



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**PETITION NO.21 OF 2017**

**(FORMALLY NAIVASHA H.Pet.14 OF 2016)**

**FRANCIS NYAHORO & 25 OTHERS.....PETITIONERS**

**V E R S U S**

**COUNTY GOVERNMENT**

**OF NYANDARUA.....RESPONDENTS**

**JUDGMENT**

This Petition is filed by 24 petitioners who are traders in the business of extraction, transportation and sale of quarry products and natural resources in Nyandarua County. They seek the following orders:

- i. A declaration do issue that the Nyandarua County Finance Act, 2016 is unlawful, unConstitutional, void ab initio in so far as the same did not follow the rules of public participation in accordance with Articles 196 and 201 of the Constitution, Sections 87, 88 and 89 of the County Governments Act and Section 127 of the Standing Orders;***
- ii. In the alternative, a declaration do issue that Section 3 and 5 of Part II of the Nyandarua County Finance Act is unlawful, unconstitutional, null and void ab initio in so far as the same was passed in contravention of Articles 201, 209 and 210 of the Constitution of Kenya;***
- iii. A conservatory order be issued staying the enforcement or implementation of Section 3 and 5 of Part II of the Nyandarua County Finance Act 2016 in so far as the same relates to the imposition of charges and fees for the extraction and transportation of quarry products;***
- iv. The respondent be restrained from enacting any legislation on fees and charges for the extraction and transportation of quarry products without following the procedure set out in the Constitution;***
- v. Costs of the petition.***

In an affidavit sworn by Francis Nyahoro and William Ndirangu on behalf of the other 22 petitioners, it is contended that the Respondent passed the Nyandarua County Finance Act 2016, which imposed exorbitant fees for payment of quarry ground rent, quarry tenancy and transportation of quarry products which is discriminatory and contravenes the Constitution; that about 10/11/2016, the Respondent's officers informed the petitioners that from 14/11/2016, they would be paying fees and charges stipulated in the Act which was Kshs.400/= per trip per vehicle, yet other vehicles in transport industry pay Kshs.43,000/= per year; that it is not clear why the respondent levied the said charges; that the imposition of the charges for ground rent and quarry tenancy cannot be deemed to be service charges for services provided by the Respondent because the petitioners pay loaders and owners of the land and any charge over and above what they pay is double taxation; that the said tax prejudices national economic policies and economic activities across County boundaries as it is intolerable for applicants to conduct business with the Respondent; that the petitioners risk closure of their businesses and loss of the right to earn a living.

It was further submitted that the levy of charges or fees ought not to prejudice economic activities across County boundaries or the mobility of goods, services, capital or labour and the above were not taken into consideration when setting the fees payable by the petitioners; that the charges, tariffs were supposed to comply with Section 120 of the County Government Act which has been overlooked; that the imposition of levies on quarry products is within the ambit of the National Government as per paragraph 420, 425, 429 and 430 of the 1<sup>st</sup> Schedule of Finance Act.

The petitioners contend that the Constitution and relevant legal provisions were flouted and the court has the mandate to intervene. Counsel relied on the decision of ***Robert Gakuru & others v Governor Kiambu County & 3 others Pet.532/2013*** where it was held that levy charges on stones quarried unless authorized by an Act of Parliament, any services rendered by County Governments towards that end would be

illegal.

The respondent opposed the petition through an affidavit sworn by the Chief Officer in the Department of the Finance Department, Mr. John Gitau Njoroge and submissions filed by counsel, Mr. Maheli. It is the Respondent's case that it is mandated to regulate trading activities in the County through issuance of licenses and enactment of the relevant Laws and Regulations; that it was well within its mandate when enacting the Nyandarua County Finance Act, 2016; that the Respondent complied with all the relevant laws, under the Public Finance Management Act on budgeting; that budgetary estimates were prepared and were considered by the Assembly and approved; that the Act was enacted to give effect to the budget; that the Finance Bill was published for public participation to voice their concerns and comments, in compliance with Article 10, 174 and 196 of the Constitution and the Nyandarua County Public Participation Act; that the public participation forum was well publicized and the petitioners admit having participated. Counsel further submitted that the respondent is constitutionally mandated to undertake functions set out in the Constitution and provide services which invite revenue generation through taxes, levies within the County's jurisdiction and revenue received from the National Government; that the allegations of discrimination are unfounded and the petition is mischievous and untenable.

