



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 MUTUMA.....1ST PETITIONER

KENNETH MURIUKI.....2ND PETITIONER

AND

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

MERU COUNTY EXECUTIVE

COMMITTEE MEMBER OF FINANCE.....2ND RESPONDENT

J U D G M E N T

1. By a petition dated 25th March, 2019, the petitioners alleged that they are residents of Imenti South Sub-County of Meru County. That in or about 2014, the 1st respondent enacted the **Meru County Finance Act, 2014 (hereinafter “the said Act”)**. That through the said Act, the 1st respondent introduced new single business permit, cess and licence fees chargeable for business and various services offered by the 1st respondent throughout the County.

2. It was the petitioner’s contention that; the fees and charges introduced were for Meru town, Maua town, Meru Central and Nyambene areas. That the other areas of Meru County were omitted from the said Act. That there were no administrative units known as Meru Central and Nyambene. That despite the other areas being omitted from the said Act, the 1st respondent had nevertheless begun charging those

charges and fees in breach of the law.

3. The petitioners further complained that, in so far as the said Act omitted the other areas of Meru County, the said Act was ambiguous and had led to the charging of excessive fees and charges of businesses within the same areas. That the said Act was not subjected to public participation before it was enacted. That in the premises, the said Act was unlawful and unconstitutional.

4. The petitioners alleged that the said Act was in breach of **Articles 40(1) and (2), 47, 196, 201, 209 and 210 of the Constitution of Kenya**. Further, that the said Act was enacted in breach of **section 132 (1) and (2) of the Public Finance Management Act** and **sections 87, 88 and 89 of the County Governments Act No. 17 of 2012**.

5. In the premises, the petitioners prayed for declarations that; the said Act is unlawful, unconstitutional and null and void in so far as it was not subjected to public participation. In the alternative, that schedules 1 and 2 of the said Act are unconstitutional and null and void in so far as they were passed in contravention of **Articles 47, 201, 209 and 210 of the Constitution of Kenya**. The petitioners further prayed for an injunction to restrain the 1st and 2nd respondent from imposing taxes without a backing legislation.

6. The respondents opposed the petition vide the replying affidavit of **Joseph Chabari** sworn on 13th May, 2019. It was contended that after the onset of devolution, the 1st respondent adopted the billing that hitherto existed under the old Meru District. The deponent explained what areas comprised **Meru Central and Nyambene**. He also explained that the areas were categorised under the said two regions for convenience as listing all the centres comprised thereon would have been cumbersome and impractical.

7. The deponent also explained the cess that was levied on the items complained of by the petitioners. He swore that the said Act was subjected to public participation and produced newspaper advertisements that preceded the said public participation including the Hansard of the Meru County Assembly during the debate for the enactment of the said Act. He explained the frustration the 1st respondent had suffered in trying to have subsequent Finance Bills enacted by the Meru County Assembly after the said Act.

8. He concluded by denying the allegations that the 1st respondent had levied any unlawful cess or fees or that the impugned Act was unconstitutional.

9. In their submissions, the petitioners contended that there had been no public participation in the enactment of the said Act and cited the decisions of **Kenya Human Rights Commission v. Attorney General & Another [2018] eKLR** in support of the said submission. That the impugned Act lacked certainty and therefore breached the principle of fair administrative action under **Article 47 of the Constitution**. The cases of **Kenya Bankers Association v. Attorney General & Anotehr [2018] eKLR** and **Keroche Industries Limited v. KRA & 5 Others [2007] 2 KLR 240** were cited in support of those submissions.

10. It was further submitted for the petitioners that since there had been no other Finance Acts enacted by the Meru County Assembly after 2014, the 1st respondent was in breach of **section 132(1) and (2) of the Public Finance and Management Act**. That the continued levying of cess and fees was illegal and unconstitutional. It was urged that the declarations sought be granted.

11. On their part, the respondents submitted that they had produced evidence, including newspaper advertisements and the Meru County Assembly Hansard, to prove that there had been adequate public participation before the impugned Act was enacted. That the impugned Act was neither unconstitutional nor flawed and that the complaints raised by the petitioners had been explained.

12. In conclusion, the respondents contended that the petition was scanty and hazily framed. That it was clear that what the petitioners were complaining about was parts of the said Act in so far as it relates to single business permits yet they had applied for the entire Act to be nullified.

13. In the premises, the respondents submitted that the prayers sought would be highly prejudicial to them if granted. That it may lead to the grounding of major services within the county as there would be no funds to supplement whatever is received from the National Government. They prayed for the petition to be dismissed.

14. I have carefully considered the affidavits on record, the evidence adduced, the submissions of Learned Counsel and the authorities relied on. This is a Constitutional Petition. A constitutional petition so called is the one which alleges the breach of constitutional provisions with a view to seek to remedy the breach.

15. In the present case, the petitioners allege that; the **Meru Finance Act, 2014** is unconstitutional; that it was enacted without any public participation and for being ambiguous in its application; that there has been no subsequent Finance Acts to authorise the imposition and exertion of new taxes on the residents of Meru County and that the respondents have been levying illegal taxes unsupported by any legislation.

16. I wish first to deal with the contention that the respondents are levying taxes illegally as the same is unsupported by any legislation. The basis for this contention was that since 2014, the 1st respondent had not complied with **section 132(1) and (2) of the Public Finance and Management Act**.

17. Under the said provision, the County Executive Member for Finance is supposed to pronounce taxation measures with the approval of the County Assembly each financial year. With such pronouncement, a finance bill is supposed to be submitted to and passed by the County Assembly as the Finance Act to authorise the taxation for the year following. This never happened in respect of the 1st respondent for the years 2015/2016, 2016/2017/2018 and 2018/2019, respectively.

