical topography of the quarry required a lot of excavation and a licence fee of Kshs.25,000/- would make the business unprofitable. He further deponed that the burden of taxation should be borne fairly and equitably.
6. The petition is opposed by the Respondent through the replying affidavit sworn on 24/10/2017 by Simon Mwangi Mbugua, who is the Respondent's revenue officer in charge of Bahati Sub-County. He deponed *inter alia* that the revenue collection of Bahati Sub-County was based on the Finance Act of 2013 and that the charges and levies complained of had been in operation since 2013. That there was adequate public participation and; that there was no unfairness in setting the levies. He further deponed that the Petitioner had been paying the same amounts and that the Petitioner has not demonstrated any violation of any of the Articles of the Constitution cited.
7. Both parties consented to prosecute the petition by way of written submissions which I have considered. From the rival affidavits and submissions, three issues lend themselves for my determination;-

***(a) Whether the petition as drafted is competent.***

***(b) Whether there was public participation on the process of enactment of the Finance Bill 2016/2017.***

***(c) Whether the Finance Bill 2016/2017 violated the Constitution and is therefore amenable to being annulled.***

**Whether the petition as drafted is competent**

8. The Amended petition dated 3<sup>rd</sup> November, 2017 is stated to be brought under Articles 2, 3, 10, 19,20,21,22,23,27 (1) and (4), 41 (i) and (4), 47, 48, 50, 118(1), 165, 169 (i), 201 (b) (i), 258 and 259. The Petitioners have also reproduced these Articles in numerous paragraphs of the petition. Further, they have made a sweeping statement that the Petitioners have been affected by the violation of the Constitution.

9. According to the supporting affidavit sworn by one Maina Kibara the Petitioners' grievances were premised on the fact that there was no public participation in the formulation of the County Finance Bill 2016/2017 and that the extra charge of Kshs.4,000/- introduced in the Bill rendered the act unconstitutional.

10. The Respondents have taken issue with the petition as crafted. They state in the Replying Affidavit of Simon Mwangi Mbugua that the Petitioner had to show the court the specific provisions of the legislation that were unconstitutional and how the same impugned the Petitioners' constitutional rights. The Respondents submit that the petition has not set out with particularity the rights infringed. They state that the Petitioner merely listed a myriad of constitutional provisions but remained silent on how the same were infringed. They cite the case of **Anarita Kairu Njeru – Vs- Republic (1976-1980) EA 14** and urge the court to dismiss the petition summarily.

11. I have looked at the petition and the Supporting Affidavit. I agree with the Respondents' submissions that the petition falls short of principles set out in the **Anarita Case (supra)**. Other than reproducing the numerous articles of the Constitution alleged to have been violated, the petition does not set out the particulars of the violation and ought to be struck out. However I am persuaded by the holding in **Musili Mwendwa – Vs- Attorney General & 3 others [2016] eKLR** that:-

***“The rule in Anarita Karimi Njeru Vs Republic (supra) ought not be applied hook line and sinker. It is not about absolute precision. If a party and a priori the court is able to painlessly identify the complainant’s case then the matter ought to be determined substantially and on its merits.”***

12. The present petition as I have observed above is not a product of elegant drafting. However I am able to discern a complaint that the Nakuru County Finance Bill 2016 which gave rise to the taxes with which the Petitioners are aggrieved was passed without their participation. I will therefore determine the petition on merits as mandated by **Article 165** of the **Constitution**.

**Whether the petition discloses any cause of action against the Respondents or any violation of the petitioners' constitutional rights.**

13. The factual basis of the petition is not contested. The County Government enacted the Finance Act 2016. The Act provided for various taxes and levies. The Petitioners who are engaged in quarry mining business were required to pay Kshs.25,000/- licence fee for quarry and a further 4,000/- for 'fire'. They have displayed both the licences and the receipts of payment. They contend that the licence fees offend Article 201(b) (1) of the Constitution.

14. The Respondents on the other hand submit that it was within the Constitutional mandate of the Respondent to levy tax and that any hardship faced by the Petitioners in the amount of tax levied did not make the tax law unconstitutional. They submit that the Petitioner has not shown how the Respondent violated **Article 201(b) (1)** of the **Constitution**.

15. My reading of the petition shows that the Petitioner does not contest the mandate of the Respondent to levy tax. By Article 209 and 210 of the Constitution, County Governments are empowered to impose taxes and various charges to raise revenue. Article 209(3) of the Constitution provides that a County Government may impose property rates, entertainment taxes, and any other tax that it is authorized to impose by an Act of Parliament. Article 210 (1) of the Constitution provides that a tax or licencing fee may not be imposed, waived or varied except as provided by legislation.