The respondent's counsel framed four issues for determination which I subscribe to. They are as follows:

**(i) Whether there was public participation in the process of enactment of the Nyandarua County Finance Act;**

**(ii) Whether the tax amount Respondent is mandated to levy charges and/or taxes within the County;**

**(iii) Whether the imposed on the petitioners by the impugned Act is exorbitant;**

**(iv) Whether the imposed tax amounts to double taxation.**

**(v) Whether Sections 3 and 5 of the Nyandarua County Finance Act is unconstitutional.**

**(1) Whether there was public participation in the process of enacting the Nyandarua County Finance Act;**

The petitioner's case is that the Nyandarua County Finance Act is unlawful void *ab initio* in so far as it did not follow rules of public participation in accordance with Articles 196 and 201 of the Constitution on public participation. I need to set out some of the legal provisions on the issue of public participation. The concept of public participation is one of the National Values and principles of good governance under Article 10 of the Constitution which provides:

**(1) The National Values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them:**

**(a) Applies or interprets the Constitution;**

**(b) Enacts, applies or interprets any decisions;**

**(c) Makes or implements public policy and decisions.**

**(2) The National Values and principles of governance include:-**

**(a) Patriotism, National Unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**

**(b) Human dignity, equity, social justice, inclusiveness, equality;**

**(c) Good governance, integrity, transparency and accountability;**

**(d) Sustainable development.**

Public participation is also captured in Article 174 of the Constitution as one of objects of devolution. It provides; Article 174, **"The objects of the devolution of government are:**

**(a)**

**(b)**

**(c) To give power of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;**

**(d) .....**"

Article 196 of the Constitution provides as follows:

196(1) A County Assembly shall:

- (a) Conduct its business in an open manner and hold its sittings and those of its committees in public; and**
- (b) Facilitate public participation and involvement in the legislative and other business of the Assembly and its committees;**
- (3) A County Assembly may not exclude the public, or any media from any sitting unless in exceptional circumstances.**

Article 201 of the Constitution also provides for public participation in financial matters. It reads:

**“The following principles shall guide all aspects of public finance in the Republic:-**

**(a) There shall be openness and accountability, including public participation in financial matters.**

**(b) The public finance system shall promote an equitable society, and in particular:-**

**(i) The burden of taxation shall be shared fairly;**

**(ii) .....**”

Other provisions on public participation are in the County Government Act, 2012.

Section 87 of the Act enumerates the principles of the citizen’s participation in the County Governments while Section 88 of the same Act provides for interaction between the citizen and the County Governments on any matters under the responsibility of the County Governments.

It is apparent that there are many provisions in the Constitution and other related statutes on public participation both in legislation and policy functions of both the National and County Governments. The objects of Devolution are captured in Article 174 of the Constitution. They are inter alia: **“Promote democratic and accountable exercise of power.”** is to enable the people to be directly involved in governance and making decisions that directly affect them contrary to what existed before when all decisions were made by the National Government; recognize the right of committees to manage their own affairs; and further the development, protection and promotion of interests and rights of minorities and marginalized groups. Promote social economic development by provision and proximate and accessible services. Ensure equitable sharing of nature and local resources, et cetera.

