



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 2 OF 2014

CONSOLIDATED WITH PETITION NO. 7 OF 2015

**IN THE COUNTY GOVERNMENT ACT NO. 17 OF 2012, LAWS OF KENYA: ARTICLES 20,
21, 22, 23 AND 165 (3) (B) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 33 (1) (A), 35 (1) (B), 43 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 196 AND 201 OF
THE CONSTITUTION OF KENYA**

BETWEEN

MALINDI NORTH RESIDENT ASSOCIATION(MANRA).....1ST PETITIONER

MALINDI SOUTH RESIDENT ASSOCIATION (MASRA)....2ND PETITIONER

WATAMU ASSOCIATION.....3RD PETITIONER

KILIFI RESIDENTS ASSOCIATION.....4TH PETITIONER

VIPINGO RIDGE ASSOCIATION.....5TH PETITIONER

MTWAPA STAKEHOLDERS FORUM.....6TH PETITIONER

KURUWITU RESIDENTS ASSOCIATION.....7TH PETITIONER

AND

KILIFI COUNTY GOVERNMENT.....1ST RESPONDENT

KILIFI COUNTY ASSEMBLY.....2ND RESPONDENT

HON. JAFFAR AMAZON KING (sued in his capacity as the

Governor for Kilifi County.....3RD RESPONDENT

JUDGEMENT

This judgement is in relation to two petitions filed by the same petitioners. These are Petition No. 2 of 2014 and 7 of 2015. The two petitions were consolidated. The petitioners subsequently amended Petition No. 2 of 2014. The amendments incorporates some of the issues raised in Petition No. 7 of 2015.

The Petitions

The amended Petition No. 2 of 2014 seeks the following prayers:-

- a) **A declaration that the conduct of the ongoing process of legislative formulation in respect to the draft Kilifi County public participation bill contravenes Articles 10, 33, 35, 196 and 201 of the Constitution of Kenya in relation to the petitioners and citizens of Kilifi County.**
- b) **A declaration that the petitioners and citizens of Kilifi County have a right to access any and all accounting and fiscal management information and participate in the legislative and policy formulation of the County.**
- c) **Judicial Review orders of Mandamus to remove into this Honourable Court and compel the 1st and 2nd respondents to oversee the passing and enactment of the public participation bill of Kilifi County Government in terms of Article 174, 175, 176, 183, 185 and 186 of the Constitution of Kenya.**
- d) **Judicial Review orders of Mandamus to remove into this Honourable Court and compel the respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, to establish mechanisms and systems to ensure the enactment of the public participation Bill of Kilifi county government as set out in Articles 93, 95, 96 and 101 of the Constitution of Kenya.**
- e) **An order directing the 2nd respondent to make available to the petitioners and other stakeholders all the relevant information on the on-going preparation of the Kilifi County public participation bill.**
- f) **An injunctive or conservatory order staying the debate, passing and assent of the Kilifi County Bills emanating from Kilifi County Assembly until the actualization of the constitutionally guaranteed principles of public participation through established mechanisms of engagement.**
- g) **A declaration that within the intendment of Article 174, 175 and 176 of the Constitution and resonating the intention of Articles 183, 185 and 186 of the Constitution, the provisions of Kilifi County Valuation for Rating Act 2016 and Kilifi County Rating Act 2016 that creates the manner of levying charges in the manner stated in the said Act and auxiliary functions outlined in the Act are unconstitutional, to the extent that there was no public participation in the process of the making, and enacting of the said Kilifi County Valuation for rating Act, 2016 and the Kilifi County Rating Act, 2016.**
- h) **A declaration that within the intendment of Article 174, 175 and 176 of the Constitution and resonating the intention of Articles 183, 185 and 186 of the Constitution, the provisions of Kilifi County Valuation for Rating Act 2016 and Kilifi County Rating Act 2016 that creates the manner of levying charges in the manner stated in the said Act and auxiliary functions outlined in the Act are null and void to the extent that there was no public participation in the process of the making, and enactment of the said Kilifi County Valuation for Rating Act,**

2016 and the Kilifi County Rating Act, 2016.

- i) This Honourable Court does order the respondents to jointly bear the costs of this petition.**
- j) Such other orders as this Honourable Court shall deem fit and just to grant in the circumstances prevailing.**

The Petition is supported by the affidavit of **Christopher Wilson** sworn on 4.4.2016. There is a second affidavit of **Harry Mwimali** sworn on 15.6.2016. There is also a further affidavit of Christopher Wilson sworn on 22.4.2016. Petition No. 7 of 2015 seeks the following prayers:

- a) A declaration that the conduct of the respondents in the ongoing process of legislative and policy formulation in Kilifi County contravenes and offends Articles 10, 33, 35, 174, 196 and 201 of the Constitution of Kenya and section 87 and 115 of the County Government Act in relation to the petitioners and citizens of Kilifi County.**
- b) An order directing the respondents to immediately embark on drafting, finalizing and implementing a county public participation policy and legislation to enshrine public participation guidelines, systems and mechanisms in Kilifi County.**
- c) A permanent injunctive or conservatory order staying the debate, passing and assent by the respondents jointly and severally of any and all legislation and or policy until the actualization of the constitutionally guaranteed principles of public participation through established mechanisms of engagement.**

Petition No. 7 of 2015 is supported by the affidavit of **Christopher Wilson** sworn on 13.4.2015.

Response to the Petitions

The respondents filed a replying affidavit for Petition No. 2 of 2014 sworn by **Owen Baya**, the secretary to the County Government of Kilifi, on 8.4.2014. There is a replying affidavit of the same person in relation to Petition No. 7 of 2015 sworn on 24.5.2016.

Petitioners' Submissions In Support Of The Petitions

Mr. Anami, counsel for the petitioners submit that the petition raises four issues namely: -

- a) To what extent should the citizens of Kilifi County have a right to access any and all public information appertaining to the process the respondents undertake when drafting of County Laws and Policies;**
- b) Whether the petitioners have shown a case that merits the grant of conservatory orders against the respondents restraining the respondents from enforcing, implementing, replying upon and or I n any manner whatsoever enforcing the Kilifi County Bills emanating from Kilifi County assembly that do not meet the constitutionally guaranteed principles of public participation;**
- c) Whether the petitioners warrant Judicial Review orders of mandamus to compel the respondent to enact the public participation Bill of Kilifi County Government pursuant to the guidelines issued by the Council of governors and the principles espoused in the Constitution and relevant Statues;**
- d) Whether Kilifi County Rating Act 2016 and the Kilifi County Valuation for rating Act 2016 was passed in a constitutional manner and whether the provisions of the act(s) are null and void.**

It is submitted that Article 2 of the constitution provides that the Constitution is the supreme law of Kenya and all organs are bound by it. Devolution was brought in by the new Constitution so as to open up the scope for social and political self fulfilment through participatory governance as held by the Supreme Court in the case of **SPEAKER OF THE SENATE AND ANOTHER VERSUS SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS, reference No. 2 of 2013 [2013] eKLR**. Article 174 of the Constitution provides for the principles and objects of devolution. Under Article 10 (2) of the Constitution National Values and Principles include democracy and participation of the people, inclusiveness, good governance, integrity, transparency and accountability.

Counsels submit that the petitioners' right to access public information relating to the process of legislative and governance policies were violated. Article 35 of the Constitution safeguards the rights to access to information. The petitioners were not given feedback before and after the public forums organized by the respondents and this breached the process of public participation. The respondents have failed to provide information and have been hesitant to provide the petitioners with information being sought. The respondents have not provided the petitioners with the information collected during the meetings organized by the respondents. This has led to apathy, confusion by the participants and time wasting. The petitioners sought the information through various correspondences and numerous meetings with officials of the respondents but the respondents have failed to share information relating to legislative and policy making within the county. A good case in point relates to the Public Participation Bill, the Valuation for Rating Act 2016, the Rating Act, the County strategy paper detailing the county government's revenues, expenditures and county borrowing. Sections 117 (8) and 125 (2) of the public Finance Management Act enjoins the respondents to ensure that there is public participation in the budget making process.

