REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 94 OF 2018

WANJIRU GIKONYO……..PETITIONER

-VERSUS-

ATTORNEY GENERAL…….1ST RESPONDENT
CABINET SECRETARY, HOUSING, TRANSPORT AND INFRASTRUCTURE……..2ND RESPONDENT

-AND-

KAJIADO COUNTY GOVERNOR……1ST INTERESTED PARTY
KIAMBU COUNTY GOVERNOR……2ND INTERESTED PARTY
MACHAKOS COUNTY GOVERNOR……3RD INTERESTED PARTY
MURANGA COUNTY GOVERNOR……4TH INTERESTED PARTY
NAIROBI COUNTY GOVERNOR……5TH INTERESTED PARTY

JUDGMENT

1. The Petitioner, Wanjiru Gikonyo, through the petition dated 14th March, 2018 seek orders as follows:

    a. A declaration that the Nairobi Metropolitan Area Transport Authority Order, 2017 is unconstitutional and invalid; and

    b. A declaration that any continued enforcement of the Nairobi Metropolitan Area Transport Authority Order, 2017 Legal Notice No. 18 of 2017 by the 1st Respondent is unconstitutional and invalid;

c. **A declaration that the appointment of Board Members to the NAMATA Authority vide Gazette Notice No. 1240 of 2018 is unconstitutional and invalid;**

d. **That the 1st Respondent bears the Petitioner's costs while Interested Parties each bear their own costs.**

2. The Attorney General and the Cabinet Secretary, Housing, Transport and Infrastructure are the 1st and 2nd respondents. The respective 1st to 5th interested parties are Nairobi City County Governor, Kiambu County Governor, Machakos County Governor, Muranga County Governor and Kajiado County Governor.

3. The Petitioner's case as gleaned from her petition and supporting documents is that the 2nd Respondent through Gazette Notice No. 1093 issued on 20th February, 2015 purported to unilaterally appoint a Steering Committee to establish the Nairobi Metropolitan Area Transport Authority (hereinafter simply referred to as the NAMATA or Authority), without a written agreement between the two levels of government. Her case is that the mandate of the Steering Committee had been extended by the 2nd Respondent for a period of one year from 1st March, 2016. Further, that on 9th February, 2017 the respondents had issued an Executive Order creating the NAMATA under Legal Notice No. 18 of 2017 and the State Corporations Act. It is additionally the Petitioner's

averment that on 9th February, 2018 through Gazette Notice No. 1240 of 2018 the Chairperson of the NAMATA Council appointed three persons to the Board of the NAMATA.

4. The Petitioner's case is that all the stated actions are invalid and of no effect in law. It is averred that the formation of the NAMATA is *ultra vires* sections 24, 26, 27 and 28 of the Intergovernmental Relations Act, 2012 ('IRA') which provisions have constitutional underpinning and are normative derivatives of Article 189 of the Constitution.

5. The Petitioner asserts that the NAMATA Executive Order of 2017 is unconstitutional and invalid in so far as it disregards the vertical separation of powers, functional, fiscal, and institutional integrity, as well as constitutional status of institutions of government at either level of government contrary to Articles 3, 4, 6, 10, 174 and 175 of the Constitution.

6. It is contended that the formation of the NAMATA is a usurpation of the legislative powers of the National Assembly under Articles 93 to 96 as well as the legislative powers of county assemblies under Article 185. Additionally, that Legal Notice No. 18 of 2017 was not preceded by the appropriate or adequate levels of public participation, and the National Assembly and county assemblies concerned were not notified of the transfer of county transport functions to the national government, and is

therefore unconstitutional and invalid.

7. The Petitioner avers that the national government has no constitutional authority to unilaterally delegate to the NAMATA, a state corporation established under Section 3 of the State Corporations Act, the functions, competencies and powers allocated to a county government under the Fourth Schedule. The Petitioner argues that the delegation is unconstitutional and invalid as it does not follow the mandatory intergovernmental processes and procedures prescribed by Article 187 of the Constitution and Section 26 of the IRA.