J. Odunga in the decision of **Robert Gakuru & others (Supra)** dealt at length with what amounts to public participation quoting extensively from South African decisions of **Doctors for Life International v Speaker of the National Assembly & others CCT.12/05 (2006)ZACC 11:2006 (12) BCLR.1399(CC); 2006 (6) S.A.416 (CC) at paragraph 56** where the judge said:

**“The phrase ‘facilitate public involvement’ is a broad concept, which relates to the duty to ensure public participation in the law making process. The key words in this phrase are ‘facilitate’ and ‘involvement’. To ‘facilitate’ means to ‘make easy’ or ‘easier’, ‘promote’ or ‘help forward’. The phrase ‘public involvement’ is commonly used to describe the process of allowing the public to participate in the decision making process. The dictionary definition of ‘involve’ includes to ‘bring a person into the matter’ while participation is defined as ‘taking part with others (in an action or matter)’.....the active involvement of members of a community or organization in decisions which affect them ‘According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore means, taking steps to ensure that the public participate in the legislative process.”**

The court further considered who and to what extent the issue of public participation ought to be determined and it quoted Sachs J, in the minority judgment in **Minister of Health and another v New Click’s case South Africa (Pty) Ltd & others 2006(2) SA 311 (CC)** J. Sachs where he said:

**“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What 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 issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”**

My understanding of the above quotation is that public participation will vary from case to case and the particulars need not be absolute but reasonable.

The question then is, whether the impugned Act was subjected to public participation. At paragraph 7 of the petition, the petitioners did admit that they participated in the passing and legislation of the Nyandarua County Finance Act. The bone of contention is that the views of the petitioners were not considered. At paragraph 12 – 15, of the respondent’s replying affidavit, the deponent explained and also exhibited the measures taken by the respondent in advertising the Finance Bill for public participation in Inooro FM and the Daily Nation Newspapers JCN 2(a) and (b). They also exhibited attendance lists from the various wards, (JGN 3). After the public participation, a report was prepared, (JGN 4). My understanding of the petitioner’s case is that even though they did take part in the public participation before the Finance Act was passed, they raised their issues which were not considered.

The question is whether after public participation, a statute will reflect the views of every person?

In the *Gakuru case (Supra)*, J. Odunga said:

***“The passage from the Doctor’s for Life Majority judgment, referred to by the applicants state the reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one’s views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views.”***

Justice Emukule also considered the same issue in *Diani Business Welfare Association and others v County Government of Kwale Pet.39/2014 (2015) e KLR*, the Judge said at paragraph 32:

***“The second challenge advanced by Prof. Cheaseman is the challenge of aggregating public opinion, that even where effective participation takes place, County Governments, face the challenge of aggregating public opinion into specific set of actionable ideas. Citizens may not agree on all ideas, particularly as consultation does not take place in one meeting but often different groups, select different priorities.***

***In as much as Citizens’ views must not be ignored, the Citizens and public at large also need to understand that Counties, like the National Government, will not be able to respond to all their demands.”***

In *Law Society of Kenya v Attorney General & 2 others Pet.318/2012*, J. Majanja observed that the determination whether there has been public participation the court has to examine the whole process from formulation of the legislation to enactment and that the burden of showing that there has been no public participation or that the level of participation does not meet the constitutional standards is the petitioners.

A part from alleging that their views were not considered, this court has no more information on what the petitioners’ views were or in what words they raised them. As can be gleaned from the decisions considered above, not all views/recommendations will be taken into account when enacting an Act because the legislators have to take into account Government Policies which the Public may not be aware of and of course it all depends on the special circumstances of each case. The needs of the wider majority must prevail.

In *Commission for Implementation of the Constitution v Parliament of Kenya & 5 others Pet.454/2012 paragraph 45*, the court considered the decision of *Pearlberg v Varty (1972) 1 WLR 534 as cited in Application Bahadur (1986) LRC 545 Const* where the court stated ***“I would only emphasize that one should not start by assuming that what parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown. In the same vein, I will reiterate that this court will start from the presumption that a statute as enacted by Parliament is constitutional, is fair unless the contrary is proven.”***

In the same case, the judge expressed the view that courts should act with restraint when invited to declare a statute unconstitutional because of the resultant effects. The court said at paragraph 69:

***“Declaring a statute as unconstitutional, needless to say is a serious issue with deep seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established. On this, I agree with the Transparency International, the 2<sup>nd</sup> Amicus Cuae on the point that it is not for this court to dictate to Parliament what it should or should not pass as that is the sole prerogative of Parliament. The court can only deal with the legislative results of Parliament.”***

Having considered the numerous decisions on the question of Public Participation, I am of the view that the petitioners herein failed to raise any grounds that would prompt this court to declare the Nyandarua Finance Act 2016 as unconstitutional on account of being denied participation.

