



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 554 OF 2013

PIUS ATOK EWOTONPETITIONER

VERSUS

HON JOSEPH KOLI NANOK

THE GOVERNOR TURKANA COUNTY1ST RESPONDENT

PAUL EKWAM NABUIN, THE COUNTY

EXECUTIVE MEMBER IN CHARGE OF

FINANCE, TURKANA COUNTY.....2ND RESPONDENT

THE CONTROLLER OF BUDGET.....3RD RESPONDENT

THE HON ATTORNEY GENERAL4TH RESPONDENT

JUDGMENT

Introduction

1. This petition pertains to the approved budget estimates for Turkana County for the 2013-2014 financial year. The petitioner alleges that the said budget was altered by the Turkana County Executive, and that the altered budget may be implemented, to the detriment of the residents of the County.

Procedural History

2. The petition was filed under certificate of urgency on 20th November 2011 when it was certified urgent and the Court directed that the matter be served and heard before this Division on 29th November 2014.
3. The matter came up on that day before me in the presence of Mr. Solonka for the petitioner. Ms. Lumumba for the 1st and 2nd respondents, and Mr. Kakoi for the 3rd and 4th respondents. Mr. Kakoi informed the Court that it was the view of the respondents that the matter had been filed too late as the issues complained of in the petition had been corrected before the petition was filed;

and that the documents that the petitioner had demanded to be supplied with were being worked on by the Controller of Budget and would be supplied in the course of the day. Mr. Solonka contended on behalf of the petitioner that the petition had not been overtaken by events and that upon being supplied with the documents the petitioner required, they would determine their next course of action.

4. The Court therefore directed the respondents to supply the petitioner with all the information that he was seeking as well as all such documents as would show that the issues complained about had been corrected.
5. When the matter next came up before the Court on 31st January 2014, Counsel for the petitioner indicated that the respondents had not yet supplied the documents that the petitioner required; that the specific documents required were typed copies of the approved budget estimates for the fiscal year 2013-2014; the altered budget submitted to the Controller of Budget by the Turkana County Executive; and the Turkana County final warranty No 1 of 2013/2014 (General Warranty dated 30th June 2013). The 1st and 2nd respondents requested for 7 days within which to supply the said documents, which was granted.
6. On 14th February 2014, Mr. Nyakundi, then appearing for the petitioner, asked for leave to file a further affidavit with regard to the documents that the petitioner was seeking, which leave was granted. Directions were also given with respect to the filing of submissions, and the matter fixed for hearing on 12th May 2014.

The Petitioner's Case

7. The petitioner bases his case on Article 35(1) of the Constitutions on the right to information. He has filed two affidavits in support of his case sworn on 19th November 2013 and 25th February, 2014. He deposes that he is a citizen of Kenya and a resident of Turkana County who is directly affected by the way the resources earmarked for Turkana County are utilized or managed. He states that he is also under a constitutional obligation to respect uphold and defend the Constitution.
8. The petitioner avers that he is aware that the Turkana County Assembly approved its budget estimates for the financial year 2013/14 on 27th June 2013 pursuant to the provisions of the Constitution of Kenya, the County Government Act, 2012 and the Public Finance Management Act, 2012.
9. The petitioner has annexed a copy of a letter dated 9th August 2013 from the Speaker of Turkana County Assembly addressed to the Controller of Budget. He contends that the details emerging from the said letter indicate that the Budget estimates for the financial year 2013 – 2014 presented to the 3rd respondent by the Turkana County Executive are not the budget estimates approved by the Turkana County Assembly on 27th June 2013; that information from the Speaker of Turkana County confirms that alterations upwards were done to the entire vote heads related to the County Executive portfolios and vote heads inserted later without the approval of the County Assembly.
10. He contends that the function of budget approval is vested by law and the Constitution in the County Assemblies: that under Article 179(1) of the Constitution, the Executive authority of the County is vested in and exercised by a County Executive Committee which consists of the County Governor, Deputy County Governor and member appointed by the County Governor; that after he learnt of the violation of the Constitution by the 1st and 2nd respondents, he requested to be furnished with copies of the approved budget estimates for the fiscal year 2013/14, certified copies of the altered Budget submitted to the Office of the Controller of Budget by the Turkana County Executive and the General Warrant dated 30th June 2013 signed by the 1st respondent.