8. The respondents oppose the petition through a replying affidavit sworn by the Principal Secretary of State Department of Transport Prof. Arch. Paul M. Maringa on 23rd May, 2018. The petition is opposed on the grounds that:

    i. The IRA is inapplicable in the circumstances leading to the filing of the petition;

    ii. Article 187 of the Constitution does not come into play in the circumstances leading to the filing of this petition. Further, that the formation of the NAMATA is under Article 189(2) and does not involve the transfer of powers/competencies and functions between the different levels of government;

iii. The petition does not raise triable issues as there is no breach of fundamental rights and neither is any issue that require interpretation of the Constitution raised;

iv. The petition is merely speculative and subjective therefore incompetent and unfounded;

v. The Court lacks jurisdiction to grant the orders sought in the petition on the basis that the matters raised therein are not justiciable;

vi. The petition was filed in flagrant disregard of public interest;

vii. The petition before this Court is not based on any dispute between any two or more counties nor is it intergovernmental; and

viii. There is no pending consultation and cooperation issue between the national and county governments or amongst the county governments involved in the formation of the NAMATA.

9. On the issue of public participation, it is asserted that the 2nd Respondent engaged various stakeholders and held public workshops to inform and educate the public in the beneficiary counties of the intended formation of the Authority. Further, that the allegation that there is no formal agreement is incorrect because on 21st October, 2014 the 1st and 5th interested parties signed a written agreement (Memorandum of

Understanding) with the 2nd Respondent that played as a forerunner for the establishment of the Authority.

10. The respondents aver that according to the Fourth Schedule of the Constitution, the transport function is a shared function between the national and county governments. Further, that it is factually incorrect that the national government delegated its functions to the county governments involved in the NAMATA.

11. The 1st Interested Party opposes the petition through its response dated 1st August, 2018. The 1st Interested Party contends that the petition is a waste of time and an abuse of the court process as it does not raise triable issues since no fundamental rights have been breached that will require the interpretation of the Constitution.

12. It is further averred that the formation of the NAMATA does not involve the transfer of powers, functions and responsibilities of the different levels of government as alleged by the Petitioner as it is formed under Article 189(2) of the Constitution which provides for cooperation between national and county governments.

13. The 5th Interested Party filed grounds dated 4th April, 2018 in support of the petition. The 5th Interested Party asserts that the NAMATA Executive Order of 2017 is unconstitutional and invalid in so

far as it was published in the absence of any formal agreement between the respondents and the interested parties capable of creating any legal obligations between the parties as contemplated by the Memorandum of Understanding entered on 21st October, 2014.

14. The 5th Interested Party did a U-turn through an affidavit sworn by its Governor, Hon. Kioko Mike Sonko Mbuvi, on 11th May, 2018. Through the affidavit, the Governor denied instructing the law firm which filed the grounds in support of the petition. He indicated that he would in due course file an application to withdraw from the proceedings. He, however, did not actualise the threat but instead filed submissions opposing the petition.

15. After careful consideration of the pleadings and submissions of the parties, I find that the first issue for the determination of this Court is whether the Petitioner has established a constitutional cause granting this Court jurisdiction to determine the matter. The Petitioner submits that in line with Article 165(3)(d)(i), (ii) & (iii), she has framed three constitutional controversies within the Court's interpretative jurisdiction: whether Nairobi Metropolitan Area Transport Authority Order, 2017 Legal Notice No. 18 of 2017 is inconsistent with or in contravention of Articles 3, 4, 6, 10, 174, 175 and 189 of the Constitution and the Intergovernmental Relations Act, 2012; whether the formation of the

NAMATA is inconsistent with, or in contravention of Articles 3, 4, 6, 10, 174, 175 and 189 of the Constitution; and the impact of the NAMATA as formed on the constitutional powers of State organs in respect of county governments and the constitutional relationship between the two levels of government.