18. It would seem that because of lack of any subsequent Finance Acts being enacted, the petitioners were of the view that the 1st respondent was not supposed to charge the respondents any fees and charges.

19. It is true and correct that without a supporting legislation, the County Government and/or even the National Government cannot purport to charge, exert or collect any taxes upon the citizens. This is so by virtue of the decree in **Article 210 of the Constitution** which provides:-

(1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation”.

20. According to the petitioners, since the respondents did not cause the enactment of any Finance Acts subsequent to the 2014 Finance Act, the continued taxation of the business community was unlawful and unconstitutional.

21. I do not think that is the correct position. The respondents admitted that they had not succeeded in persuading the Meru County Assembly to pass any finance legislation after the impugned one. To my mind, what that meant was that the respondents have to stick with the taxes that had been authorised by the Meru County Assembly in 2014. That neither invalidates the **Meru Finance Act 2014** nor any taxation thereunder,

22. Accordingly, I hold that the **Meru Finance Act, 2014** is not unconstitutional for failure to enact subsequent Finance Bills for the years 2015, 2016, 2017, 2018 and 2019. Further, I hold that the tax levied under that Act is still lawful and constitutional notwithstanding the failure to enact any subsequent Finance Acts in the stead thereof.

23. The second issue is whether the **said Act** is unconstitutional for lack of public participation. It was the petitioners’ contention that before the said Act was enacted, there had been no public participation and that the same was therefore enacted in breach of **Articles 196 and 201 of the Constitution of Kenya** and **sections 87, 88 and 89 of the County Governments Act**.

24. I agree with the pronouncement made in the case of **Kenya Human Rights Commission v. Attorney General & Another (supra)**. Under the current constitutional dispensation, the principles of public accountability and transparency are very central. It is for this reason that any issues that affect the citizenry including legislation **must** be subjected to public participation.

25. In their replying affidavit, the respondents averred that there had been extensive public participation prior to the enactment of the impugned Act. They produced newspaper advertisements and the Meru County Assembly Hansard to back up their contention. The petitioners did not file any rebuttals thereto.

26. I have carefully considered the evidence tendered by the respondents. I note that there was an advertisement in The Daily Nation of 8th February, 2014 which called for public participation for the subject Act at Buuri and Tigania East. The two areas are within the Meru County. There was also a list of participants for some public participation on 17th February, 2014. Further, it would seem that a robust debate took place within the Meru County Assembly before the said Act was enacted.

27. The petitioners did not fault the aforesaid evidence which the respondents produced as constituting public participation. It was never challenged or argued as being insufficient. I note that the other advertisement for 5th November, 2015 was way after the said Act had been passed and it was meant for the 2015 Finance Bill that was never enacted. Further, the other advertisement was not clear as to what bill or for which period.

28. However, since the petitioners did not dispute the 8th and 17th February, 2014 advertisement and list, and the County Assembly Hansard as constituting adequate public participation, I am unable to hold that there was no public participation at all as alleged by the petitioners. It may be argued that the said public participation may not have been adequate as not all areas of Meru County were covered, but that was not the petitioners’ case. Their case was that there was no public participation at all. This court cannot close its eyes to the evidence produced by the respondents, however little.

29. Accordingly, I am satisfied that in so far as there was evidence that on 8th February, 2014 there was an advertisement in the Daily Nation announcing a public participation in two sub-counties of the Meru County; that there was a list of some public participation that took place on 17th February, 2014 and the subsequent robust debate of the Bill in the Meru County Assembly before it was enacted, this court is unable to hold that there was no public participation in the enactment of the said Act. As already stated, the said evidence was neither denied nor challenged.

30. To my mind therefore, the provisions of **Articles 196 and 201 of the Constitution** were duly adhered to in the enactment of the said Act.

31. The last issue was that the said Act was ambiguous as to its application. It was the petitioners’ case that the only places that had been named with particularity were, **Meru Town and Maua Town**, respectively. That since there were no administrative units known as **Meru Central and Nyambene**, the Act was ambiguous which had led to the exertion of different fees and charges on the affected areas.

32. The respondents dis clarify that after the coming in of devolution, the 1st respondent adopted the then prevailing billing rationale or system of the then Meru Municipality or District. That under the said system, the entire County was divided into four sections for taxation purposes, namely, **Meru Town, Maua Town, Meru Central and Nyambene** areas.

33. The respondents clarified that **Meru Central and Nyambene** areas were so vast that to include the affected trading centres or markets would have been cumbersome and or difficult in the said Act. They averred that the Meru Central areas were well known as were Nyambene areas. The petitioners did not dispute that the areas named under Meru Central were actually known as such or that they knew which areas fell under Nyambene.

34. To this court's mind, the areas covered by or referred to or falling under the general area known as Meru Central is well known by the residents of Meru County. So is the area falling under or generally referred to as Nyambene. It was not the petitioners' case that they did not know which areas these terms referred to. They also failed to respond to the response made by the respondents. To that extent, the respondent's contentions remained unchallenged and uncontroverted.

35. Accordingly, I am satisfied that the said Act is not ambiguous as alleged by the petitioners. The ambiguity alleged has been clearly explained by the respondents and not disputed. The alleged irrational, irregular and ununiformed charges levied on businesses has been explained by the respondents and was never challenged or denied by the petitioners.

36. In the premises, I find that the petitioners have not proved their case to the required standard. A petitioner of an alleged breach of a constitutional provision cannot just make an allegation and throw it on the face of a court and expect a remedy. The allegation must be proved with specificity. That means calling adequate, acceptable and sufficient/ satisfactory evidence. That was not the case here.

37. Accordingly, I find the petition to be without merit and the same is hereby dismissed. Being a public interest matter. I make no orders as to costs.

It is so decreed.

DATED and DELIVERED at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE