



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

PETITION NO.12 OF 2018

DENNIS OGERO SIRONGA.....1ST PETITIONER

BENARD OBWONGE ONDARI.....2ND PETITIONER

AND

COUNTY SECRETARY – KISII.....1ST RESPONDENT

KISII COUNTY GOVERNMENT.....2ND RESPONDENT

AND

MATATU OWNERS ASSOCIATION

(KISII BRANCH).....PROPOSED INTERESTED PARTY

JUDGMENT

1. On the 18th September 2018 the petitioners filed a petition against the respondents. Simultaneously the petitioners also filed a Notice of Motion dated the 18th of September 2018. The petition dated the 18th September 2018 is supported by the affidavit of Bernard Obwonge Ondari a resident of Kisii and the statements of Dennis Ogero Sironga and Bernard Obwonge Ondari residents of Kisii. The orders sought in the petition dated 18/9/2018 are;

- a. An order of injunction restraining the respondents by their agents, servant, employees and or assignees from collecting revenue in Kisii county till essential services such as county courts, toilets, water, market sheds, bodaboda sheds, waste disposal, matatu terminus and parking space among others have been provided.
- b. A declaration that double charging for revenue collection in monthly stickers and daily payment at entry points, erecting road blocks and collection of revenue on gazetted and undesignated areas within the main highways is irregular and unlawful.
- c. A declaration that some sections of the Finance Act are irregular and unconstitutional
- d. Costs of the petition.

2. On the 6th November 2018 the petitioners filed an amended petition seeking the following orders;

- i. An order of injunction restraining the respondents by their agents, servants, employees and or assignees from collecting revenue in Kisii county without valid Finance Act and till essential services such as county courts, toilets, water, market sheds, bodaboda sheds, waste disposal, matatu terminus and parking space among others have been provided
- ii. A declaration that gazettelement, enactment and implementation of the Kisii County Finance Act 2018 without subjecting the same to due process and public participation was irregular, illegal, null and void.
- iii. A declaration that gazettelement, enactment and implementation of two sets of Finance Act 2018 are null and void hence refund of the money paid and or collected.

iv. A declaration that the provisions of PART III (2) , PART V SECTION 7, and SCHEDULE 2 of the Kisii Finance Act 2018 are unlawful, unconstitutional and ought to be suspended.

v. Costs of the petition.

3. When the Notice of Motion came up for hearing this court directed that petition be heard and not the interlocutory application. The parties made oral submissions and filed case law to support their submissions. The Matatu Owners Association the interested party were enjoined after they made a formal application.

PETITIONERS CASE

4. The petitioners are residents of Kisii County. They state they are members of the business and taxpayers through the revenue collection by the respondents in line with the provisions of Article 209 of the Constitution, the County Finance Act, rules and regulations. That the mandatory requirement of the law is to involve the petitioners and all other residents of Kisii County in public participation during the passage and implementation of the Finance Bill. That the petitioners being residents of Kisii and Kisii County business community by virtue of the Finance Act and the Constitution of Kenya have an obligation to pay taxes in the form of revenue to the 2nd Respondent as required in law in return for essential services. That the 2nd respondent in total disregard to the relevant statutes and the constitution have compelled the petitioners and other members of Kisii county to pay taxes through revenue collection but has failed to provide essential services like toilets, water, parking space, matatu terminals for different routes, collection and disposal of garbage, sealing of potholes, market stalls and shed among others. That under the Constitution and Finance Act 2018 the respondents are mandated to create county courts to facilitate access to justice in instances where there are petty offenders affecting the implementation of the finance act and involve all stakeholders into public participation. That instead the respondents have impressed kangaroo courts and commenced impounding of motor vehicles and seizure of animals within the central business district or adjacent towns and penalized the owners without subjecting them through a legal process. That failure to render essential services to the tax payers amounts to infringement of their constitutional rights. That said are particularized at paragraphs 13 of the petition. The petitioners also claim that as a result of the infringement and violation of the constitution they have suffered loss and damage and need the protection of this court. They therefore seek the injunctive and declaratory orders, general and extemporary damages.

5. During the oral submissions Mr. Nyambati for petitioners gave a background of the County Finance Act. He argued the Finance Act 2018 was not subjected to public participation and that at the time of his submission there was no valid Finance Act to enable the County government collect revenue. That Article 209 of the Constitution provides that no revenue will be collected without an Act of Parliament. That they cannot operate on two sets of Acts, Finance Act 2018 assented to on the 20/12/2017 and the other assented to on 22/9/2018. That the Finance Act 2018 of 27/12/2018 does not provide for a repeal of the previous Finance Act. That the petitioners' rights are being violated as there is no proper Act. It was further submitted that Article 209 guides on the kind of revenue the county government is entitled to collect, that no Act of Parliament gives the county government the mandate to collect any form of royalties. That under section 10 (2) of the Finance Act the offences provide for imprisonment yet the Act does not provide for municipal courts hence the right to a fair trial has been infringed. That the issue of impounding vehicles is unconstitutional. That they have attached the unbearable conditions of the roads, the sewage, the matatu terminus, lack of water. That the only way to deal with these issues is to issue an injunction.