16. The Petitioner argues that the political question doctrine does apply in Kenya the same way that it applies in the American constitutional context. In reliance on the cases on **Communication Commission of Kenya & 5 others v Royal Media Services Limited [2014] eKLR; Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR;** and **Hon. Kanini Kega v Okoa Kenya Movement & 6 others [2014] eKLR**, the Petitioner submits that the respondents should not deprive the Court of its jurisdiction under Article 156(3)(d) of the Constitution as the dispute does not present a political question.

17. The Petitioner submits that when comparing Part 2 of the Fourth Schedule of the Constitution and Regulation 5(2)(o) of the impugned Legal Notice, county functions have been allocated to the NAMATA which amounts to a *de facto* transfer. This falls under Section 24 of the IRA and therefore calls for this Court's examination on the procedural and substantial validity of the transfer under Article 165 of the Constitution and the IRA.

18. The respondents filed submissions dated 25th May, 2018 and assert that the petition is not based on any dispute between any two or more counties nor is it intergovernmental, and there is no pending consultation and cooperation issue between the national and county governments or amongst the county governments involved in the formation of the NAMATA. Reliance is placed on the decision of **Okiya Omtatah Okoiti & another v Attorney General & 6 others [2014] eKLR**. The respondents contend that the Petitioner is not one of the parties contemplated under Section 30 of the IRA.

19. The respondents further submit that the petition does not raise any triable issues and that sections 23, 24, 25, 26, 27, 28 and 29 of the IRA and Section 6 of the Urban Areas and Cities Act, 2011 should not be interpreted in a manner that is disruptive to Articles 6(2), 174, 175, and 189(1)(c) & (2) of the Constitution. The respondents contend that the Executive Order establishing the Authority is consistent with the Constitution, the IRA and the Urban Areas and Cities Act, 2011.

20. The respondents submit that the petition does not present a real controversy requiring the intervention of the Court as it is based on issues that are purely within the jurisdiction of the executives of the governments at both levels. Further, that concerns around revenue are premature and do not carry a viable cause of action.

21. The respondents additionally submit that the Petitioner has not demonstrated sufficient stake as a litigant to show that she has suffered actual injury. It is therefore urged that the petition is based on speculation and conjecture. These arguments are buttressed by reliance on the decisions in **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR; Patrick Ouma Onyango & 12 others v A.G. & 2 others Misc. Appl. No. 677 of 2005** (as quoted in **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & another [2015] eKLR);** and **Maharashtra State Board v Kurmarsheth & others [1985] CLR 1083** (as quoted in British **American Tobacco Ltd v Cabinet Secretary of the Ministry of Health & 5 others [2017] eKLR).**

22. The 1st Interested Party filed submissions dated 13th September, 2018 asserting that the Petitioner has not pleaded with reasonable precision how the Constitution has been violated and how the alleged violations were committed and to what extent. It is urged that the petition is anticipatory, premature and an abuse of the court process. Reliance is placed on the decision in **Bernard Murage v Fineserve Africa Limited & 3 others [2015];** and **Harrikson v Attorney General of Trinidad and Tobago [1980] AC 265.**

23. The 5th Interested Party filed submissions dated 6th November, 2018 submitting that the petition is ambiguous and does not raise any

constitutional question. The 5th Interested Party contends that the unconstitutionality as raised by the Petitioner is not based on the provisions of the Constitution but on clauses of the Memorandum of Understanding and the IRA which are illegitimate grounds. This argument is buttressed by the case of **Nairobi County Government v Kenya Power and Lighting Company Limited [2018] eKLR**.

24. The 5th Interested Party further submits that the Petitioner lacks the locus to litigate on the constitutionality of the formation of the NAMATA as she was neither a signatory nor a person likely to suffer any prejudice against its operationalisation. Furthermore, that Article 189 of the Constitution and sections 31 to 35 of the IRA do not envisage disputes brought by individuals as they simply provide for a resolution forum for disputes between the different levels of government.

