



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CONSTITUTION & HUMAN RIGHTS DIVISION.

PETITION NO. 1 OF 2019.

RAPHAEL MAKOKHA WERE.....PETITIONER

VERSUS.

H.E. GOVERNOR BUNGOMA COUNTY.....1ST RESPONDENT

THE CECM LAND, URBAN, PHYSICAL

PLANNING & HOUSING.....2ND RESPONDENT

THE COUNTY SECRETARY &

HEAD OF PUBLIC SERVICE.....3RD RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD.....4TH RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA.....5TH RESPONDENT

SPEAKER, COUNTY

ASSEMBLY OF BUNGOMA.....6TH RESPONDENT

CLERK, COUNTY ASSEMBLY OF BUNGOMA.....7TH RESPONDENT

THE CHAIRPERSON, COMMITTEE OF LANDS,

URBAN, PHYSICAL PLANNING & HOUSING.....8TH RESPONDENT

JUDGMENT.

The Petitioner Raphael Makokha Were is a resident of Bungoma County. The 1st Respondent is the Governor, and the Respondents are officers of the County Government of Bungoma. By Petition dated 29.1.2019 and filed in Court on 31.1.2019, the Petitioners seek the following orders;

1. **THAT** this Honourable Court grants interim orders barring the Respondents, their employees, servants and agents are restrained from implementing, executing and administering the disputed and irregular Charters of Bungoma and Kimilili Municipalities and approving names of member of Bungoma Municipal Board and Kimilili Municipal Board until the Application and Petition are heard and determined.

2. **THAT** this Honourable Court grants orders barring the National Government through the Office of Mr. Henry Rotich, Cabinet Secretary for Finance (National Treasury), Controller of Budgets, M/s Agnes Odhiambo and the World Bank, their employees, servants and/or agents from approving or committing any Funds to Bungoma Kimilili Municipalities, the Application and Petition are heard and determined.

The grounds forming basis of his Petition are;

1. Your Petitioner avers that the process of conferment and approval of charters and appointment of members to Bungoma and Kimilili Municipalities by the Respondents 1st to 7th was unconstitutional, illegal and irregular and un-orthodox approaches and methods that were applied by both the leadership and duty bearers in the County Assembly and in the County Executive of Bungoma County during the process of conferring charters for Bungoma and Kimilili Municipalities.

2. Your Petitioner states that the above captioned Respondents did not adhere to the rule of law and due process in the formulation, approval and conferment of the Charters for Bungoma and Kimilili Municipalities.

3. The Respondents did not provide adequate opportunity for public participation of municipal citizens and stakeholders. The participants were invited within a period of one day or less to the actual date/day for public participation forums on 9th November 2018 at KIE Hall for Bungoma Municipality Stakeholders and Friends Church for Kimilili Municipality Stakeholders.

4. Your Petitioner is duly aware and informed that none of the other participants for the Public Participation Forums at KIE Hall and Friends Church received any Written Notice of Invitation or Text message (SMS), seven days prior to the D- Day thus 9th November 2018. The mobilization and invitation process of participants to Municipal Charters Forums was contrary to the provisions of Section 13 of the Bungoma County Government Public Participation Act of 2016, which stipulates at least 7 days notice before such important forum or event can take place. The said process was also contrary to provisions of Section 5 of the Statutory Instruments Act No. 23 of 2013.

5. The doctrine of separation of powers between the County legislative Arm and the County Executive Arm is stipulated in Articles 183 and 185 of the Constitution of Kenya, 2010 was grossly abused in the entire process of formulating enacting and conferring the Charters for Bungoma Municipality and Kimilili Municipality, respectively. That the doctrine of Separation of power between the two arms of the County Government must be respected and practiced. The two arms have to be left to perform their duties independently, without involvement and interference of the other arm of County Government.

6. The Charters infringes on the constitutional rights and fundamental freedoms of the residents of Bungoma and Kimilili Municipalities who were not given adequate time and opportunity to interrogate the documents before they were formulated and enacted by the County Executive and County Assembly, respectively. There were numerous complaints from stakeholders/participants who were invited for the Committee Sessions at KIE Hall at Bungoma Town and Friends Church at Kimilili Town, with regard to lack of adequate opportunity for public participation. Some participants were concerned about the manner in which the Governor and his goons stormed into the County Assembly Committee at KIE on the 9th November, 2018.

