



**Khamis v County Assembly of Kisumu & another (Petition 1 of 2024)
[2024] KEELRC 2416 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2416 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 1 OF 2024
NZIOKI WA MAKAU, J
SEPTEMBER 30, 2024**

BETWEEN

MARIAM ABDALLAH KHAMIS PETITIONER

AND

THE COUNTY ASSEMBLY OF KISUMU 1ST RESPONDENT

KISUMU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The Petition seeks the following orders: -

- a. A declaration be and is issued that, section 10 of the Kisumu County Administration (Village Units) Act, 2024 be declared unconstitutional for violating Article 10(2) and Article 196(2) of *the Constitution* on public participation.
- b. A declaration be and is issued that, section 10 of the Kisumu County Administration (Village Units) Act, 2024 be declared unconstitutional for violating Articles 10, 27, 174, 196 and Part 2 of the Fourth Schedule to *the Constitution*.
- c. A declaration be and is issued that, the County Government Act, 2012 prevail the Kisumu County Administration (Village Units) Act, 2024.
- d. An order of certiorari be and hereby removed from the Honourable Court quashing the Kisumu County Public Service Board the advertisement Reference No. KSM/CPSB/07/11/2023 for the seventy (70) vacancies for the position of the Village Administrator of Kisumu County and the shortlist of candidates uploaded on the 2nd Respondent's website on 19th March 2024 for various positions within the county public service, county administration and participatory development and the interviews that are slated to start as from 26th March 2024 to 29th March 2024.



- e. An order of mandamus compelling the Kisumu County Public Service Board to freshly advertise the position and/or appoint the Village Administrators in strict adherence to the Constitution and the County Government Act, 2012
 - f. Costs of this petition.
2. The Petitioner describes herself as a civic minded citizen with the solemn obligation to respect, uphold and defend the Constitution. She avers that via the Gazette Supplement No. 9 (Kisumu County Act No. 5) dated 5th February 2024 the 1st Respondent purported to enact Kisumu County Administration (Village Units) Act 2024 without public participation. It is her case that the Kisumu County Act No. 5 amends the Kisumu County Administration (Village Units) Act 2019 by introducing the following changes to section 10 thereof:-
- (vi) Fourteen (14) days timelines for the public service board to complete the interview process, submit the list of Village Administrators to the County Assembly for verification and approval.
 - (vii) The accompanying documents the public service board should submit to the County Assembly on submission of the list of Village Administrators.
 - (viii) Twenty-one (21) days times for the County Assembly to approve the Village Administrators.
 - (ix) The Village Administrator shall within 21 days upon appointment nominate and submit a list of Members of the Village Council to the CEC Member for County Administration in accordance with the 2nd Schedule of this Act.
 - (x) The CEC Member shall upon receipt of the Members of the Village Council submit the list of the Members the Village Councils to the County Assembly within 14 days for Approval.
3. She affirms that the above changes under section 10 of the Act purport to establish an approval procedure for Village Administrators contrary to section 52 of the County Governments Act 2012. The Petitioner's contention is that the amendment will have the effect of making the Kisumu County Public Service Board subservient to the County Assembly thereby eroding the its independence. In light of the amendments, it is the Petitioner's case that the 1st Respondent exerted pressure on the 2nd Respondent to advertise for vacancies in the position of Village Administrator unconstitutionally. This the Petitioner states is contrary to the National legislation in the form of the County Governments Act which provides for appointment of Village Administrators uniformly across the nation. In further support of the petition the Petitioner avows that the office of Village Administrator created under Part VI of the County Governments Act is not subject to the approval by the County Assembly. For this reason, it is her case that the shortlisting of 70 candidates in the 2nd Respondent's website is part of an unconstitutional process.
4. In response the Respondents filed a Replying Affidavit dated 21st May 2024 and a Supplementary Affidavit dated 29th May 2024. They aver that the Act was passed as required by law. It is their contention that there is no contradiction between the Section 10 of the Act and the Constitution. They emphasise that the 2nd Respondent's action was in line with its mandate to implement Article 185 of the Constitution of Kenya 2010 and section 8(a) of the County Government Act. Additionally, the Respondents assert that the Petitioner's interpretation of section 52 of the County Governments Act vis-à-vis section 10 of the impugned Act has been done in isolation of other relevant provisions, to wit section 8(A) of the County Governments Act on the 1st Respondent's power to approve nominees to County Public Offices.