6. The 1st and 2nd respondents response was by Jones Nyakundi the Director of Revenue with the 2nd Respondent vide an affidavit filed in court on the 15/10/2018. The petition was opposed. Their response is as follows; that the petitioners have failed to demonstrate that they represent any public interest in the petition and therefore lack locus standi to mount the pleadings. That there are no fundamental or constitutional rights of the petitioners and or public at large which has been infringed. In affidavit filed in court on the 15th of October 2018, it was deposed that on the 2nd June 2018 the 2nd respondent put up an advertisement inviting members of the public to attend hearing scheduled as from 11th to 14th June 2018 and make contributions/ submissions at the consultative meetings. The exercise was successfully carried out through the Respondent's website, media houses and word of mouth by the area chiefs, ward administrators and various government agencies. The exercise was carried out by the executive arm of the 2nd respondent. That the executive committee considered the residents views and forwarded the Bill to the County Assembly for debate. The exercise was concluded by the Assembly on 26th September 2018 at the Governors Board Room where the officials and members of the matatu and bodaboda presented their views to the County Assembly Committee of Budget and Appropriations, the Gumsa Welfare association was duly represented by their chairperson George Monda. The Bill was passed on the 27th of September 2018 and assented to by the Governor. That the County Finance Act is a work in progress and the same is pending publication at the government printers. That the Finance Act 2017 was assented into on the 20th December 2017 and it was subjected to public participation as required by law before the Act was sanctioned into law. That there was an advertisement in the star newspaper of 30th November 2017 besides others in Egesa radio and the Kisii County website which was in public circulation invited public to present their views at various towns and markets within Kisii county as required by law. That the revenue that was being collected was as per the Kisii County Finance Act 2017 until the publication and subsequent coming into law of the Kisii Finance Act 2018. That the Kisii Finance Act 2018 has been published in the Kenya Gazette and the Municipal Charter for Kisii Town has been published in the Kenya Gazette of 30th November 2018 as directed in the Urban Area and Cities Act. That the order of injunction cannot issue against collection of revenue by the 1st respondent where; the petitioners have not specified the sections of the law or any law that is infringing on their rights and the services or lack of them as enumerated in the amended petition is vague, ambiguous, equivocal, broad, ambivalent, un-illustrated and at best bereft of the truth as pertains various markets and towns within the County. That the court cannot declare a non-existence document irregular, illegal and void. That PART III, PART V SECTION (7) and SCHEDULE of the Kisii Finance Act 2018 has not been attached or filed in court to enable the court to judiciously examine and or issue any declaration as regards to their legality. The respondents denied all allegation of acts alleged not to have been done.

7. Mr. Mosati submitted that the amended petition is jumbled up and has no reference as to pin point the complaints so as to enable them reply. That the complaints are not supported by any evidence. The supporting affidavits have no evidence of how their rights have been violated nor have they demonstrated the loss and damage. That their response of public participation has not been challenged. No reason has been given to declare the enactment illegal. That document they attach is a strange document and it does not affect them. They have attached the legal document the Kisii Finance Act 2018. That due process was followed in enacting the said Act. No basis has been laid for their allegations on PART III of the Act. That the board is in place. That section 10 of the Act has no relation to Article 48 as anyone who violates

the Act is taken to court. They have failed to demonstrate their allegation of Kangaroo courts. That after the Kisii Finance Act 2018 was published the Act of 2017 ceased to be in operation by virtue of section 1 of the Act. That the Act deals with collections of taxes and not royalties which is not tax. That the petitioners have failed to demonstrate that they have a prima facie cases. Issuing the order would cripple the government from collecting taxes. They have also failed to demonstrate the irreparable loss they will suffer. That the petitioners have not come on behalf of the public, they are seeking publicity and fame. On the exhibits annexed to the petition are undated, without invoice, unexplained. The respondents sought to have the petition dismissed.