11. He contends that he sought information from the County government of Turkana and the Controller of Budget but was not furnished with the information he sought; that the Court made an order directing the respondents to supply him with documents but the documents he was supplied with were not the ones he was seeking. According to the petitioner, the document he required was a warrant furnished to the Controller of Budget showing estimates of the county budget.
12. He alleges that what he was furnished with was a warrant addressed to the County Executive for Finance and Planning, but that he was able to obtain a copy of the warrant to the Controller of Budget from an anonymous source in the County of Turkana. He maintains that this document, which he has annexed to his further affidavit, is different from the warrant which the respondents furnished him with which is annexed to the affidavit of Waweru Tuti as “**OCOB-2**” and further, that the figures in the two warrants are different.
13. The petitioner contends that he is entitled to the documents that he seeks as of right under Article 35(1); that there are no restrictions to the right of access to information; and that the Court should compel the Governor of Turkana County and the Controller of Budget to furnish him with certified copies of the document he requires or order that an investigation of the matter be carried out.
14. He maintains that the respondents have ignored his request or refused to supply him with the documents that he was seeking. He therefore felt obliged to bring the present proceedings in order to fulfil his constitutional obligation to respect, uphold and defend the Constitution. He states that he seeks the documents in question in order to enable him institute appropriate legal proceedings against the respondents for violating the Constitution.
15. The petitioner contended that there was an admission that the documents to the Controller of Budget had been falsified, and that he is entitled to the prayers he seeks in his petition dated 19th November 2013 as follows:

a) A declaration that the refusal by the 1st, 2nd and 3rd respondents to furnish the petitioner with the information detailed in paragraph 10 of the petition violates or threatens to violate Article 35(1)(a) and (b) of the Constitution and is invalid.

b) An order directing the 1st 2nd and 3rd respondents to furnish the petitioner with the information detailed in paragraph 10 of the petition.

c) An injunction prohibiting the 3rd respondent from approving the amended and or altered Budget submitted to the office of the controller of Budget by the Turkana County Executive.

d) An injunction prohibiting the 1st and 2nd respondents from implementing and or utilizing any public fund emanating from the altered Budget submitted to the office of the controller of budget by the Turkana County Executive.

e) Such further or other relief as this Honourable Court shall deem fair and just to grant.

f) The respondents do pay the costs of this petition in any event.

The 1st and 2nd Respondent’s Case

16. The 1st and 2nd respondents rely on an affidavit sworn by Ms. Akoth Lumumba on 2nd February 2014. In her affidavit in reply to the petition sworn on 12th February 2014, Ms. Lumumba, the advocate having conduct of this matter on behalf of the 1st and 2nd respondents, avers that the petitioner’s Counsel requested in Court on the 31st of January 2014 to be furnished with three

specific documents which he stated were not included in the 3rd respondent's bundle of documents. The three documents were the budget approved by the Turkana County for the fiscal year 2013/2014; the altered budget presented to the Controller of Budget by Turkana County Executive; and General warrant No 1 of 2013/14 dated 30th June 2013 which had been sent to the Controller of Budget.