7. Your Petitioner avers that apart from the unconstitutional, illegal, irregular and flawed process of formulating and enacting the aforementioned Charter of Bungoma and Kimilili Municipalities, the Statutory Instruments (i.e., Charters) have the following shortcomings:

15.1. THAT the Charters for Bungoma and Kimilili Municipalities are not in accord with the provisions of the Constitution of Kenya, 2010, especially Articles 1,2,3,10,33,35,37,47,48,50,73,183,184,185,195,196,232 & 259 of the Constitution.

15.2. The said Charters are no in accord with Sections 9, 14, 15, 20 (1) (2) of the Urban Areas and Cites Act, 2011 (Revised 2013), especially with regard to the criterial and procedures for the selection of Members of the Municipal Boards for Bungoma and Kimilili Municipalities, respectively. For instance, the appointing authority did not adhere to the **principle of affirmative action for persons with disability in appointing members to Bungoma Municipal Board.**

15.3 The said Charters are not in sync with Sections 5, 6 & 13 of the Statutory Instruments Act No.23 of 2013 (Revised 2018), Country Assembly of Bungoma Standing Order No. 194, which confers powers to the Committee of Delegated County Legislation.

15.3. The Charters for Bungoma and Kimilili Municipalities usurp the legislative powers and authority of the County Assembly and by extension the Nation Assembly and Senate. The said charters have given them sweeping powers to enact their own legislations and regulations contrary to provisions of Articles 94 & 185 of the Constitution of Kenya, 2010;

15.5 The said Charters grants the Municipal Managers the authority to hire and fire employees of the respective Municipality without necessarily consulting with the County Public Service of Bungoma. This is contrary to the provisions of Article 41, 232 & 235 of the Constitution, read together with several sections of the Employment and Labour Relations Act, 2007, several sections of the County Government Act, 2012 and other enabling legislations.

15.6 The illegal and irregular provisions in the Charter for Bungoma and Kimilili Municipalities are likely to set an ugly stage for un-ethical practices including, nepotism, abuse of office and impunity perpetuated by the envisaged municipal managers.

Mr. Makokha Counsel for the Respondent filed grounds of opposition and notice of Preliminary Objection on the following grounds;

1) That that Petitioner has not demonstrated a prima facie case with a likelihood of success to enable him deserve conservatory orders sought.

2) That the entire Application and the Petition is defective bad in law and contrary to public policy and public interest as the County Assembly of Bungoma and the County Government of Bungoma cannot be restrained from performing duties and Responsibilities the Constitution and the Statutes demands them to do and perform.

- 3) That the prayers by the Petitioner is opaque and not specific and hence an abuse of the process of the court.
- 4) That the Petitioner being a resident of Bungoma Municipality cannot injunct the Charter and the Board Members of Kimilili Municipality when the residents have approved the same.
- 5) That the grant of the Orders sought shall deny the two Municipalities the much needed revenue and funds of more than 800 Million for uplifting the development and infrastructure of the two Municipalities from the National Government (National Treasury) World Bank and other donors.
- 6) The Petitioner is guilty of non-disclosure of material particulars and hence do not deserve the Conservatory orders sought.

Respondents also filed a Replying Affidavit sworn by Chrisantus Wamalwa, the Acting County Secretary and Head of Public Service of the County of Bungoma, where he depones;

1. THAT I am aware that Article 184 of the Constitution of Kenya 2010 mandated the parliament to enact a legislation to provide inter alia the criteria for classifying areas as urban areas and cities, establishing the principles of Governance and Management of Urban areas and cities and to provide for participatory by the residents in the Governance of Urban areas and cities.
2. THAT I am also aware that the parliament duly enacted the Urban Areas and Cities Act 2011 which inter alia gave effect to Article 184 of the Constitution of Kenya.
3. THAT I am also aware that Section 9 of the Urban Area and Cities Act 2011 which inter alia gave effect to Article 184 of the Constitution of Kenya.
4. THAT I am also aware that Section 9 of the Urban Area and Cities Act empowers the County Governor, on the Resolution of the County Assembly, to confer on the qualifying town, the status of a Municipality by grant of a Charter in a prescribed form.
5. THAT I am aware that the County Assembly of Bungoma duly approved the request for grant of the Charter to confer Municipality status on Bungoma and Kimilili Municipality.
6. THAT I am also aware that the draft charters are first published and after publication the same is taken to the public to give their views and input.
7. THAT I am also aware that the Public Participation was done on 9th November 2018 at K.I.E. Hall Bungoma Municipality of Bungoma and Friends Church Kimilili for the Municipality of Kimilili.
8. THAT I am also aware that several different groups participated in the Public Participation at K.I.E. for Municipality of Bungoma including the following:-
 - (a) Khalaba Business Group 23 persons
 - (b) Bungoma Tax group 30 persons
 - (c) Bukembe East 15 persons
 - (d) People with Disability 10 persons
 - (e) Bodaboda group 36 persons
 - (f) Bungoma Taxi Pickups 26 persons
 - (g) Muungano Group 28 person
 - (h) Khalaba residents 28 persons
 - (i) Township ward 15 persons
 - (j) Religious organization 15 persons
 - (k) Small scale farmers 21 persons
 - (l) Civil Society Organizations 22 persons. **(Annexed herewith and marked GGB 3 are copies of the participation lists).**

