

**PUBLIC PARTICIPATION IN THE BUDGET MAKING PROCESS OF COUNTY  
GOVERNMENTS; A CASE ANALYSIS OF SELECT COUNTIES.**



**UNIVERSITY OF NAIROBI**

**BY**

**SONGOLE BRILLIAN ASINGWA**

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## **DECLARATION**

### **Student's Declaration**

I hereby declare that this research project has not been presented for any degree in any University.

Name: Brillian Asingwa Songole

Signature:

Date:

### **Supervisor's Declaration**

This research project has been submitted for examination with my approval as the University Supervisor: Ogutu Kennedy

Name:

Signature:

Date:

## **DEDICATION**

This research is dedicated to my father, who has been and continues to be a source of encouragement and inspiration to me. Thank you for supporting me through this project and my education since I was little.

To my mother for being supportive and always saying prayers for me.

## **ACKNOWLEDGEMENT**

I thank the almighty God for all the provisions and care throughout my academics at University of Nairobi.

I first of all extend my sincere gratitude to my lectures at University of Nairobi - Law Department who have equipped me with academic knowledge that has enabled me to finish this course successfully.

Special thanks to my supervisor for always creating time to guide me throughout my writing.

Greater appreciation to my parents and brothers who have always been there for me. God bless you all.

**MAY THE ALMIGHTY GOD REWARD AND BLESS YOU ALL ABUNDANTLY.**

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## **List of Abbreviations**

UN	United Nations
PFM	Public Finance Management Act
LASDAP	Local Authorities Service Delivery Action Plan
CDF	Constituency Development Fund

## **Abstract**

With the passing of the new constitution came in the concept of devolution and the sharing of power and resources between the national and county government, and among the constituencies within the county governments.

The concept of devolution was meant to control imbalances in regional development and bring into existence citizen participation in the management of public resources by bringing decision-making closer to the people, hence promoting poverty alleviation and improving service delivery.

Decentralization of resources including public funds aims at ensuring that development planning is done at the county level where the communities' needs are best captured through public participation in the identification, analysis and prioritization of development projects through participatory planning and budgeting processes.

Public participation is of fundamental importance as it provides an opportunity to the citizens to participate in management of public finances. The project will therefore seek to examine various aspects, first, the challenges affecting citizen participation in budget making process of county governments in Kenya.

Secondly, to examine the history of public participation in Kenya before and after the passing of the new constitution (2010). Thirdly, the legal framework governing public participation in the budget making process at the county government level and fifthly, the extent to which county governments have implemented public participation in the budget making process.

To demonstrate the extent which public participation has been implemented by county governments, a case analysis and review of various researches and surveys conducted on various county governments will be analyzed.

Although county governments have enacted various legislations for public participation nevertheless citizen participation in the budget making process of county governments remains elusive as it is not being conducted effectively and efficiently as anticipated by the Constitution.

The legislations enacted have not provided clear structures on how public participation should be conducted. The study will seek to define various other numerous challenges that hinder effective public participation. These challenges include low literacy levels, lack of knowledge and poor understanding of laws in the budget making processes amongst others. County governments therefore need to come up with clear, defined structures and processes so as to overcome these challenges and ensure that effective and efficient public participation as a constitutional duty is being carried out as required under the law.

The research project is adopting the doctrinal and case study methodology. It will seek to rely on primary and secondary sources of information. Some of the primary sources will include legislations, decided cases, media publications, newspapers, government policy documents, existing surveys and reports. Secondary sources of information and online materials will be used.

The theoretical framework for the study will rely on the right based theory to give guidance on how county governments and citizens are to know what roles they are to play so as to ensure that public participation is effective and efficient and how best they can work together

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# CHAPTER ONE: INTRODUCTION

## 1.0 Introduction

Public finance management in Kenya has undergone fundamental changes since the enactment of the new Constitution which dedicated an entire chapter to public finance. This came against the backdrop of the repealed Constitution which had weak structures and policy frameworks for public participation during the budget making process and its implementation.