5. It is also the Respondents' case that section 8(2) of the County Governments Act bestows the County Assembly with power to enact laws enriching the County Government Act. Moreover, the Respondents assert that public participation was done in compliance of principles set in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR as evinced by the attendance registers and the public views and civil society memoranda by Civil Societies in the report presented to the County Assembly in October 2023. In further opposition to the petition the Respondents assert that the Kisumu County Administration Act do not undermine the powers of the County Public Service Board, as Article 185 of the Constitution and section 8(2) of the County Governments Act contemplates approval for appointment to public offices.
6. Contemporaneously with the Petition, the Petitioner filed a notice of motion application seeking interim relief and in a compromise recorded before Radido J., the parties agreed to canvass both the motion and the Petition together. As such, the submissions of the motion were subsumed and it is the determination of the Petition that will determine the outcome of both the Petition and the Notice of Motion preferred by the Petitioner.
7. The Petition was disposed of by way of written submissions.
8. Petitioner's Submissions

It is the Petitioner's submission that the public participation by the 1st Respondent was below the legal threshold. She contends that by undertaking public participation: in only 5 out of 35 wards, publishing the bill in English despite a large population not speaking the language, allowing access to the bill only through the internet despite limited connectivity, restricting public participation to only a single day. She asserts this approach locked out a very large section of the population. In buttressing this point she cites the case of *Kaps Parking Limited & another v County Government of Nairobi & another* [2021] eKLR in which the court subjected the Nairobi Finance Act of 2018 to the following parameters of public participation:-

141. The Respondents adopted two ways in availing the Bill to the public. They were uploading the Finance Bill, 2018 unto the County website and organizing two public meetings.
142. On the aspect of uploading the Bill unto the county website, the Respondents did not state when the Bill was uploaded and what steps they took to inform the public of the same. There is, as well, no record of the people who reside within Nairobi County who access the website either on daily basis or within the period the Bill was uploaded.
143. On the two meetings, suffice to say that Nairobi County is the third smallest County in Kenya. Surprisingly, it is the most populous of the counties projected at around 5 million people. It occupies an area of 696 square kilometres (270 sq. miles). It comprises of 17 Constituencies & 85 Wards.
144. Whereas Waithaka Social Hall is in Waithaka W Ward in Dagoretti South constituency, Jericho Social Hall is in Makadara constituency. It, therefore, means that the two public meetings were held in 2 wards out of the 85 wards in the county. The record is silent on the criterion used to settle for the two meetings and how the public was made aware of the meetings. The record is further silent on whether the meetings were duly attended by the targeted people. This Court is also unaware of the number of people who may have attended the meetings, the sectors they represented and the areas they hailed from. This Court is, therefore, not convinced that the Respondents conducted any of the alleged two meetings.



145. Even if this Court takes it that the two meetings were held, still the Respondents ought to have considered other modes of conveying and sensitizing the Bill to the public especially considering that not every resident in Nairobi County may be accessible to the County website and that the public meetings were not publicized. In this case, the use of mass media say like local newspapers, television stations and radio stations would have sufficed. Be that as it may, what of those who were differently-abled, for instance, those who are both blind and deaf?
146. There is also the issue of the language used in the Bill. Article 7 of *the Constitution* provides that the national language is Kiswahili while the official languages are Kiswahili and English. The Bill was published in English language. It is unknown how the people who cannot read and/or understand English Language were taken care of. The need to reach out to those who cannot read and/or understand English language was inevitable. The Respondents did not give any reason why they only availed the Bill in English language. The Respondents were bound by Article 7 of *the Constitution* to, unless for reasons to be given, avail the Bill in Kiswahili language as well.
9. The Petitioner submits that the amendments to the Bill fundamentally altered the bill in such a manner that it virtually created a new law which was supposed to be subjected to public participation. It is her contention that the huge differences between the bill and the Act meant that the 1st Respondent surreptitiously sneaked in provisions without public participation. She cites the Kaps Parking case (*supra*) wherein it was stated:-
137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.
10. Flowing from the foregoing the Petitioner submits that the public was not accorded reasonable access to information, and was not reasonably sensitized on the contents of the bill and intended amendments, undermining the importance of public participation as highlighted by the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR in the following terms:-
- “The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their



decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."

