



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 7 OF 2015

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), 43 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF A ALLEGED CONTRAVENTION OF ARTICLES 10, 174, 196 AND 201
OF THE CONSTITUTION OF KENYA**

BETWEEN

MALINDI NORTH RESIDENT ASSOCIATION

(MANRA)..... 1ST PETITIONER

MALINDI NORTH 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

HON. JAFFAR AMASON KINGI (sued in his

capacity as the governor for Kilifi county) 3RD RESPONDENT

RULING

The application dated 30th April 2015 seeks the following orders:

1. **THAT** the court be pleased to certify this application as urgent and service of the same be dispensed within the first instance.
2. **THAT** the court issue mandatory orders to the 1st respondent to immediately make available to the petitioners and other stakeholders a clear timetable for public participation for the laws and policy instruments currently being prepared together with all draft bills and policies that shall affect Kilifi Residents pending the hearing and determination of this application inter parties.
3. **THAT** this Honourable Court issue an injunctive or conservatory order staying the debate, passing and assent by the respondents jointly and severally of any and all legislation currently being debated by the Kilifi County Government until the actualization of the constitutionally guaranteed principles of public participation through established mechanisms of engagement pending the hearing and determination of this application inter parties.
4. **THAT** this Honourable Court issue an injunctive or conservatory order staying the debate, passing and assent by the respondents jointly and severally of any and all legislation until the actualization of the constitutionally guaranteed principles of public participation through established mechanisms of engagement pending the hearing and determination of this petition.
5. **THAT** this Honourable Court be further pleased to grant any further orders it may deem necessary in the interest of justice.

The application is supported by the affidavit of Christopher Wilson sworn on 13th April, 2015. The first and 3rd respondents filed two replying affidavits sworn by Hon. Amason J. Kingi and Owen Yaa Baya on 24th June, 2015. The 2nd respondent filed grounds of opposition on 7th July 2015.

Counsel for all the parties agreed to determine the application by way of written submissions. Mr. Anami, counsel for the applicants submit that the respondents have no clear process whereby public participation can be engaged. The current public participation process is not predictable. Although the respondents have drafted a public participation bill, this is yet to be enacted into law: The respondents view public participation as a favour yet it is enshrined in the constitution. Only three days notice was given for public participation in relation to the valuation and Rating Bills.

Mr. Anami maintains that there is no public participation Act in Kilifi County and this curtails public interest. The applicants are duly registered organizations resident in Kilifi County and have the locus standi to file this suit. Counsel relies on the case of **GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 2 OTHERS**, Supreme Court application number 5 of 2014: Counsel further maintains that Article 260 defines a person to include an Association: The application is not restricted to issues of policy only. Article 10 of the constitution governs the conduct of state officials. The respondents have failed to establish a predictable public participation process.

Mr. Mugambi, counsel for the 1st and 3rd respondents opposed the application. Counsel maintains that there has been public participation in Kilifi County in relation to draft bills: Notices were sent for consultative meetings. The applicants also acknowledge that consultations were done but their main concern is lack of feedback: Counsel maintains that it is immaterial whether the applicants' views were taken into consideration. Reasonable opportunity was accorded to the applicants together with other members of the public.

Mr. Mugambi further submit that the application is defeated by the doctrine of ripeness. The

legislation has not yet been passed. The applicants should wait until when the bills are forwarded to the County Assembly. Thereafter, the bills will be forwarded to the committees and the applicants will be able to raise their concerns. There is no constitutional requirement for a timetable to be forwarded to the applicants. Public participation has infinite degrees of variations. Further, Mr. Mugambi contends that there is no proof that the applicants are duly registered Associations.

The main issues being raised by the applicants are that the Kilifi County government has been passing legislation without public participation. Further, whenever members of the public are invited to participate, the notice for such invitation is usually short and that even after participation, there is no feedback to the members of the public.

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 application makes reference to various bills prepared by the Kilifi County Assembly. Paragraph 9 of the supporting affidavit makes reference to the valuation, rates and public participation bills. The applicants filed their list of documents which include several correspondences between the parties. On their part, the respondents filed minutes showing meetings of stakeholders in relation to the preparation of the above three bills. The applicants seem not to deny that several meetings have been held. However, they maintain that those meetings should reflect both quantitative and qualitative engagement. The respondents should not view public participation as a favour to the applicants or Kilifi County residents.