Under the old constitutional order, decision-making in terms of financial management was always shrouded in secrecy with little room for the involvement of the public. Additionally, financial decisions in most cases were made by the Executive.<sup>1</sup>

The passage of the new Constitution was followed by the enactment of a new Public Finance Management Act, 2012 which opened up an avenue for public participation whose aim is to promote inclusivity, accountability and transparency in the management of public finances. This was done by consolidating the laws on public finance management while repealing the old statutes that governed public finance pre-2010 so as to give effect to the new Constitution.

With this new constitution came the concept of decentralization of power, resources and public funds between the national and county governments, and among the constituencies in county governments.

The decentralization of public funds was aimed in part at controlling imbalances in regional development and bringing into existence citizen participation in the management of public resources by bringing decision-making closer to the people, hence promoting poverty alleviation and improving service delivery. Decentralization of these funds also aims at

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<sup>1</sup><https://www.icpak.com/wp-content/uploads/2015/09/Chapters-on-Public-Participation-in-Public-Finance-Management-and-Publi.pdf>



ensuring that development planning is done at the county and local levels where the communities' needs are best captured through public participation in the identification, analysis and prioritization of development projects through participatory budgetary planning processes.<sup>2</sup>

To achieve public participation county governments enacted various legislations which would ensure that members of the public are able to actively participate in the budget making process. However, the said legislations do not give clear structures and process of how the exercise will be carried out efficiently and as a result meaningful public participation still remains elusive.

### **1.1 Statement of the Problem**

An effective and efficient government is one which is responsive to the needs and wants of its citizens while recognising that these wants and needs are often varied and sometimes divergent. To be able to understand this, there is need to have citizens participate in pointing out to government what their needs and wants are. This can only be done if county governments come up with structures and procedures which will ensure citizens engage in meaningful participation.

Although county governments have come up with legislations on public participation nevertheless there are no clear defined procedures, structures and processes on how to engage in meaningful participation which will ensure the needs of the citizens are catered for.

This problem is not unique to county governments only; the national government also does not have clear defined procedures on public participation during its budget making. The challenge for County Governments in Kenya is therefore is how to come up with clear defined structures and procedures that will ensure that public participation as a constitutional duty is

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<sup>2</sup>Institute of Economic Affairs, 'Development Planning, Implementation and Public Participation; Lessons from Constituency Development Fund and Issues of Policy Consideration' Issue No. 12, 2012.

implemented effectively and efficiently. Clear defined structures, processes and procedures will also help county governments overcome challenges hindering effective and efficient public participation from being carried out as required under the law

## **1.2 Justification**

The study aims at showing how effective and efficient public participation during the budget making procedure in county governments will enable county governments understand and appreciate the different needs and interest of their citizens which in turn will reduce social conflicts. Structured public participation will make county governments more accountable, transparent and responsive in the management of public finances hence there will be a positive response to the needs of the citizens which will in turn lead to development. Through structured, effective and meaningful participation, the budget exercise becomes more legitimate and acceptable as competing and diverse interests of the citizens are resolved and considered during the process. The process also promotes trust in the county government by citizens as they feel a sense of ownership.

By having clear and defined structures and processes, the marginalized will also have an opportunity to present their concerns and lobby for their interest to be incorporated in the budget.<sup>3</sup> Service delivery will also be more effective as the needs of diverse groups will have been factored into the budget.

## **1.3 Chapter Breakdown**

Chapter one introduces the study and gives us its context. It identifies problem statement, sets the research's main objective, relevant questions of inquiry and gives the hypothetical answers to the relevant inquiry questions.

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<sup>3</sup> Wandaka Lewis Mungai, Eric Kanyi and Odindo Opiata, 'Citizen participation in the budget process' Economic and Social Rights Centre, 2013

The chapter also gives a detailed literature review, the conceptual framework as well as the research methodology.

Chapter two will address the historical background of public participation in Kenya. It will briefly look at public participation history during the colonial period, pre 2010 constitution period and post 2010 constitution period.