25. In order to ascertain the jurisdiction of the Court to hear and determine a particular matter, one must always start by scrutinizing the Constitution. Clause (3) of Article 165 is one of the constitutional provisions which provides for the jurisdiction of the High Court by stating that:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

26. The provision therefore confers on the High Court jurisdiction to answer the question of whether any law is inconsistent with the

Constitution, and whether any action done under the authority of the Constitution is actually in contravention of the Constitution. Herein, the Petitioner has centred her prayers around the questions of whether the Nairobi Metropolitan Area Transport Authority Order, 2017 is constitutional; whether the continued enforcement of the Nairobi Metropolitan Area Transport Authority Order, 2017 published as Legal Notice No. 18 of 2017 by the 1st Respondent is constitutional; and whether the appointment of Board Members to the Authority vide Gazette Notice No. 1240 of 2018 is constitutional.

27. It is apparent to me that the petition is brought well within the jurisdiction of this Court under Article 165 (3) of the Constitution. The Petitioner's prayers fall within the jurisdiction of the Court to answer the question of whether any law and any action done under the authority of the Constitution is in contravention of the Constitution. It is for this reason that I find that this Court has jurisdiction to scrutinize the constitutionality of the Nairobi Metropolitan Area Transport Authority Order and the formation of the NAMATA and its Board.

28. On the matter of *locus standi* of the Petitioner, I turn to Article 258 of the Constitution which states that:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with

contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

29. The Petitioner has made it known that she has brought this petition in the public's interest. Various courts have pronounced themselves on the issue of public interest litigation. For instance, the Supreme Court in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR** determined that:

"[89] Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution's aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional

interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance."

30. In the High Court case of **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR,** it was postulated that:

"60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the *bona fide* interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. The constitution envisages the judiciary as "a bastion of rights and justice.

61. Public interest litigation is a highly effective weapon in the armoury of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns."

31. It is not novel for the Petitioner to claim to bring a constitutional petition in public interest and on the claim that the Constitution has been contravened or is threatened with contravention. Public interest litigation serves the important purpose of safeguarding social justice and protecting the rights of the public at large.

32. On the allegation that the Petitioner is not a party envisaged under sections 30 to 36 of the IRA, I do not see the correlation between the constitutional questions raised by the Petitioner and the provisions of the IRA on dispute resolution mechanism. This matter is not about a dispute envisaged under the cited provisions but a constitutional petition regulated by the provisions of the Constitution. I, therefore, find that the Petitioner has the requisite *locus standi* to bring this petition before this Court in her own interest and that of the public.

33. The second question is whether the formation of the NAMATA amounts to transfer of powers, functions and resources from the concerned county governments to the national government. On this

issue, the Petitioner submitted that the functions that the 2nd Respondent purported to vest in the NAMATA are county government functions that are not only constitutionally vested in the 1st to 5th interested parties under the Fourth Schedule of the Constitution but are also transferred to the interested parties under the applicable transitional laws and policies. This argument was supported by the decision in **Council of County Governors v Kenya National Highways Authority and 2 others [2014] eKLR**.

34. The Petitioner refers to Article 187(1) of the Constitution on situations where functions and powers may be transferred from one level of government to another. She further quotes Section 26 of the IRA on the criteria and procedures for the transfer of functions. The Petitioner submits that the powers and functions purportedly transferred to the NAMATA via Legal Notice No. 18 of 2017 did not adhere to the constitutional and legal provisions regarding the transfer of functions. It is asserted that the Memorandum of Understanding between the 2nd Respondent and the interested parties does not amount to an inter-governmental agreement as contemplated under Article 187(1). Furthermore, it is argued that county government powers cannot be transferred by an act of the county governor alone, as it requires the explicit approval of the county assembly. This position is supported by

the case of **Council of Governors & 3 others v The Senate & 2 others [2015] eKLR**.

