



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO 7 OF 2019

IN THE MATTER OF ARTICLES 1,2,10,22,23,40,47,73,165,174,185,209,210,220 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 27, 47,184,196,201, AND 210 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO 17 OF 2012

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT 2012

AND

IN THE MATTER OF URBAN AND CITIES ACT NO. 13 OF 2011

AND

IN THE MATTER OF THE MERU COUNTY FINANCE ACT 2014

BETWEEN

THURANIRA SALESIO MUTUMA1ST PETITIONER

KENNETH MURIUKI.....2ND PETITIONER

AND

COUNTY GOVERNMENT OF MERU.....1ST RESPONDENT

MERU COUNTY EXECUTIVE COMMITTEE

MEMBER OF FINANCE2ND RESPONDENT

RULING

1. Before me is a Motion on Notice dated 25th March, 2019 seeking conservatory orders “*restraining the 1st the 2nd Respondent ... from implementing new charges and fees for single business permits and cess under Meru County Finance Act 2014 ...*”, pending hearing and determination of the petition.

2. The grounds for the application were that *Meru County Finance Act, 2014*, does not provide for some areas of Meru County namely; **Imenti South and Imenti Central Sub- counties**. That the 1st respondent was imposing raised single business permit fees in the areas without the backing of legislation. That the act is discriminative as it imposes different single business permit fees in non-defined administrative units while omitting other areas.

3 It was further contended that some businesses were not provided for in the Act, yet the 1st respondent was levying single business permit fees for them. Finally, that the Act was not subjected to public participation and that traders in Meru County will suffer irreparable damages.

4. The application was opposed through the replying affidavit of **Joseph Chabari**, the Chief Officer for Finance, Economic Planning and ICT. He stated that the Act adopted the system prevailing before devolution which had categorised Meru to **Maua Town, Meru Town, Meru Central and Nyambene** for purposes of payment of cess. That the regions were lumped into four (4) zones for ease of operationalising the Act and efficiency purposes.

5. He explained the discrepancies in the business permit fee payments for the categories raised by the petitioners. Lastly, he stated that the Act was subjected to public participation and promised to provide evidence at the trial of the petition.

6. It was submitted for the applicants that they were challenging the Act because it was enacted in 2014 and for three years, there had been no other Finance Act. That that which was in breach of **Article 210 of the Constitution of Kenya** as read with **Section 132 (1) & (2) of the Public Finance and Management Act** which requires enactment of a Finance Act every financial year.

7. It was further submitted that the Act was ambiguous as it referred to regions which do not have clearly marked boundaries. That there were no administrative areas known as Meru Central and Nyambene. The case of **Kenya Bankers Association v Attorney General & Another [2018] eKLR** was cited in support of those submissions.

8. It was finally submitted that, the respondent is charging non-existent charges and codes. That the charges for single business permit had been increased from Kshs. 4,600/= to Kshs. 6,000/=. That **section 22 (a) of the Act** also provides for penalties. Counsel therefore submitted that the traders would suffer irreparable damage if the orders sought are not granted.

9. For the respondents, it was submitted that the prayers sought were ambiguous. That there is no evidence that there had been an increase in the fees. That the payment vouchers annexed to the application were not admissible as the owner's thereof had not been joined as parties to the petition.

10. That the Act cannot be suspended as it was already operational and had been in force for 4 years now; that a similar petition to the County Assembly in 2017 had been dismissed. That the delay alone should render the application inadmissible. The case of **Diani Business Welfare Association & Others vrs County Government of Kwale [2015] Eklr** was cited in support of those submissions.

11. I have considered the affidavits on record and submissions of learned Counsel. There was a challenge to the petitioners' locus standi to institute these proceedings. In their supporting affidavit, they swore that they had brought the proceedings on their own behalf and on behalf of the traders and business people of Meru County. To my mind, that objection was not properly taken. In the current constitutional dispensation, lack of locus standi on public interest litigation disappeared through the window in our jurisdiction.

12. The issue of locus standi in public interest litigation is clearly set out in **Articles 22 and 258 of the Constitution** which provide:-

“22 (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

And;

“258 (1) Every person has the right to institute court proceedings claiming that this constitution has been breached, contravened, or is threatened with contravention;

(2) In addition to any person acting in their own Interest, court proceedings under Clause (1) may be instituted by –

a person acting on behalf of another who cannot act in their own name;

a person acting as a member of, or in the interest of, a group or class of persons;

a person acting in the public interest or; an association acting in the interests of one or more of its members;”

13. It should be noted that, the above provisions are couched in mandatory terms thereby doing away with any discretion. In **John Mining Temoi & Anor vs. Governor of County of Bungoma & 17 Others [2014] eKLR**, the court held: -

“I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms.

A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties. In this case, Mr. Khaoya has described himself as the “CEO/CO-ORDINATOR” of the organization and the Petition is about the alleged violation of the Constitution, Mr. Khaoya has in my view illustrated that there is a nexus between him and the organization.”

14. In **Kiluwa Limited & another v Commissioner of Lands & 3 others [2015] eKLR** the Court held:-

“...The provisions of Articles 22(2) and 258(2) of the Constitution changed all these common law principles. The expression or phrase “in addition” used in Articles 22(2) and 258(2) of the Constitution do not constitute a condition precedent to a person’s right to bring court proceedings in the public interest. The phrase merely emphasizes and expands the right of every person to initiate court proceedings in “the public interest” in addition to a personal interest (where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution)...”