11. The Petitioner further submits that the amendments violate other laws applicable in appointment of Village Administrators. She affirms that the County Public Service Board is the only body empowered to appoint Village Administrators. It was submitted that in making the amendments the Petitioner avows that the 1st Respondent is illegally arrogating itself power to approve appointment of Village Administrators, thereby allowing it to supervise the 2nd Respondent in discharging its mandate, contrary to section 65 of the County Government Act. For the foregoing reason it is her submission that section 10 of the Act violates sections 52, 55 and 59A of the *County Governments Act*. Moreover, she asserts that section 10 of the Act breaches Article 27 of *the Constitution* to the effect that it subjects the position of Village Administrator to an approval procedure different from that of Sub-County Administrator, Ward Administrator and Village Council. Additionally, she submits that other Village in the remaining 46 Counties are not subjected to the same procedure. She cites the case of *FIDA Kenya v Attorney General & another* [2011] eKLR where the court stated as follows:-

When a provision is challenged as offending against equal protection the question for determination by the courts is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of the legislation. In our view mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis having regard to the object which the legislature has in view or which *the Constitution* had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of *the Constitution*. In addressing that issue, it is important to know whether there are other provisions or special provisions that have reserved special seats and benefits for the vulnerable members of our society. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

12. In further support of the Petition the Petitioner asserts that via section 10 of the impugned Act the 1st Respondent unconstitutionally arrogates itself human resource functions vested in the 2nd Respondent.

13. Respondents' Submissions

In their submissions the Respondents identify the following key issues for determination.

- a. Whether the Act violates the dictates of public participation, the principle of separation of powers and Article 27 on discrimination.
- b. Whether the Act contradicts the *County Governments Act* and other existing Laws.
- c. Whether the court should grant the reliefs sought.

14. The Respondents submit that adequate public participation was carried out. They cite the notice in the Star Newspaper of the 29th September 2023 in which the locations and timelines for submission of oral and written memoranda were provided. They equally draw the court's attention to the case of *Mui Coal* (supra) where it was stated that not everyone must give their views for public participation to be valid. In respect of Act violating separation of powers under Article 174 the Respondents submit that the County Assembly has authority to approve public officer appointments. They assert that the 1st Respondent's role is limited to approval as per the provisions of section 8(1) of the County Assembly



Act. In further support of the Act the Respondents submit it does not reorganize the appointment of administrators but rather provides necessary procedures that align with constitutional mandates for local governance. On the Act being discriminatory the Respondents submit to the contrary. They argue that different treatment for different roles is permissible under the law. They cite the case of Peter K. Waweru v Republic [2006] eKLR, where the court stated as follows:

“Firstly, unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the constitutional definition of the word “discriminatory” in section 82 of *the Constitution*. It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate. Such differentiation, however, does not amount to the discrimination that is prohibited by *the Constitution*.

15. They thus avow that it is untenable for Village Administrators to be treated the same as Ward Administrators or Sub-County Administrators. In conclusion the Respondents assert that the Act is constitutional and the recruitment process is lawful hence the petition should be dismissed in its entirety.
16. The Kisumu County Administration (Village Units) Amendment Bill 2023 is fraught with procedural and legal impurities. For instance, the process before the Kisumu County Assembly was vide the Hansard of Proceedings of the County Assembly dated 9th November 2023 indicative of missteps. The process did not permit the proposal for amendments to be made then seconded before deliberation on them. The Chair of the Committee of the Whole House Hon. Okumu (MCA East Seme Ward) did not allow for the procedure despite the issue being pointed out by the Chief Whip Hon. Kanga (MCA Market Milimani Ward) who pointed out, correctly in my view, that the amendments procedurally required the proposer to move the intended amendment and there be a seconder before there was debate on the proposed amendment.
17. The Hansard dutifully records the following verbatim at the mid part of page 19 of the Hansard:-

Chief Whip (Hon. Kanga, MCA, Market-Milimani Ward): When the Chair of a House Committee proposes an amendment, he should request a member to second then you put a question. But when the Chair will be proposing and then you just put questions then the Assembly will be proceeding unprocedurally. I believe that this is from past experience.

Chairperson, Committee of the Whole House (Hon Okumu, MCA, East Seme Ward): Honourable Member, I totally agree with you but you know the problem is when you are half in the Assembly and you are half outside, and up to that point, we have reached a point where we have to put a question to the amendment and moving to the next. It is the resolution of the House that we adopt those amendments as proposed by the Chair of the House Committee. So, you request that the next one we do secondment before we debate. So, Members we have agreed that Section will become part of the Bill by the amendments therein.
18. The Chair in his ruling during the session merely stated that the house had moved to discuss the matters and there had been no objection. There being no objection did not sanitise the improper procedure applied as the Kisumu County Administration (Village Units) Amendment Bill 2023, though not a money bill, had major implications on finances. The Kisumu County Administration (Village Units) Amendment Bill 2023 would have provided for the establishment of Village Units which would mirror the lower tier of the National Government Administrative Offices (NGAO). In my considered view, the implementation of aspects of the Kisumu County Administration (Village Units) Amendment



Bill 2023 would have replicated the NGAO structure at village level and was an entirely unnecessary effort at duplicating service provision which would be a waste of precious public funds. The structures already provided for suffice and need no tweaking or change. Kisumu County is by far one of the Counties in the Country that has made efforts to ensure sanitation is maintained. The markets, bus stations, streets and public spaces are maintained – clear of any debris, littering or any dirt. It is impressive by all standards and this merely needs to be maintained not encumbered by a bureaucratic layer of control/interference.