35. The Petitioner further submits that even if the functions covered by the NAMATA fall within the concurrent powers of the two levels of government, the creation of the NAMATA failed to meet the constitutional requirements on how the administration of concurrent powers should be regulated. The Petitioner argues that concurrent powers and functions can only be regulated or varied through national legislation. She states that in this case, the powers and functions that are contemplated for transfer to the NAMATA have not been subjected to legislative scrutiny and there is no national law that specifically deals with the powers set aside. Reliance is placed on the South African case of **City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunals and 6 others (CCT89/90) [2010] ZACC 11.**

36. On the issue of intergovernmental consultation and cooperation, the Petitioner refers to Articles 6(2) and 189 of the Constitution and submits the 2nd Respondent made a unilateral decision to publish in the Gazette the establishment of the NAMATA without the involvement of county government institutions as required by the constitutional principles of intergovernmental relations. The Petitioner relies on the South African case of **Premier of the Western Cape v President of the**

Republic of South Africa & another (CCT26/98) [1999] ZACC 2 on the importance of the principle of cooperation.

37. On their part, the respondents submit that the NAMATA was formed pursuant to Article 189(2) of the Constitution to establish a joint committee/authority. They state that such an organ is also envisaged under Section 23 of the IRA. It is submitted that the said legal provisions do not, however, spell out the mechanisms of establishing joint committees or authorities. It is submitted that in the circumstances the respective county governors or the interested parties and the respondents were within the law to conclude a Memorandum of Understanding on the creation of a framework for collaboration, consultation and joint planning of the Mass Rapid Transport System. Additionally, that the President was within his powers to issue the Executive Order establishing the Authority.

38. The respondents submit that the long title of the IRA brings its applicability to joint committees or authorities established under Article 189(2) of the Constitution. They contend that the circumstances of the formation of the NAMATA are limited to Section 23 of the IRA which recognises joint committees but does not provide how they are to be established. The respondents assert that the Authority was established by the executive arm of the two levels of government, following the

conclusion of a Memorandum of Understanding, and it is therefore not within the jurisdiction of this Court to overrule or overturn the decision to form the Authority.

39. The respondents contend that the petition is merely speculative and subjective. They aver that no monies have so far been expended by the NAMATA and the fears of the Petitioner in respect to the financing of the entity are unfounded since financial matters in respect of public bodies are well taken care of by Articles 220, 221, 222 and 223 of the Constitution and paragraph 7(c) of the Executive Order.

40. The 1st Interested Party's submission is that the County of Kajiado has not disbursed any county finances from the County Revenue Fund to finance the activities of the NAMATA as alleged by the Petitioner. It is therefore contended that the allegations of the Petitioner are without factual basis.

41. On its part, the 5th Interested Party submits that the petition is devoid of merit as Articles 6 and 189 of the Constitution require the governments at the national and county levels to consult, cooperate, coordinate and liaise with each other, and the Constitution expressly provides for setting up of joint authorities. This position is supported by the decision in **Council of Governors & 3 others v Senate & 53 others [2015] eKLR.**

42. In my view, the establishment of the NAMATA as envisaged in the Nairobi Metropolitan Area Transport Authority Order, 2017 is in accordance with Article 189(2) of the Constitution which states that:

Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

43. The NAMATA was therefore established in furtherance of cooperation between the two levels of government as provided under Article 189(2) of the Constitution. Consultation and cooperation at different levels is also envisioned in Article 6(2) of the Constitution which states that the national and county governments **"are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation."**

44. The Constitution states that in furtherance of the cooperation between the two levels of government, they may establish joint committees and joint authorities. According to Section 3 of the impugned Executive Order, the NAMATA is described as a **"joint authority in accordance with Article 189(2)"** thus giving it constitutional foundation.