15. It cannot be gainsaid that this is a public interest litigation. The issue of a Finance Act that is alleged to be illegal or where it is alleged that a government is collecting taxes illegally is a matter of public interest. In any event, the petitioners have indicated that in addition to bringing the petition on behalf of other traders and business people of Meru who are affected by the impugned Act, they bring the petition on their own behalf.

16. Accordingly, the petition and the Motion are properly before this court for consideration. I reject that objection.

17. The respondents contended that the petitioners were guilty of laches. That the Finance Act has been in operation for the last 4 years and that a similar petition lodged with the Meru County Assembly in 2017 was dismissed. In my view, the delay was explained. The petitioning of the County Assembly of Meru was one of the ways of seeking a remedy and I do not think that the petitioners should be punished for having followed that route.

18. Further, the fact that that Assembly in its wisdom dismissed that petition, that *per se* does not preclude this court from entertaining the matter. This court is the guardian of the Constitution and the law. Once a party feels that either of them is being breached by any entity, such person has the right to approach it for the necessary remedies.

19. The next issue is whether the conservatory orders sought should be granted. In the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Supreme Court held:-

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues a ‘the prospects of irreparable harm’ occurring during the pendency of the case; or ‘high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, and priority levels attributable to the relevant causes”.
(Emphasis supplied).

20. The petitioners contention was, that the Meru Finance Act has not been enacted in the last three years as provided for under the ***Constitution and the Public Finance and Management Act***; that the current Finance Act 2014 is ambiguous since the area of its operation is not well defined and that irreparable harm will be occasioned if the current cess on agricultural produce and taxable income on business premises continue to be implemented.

21. On the failure of the respondent to enact a Finance Act for the years subsequent to 2014, that does not invalidate the 2014 Finance Act. All that it means is that the respondent *must* stick to the fee levels that were enacted pursuant to that Act until a replacement Act is enacted.

22. On the issue of ambiguity of the Act, there seems to be some degree of truth in it. The First and Second Schedule of the Act only specifies four areas of Meru County, Maua Town, Meru Town, Meru Central and Nyambene. The deponent of the replying affidavit tried to explain that, Meru Central and Nyambene areas include all other areas of Meru apart from Meru and Maua towns. He tried to set out areas which constitute Meru Central and Nyambene. There is nowhere in the Act itself where the information he gave can be discerned from. The Act does not specify what is covered by Meru Central and Nyambene. Neither does it state that the terms used are those which were applicable during the old days of the Municipal Council of Meru as suggested by the deponent of the replying affidavit.

23. The petitioners contended that as a result of the said ambiguity, there was discrimination as areas falling on either the same area were being subjected to different fees and code numbers. This was evident from the copies of invoices and receipts that were produced in evidence. To that extent, the petitioners have succeeded in their contention against the Act.

24. There was the allegation that the Act was not subjected to public participation. Public participation is an intergral part of our constitutional set up. The framers of our Constitution found it fit to subject all and every action that would affect Kenyans to be subjected to public participation. The objective was to guard against previous tendencies where public actions by a clique of people were undertaken which had extensive ramifications against the public without the latter’s participation.

25. The respondents only dismissively stated that the same was subjected to public participation and that they will produce massive evidence at the hearing of the petition. The deponent of the replying affidavit did not find it fit to even mention and tell the court the period and the areas when the said Act was subjected to public participation. To that end, the petitioners have also established a case for consideration.

26. **Article 201 of the Constitution** as read with **Article 210** provides that there shall be openness and accountability including public participation in financial matters. It is all about transparency. It is also provided that no tax or licensing fee may be imposed, waived or varied except as provided for by legislation. With the lack of prove of public participation, the constitutional tenets of **Articles 201 and 210** have not been met for the said Finance Act, 2014.

27. It would seem that the respondents did not see how serious it is to levy taxes in a manner not allowed by the Constitution or while applying an ambiguous statute. The law will not allow that. It will amount to a breach of the Constitution as the respondents will be infringing on the residents constitutional right to property.

28. It is therefore my holding and finding that the petitioners have raised a case with inherent merit that merit serious consideration. However, looking at the prayers sought, I am unable to comprehend what the petitioners are seeking. It is not clear whether what is sought is;

a) the barring of the respondents from levying new charges or fees under the said Act while maintaining the levying of the old and operative charges,

or

b) the barring of the respondents from levying any charges fees or cess at all under the said Act.

29. If it be the 2nd limb this will have the effect of suspending the application of the statute to the entire county including those areas that are not ambiguous, such as Meru and Maua Towns which would delve a blow to the County Government of Meru in its quest to offer services to its people. This has to be avoided.

30. In this regard, due to the imprecise wording of prayer number 3 of the Motion, and for the reason that the court cannot make a case or frame the prayers for the petitioner, I am unable to grant the same.

31. In this regard, since the respondent may have been levying charges unconstitutionally, I direct that the respondent do forthwith respond to the petition and in any event within 14 days. The parties exchange written submissions within 14 days thereafter and the petition be disposed off within 28 days of this ruling to avert the continued unconstitutional collection of taxes.

32. The costs to abide the petition.

DATED and **DELIVERED** at Meru this 2nd day of May, 2019.

A. MABEYA

JUDGE