***Whether the respondent is mandated to levy, charge/taxes within the County:***

The petitioners allege that the respondent has no power to levy quarry ground rent and tenancy rent.

Article 185 of the Constitution provides for the legislative authority of the County Assemblies. Article 185(2) provides:

***“A County Assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Forth Schedule.”***

The impugned Nyandarua Finance At was enacted to give effect to the above Article. The Fourth Schedule of the Constitution deals with distribution of functions between the National Government and the County Government. At paragraph 2(7) of the Schedule, the County Government is charged with functions of trade development and regulation including:

***“(a) Markets;***

***(b) Trade licenses (excluding regulation of professions);***

*(c) Fair trading practices;*

*(d) Local tourism*

*(e) Co-operative societies.”*

Article 209(3) of the Constitution empowers the County Government to impose the following taxes and charges; property rates, entertainment taxes; and any other tax that it is authorized to impose by an Act of Parliament.

Under Article 290(4), the County Government is also allowed to impose charges for the services the County Government provide. Section 104 1(d) of the Public Finance Management Act, 2012 on its part, empowers the County Government to mobilize resources for funding its budgetary requirements and putting in place mechanisms of raising revenue and resources.

The respondent has the mandate to provide services to the people of Nyandarua which includes maintenance of roads, security, water e.t.c. To realize its mandate, the Respondent has to raise revenue funds through charges, levies, permit fees, licenses e.t.c. It is therefore within the discretion of the Respondent to find ways of raising the revenue provided it acts within the law. The respondent is empowered to levy taxes and charges under Article 209 3(c). The Article could not be specific on the levies and charges because the kind of trades engaged in by each County varies from County to County.

The petitioners seek a declaration that Sections 3 and 5 of the Nyandarua County Finance Act are unlawful and unconstitutional. The said Sections provide as follows:

**“Section 3**

***(1) The services cited Under First Schedule shall be charged a fee at the rate specified therein;***

***(2) The services listed Under the Second Schedule shall be charged a fee at the rate specified therein.***

**Section 5**

***(1) A person carrying on any activity listed in the Schedules shall pay to the relevant office a fee at the rate set out in the schedule;***

***(2) A person who carries on an activity listed in the Second Schedule (Part1) and fails to pay the fee referred to under subsection 1 commits an offence and shall be liable to fine not exceeding three thousand shillings.”***

Paragraphs 420, 425, 429 and 430 of the First Schedule of the Finance Act deals with issues of stone cutting and extraction of national resources.

Generally, the petitioners did not demonstrate how the said sections are unconstitutional because the Nyandarua Finance Act is enacted pursuant to Article 209 of the Constitution and Section 290(4) of the County Government Act. As earlier noted, the County Government must enact legislation to enable it raise revenue to enable the County in order to render services in the County.

Whether extraction and dealing in quarry products is a natural resource that taxes should be controlled by National Government, I am persuaded that it is not. Mining of quarries is generally done on private land and quarries do not exist in every county and the imposition of quarry levy and rent by the County Government is putting into effect the provisions of the Finance Act. The petitioners have not demonstrated that the levying of charges or rent are unconscionable or unfair to warrant the court to declare sections 3 and 5 of the Finance Act as unconstitutional. I echo the sentiments of J. Majanja in the case of *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR* held in part that:

***“Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established.”***

***Whether the charges or taxes are exorbitant:***

As considered earlier in this judgment, before the enactment of the Act, the respondent came up with a County Budget and the Bill was prepared based on the said budget which includes the respondent’s revenue and expenditure which have been considered in coming up what the charges, taxes or levies were to be imposed.