45. The Petitioner points out that transport falls within the functions and powers of the county governments as provided under the Fourth Schedule of the Constitution. However, she has failed to acknowledge that under the same schedule, certain aspects of transport and national public works fall within the ambit of the national government as well. This can be comprehended to mean that transport is a shared duty and responsibility of both levels of government and therefore one level of government cannot possibly usurp or transfer such duty from the other.

46. The Petitioner relies on Article 187 of the Constitution which deals with the transfer of functions and powers between levels of government. I am not convinced that this provision is relevant in the circumstances herein as I have already established that transport falls within the mandate of both national and county governments and is thus a shared responsibility and there is no need for any transfer of functions. It is actually Article 186(2) of the Constitution that is relevant in the circumstances of this case as it states that:

A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

47. The Petitioner has also raised an argument that the respondents have not met the constitutional requirements on how the administration

of concurrent powers should be regulated. She claims that shared powers and functions can only be regulated through national legislation. The respondents have indeed conceded that both the Constitution and the IRA do not spell out the mechanisms of establishing joint committees and authorities. The Petitioner has, however, not indicated any constitutional or legislative provisions that support her argument. Since there are no legislative provisions on the establishment of joint committees and authorities, the respondents cannot be faulted for using the impugned Executive Order to establish the NAMATA. Much as the legal framework may be necessary, the need to provide services to the people through agencies like the NAMATA is also very important. That explains why the NAMATA is anchored on the law governing parastatals.

48. Another contention by the Petitioner is that the establishment of the NAMATA will infringe upon the revenue-raising and revenue utilisation powers of the county governments involved. Once again, the Petitioner has not supported this allegation with any form of proof. According to Section 15 of the Executive Order:

15. The funds of the Authority shall consist of—

(a) monies allocated by Parliament for the purposes of the Authority;

(b) such monies or assets as may accrue to the Authority in the course

of the exercise of its powers or in the performance of its functions under this Order;

(c) all monies from any other source provided, donated or lent to the Authority;

(d) contributions from the counties in the Metropolitan Area; and

(e) any other funds approved by law.

49. There is nothing in the impugned Executive Order that contemplates that the resources owed to the involved county governments by the national government will be redirected to the Authority hence infringing upon the raising and utilisation of funds by the county governments. The Executive Order is clear on the various sources of revenue for the Authority, and being a public entity the Authority will be subject to the fiscal discipline and oversight applicable to public bodies.

50. I therefore concur with the respondents and interested parties that the Petitioner has not demonstrated through the use of evidence or reliance on constitutional and legislative provisions that the impugned Executive Order establishing the NAMATA amounts to an infringement of the Constitution and poses a threat to the revenues and resources of the concerned county governments.

51. The third issue for consideration is whether the public was involved in the process leading to the establishment of the NAMATA. The Petitioner in her pleadings has alleged that Legal Notice No. 18 of 2017 was not preceded by the appropriate or adequate levels of public participation, and the National Assembly and county assemblies of the involved counties were not notified of the transfer of county transport functions to the national government, and therefore the instrument is unconstitutional and invalid.

52. In response, the respondents submit that they together with the interested parties, various stakeholders and resource persons/institutions held several meetings both in Nairobi and in all the affected counties to discuss various reports generated from the stakeholder meetings. It is the respondents' case that the meetings, workshops and excursions were to ensure public participation.

53. The 1st Interested Party further submits that the establishment of the NAMATA is valid and constitutional as the process entailed in the formation of the Mass Rapid Transport System was done in consultation with the parties involved in the project. It is additionally the 1st Interested Party's submission that the establishment and gazettement of the NAMATA did not involve the transfer of powers, functions and responsibilities of the different levels of government but is a cooperation

between the national government and the interested parties as envisaged under Article 189(2) of the Constitution.