My analysis of the dispute herein is that the applicants are apprehensive that the respondents will proceed and pass legislations that have financial implication on the Kilifi County residents, including the applicants, without their input. The concern is mainly centered on the valuation for rating bill, 2014 and the rating bill, 2014. The record shows that several meetings were called by the respondents whereby members of the public were invited to participate and give their input. The respondents advertised consultative meetings for the two bills in the daily Nation Newspaper of 15th September, 2014: Two

meetings were scheduled for 18th September, 2014 in two various venues in Kilifi and Malindi. Another meeting was scheduled for 19th September, 2014 in Mtwapa and Mariakani. Several people attended those meetings and the minutes have been annexed in the affidavit of Owen Yaa Baya. There is also correspondence between officials of Kilifi County Government and counsels for the applicants. In a letter dated 23rd September, 2014, Mr. Christopher Wilson wrote to the County Government submitting a memorandum in relation to the Valuation Roll Bill and the Property Rates Bill. The letter makes references to a meeting held at Ocean Beach Resort.

Similarly, on 17th December, 2014, Mr. Anami Advocate wrote to the County Government indicating that there was a short notice about a two day stakeholders meeting, that his clients had not seen the reviewed bills and that there was lack of confirmation that the citizens' contributions were influencing the County's decisions: I have also seen a number of e-mails between the County Government and applicants' advocates as wells as between counsels for both parties.

As indicated herein above, the Kenyan laws put great emphasis on public participation. However, this should not be interpreted to be a very long and tedious process whereby each and every resident's views have to be sought and included in the output in form of legislation. Views can be as divergent as one can imagine. A poor resident would definatley be happy if the County Government levies taxes on the rich. The proposed rate of tax by such resident would definately be subjective. On the other hand, a rich resident would prefer to have low taxes levied so as not to push him out of business. The County Government would therefore be called upon to strike a balance between the two views. It should not be expected by any resident(s) that whenever they make their contributions through public participation, then those contributions would be the basis of the legislation. The legislative powers are vested with the County Assemblies under Article 185. The County Assemblies exercise that power in a delegated form . However, the end result is that it is the members of the County Assemblies who pass the bills into law. Amendments can be proposed at the floor of the house by a member and the Assembly can adopt such amendments. In other words, the final output is a product of the County Assembly. All what the citizens can do is to expect that the members of the County Assembly will take their contributions into account. If that does not happen, then the residents have the residual powers of voting out their representatives during the elections. Apart from that, it is not possible for a resident or Association of residents to stand up and say that the legislative process is faulty or that the ultimate legislation is bad in law as it did not take into account their contributions. It is possible to challenge the ultimate legislations if they are against the constitution or National laws but not on the basis of the input by the residents. If that were to happen then we shall be producing legislation through direct exercise of sovereign powers as opposed to the current set up of representative mode of legislation. Each member of a County Assembly represents a defined ward and is taken to be representing the views of the residents of those wards. Public participation comes in as an extra input in the legislative making processes.

The applicants herein contend that there is no timetable put in place to guide public participation. It is agreed by the parties that once the Public Participation Bill is passed into law, such complaints will be avoided. Since the bill is ready, the absence of such a timetable should not be a ground for granting the orders being sought. Prayer two of the application herein cannot therefore be granted.

Prayer three of the notice of motion dated 30.4.2015 seeks an order of injunction or conservatory order staying any debate, passing or assenting to several unnamed legislation currently being debated by the County Assembly. The reason for such a prayer is that the respondents have not actualized the principles of public participation. Prayer four is similar to prayer three but it is to be granted pending the hearing and determination of the petition.

If the court were to grant the above prayers, all what will happen is that the legislative process at the Kilifi County will come to a halt. The prayer is quite general and covers a larger aspect of the work of the County Assembly. The Kilifi County Government is a Creature of the Constitution and draws its mandate from Article 176 of the Constitution. The first schedule to the Constitution lists all the 47 Counties. The court can only stop debate or passing or assenting to a County legislation for extreme and valuable reasons: The exercise of delegated sovereign power by the Kilifi County Assembly or County Government should not be stopped at the behest of a resident. There should be good reasons shown as to

why such orders are extremely necessary. The record herein shows that the applicants were accorded hearings by the respondents. They met representatives of the respondents and even forwarded their memorandum. While this application was pending, it was reported to the court that parties were talking. That is sufficient proof of public participation. The proposed legislation did not spring out of nowhere. A foundation was laid through public participation. There is no good basis presented to this court to grant prayers three and four of the application.

With regard to the issue of locus standi, I do find that the applicants do have the locus standi to file the petition. Every citizen, whether registered as a company, an Association or a single individual has the right to approach the court under Article 228 of the Constitution. Christopher Wilson swore an affidavit and I find as an individual, he has the right to approach the court personally: The bar in this regard is quite low and locus standi should not be a serious issue in cases involving alleged violation of constitutional rights. The courts are called upon under Article 23 of the Constitution to uphold and enforce the Bill of Rights.

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.

The upshot is that the application dated 30.3.2015 lacks merit and the same is hereby dismissed. Costs shall follow the outcome of the main petition.

Dated and delivered in Malindi this 13th day of April, 2016.

S. CHITEMBWE

JUDGE