Section 131 of the Public Finance Management Act provides as follows:

**“Section 131**

***(1) The County Assembly shall consider the County Government budget estimates with a view to approving them, with or without amendments, the time for the relevant appropriation law and any other laws required to implement the budget to be passed by the 30<sup>th</sup> June in each year.***

***(2) Before the County Assembly considers the estimates of revenue and expenditure, the relevant committee of the County Assembly shall discuss and review the estimates and make recommendations to the County Assembly and in finalizing the recommendations to County Assembly, the Committee shall take into account the views of the County Executive Committee Member for finance and the public on the proposed recommendations.”***

The petitioners had taken part in the review of the budget. All the views having been considered, the respondent must have come up with what it believed was fair to meet its budgetary demands in order to perform its mandate. I agree with the observation by Odunga J. in Gakuru case that the courts ought to exercise judicial restraint in matters that deal with legislative authority of County Governments in order to safeguard the doctrine of separation of powers. By the petitioners asking the court to bar the respondent from carrying out its mandate of legislating on fees and charges on extraction and transportation of quarry products, it would be an outright breach of the doctrine of separation of powers.

The petitioners also allege that by being called upon to pay the charges of Kshs.400/= for transportation per trip, it amounts to double taxation and is discriminatory. The petitioners allege that they pay the owners of the stone and also the loaders for extraction and that the loaders and owners pay tax. What is a double taxation was defined in the case of Kenya Pharmaceutical Association and others v Nairobi City County and the 46 other County Governments Pet.97/2016 to mean:

***“What is the meaning of double taxation? Double taxation is the taxing of the same income twice.”***

If the loaders and owners of the land pay a fee, it is charged on their income. It is not a charge imposed on the petitioners for transportation. The tax or charge on the stone is not the same as that of transportation and it is not the same as that which the owners of the stone are charged. The tax under challenge is for doing business in the respondent’s County of transporting stone. So far, the petitioners have not demonstrated that they are taxed twice on the same income.

The applicants alleged breach of their fundamental rights under Article 27 of the Constitution which provides for equality and freedom from discrimination; Article 40 which protects rights to property and Article 47 on the rights to fair administrative action. The said allegations of breach of fundamental rights were never substantiated. They did not plead with precision the nature of the breach was, the actual breach. The law is clear on how one should present a petition for breach of rights under the Constitution. In the case of Meme v Republic (2004) I EA 124, the court stated as follows:

***“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision, that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicants instant application had not fully complied with the basic test of constitutional references; as it was founded on generalized complaints without any focus on fact, but on Constitution, hence it had nothing to do with the Constitutional rights of the appellant.”***

The same principles were espoused in Anarita Karimi Njeru v AG (1979) KLR 54.

On the question of discrimination, Article 27 provides for equality and freedom from discrimination. The Article reads:

***“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law;***

***(2) Equality includes the full and equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(3).....(8)”***

The petitioners did not demonstrate how they have been discriminated against. Although they alleged that large Transportation PSV Company Vehicles in Saccos pay Kshs.43,000/= in fees per year, such evidence was not availed to the court. It was just an allegation that was generalized. Whereas I appreciate that the payment of Kshs.400/= per trip, irrespective of the distance covered, may be on the higher side, the County Government should re-consider, but that is not a basis for declaring the provisions of the Finance Act unconstitutional. The petitioners should engage the County Government on how best they can agree on a fair sum to be charged in taxes. The laws are not meant to oppress the people of Nyandarua but serve their interests and needs.

As regards breach of Article 40 of the Constitution that guarantees rights to property again, the petitioners did not demonstrate how this right was infringed.

Having considered the petition and all the issues raised, I find no merit in the petition. I hereby dismiss it with costs to the respondent.

**Dated, Signed and Delivered at NYAHURURU this 8<sup>th</sup> day of October, 2019.**

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**R.P.V. Wendoh**

**JUDGE**

**Present:**

Mr. P. Chege for Petitioner

Eric – Court Assistant