Counsel relies on the case of **SAMMY NDUNG'U AND 5 OTHERS VERSUS GOVERNOR, Laikipia County (2016) eKLR**. In that case Justice Jairus Ngaah observed as follows: -

“Under Article 1 (2) of the constitution the people have the discretion to exercise their sovereign power either directly or through their democratically elected representatives; however, it is important to note that, according to this provision of the Constitution, the discretion on how to exercise their sovereign power inheres in the people themselves and not in their elected representatives. It follows that the latter will not be heard to say, as the respondents have urged, that the participation of the people in the legislatives process is assumed by their elected representatives. If that were the case then Articles 118 (1) (b) and 196 (1) of the Constitution which make it mandatory for the legislative organs both of the National and County government to facilitate public participation and involvement in the legislative process and other business of the respective assemblies would be rendered superfluous.”

Counsel submit that the petitioners are residents of Kilifi County and are entitled to raise their complaints when their constitutional rights are violated. The respondents have fundamentally abused their mandate by enacting approximately twenty legislative instruments including the Kilifi County Government Valuation for Rating Act, 2016 and Kilifi County Rating Act, 2016 in violation of the constitutional principle of public participation as envisaged under the Constitution of Kenya and the rules of natural justice requiring that residents of Kilifi County do participate in governance and in the legislative making process. It is submitted that public participation is part and parcel of the law-making process and failure to comply with this obligation renders the resulting legislation invalid. The respondents have infringed and are likely to infringe the petitioners' fundamental and constitutional rights under Articles 10, 35, 47, 184, 196 and 201 of the Constitution as well as sections 87 and 115 of the County Government Act, 2012.

It is submitted that if the orders being sought are not granted it will lead to the same position which led to the filing of the petitions. The petitioners have disclosed their interest in public participation in the affairs of the respondents. The petitioners further contend that their right to administrative action was breached and they are entitled to orders of Judicial Review so as to compel the respondents to pass the public participation bill of Kilifi County Government as per the law. The Bill does not echo the spirit of the Kenyan Constitution and is not in tandem with the county public participation guidelines published by the

council of governors.

It is further submitted that the Kilifi County Rating Act 2016 and the Kilifi County Valuation for Rating Act 2016 are unconstitutional. The two legislations did not take into account public participation. It is further submitted that the right to fair administrative action is provided under Article 47 of the Constitution. The petitioners were not accorded that right before the respondents enacted the legislation. Counsel relies on the case of **KENYA NATIONAL EXAMINATION V THE REPUBLIC, EX PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS, Court of Appeal No. 266 of 1996 [1997] eKLR**. In that case the Court of Appeal explained the effect of each of the three orders of Judicial Review namely prohibition, mandamus and certiorari. The guidelines on devolution by the council of governors provide for public participation and were not followed.

Mr. Anami contends that the threshold of what constitutes public participation was not met by the respondents when they passed the Kilifi Valuation for Rating Act, 2016 and the Kilifi County Rating Act as the process of public participation which involves two components namely the facilitation to the public participation and the actual and constructive public participation were not met. The two legislations are null and void as they create the levying of charges as outlined on the basis of provisions that are at variance with the National legislation. The county legislation is not in line with the Valuation for Rating Act (Cap 266) and the Rating Act (Cap 267) Laws of Kenya. The former Kilifi County Council followed the National legislation. Under section 3 of the Valuation for Rating Act, local authorities were required to prepare a valuation roll of all rateable properties within their jurisdictions. Under section 4 of the Rating Act local authorities could levy rates according to the use of the land. Rates could be on agricultural rental value, site value rates and a combination of a site value rate and improvement rate. Flat rates and rate by use of the area could also be utilized. Under Article 191 of the Constitution whenever county legislation is in conflict with the National legislation then the National legislation prevails over the County legislation. The Kilifi County legislation excludes sections 10 and 12 of the Rating Act which prescribes that rates should be for all intents and purposes be done equitably and uniformly across the respective rating areas. The respondents have intentionally left out that aspect of the law so that they can inequitably levy rates contrary to the provisions of Articles 201 and 210 of the Constitution. Sections 19, 20 and 27 of the Kilifi County Valuation for Rating Act have errors and had the public allowed to participate in their enactment then the errors could have been flagged out.