19. The issues the Court identifies as critical for the determination of the issue before it is:-
- a. Whether the Kisumu County Administration (Village Units) Act 2024 violates the dictates of public participation, the principle of separation of powers and Article 27 on discrimination.
 - b. Whether the Kisumu County Administration (Village Units) Act 2024 contradicts the County Governments Act and other existing Laws.
 - c. Whether the court should grant the reliefs sought.
20. The Court is bound to consider whether the County Assembly took steps to afford the residents of Kisumu County, read the public, what amounts to a reasonable opportunity to participate effectively in the law-making process as contemplated in the Constitution and thereby complied with Article 27 on discrimination and Article 118(1)(b) on public participation. The key aspect of public participation is the imprimatur to provide meaningful opportunities for the public to participate in the law-making process. The second aspect is the duty to take measures to ensure that the members of the public have the ability to partner with the legislature in decision-making. Of note for purposes of this decision, the Kisumu County Administration (Village Units) Amendment Bill 2023 was subjected to what was said to be "public participation". Viewed through the lenses of public participation and the Constitutional safeguards in place, the fact is, there was no public participation as contemplated in the Constitution and the law. The Kisumu County Administration (Village Units) Amendment Bill 2023 when presented for public participation had only one clause with two subclauses. What emanated from the Kisumu County Assembly was an Act that did not bear any semblance to what was subjected to the so-called "public participation". The amendments proposed during the Committee of the Whole House fundamentally altered the character of the Kisumu County Administration (Village Units) Amendment Bill 2023 and led to the deliberation of an entirely different bill from that which was taken to the Public for input and discussion. That resulted in the enactment of the Kisumu County Administration (Village Units) Act 2024. In my considered view the discussions on the amended clauses deprived the public of their right to public participation. Public participation is to facilitate the realisation of Article 118(1)(b) of the Constitution which provides that:-
118. (1)Parliament shall
- (a)
 - (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
21. This aspiration was considered by the Court of Appeal in the case of Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra). The Court of Appeal pronounced itself thus:-

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways,



to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning. [Emphasis mine]

22. As noted in the above case, the essence of public participation is to permit the public to have an opportunity of influencing the decision law makers reach in as far as their mandate to legislate is concerned. It is one of the salutary aspects of *the Constitution* of Kenya which makes room for the governed to have a greater say in how their affairs are run by those they elect. It provides an umbilical cord to Parliament to permit the organs serving the people to have the interests of the people at heart since their involvement is not merely cosmetic as the amendments on the floor of the house in the Kisumu County Assembly seems to suggest as far as the provisions of section 10 of the Kisumu County Administration (Village Units) Act 2024 is concerned. The public was not invited to give their input on the proposal to subject appointees of the 2nd Respondent to vetting by the 1st Respondent. Put simply, it is my finding that there was no public participation as contemplated in law since the amendment provides for an approval procedure for Village Administrators contrary to section 52 of the *County Governments Act* 2012. For the foretated reasons, I would agree with the Petitioner that on the issue of public participation that the 1st Respondent's actions variously infringed Articles 10, 174(c) and 118(1)(b) of *the Constitution* as well as section 87 of the *County Governments Act*, in not according the members of the public, including the Petitioner an opportunity to engage in public participation in respect to the amendments proposed to section 10 of the Kisumu County Administration (Village Units) Act 2024. There is no place in the *County Governments Act* for an approval procedure for the appointees to the position of Village Administrators. The function is solely that of the 2nd Respondent and the 1st Respondent has no role in the appointment as to place section 10 where it is puts the 1st Respondent in the position of an organ exercising human resource functions which are the remit of the 2nd Respondent.
23. The impugned provision of the law in the Kisumu County Administration (Village Units) Act 2024 being the outcome of a flawed Bill namely, the Kisumu County Administration (Village Units) Amendment Bill 2023, is hereby declared unconstitutional, null and void to that extent. As to costs, this Petition being in the class of public interest litigation, the order that commends itself for me to make in regard to costs is that each party will bear their own costs for the motion and Petition. In the final result I hereby order as follows:-
- a. A declaration be and is hereby issued declaring section 10 of the Kisumu County Administration (Village Units) Act, 2024 is unconstitutional for violating *the Constitution* of Kenya and therefore null, void and of no effect.
 - b. Each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2024

NZIOKI WA MAKAU

JUDGE