54. On the question of whether there was adequate public participation, I wish to rely on the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** where it was held that:

"35. Once a petitioner attacks the legislative process on grounds that the law making process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation. And because it is the constitutional duty of Parliament to ensure that there is public participation, the Attorney General as the respondent, has the legal burden to disprove this contention. This is so because it is a constitutional requirement that the National Assembly conducts its affairs in compliance with the constitution…

42. … public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation. That is, people must be accorded an opportunity to participate in the legislative process and this is a question of fact to be proved by the party that was required to comply

with this constitutional requirement that indeed there was compliance."

55. It is discerned from the cited case that where a petitioner raises doubts about involvement of the public in legislative or other public business, the burden of proof lies on the respondent to show that they carried out adequate public participation. This position was affirmed by the Court of Appeal in **Law Society of Kenya v Attorney General & 2 others [2019] eKLR** when it held that:

"From the finding above, the learned judge ought to have found in favour of the appellant based on the claim made on the lack of public participation. It was an error for the learned judge to require the appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was. Much weight has been placed on public participation because it is the only way to ensure that the Legislature will make laws that are beneficial to the *mwananchi,* not those that adversely affect them.

Additionally, the onus is on the Parliament to take the initiative to make appropriate consultations with the affected people. It is therefore a misdirection for the learned judge to hold that the appellant had the responsibility to prove that the consultations did not happen."

56. The question therefore is whether there was public participation

and if so whether it was adequate. The Court of Appeal expressed the law in that respect in the case of **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR** as follows:

"43. It is now settled, that what matters in determining whether the constitutional threshold of public participation has been met is that at the end of the day a reasonable opportunity is offered to the members of the public and/or all interested parties to know about the issue/project and to have an adequate say on the same."

57. The respondents have attached to their replying affidavit dated 23rd May, 2018 annexures marked 'PMM-1' and 'PMM-2' as proof that they carried out adequate public participation. The annexure marked 'PMM-1' comprises the 'Minutes of the Nairobi Metropolitan Area Council Meeting held on 7th September 2017.' The attendants of the meeting included the governors of the interested parties save for those of Kiambu and Kajiado counties. In the meeting, the participants discussed the appointment of independent members of the board, the NAMATA profile, and updates on the Mass Transit Systems for the Nairobi Metropolitan Area. The bundle also includes the list of participants for the 'Nairobi Traffic Mobility and Decongestion Committee Meeting held on 16th April 2018'; the 'Meeting between NAMATA and Matatu Operators held on 16th January 2018'; as well as

the various secretariat meetings of the NAMATA held in Nairobi, Kiambu, Machakos and Murang'a counties. The annexure marked 'PMM-2' contains the Report of the NAMATA retreat held from 16th to 18th March, 2016.

58. It is my finding that the respondents have tendered significant evidence that they engaged with and involved the relevant stakeholders like the matatu operators and those who are likely to be affected by the Mass Transit System for Nairobi Metropolitan Area in the planning of this project and the appointment of the members of the Board of the NAMATA. The governors of the counties involved in the project and other county representatives were also been involved in various workshops and meetings with the 2nd Respondent and the NAMATA secretariat.

59. It is therefore my finding that there has been adequate public participation contrary to the Petitioner's allegation. The establishment of the NAMATA was therefore not a unilateral decision.

60. I have determined that the Petitioner has not demonstrated that the respondents violated the constitutional integrity of the county governments by establishing the Nairobi Metropolitan Area Transport Authority. It is my finding that the Authority does not pose any risk to the resources and revenue of the county governments and neither does it

seek to usurp the powers of the county governments under the Fourth Schedule of the Constitution. The 2nd Respondent has shown through evidence that they undertook sufficient public participation with the relevant stakeholders in the formulation of the NAMATA. For the stated reasons I find the petition without merit and I dismiss it. The petition having been brought in the public interest, I direct the parties to bear their own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 22nd day of September, 2021.

W. Korir,
Judge of the High Court