By Consent of the Parties, this Petition was to be canvassed by way of Written Submission. Both Parties duly filed their respective Submissions.

The Petitioner who was acting in person submitted that this Petition is brought pursuant to the Constitution of Kenya 2010, County Government Act, Urban and Cities Act, Statutory Institution Act and the County Assembly (powers and privileges) Act. He submits that the Petitioners are aggrieved by the unconstitutional, illegal and irregular manner in which the Municipal Charters were conferred on Bungoma and Kimilili Municipality and the Constitution and appointments of the Boards by the Respondents. He submits that the Urban Area and Cities Act 2011 provides for the procedure of conferment of Municipal Status in Section 8 of the Act which was not followed by the Respondents; nor was the criteria provided for by Sec. 9 established to be present before conferment of the Municipal Status.

The Petitioners submits that there was no meaningful Public participation as the notice issued for public to attend the meeting by the Committee on Lands, Urban planning at K.I.E. Bungoma was short; and participation was not adequate and therefore the outcome was that the public were deprived the opportunity to engage with the respondents at every stage of the process. He submits that in this respect Article 184(1) and in respect of Participation of residents in the governance of Urban areas and Cities, and Section 21 and 22 of the Urban areas and Cities Act which provides for the rights of and participation of residents in affairs of their city or municipality or town. Petitioners urged this court to be guided by the persuasive authority in *Roberty N. Gakuru & Others Vs. Governor Kiambu County & 3 Others*. Petition No. 532 OF 2013.

The Petitioner submits;

“Your Petitioner and other members of the public were not given adequate opportunity to participate in the making of the Charters and appointment of members of municipal boards that affect them. Whatever happened on the 9th November 2018 was not consistent with respondents’ constitutional commitment to human dignity and self-respect. Indeed, this requirement was not fulfilled by the respondents in the case for the conferment of Municipal Charters and appointment of members of the Boards for Bungoma and Kimilili Municipalities.

Finally the Petitioner urges this Court to find that;

*The Charters of Bungoma and Kimilili Municipalities are not in accord with the provisions of the Constitution of Kenya, 2010, especially Articles 1, 2, 3, 10, 33, 35, 37, 47, 48, 50, 73, 183, 184, 185, 195, 196, 232 & 259 of the Constitution. Ironically, the Charters were gazette on 17th October, 2018 vide Kenya Gazette Supplement No. 9 of Legal Notice No. 3 and Public Participation was done on 9th November, 2018 at KIE Hall, Bungoma and Friends Church Kimilili, respectively. In this context, we assert that the so called public participation was an afterthought and only meant to hoodwink the **World Bank, National Treasury, Controller of Budget** and other development stakeholders that the process took place. In real sense it was a ceremonial exercise with pre-determined outcomes/results. Under the acceptable rules of procedure and universal practices, public participation by the County Assembly Committee on Lands, Urban, Physical Planning & Housing was to come before Gazettement of the said Charters. The Committee violated provisions of Part 8 of the County Government Act, 2012, particularly Section 87, on public participation.*

Mr. Makokha learned Counsel for the Respondent submits that;

the Petitioner has insidiously sneaked this Petition in this court claiming gross contravention of fundamental rights and freedoms pursuant to Article 1, 2,3,10,33,35,47,48,50,73,183,184,185,195,196,232 & 239 of the Constitution of Kenya 2010. The Law demands that any party claiming violation of Constitutional rights has a burden placed on him or her to particularize with reasonable precision the provisions of the Constitution that have been violated and also demonstrate the manner in which they have been violated. In our case here, the Petitioner has failed to demonstrate to this court which particular right has been violated and to what extend. He has failed to demonstrate that the residents of Bungoma and Kimilili Municipalities rights have been infringed and or that the women, youths and the marginalized groups have not been taken care of. The Respondents have in their replying affidavits provided the evidence that the people with disability interests have been sufficiently catered for.