16. The Petitioners' argument is that the licensing fee for quarry levied by the Respondent was too high and amounted to an unfair taxation. To back up this argument, the Petitioner states that the topography of the area where the quarries are situated is such that the mining costs would be higher than in the neighbouring quarries and that the high fees would therefore make their business unprofitable. Whereas I would find this a reasonable grievance, it does not demonstrate in any way that the licence fees were unconstitutional or unlawful. The court would in my view lack the competence to assess what would amount to a fair tax, levy or licence fee in this case. As held in **Pevans East Africa Limited Vs. Chairman Board & 6 others (2017) eKLR**,

***“.....If a person sought to be taxed comes within the letter of law he must be taxed, however great the hardship may appear to the judicial mind to be....notwithstanding the notion that fairness and equity limit the power to tax, courts have made it clear that differential taxation schemes are not unconstitutional.....”***

**Whether there was public participation in the passing of the Finance Bill 2016/2017**

17. The Petitioners state both in the affidavit of Maina Kibara and the written submissions of their counsel that there was no public participation prior to the passing of the Finance Bill 2016/2017 as required by Article 201 (a) of the Constitution. They argue that public participation would have given the Petitioners an opportunity to explain that the prescribed amount was too high and punitive to their businesses. They further urge that Article 201 of the Constitution as read with Section 87 of the County Government Act, 2012 makes public participation mandatory and that a bill that is passed without public participation was a nullity. They cite **Robert Gakuru & others Vs. Governor Kiambu County & 3 others (2014) eKLR**.

18. The Respondent deponed in the Replying Affidavit of Simon Mwangi Mbugua that there was public participation. He annexed a copy of an advertisement extract published in the Standard Newspaper of 20<sup>th</sup> September 2016. He also annexed a report of the Committee on Finance Bill titled ‘Report on the formulation of the Draft, Nakuru County Finance Bill 2016’ which details the activities planned by the said committee for public participation.

19. According to the aforesated Report, the Committee was constituted on 29<sup>th</sup> August 2016 and consisted of eleven (11) officers drawn from various departments in the County Government. Their terms of reference were *inter alia* to “co-ordinate activities leading to participation of citizens and interest groups in the preparation of the Draft Finance Bill and compile the Draft Finance Bill for publication and tabling before the Executive for onward transmission to the County Assembly. The Report further stated that at the preliminary design stage, it placed advertisements in the Daily Nation and The Standard newspapers on 31<sup>st</sup> August 2016 placed adverts in Milele FM and Q FM Radio Stations from 9-14<sup>th</sup>, aired an advert on NTV between 9<sup>th</sup>-14<sup>th</sup>, printed and distributed 20,000 brochures written in both English and Kiswahili and did road shows in open lorries and pickups with public address systems between 5<sup>th</sup> - 8<sup>th</sup> September, 2016.

20. On this issue of public participation, the Respondents recognized in their written submissions that public participation is a national value enshrined in Article 10 of the Constitution. They stressed that there was sufficient and adequate public participation in the process leading to the enactment of the impugned legislation. They drew the attention of the court to the advertisement extract and the Report referred to above. They cited several cases including **Law Society of Kenya V. Attorney General & another [2016] eKLR** in support of the proposition that public participation only requires that reasonable steps are taken to facilitate such participation and that it is not expected that every individual must participate.

21. In **Robert N. Gakuru & others Vs. Governor Kiambu County & 3 others (2014) eKLR, Odunga J** cited the South African Constitutional Court decision in **Doctors for Life International Vs. Speaker of the National Assembly & others (CCT 12/05) (2006) ZACC 11: 2006(2) BCLR 1399 (CC) SA 416 (CC)** which extensively dealt with the principles in respect of public participation. From my reading of that decision which was cited to me by both parties, there are several principles relevant to the present petition. These are that: the general right to participate in the conduct of public affairs includes engaging the public in public debate and dialogue with elected representatives at public hearings; duty to facilitate public participation in the conduct of public affairs; the duty to facilitate an appropriate degree of participation; the duty to provide a reasonable opportunity to members of the public to know about the issues and have an adequate say; and that what constitutes a reasonable opportunity is dependent on the issue at hand.

22. In the present petition, the Petitioners were categorical that they did not participate in the law making process. I have looked at the report annexed to the Replying Affidavit of the Respondent. Apart from the Newspaper adverts which are annexed, the long list of public participation activities listed in the report are not supported by further evidence. It remains unknown therefore whether the detailed activities listed were actually undertaken. However, the Petitioners did not rebut that advertisements in local FM radio stations were carried out or that the brochures printed in both English and Kiswahili were brought to their attention. There is therefore a possibility that the activities were undertaken and that the Petitioners failed to take advantage of the various public fora for participation. It must be remembered that effective public participation does not require each individual to participate or give their individual views.

23. I agree with the position stated in **Law Society of Kenya Vs. Attorney General & Another (2016) eKLR**, where the court elucidated the law thus:-

*“The law however is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to each and every person wherever the person might be. What is required is that reasonable steps be taken to facilitate the said participation. Once this is done the court will not interfere simply because due to peculiar circumstances of an individual, he or she failed to get the information. In other words, what is required is that reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore even in cases where there are oral hearings the mere fact that a particular person has not been heard does not necessarily warrant the whole process being nullified . . .”*

24. From the foregoing it is my conclusion that the Petitioners have failed to demonstrate how the Nakuru County Finance Bill 2016/2017 and later Finance Act 2016 violated their constitutional rights or offended the Constitution. The petition therefore as crafted cannot succeed.

25. The petition is dismissed with no order on costs.

Orders accordingly.

**Judgement signed**

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**R.LAGAT KORIR**

**JUDGE**

**Judgment delivered, dated and signed at Nakuru this 12<sup>th</sup> Day of February, 2019**

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**JANET MULWA**

**JUDGE**

**In the presence of:**

..... **Court Clerk**

..... **For the Applicants**

..... **For the Respondents**