Respondents' submissions

Mr. Mugambi, counsel for the respondents opposed the petitions. Counsel submit that the petition raises the following issues for determination: -

- a) Whether the respondents have breached the petitioners' right to access information**
- b) Whether the respondents have breached the petitioners' right to freedom of expression**
- c) Whether the respondents have breached the petitioners' right to fair administrative action**
- d) Whether the respondents have breached the principles of public finance in financial matters within the County**
- e) Whether the respondents have acted inconsistent and in contravention of the National Values and Principles of Governance in the Legislative and policy formulation within the County**
- f) Whether the reliefs sought by the petitioners in the Amended Petition should issue.**

It is submitted that the respondents have not breached the petitioners' right to access information. Correspondences between the head of Legal Services Kilifi County and the petitioners in form of email and draft bills were annexed. That shows that there was participation by the petitioners. The petitioners were given the information before the bills were enacted. There was no intention to keep the bills out of

public domain. If that was the case, then the petitioners could not have learnt about the bills and engage the respondents through correspondences. Several meetings were held and even the petitioners forwarded their memorandum.

It is further submitted that the County Government of Kilifi constituted a committee to harmonize county fees and charges and single business permits to be incorporated in the County finance draft bill. Meetings were held with stakeholders and notices for consultative forums were issued on 8.11.213. Meetings were held on 12th and 13th November, 2013. Attendance registers were also kept. There were talk shows on Baraka FM Radio and a DVD on the talk shows was recorded and provided to the court. All this was done in the principle of openness and accountability in public finance matters. The respondents acted within the confines of the Constitution and Statute Law. The petitioners were accorded their right to fair administrative action. The respondents demonstrated their dedication in ensuring public participation in its legislative formulation. With regard to the public participation bill, the bill is still a proposal and will be subjected to public participation by the County assembly and the petitioners will have adequate time to present their views on the bill. The court cannot at this stage interfere with the enactment of that bill. Counsel relies on the case of **DIANI BUSINESS WELFARE ASSOCIATION AND OTHERS V COUNTY GOVERNMENT OF KWALE [2015] eKLR.**

Analysis and Determination

The two petitions raises only two issues namely: -

1. Whether there was public participation in Kilifi County during the enactment of its Legislative Bills including the Public Participation Bill.
2. Whether the Kilifi County Valuation for Rating Bill and Rating Bill 2016 are unconstitutional.

In my ruling during the interlocutory stage, I did state the following with regard to public participation: -

“The applicants’ complaint can be traced from the advent of devolution. The applicants are residents of Kilifi and would like to participate in the activities of the County Government in line with the objectives of devolution. Article 174 (c) of the constitution stipulate that one of the objects of devolution is to give powers of self-governance to the people and enhance their participation in the exercise of the powers of the state and in making decision affecting them.

There is enormous legislation in Kenya stressing on the need for public participation in the legislation making process. Article 196 (b) of the constitution puts emphasis on County Assemblies to facilitate public participation and involvement of members of the public in the legislative process as well as in other business of the County Assemblies and their committees. Article 1 of the Constitution clearly indicate that sovereign power belongs to the Kenyans and they can exercise that power directly or through their elected representatives. Direct exercise of sovereign power by the people of Kenya includes public participation in policy and legislative making process. The County Assemblies as well as the National Parliament and Senate only exercise delegated sovereign power. Under article 10 (2) (c) one of the national values and principles of governance include good governance, integrity, transparency and accountability.

The County Governments Act number 17 of 2012 provides under Section 3 (f) for public participation in the conduct of the County Assemblies and their respective committees. Although counsel for the 1st and 3rd respondents contend that there is no requirement that members of the public participate in policy formulation, it should not be lost that devolution entails self-governance by the people. The underlying objective of devolution is that all areas in Kenya should be developing progressively. It is policies formulated by the executive arm of the County Government which can lead to economic and social development. Some policies require legislative enactment while others can be implemented directly. A decision to build dam in an area could be a policy to provide water to the people. The people have to be

consulted before the dam is constructed. My view is that even policies require public participation. The residents of each county need to be aware of the plans put by their County Government in form of policies that will eventually better their life. Some policies ultimately go through legislative process. The residents can participate in both the policy formulation as well as legislative process stages.”