17. The 1st and 2nd respondents state that the budget estimates approved by the Turkana County Assembly were communicated to the Turkana County Executive for finance and planning by the interim clerk for Turkana County Assembly through a letter dated 28th June 2013 informing the County Executive that the budget was approved by the Turkana County Assembly; that there was no approved budget as such that was drafted in detail and passed by the Turkana County Assembly; that there was only a report dated 25th June 2013 presented to the Turkana County Assembly from the Committee on Budget and Appropriation for the budget estimates scrutiny and recommendations for the fiscal year 2013-14 ***“which basically made recommendations after scrutinizing the initial budget estimates presented to the Turkana County Assembly”***.
18. Ms. Lumumba states that she received a certified copy of the general warrant requested by the petitioner's counsel; a certified copy of the budget presented to the office of the Controller of Budget; and a report from the Controller of Budget on the investigation of irregular alteration to the budget estimates for the fiscal year 2013/2014 in which a comparison was made between the approved budget by the Turkana County and the altered budget presented to the Controller of Budget.
19. The 1st and 2nd respondents submitted that the petitioner had conceded in his submissions dated 13th February 2014 that he was supplied with two of the documents that he was seeking. She contended that the respondents had complied with the request for information by supplying warrant No.1 dated 30th June 2013 which is signed and certified by the Governor. It was their case therefore that they had complied with the demands in the petition as the warrant sent to the Controller of Budget was not prayed for in the petition.
20. With regard to the contention by the petitioner that the respondents had admitted that the warrant to the Controller of Budget had been falsified, it was the 1st and 2nd respondent's case that what had been admitted in the submissions was that the initial approved budget estimates by the County Assembly of Turkana were altered and the altered budgets sent to the Controller of Budget. They contended that the issues of alterations were dealt with in the period August – September 2013; that it was agreed that the falsified or altered budget as well as the initially approved budget be consolidated, harmonized, and sent to the Controller of Budget; and that the harmonized budget was approved by the County Assembly, the Appropriation Act passed, and funds released.
21. The respondents submitted therefore that the petitioner had not demonstrated a violation of Article 35(1) since, at the time of the filing of the petition, he had already been furnished with the documents that he required.

The 3rd and 4th Respondents' Case

22. Mr. Kakoi opposed the petition on behalf of the 3rd and 4th respondents. He relied on the affidavit of Mr. Waweru Tuti, a legal officer with the office of the Controller of Budget. According to the 3rd and 4th respondent, the Controller of Budget had received information that there had been alterations to the budget for Turkana County but that by the time this petition was filed, the mistake had already been corrected and another warrant sent to the Controller of Budget. It was their case therefore that there was no longer any dispute to be dealt with by the Court.
23. In his affidavit sworn on 17th May 2014, Mr. Waweru Tuti states that sometime in October, 2013, the petitioner made an oral request for some documents in respect of the Turkana County budget

- from the Office of the Controller of Budget, but was advised to put his request in writing. By a letter dated 30th October, 2013 from his Advocates, the petitioner requested for the approved budget estimates for the 2013/14 financial year, the budget that had been presented to the Controller of Budget, and the General Warrant dated 30th June, 2013 signed by the Governor of Turkana County.
24. Mr. Tuti avers that the documents requested for were compiled but inadvertently, the petitioner was not informed that they were ready for collection. The petitioner then filed this petition, which was served on the 3rd respondent on 25th November, 2013. The 3rd respondent avers that at the first appearance of all the parties in Court on 29th November, 2013, it undertook to furnish the petitioner with the documents requested for which were in its possession. A letter from the 3rd respondent forwarding the documents to the petitioner is attached.
25. The 3rd respondent denies that it has refused to furnish the petitioner with any documents and in particular with General Warrant No. 1 dated 30th June, 2013 signed by the Governor of Turkana County. It states that the General Warrant No. 1 furnished to the Petitioner on 29th November, 2013, a copy of which is annexed to Mr. Tuti's affidavit, is the one that was submitted to the Controller of Budget by the Governor of Turkana.
26. Mr. Tuti also makes various depositions with regard to the alleged alteration of the budget for Turkana County. He states that the 3rd respondent received a letter on 20th August, 2013 from the Senate Committee on Finance, Commerce and Economic Affairs requesting it to carry out an investigation on the alleged alteration of Turkana County budget for the 2013/2014 financial year; that the 3rd respondent constituted a team to investigate the matter in accordance with its mandate under Article 252(1)(a) as read with Article 254(2) of the Constitution. The team carried out an investigation and prepared a report which was submitted to the Senate Committee on Finance, Commerce and Economic Affairs.
27. The report revealed that the budget had indeed been altered, and made recommendations on how to address the issue. The report was considered at a Senate sitting on 8th October, 2013 and the Senate resolved to refer the issue back to the Committee for further action. Mr. Tuti avers that the Senate Standing Committee has not presented its report back to the House for debate.
28. Mr. Waweru depones, however, that on the strength of the investigation report, Turkana County revised its budget estimates which were approved by the County Assembly and General Warrants No. 2 and 3 were then signed by the Governor on 5th September 2013 and presented to the Controller of Budget.
29. Counsel submitted that all the documents requested for by the petitioner were sent by a letter dated 29th November 2013 to the petitioner's Advocates and were received on 2nd December 2013. It was their case therefore that the petition had been overtaken by events and should be dismissed with costs.

