



Oloo v County Government of Homa Bay & 2 others (Constitutional Petition E003 of 2022) [2024] KEHC 1602 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CONSTITUTIONAL PETITION E003 OF 2022**

KW KIARIE, J

FEBRUARY 22, 2024

BETWEEN

EVANS OTIENO OLOO PETITIONER

AND

THE COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT

THE HOMA BAY COUNTY SECRETARY 2ND RESPONDENT

SAFARICOM LIMITED 3RD RESPONDENT

JUDGMENT

1. Evans Otieno Oloo Gor, the petitioner herein, filed a petition dated the 8th day of November 2022. He is seeking the following orders:
 - a. A declaration that the 1st and 2nd respondents’ actions in appointing and authorizing the Hon. Ndiritu’s Task force to come up with recommendations without public participation and implementation of the said recommendations to wit’ appointing and/or awarding the 3rd respondent – Safaricom Limited as the sole network service provider in collection of revenue in the county of Homabay is brazen, illegal, egregious, discriminatory and in violation of the petitioner’s and the general public was constitutional right.
 - b. A declaration that the respondent’s decision to direct that the county revenue payments and collection be made via 3rd respondent’s network services without a supporting legal framework expressly violated the provisions of Articles 147, 209 and 210 of *the Constitution* of Kenya 2010.
 - c. An order of Judicial Review in the nature of certiorari bringing before this court for purposes of quashing the decision of the 1st and 2nd respondents to form a task force and implement the



task force's recommendations to wit payments of revenue via 3rd respondents' Paybill number 684587/0434343 and collection thereof of revenue within the county of Homa Bay.

- d. An order of Mandamus to issue and be directed to the respondents mandating them to undertake the required lawful process and procedures, including but not limited to undertaking public participation before taking the administrative actions, including collecting revenue within the County of Homa Bay. In the alternative, refrain from taxing the public till such compliance is met.
 - e. An order of Judicial Review in the nature of prohibition prohibiting the respondents, their agents, officials, undisclosed principals and any other person acting on their behalf or instruction from collecting revenue and harassing the citizens of Homa Bay County to pay revenue via the 3rd respondents' Paybill number 684587/0434343 without the existence of a legal framework for the charging of the same and following the due process or in pursuance of a lawful direction and decision.
 - f. An order in the nature of permanent injunction directed towards the respondents restricting and/or prohibiting the respondents, their agents, officers and any person acting under them from collecting and/or directing payments of revenue via the 3rd respondents' pay bill number 684587/0434343 before the formulation of necessary legislative framework, regulations and/or laws to govern the collection of revenue through a process that conforms with the dictates of *the constitution*.
 - g. An order directing the respondents to audit and publicly declare all amounts illegally collected/ received via 3rd respondents' Paybill No.684587/0434343 and to refund within twenty (20) days of this court's order to the people/vendors/traders of and within Homa Bay county who had made payments through the same system.
2. The petition was premised on the following grounds:
- a. That the respondents have effected an illegal, unconstitutional, unprocedural revenue collection subject to a task force recommendation which came up with such recommendations to wit: payments of revenue via the 3rd respondent's Paybill number.
 - b. The respondents assumed that all traders within the county of Homa Bay possess the 3rd respondents' lines and should secure the same as a mandatory trading tool within the County.
 - c. The respondents did not consider the violations the traders will go through in transferring the said revenues via the 3rd respondent's network and Paybill number 684587/0434343.
 - d. That public funds have been spent and are likely to be further spent in an illegal process that may lead to further petitions and waste of public resources.
 - e. That out of the purported recommendations, it is not clear whether special groups and persons with disability have been considered on the use of network service providers in regards to the collection of revenue and relevant laws and provisions of *the constitution*.
 - f. In light of the above, I am apprehensive that the inability of the respondents to obey *the Constitution* and the relevant statutes will lead to the infringement of the laws thereof.
3. The respondents opposed the petition on the following grounds:
- a. That the applicant seems to have an issue with the mode of payment of taxes, vide the 3rd respondent and not so much with the taxes themselves, and that cannot raise a constitutional



matter worth canvassing by way of a constitutional petition as the same does not reveal a constitutional breach.

- b. That the application by the applicant is misplaced, an abuse of the process of law and only meant to block the regular running of County affairs; therefore, the application is not merited and should be dismissed.
4. After perusing the petition, the supporting affidavit thereof, and the submissions by the parties, the following issues emerge and require determination:
 - a. Whether appointing the Hon. Ndiritu's Taskforce by the 1st & the 2nd respondents required public participation.
 - b. Whether the respondents' decision to direct that the County revenue payments and collections be made via the 3rd respondent's network services without a supporting legal framework expressly violated the provisions of Articles 10, 47, 209 and 210 of *the Constitution*, 2010.
 5. Section 107 of the *Evidence Act* provides:
 - 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

This echoes the legal maxim "ei incumbit probatio qui dicit, non quo negat" ("he who avers must prove").

6. The petitioner has claimed that the appointment of the Hon. Ndiritu's Taskforce by the 1st & the 2nd respondents required public participation. He has not demonstrated which law required public participation for such an appointment. Public participation is not envisaged for every administrative action taken. Were this to be the position, then public service activities would grind to a halt.
7. It would appear that the petitioner does not understand the import of revenue collection by a cashless platform such as M-pesa. He has, unfortunately, described it as taxation. One of the copies of the transaction attached to the affidavit of Michael Otieno, who describes himself as a trader within Homa Bay, indicates that he paid Kshs. 40.00 This payment was made to Homa Bay County Revenue Collection through the M-pesa, and the transaction cost is Kshs.0.00. This absolves the new mode from being assumed to be a form of taxation.
8. I therefore find that the respondents' decision to direct that the County revenue payments and collections be made via the 3rd respondent's network does not violate the provisions of Articles 10, 47, 209 and 210 of *the Constitution*, 2010.
9. The petition is therefore dismissed. Each party is to meet its costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF FEBRUARY 2024

KIARIE WAWERU KIARIE

JUDGE.