The pleadings show that there were various stakeholders meetings organized by the respondents. There is correspondence between the respondents and the applicants’ counsel on the issue of the bills. In my earlier Ruling, I did find that there was public participation and stated as follows: -

“In the end, I do find that the respondents indeed took into account public participation before setting off the legislation process in relation to various bills. The applicants did participate in the public forums and whether their input was taken into account or not can only be known when the laws are passed. As indicated herein, there is no mandatory requirement that the views of each resident in a County must form the basis of the legislation being formulated. If that were to happen, then no laws would be passed as it would take a lot of time to agree or pass one piece of legislation.”

Given the pleadings herein, I do find that there was enough public participation. Public participation should not be limited to the satisfaction of certain individuals in a county. The legislation enacted by the County assemblies is for the benefit of the entire county and is not intended to benefit a few individuals. The subsequent legislation is the feedback to those who would like to know what happened to their proposals on a specific legislation. The law has to take into account the interests of all the residents of the county.

The next issue relates to the Rating Act and Valuation for Rating Act 2016. The applicant contends that the two Acts are unconstitutional as they were not subjected to public participation. Secondly, it is submitted that some section of the Acts are null and void in so far as the legislation create the levying of charges. With regard to the first issue, I have already found that the respondents did accord the residents of Kilifi County ample opportunity to air their views before the legislations were enacted. The two legislations are therefore not unconstitutional for lack of public participation.

The applicants submit that the two legislation are at variance with the National legislation. This makes the County legislation null and void. I have read the submissions by counsel on this issue. It is submitted that sections 3, 4 and 6 of the National legislation (rating Act) empowered the former County Governments to levy rates over rateable property based on unimproved site value. The use of flat rate on the area of land, graduated rate, differential rate or graduated differential rate could also be used with the consent of the Minister for Local Government. It is further submitted that sections 10 and 12 of the Rating Act (Cap 267) which provides that the rates should be for all purposes be done equitably and uniformly across the rating areas have been excluded from the County legislation. The petitioners further contend that the exclusion of the above sections from the county legislation is a deliberate move to inequitably levy rates charges contrary to Articles 201 and 210 of the Constitution. The Kilifi County Valuation for Rating Act has also made similar omissions. The Act has errors on its section 109, 20 and 27. The Act makes reference to where a complaint on valuation can be filed to be the High Court instead of the Environment and Land Court. Such errors could have been rectified if the legislation was subjected to public participation.

Section 3 of the National Legislation Rating Act (Cap 267), 2012 provides for the duty to levy rates. Section 4 of the same Act itemizes the forms of rating as (a) an area rate (b) an agricultural rental value rate (c) site value rate of site value rate in accordance with an improvement rate. Section 5 (1) and (2) of the Act states as follows: -

5. Alternative methods of area rating

(1) Subject to subsection (2) of this section, the rating authority may, with the approval of the Minister, adopt one or more of the following methods of rating –

- a) a flat rate upon the area of land;
- b) a graduated rate upon the area of land;
- c) a differential flat rate or a differential graduated rate upon the area of land according to the use to which the land is put, or capable of being put, or for which it is reserved;
- d) an industrial rate upon the area of land used for other than agricultural or residential purposes’
- e) a residential rate upon the area of land used for residential purposes;
- f) such other method of rating upon the area of land or buildings or other immovable property as the rating authority may resolve, and a rate levied in accordance with any such method as aforesaid shall in this Act be known as an area rate.

(2) the rating authority may adopt different methods of area rating for different parts of the area of the rating authority and may from time to time vary the method or methods adopted, and may adopt in relating to any rating area the methods of area rating referred to in subsection (1) of this section in the manner following, that is to say –

- i. method (a) or method (b) or method (c) as alternative methods which are mutually exclusive;
- ii. method (d) or method (e), or both, in addition to method (a) or method (b), but not in addition to method (c);
- iii. method (f) shall not be combined with any other method of area rating.