On the issue that there was no public participation counsel submitted;

that the Respondents complied with the Public participation criteria by inviting people for discourse at KIE Hall Bungoma and Friends Church Kimilili. The Respondents attached on their affidavits several groups and stakeholders who attended these meetings and clearly proved the establishment of the Charters for the two towns. The Petitioner has confirmed in his pleadings that indeed these meetings took place and various people attended and aired their views. He also confirms that Governor attended the meeting and also addressed the committee on the issues of conferring the Municipality Status.

The draft Charters were published in the Kenya Gazettes on 17th October, 2018 for all and Sundry to read and interrogate them before the Public Participation was carried out on 9th November, 2018. That still after the Public participation, the draft Charters and the Committee report was taken to the County Assembly for deliberation and adoption and the majority of the members of the County Assembly approved the report and gave green light for the two towns to be conferred with Municipality Status.

Counsel submits that the Constitutional and Statutory requirement of the law was followed to the letter and all stake holders were given a chance through Public participation and through their elected representatives in the County Assembly to air their views before the same came to be. That even the minority were given chance to produce their dissenting report which was tabled in the County Assembly for deliberation.

Finally counsel urges this court to find; that the Petitioner cannot impugn the functions and powers of the Governor, County Assembly and County Executive as provided for the Constitution, Urban Areas and Cities Petition as presented lacks merit, is an abuse of the due process of the court and the same should be dismissed with costs to the Respondents.

From the Petition, Response and Submissions the issues for determination by this court are the following;

- 1). *Was the conferment of the Municipality Charter to Bungoma and Kimilili Municipality legal.*
- 2). *Was there public participation?*
- 3). *Are the Petitioners entitled to the reliefs by sought?*

The first issue raised by the Petitioner is that the conferment of the Charter was done contrary to law and that the process of and criteria for conferment was not done according to law.

The provision for establishment of Urban Centres and Cities is anchored in Article 184 of the Constitution which provides;

184. (1) *National legislation shall provide for the governance and management of urban areas and cities and shall, in particular –*

- (a) establish criteria for classifying area as urban area and cities,*
- (b) establish the principles of governance and management of urban areas and cities; and*
- (c) provide for participation by residents in the governance of urban areas and cities.*

(2) *National legislation contemplated in clause (1) may include mechanisms for identifying different categories of urban areas and cities, and for their governance.*

Parliament pursuant to Article 184 enacted the Urban areas and Cities Act 2011. Section 4 provides for the object of the act as;

- (a) classification of areas as urban areas or cities;
- (b) governance and management of urban areas and cities; and
- (c) other matters of the attainment of the objections provided for in paragraphs (a) to (c).

Section 8 and 9 of the Act Provides for the procedure for establishment. Section 8 provides;

(1) The board of a Municipality may, upon a resolution, apply to the county executive committee for consideration for the conferment of city status.

(2) Where the executive committee approves the application, the County Governor shall constitute an Ad hoc Committee to consider the recommendation and advise as appropriate.

(3) The ad hoc Committee shall comprise of relevant professionals in good standing nominated by the following institutions taking account of regional, ethnic and gender diversity and **representation of persons with disability?**

- (a) the Institution of Surveyors of Kenya;
- (b) the Kenya Institute of Planners;
- (c) the Architectural Association of Kenya;
- (d) the Law Society of Kenya;
- (e) an association of urban areas and cities; [Rev. 2015] [Issue3] U5 – 8
- (f) the Institute of Certified Public Accountants of Kenya; and
- (g) the business community.

(4) Where the ad hoc committee under subsection (2) determines that the town under review meets the requisite criteria for classification as a city, the County Governor shall transmit the recommendation to the County Assembly for approval.

(5) Where the County Assembly approves the recommendation for conferment of Municipality Status to a town under this section, the clerk of the County Assembly shall transmit the resolution to the County Assembly for consideration.

(6) Where the County Assembly approves the recommendation, the clerk of the County Assembly shall forward the resolution to the Governor for conferment of Municipality status on the town.