Determination

30. The crux of the petition before me is Article 35 of the Constitution, which guarantees to citizens the right to information by providing as follows:

35. "(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom."

31. The Court has had occasion to consider the meaning and implication of the right to information under the Constitution. In **High Court Petition No. 278 of 2011 Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013]eKLR**, I observed as follows at paragraphs 34 of the judgment:

34”...the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest - this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State.”

32. I believe none of the respondents disputes the petitioner’s right to information, or the duty of the State or state organs such as the County government of Turkana, to furnish such information as a citizen may request for. Indeed, as is clear from the procedural history set out above, the respondents have been willing from the beginning to furnish the information sought by the petitioner.

33. At the hearing hereof, Counsel for the petitioner confirmed that he had all the documents he wanted except Warrant No. 1. He states that he managed to obtain a copy of this document, which is annexed to his affidavit as **PAE1**, from an anonymous source. He maintains, however, that he has a right to access this document and he asks the Court to direct the respondents to supply it to him.

34. There is something of a puzzle in the insistence by the petitioner that he is furnished with a document that he already has in his possession. What appears implicit in this demand is that the petitioner thinks that the respondents have something to hide, that they have supplied him with documents which do not show the true picture regarding the budget estimates for Turkana County, and that they should supply him with the document which he has already obtained from an anonymous source in the County.

35. The Court notes that there is an acknowledgement that there were some irregularities with the Turkana County budget estimates. The office of the Controller of Budget has confirmed that upon receiving the allegations of irregularities, it undertook an investigation and a report was submitted to the appropriate Senate Committee and thereafter to the Senate. Subsequently, the estimates appear to have been rectified, and other warrants, Nos. 2 and 3 dated 5th September 2013, sent to the Controller of Budget.

36. It is apparent therefore that the respondents have complied with the demand for information by the petitioner. What he is now insisting on is receiving a document from the respondents which he states he already has a copy of, having received it from what he refers to as an anonymous source. The origin of this document is thus unclear, as is its relationship to the Turkana County Government budget estimates. The petitioner has not demonstrated that this document is within the possession of the respondents, or that they have failed or refused to furnish it to him.

37. In the circumstances, I am unable to issue the orders that the petitioner is seeking with regard to this document. Should his case be that there are yet more irregularities with regard to the County budget, or some acts that violate the law or the Constitution have been committed, then it is incumbent upon him to present such information to the appropriate bodies, including the 3rd respondent, so that investigations can be undertaken.

38. On the basis of the evidence before me, however, I am unable to find any violation of the petitioner’s rights under Article 35(1). This petition is therefore dismissed, but with no order as to costs.

39. In closing, however, I must commend the petitioner for raising his concerns with regard to the

budget estimates for Turkana County. It may well be that it is his concerns that led to the investigation of the irregularities in the budget. It is such vigilance by citizens that will advance good governance and the rule of law, as well as proper use of resources, at both the national and devolved government.

Dated, Delivered and Signed at Nairobi this 8th day of July 2014

MUMBI NGUGI

JUDGE

Mr. Solonka and Mr. Nyakundi instructed by the firm of Solonka & Company Advocates for the Petitioner

Ms. Lumumba instructed by the firm of Rachier & Amollo Advocates for the 1st and 2nd Respondents

Mr. Kakoi instructed by the State Law Office for the 3rd and 4th Respondents