Section 12 of the Rating Act states as follows: -

“12. Equitable distribution of rates

(1) It shall be the duty for the rating authority in adopting any method or methods of rating under this Act to ensure that the costs of the rating authority’s general expenses, and of the general expenses of every urban, area or local council in whose area the rating authority levies a rate, are distributed equitably over all parts of the respective areas of threatening authority and the Minister may give such directions to the rating authority as he considers necessary for the purpose of obtaining equitable distribution as aforesaid, and any such authority shall comply therewith.”

Section 19 of the Kilifi County Valuation for Rating Bill provides for Appeals. It provides for appeals to both the High Court and the Magistrate Court. Section 20 of the County Valuation for Rating Act 2016 provides for the High Court to decide on the questions of law. Section 19 of Chapter 266 laws of Kenya states that appeals shall be filed before the ELC Court. The only difference is that the National legislation refers to the ELC Court and subordinate Court while the Kilifi County Act refers the appeals to the High Court and Subordinate Court. The ELC Court and the High Court are courts of equal status. The county legislation cannot be declared as unconstitutional simply because it makes reference to the High Court instead of the ELC Court. Section 27 of the Kilifi County Valuation for Rating Act Bill, 2016 provides for stay of execution. It is provided that an appeal under section 19 and 20 of the Act shall not operate as a stay of the decision of the Court appealed from.

I have observed that the county legislations namely the Valuation for rating Bill, 2016 and the Rating Bill, 2016 are still bills which have not been passed or assented to so as to come into force as proper legislation. The reference of the High Court instead of the ELC Court can be amended by the members of the County assembly. If the Bills have been passed into law, amendment can still be made through a

Miscellaneous Act of the County Assembly. That anomaly cannot make the entire Act unconstitutional.

The other issue involves the omission of section 10 and 12 of the Rating. The main effect of section 10 is that rates should be uniform. Section 10 provides for a uniform percentage rates of the rateable value of each property. Section 9 (1 and (2) of the County Rating Bill states as follows: -

9. (1) Rates may be imposed by the Act providing for annual county finances or by such other Act as the count assembly determines.

(2) Without limiting subsection (1), a rate may be imposed using the form of wording set out in schedule 4.

Schedule 4 of the County Rating Bill states as follows: -

“A rate is imposed on all ratable property in the county for the calendar year starting on 1st January, 2016 and the amount of the rate is not exceeding four per cent (4%) of the unimproved value of the rateable property.”

Section 12 of Cap 267 mainly provides for equitable distribution of the costs of the rating authority's general expenses. Section 4, 5 and 6 of the County Rating Bill are similar to the same sections of the National legislation, Cap 267.

From the above background, it appears that the petitioners have no tangible complaint against the county legislation. A flat rate of 4% is provided for under the 4th schedule of the Rating Act. The various modes of categorization of the rates have been provided for under sections 4, 5 and 6 of the County legislation. The legislation was subjected to public participation. There is no contention that the petitioners will be subjected to a rate not provided for under the legislation or to a rate different from what other Kilifi residents are subjected to. The county legislation is neither null or void. It confirms to the National legislations well as to the Constitution.

The County Governments have been in existence since 2013. It is expected that by now each County Legislative Assembly must have enacted a Public Participation Act. Public Participation is one of the good reasons for devolution. The Kilifi County Assembly is yet to pass a Public Participation Act. The Bill is yet to be enacted into law. I do order that the Kilifi County Assembly should enact the Kilifi County Public Participation Act within six (6) months after the swearing in of the next Assembly. That is to say after the next general elections. The Public Participation Act will solve most of the issues being raised by the residents.

From my above analysis, I do come to the one and only conclusion that the petition herein lacks merit and is hereby dismissed. The Kilifi County Assembly should enact the Public Participation Act for the County as herein above ordered. Parties shall bare their own costs.

Dated, signed and delivered in Malindi this 4th day of April, 2017.

S.J. CHITEMBWE

JUDGE