From these provisions in the establishment of Municipality or Town, following steps must be followed;

1. There is an application by Board of Town or Municipality to the County Executive Committee.
2. Where the CEC has approved Request Governor to appoint Ad hoc Committee.
3. The membership of the ad hoc Committee is as provided for in Section 8(3) with representatives from Institutions named (a -g).
4. The Ad hoc Committee prepare a report to the Governor who will transmit it to County Assembly.
5. County Assembly to deliberate and if approved transmit the same to the County Government
6. County Governor then confers the status of Municipality by Charter.

The Petitioners in this Submission contends that these steps were not followed by the Respondents. The Respondents in Replying Affidavit sworn by Chrisantus Wamalwa depones on the chronology of events as follows;

- (1) The County Assembly approved request for grant of Charter to confer Municipalities Status to Bungoma and Kimilili.
- (2) The draft Charters were published on 17.10.2018 and thereafter taken to Public for input.
- (3) Public participation was done on 9.12.2018.
- (4) County Assembly deliberated and passed the Report.
- (5) Charters were gazetted on 23.11.2018.

The second issue raised by the Petitioners is that there was no public participation in the process of conferment of the Charters. Public participation in the governance and management Urban areas and Cities is anchored in Article 184(1) of the Constitution and Article 232(1) which reinforces this as a principle of Public Service, Section 91 of the County Government Act places an obligation on the County Government to establish modalities and platforms for residents participation and Section 21 and 22 of the Urban area and cities Act confirms the same. The concept of Public Participation has been restated by this court in **BGM HC. Const. Petition No. 3 of 2018 Philip Wanyonyi Wekesa & 2 Others -Vs- The Clerk of the County Assembly of Bungoma & 4 Others** stated as follows;

The concept of Public participation is central in the democratic process of a Country, particularly when it relates to matters that affect the citizens. Public participation refers to the process by which the Public participates in governance or actions of governance which is a measure of transparency and accountability. Central in the concept of public participation is the affording the public the opportunity to give their input in decision making.

Public participation is a process whose objective is to receive public input to the legislation or policy with the aim of promoting legitimacy and acceptance on essential ingredient for an open, accessible, accountable and responsive society. It is therefore not an event but a process that involves dissemination of legislation or policy, civic education on same, adequate notice to public to submit memorandum or make presentation, and consideration of the views received.

The Petitioner submits that there was no effective public participation in this case. He submits that the residents were not given adequate notice, that notice was issued by way of S.M.S a day or a few hours before the forum at KIC and Friends Church Kimilili; that the same was broadcast in Sulwe Radio (896 FM) which has limited coverage. He Submits that on the material day responding to the SMS he attended KIE on 9.11.2019 and that goons invaded the forum and the Governor stormed the venue and directed the participants to approve the Charter. He therefore submits that this was County Executive interference with the work of the County Assembly.

The basis of the Petitioner's submission is that there was no public participation in leading to the conferment of the Charter; on that basis he urges that court to declare the Chartered conferred illegal.

The Petitioner in his response and submission readily agrees on (a) that there was a forum called by the Respondents for Public Participation at both K.I.E. Bungoma hall and Friends Church Kimilili. He admits having been informed of the meeting via SMS message. Indeed he confirmed he personally attended the KIE Hall meeting. The Respondent in their response submit that in the same KIE Meeting the public both individual and organized group attended and gave the views. They have annexed the list of participants and organized groups that attended;

- (a) *Khalaba Business Group 23 persons*
- (b) *Bungoma Tax group 30 persons*
- (c) *Bukembe East 15 persons*
- (d) *People with Disability 10 persons*
- (e) *Bodaboda group 36 persons*

(f) Bungoma Taxi Pickups 26 persons

(g) Muungano Group 28 person

(h) Khalaba residents 28 persons

(i) Township ward 15 persons

(j) Religious organization 15 persons

(k) Small scale farmers 21 persons

(l) Civil Society Organizations 22 persons. (Annexed herewith and marked GGB 3 are copies of the participation lists).

including, Media, Registrar grounds, business association, people with Disabilities Residents Association, all these gave main input which was condensed into a report tabled before the County Assembly. The County assembly deliberated in the report, voted and also noted the dissenting report of 4 M.C.A. who dissented.

All these process in my view stand that the public was actively informed and participated in the discussion of the report and proposal for awarding of the Charter to Both Bungoma and Kimilili Municipalities. The petitioner having participated in the process cannot properly in my view turn and allege he was not given an opportunity or that there was no public participation.

I therefore find no merit in this Petition which is hereby dismissed. I make no order as to costs.

Dated and Signed at Bungoma this 2nd day of July, 2019.

S.N. RIECHI

JUDGE