8. The interested party too opposed the application. Mr. Samson Mogoia the chairman of the Matatu Owners Association filed a response to the petition vide an affidavit dated the 3rd December 2018. Mr. Kimaiyo submitted that the interested party is the one with the locus to address issues affecting their industry. The petitioners are unknown to the interested party. That the petitioners have not informed the court where there is no parking space. There is no evidence of being subjected to Kangaroo courts. That the interested party has continually engaged with the respondents on various issues of concern amongst them the matatu terminus, the general welfare of the Matatu owners association, payment of parking fees/ stickers, bus park charges/ fee, bodaboda sheds, washrooms and water. That there are a number of shelters/ sheds and washrooms within the various terminus in the County for the Matatu Owners Association and the public at large. The respondents have not caused any obstruction. That the Finance Act 2018 is operation and that the petitioners have filed the petition in their own interests.

9. In response Mr. Nyambati submitted that the petitioners have shown the law the respondents are breaching this being the prima facie case. That they have shown payment of services and that there are two sets of the Finance Act. That the interested party is a gun for hire. The petition has merit and should be allowed.

DETERMINATION

10. The issues for determination in this matters are;

- i. Whether there was public participation of the Public before the enforcement of the Kisii Finance Act 2018.
- ii. Whether the orders sought in the amended petition should be granted.
- iii. Whether there was public participation of the Public before the enforcement of the Kisii Finance Act 2018.

The petitioners allege that there was no public participation before the enactment of the Kisii Finance Act 2018. This allegation has been countered by the 1st and 2nd respondents. Sachs J in the South African case of **Minister of Health vs. New Clicks South Africa (Pty) Ltd** (2005) held as follows; “...whether matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of the case.”

In their response the respondents have shown that there was public participation. The respondents have attached the notices issued to the public which show that the public were informed and there was attendance by the public. They have attached the publication that was done in the Saturday Nation dated 2nd June 2018, a public hearing memo on the Bill showing the various places, dates and venue of presentations that were to be made orally or by way of written submission and the various venues and an attendance register dated the 26th September 2018 before the Committee of Budget and Appropriations. The respondents have demonstrated that after there was public participation, the public was given reasonable notice and opportunity to participate effectively in the passing of the Kisii Finance Act 2018 the said Act was enacted and is currently in operation. The petitioner’s argument that there are two Acts in operation was not demonstrated. The Kisii Finance Act 2017 ceased to be in operation once the 2018 Act became operational.

ii. Whether the orders sought in the amended petition should be granted.

11. The petitioners seek injunctive orders and various declaratory orders. The law on of injunctions is very clear. A party seeking an injunction must demonstrate that they have a prima facie, demonstrate that they will suffer irreparable loss if an injunction is not issued and that the balance of convenience is in their favor (**See Geilla vs. Cassman Brown and Company Ltd (1973) EA 358**). In this matter the locus of the petitioners have been challenged. They claim to be business persons and that they have come on behalf of the business community. The business community they claim to represent is not specified. The business they are conducting too is not specified. The Matatu association representative has denied knowing them. They claim to have the public interest and that they have brought the petition on behalf of the public. In the case of **Ashok Kumar Pandey vs. State of West Benga AIR 2004 SC 280**, the Court held as follows;

“Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.”[Emphasis mine]

12. The petitioners claim that the Kisii Finance Act was not subjected to public participation has flopped. They now claim that the revenue being collected is not being used to render the essential services. Their case is that they are being subjected to tax and that various persons are

being compelled to pay and being subjected to Kangaroo courts. They have attached receipts and stickers without any explanation. The photos attached too have no explanation. The respondents needed to have done more than just to lump pictures and receipts and claim that the revenue being collected is not being used as required. The Kisii County is large. The specific areas where services are not being properly rendered have not been identified. To lumps services like they have done does not help the court at all. They have failed to demonstrate that they have a prima facie case. Nor have they shown what irreparable loss they will suffer or how their rights have been infringed as claimed at paragraph 13 of the amended petition. There was no evidence adduced to support any of these allegations of loss and damage either. The petition in my view is lacking in substance as the allegations are vague made have not been supported by any material evidence. The respondents have demonstrated that the Kisii Finance Act 2018 has been published in the Kenya Gazette and is in operation and the Municipal Charter for Kisii Town has been published in the Kenya Gazette of 30th November 2018 as directed in the Urban Area and Cities Act.

13. Lastly the provisions of **PART III (2), PART V SECTION 7 and SCHEDULE 2** of the Kisii Finance Act 2018 provides for levies, fees and charges, the payable and rates applicable. The levies and fees are set out in the columns in the Schedules. The petitioners have failed to point out the provisions that are unlawful, unconstitutional and why they ought to be suspended. The respondents have demonstrated that there was public participation before the Act became operational; the Matatu Association body has demonstrated that they participated in the deliberations on the amounts to be levied.

All in all I find that the petition lacks merit and it is dismissed with costs.

Dated signed and delivered this 1st day of April 2019

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyambati For the Petitioners

Mr. Mosati For the Respondents

Interested Party Absent

Rael Court Clerk