Chapter three will look at the various legal frameworks which public participation is anchored on in Kenya. Various decided court cases regarding public participation will be highlighted in the chapter too.

Chapter four of the paper will present some of the recent case studies in order show the extent in which county governments have undertaken public participation. It will also highlight the challenges that public participation faces.

Chapter five concludes by recommending what needs to be done in order to better public participation and ensure it is carried out effectively.

#### **1.4 Research Questions**

The main objective of the study is to examine the challenges that public participation in the budget making process of county governments in Kenya is experiencing. The following research questions will also be investigated;

- 1 To examine the history of the public participation exercise before and after the passing of the new constitution of Kenya.
- 2 To examine the legislative framework governing public participation in Kenya.
- 3 To examine the extent with which county governments have implemented public participation in their budget making process.

- 4 To find out the steps needed to be taken in order to better public participation in the county governments of Kenya.

### **1.5 Research Objective**

The main objective of the study is to examine the challenges that public participation in the budget making process of county governments in Kenya is experiencing

### **1.6 Hypothesis**

Lack or poor structures and process for public participation in the county budget making process results in inefficient and ineffective citizen participation which gives rise to lack of transparency, accountability and inclusivity in public finance management hence promoting misuse of public resources. Clear structures, processes and procedures in public participation on the other hand promotes meaningful, efficient and effective participation which in turn leads to excellent service delivery, reduces corruption, empowers and informs citizens and increases government revenue.<sup>4</sup>

### **1.7 Scope of the Study**

Although public participation is required to be carried out in various levels of decision making, the study will focus on public participation in the budget making process at County government level. It will seek to examine the challenges public participation is experiencing during the budget making process, its historical background before and after passing of the new constitution, what legislative framework it is anchored on and the extent in which county governments have been implemented it.

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<sup>4</sup> Lydia Kimemia, 'Four benefits of public participation in Kenya's Devolved System' 8<sup>th</sup> Septemebr,2017

## **1.8 Theoretical Framework**

The study relies on the right based perspective theory which seeks to answer the main research objective by advocating for the right bearer to know their duty. The right bearer in this research is the citizen. It is vital that the citizen who pays taxes hoping for good service delivery will be involved in public participation during the planning stages of the use of the taxes. That effective and efficient participation should involve the right bearer who is required to understand their role in the process.

The right based approach originated from the UN Universal Declaration of Human Rights adopted by the United General Assembly in 1948. The declaration provides under Article 21 that everyone should take part in the conduct of the public affairs.<sup>5</sup> The declaration recognizes participation as a human right.

Article 25 of the International Covenant on Civil and Political Rights also recognizes participation as a critical exercise alongside other rights. It provides that every citizen should undertake participation of the public affairs without any unreasonable restrictions.<sup>6</sup>

The right based perspective theory views citizens' participation as a right which citizens should exercise in their society. That they should be able to express their views towards governance. The concept aims at combating inequality, discrimination, poverty and exclusion.

The right based perspective theory has two main actors/ stakeholders; one is the right holder and the other is the duty bearer. In the research the right holder is equated to the citizen while the duty bearer is the county government.

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<sup>5</sup> United Nations Declaration of Human Rights, Article 21,

<sup>6</sup> International Covenant on Civil and Political Rights, Article 25

The theory advocates for strengthening the duty bearer and empowering the rights holder.<sup>7</sup> Both stakeholders must be educated by articulating the rights of the right bearer and the duty of the duty bearer on the other hand. This will enable effective communication between the two actors.<sup>8</sup>

The theory sees the relationship between the two stakeholders as two ways. It sees the citizens as active actors rather than passive ones. That they need to be informed educated and empowered.<sup>9</sup> Their participation is important and they should not only ensure that they own the projects but also sustain them.

The duty bearer on the other hand should meet the citizens' obligations and encourage them to claim their right. The duty bearers who are equated to governments, have three duties namely; protect, respect and fulfill citizens' rights.<sup>10</sup>

However, critics of the theory are of the view that since the theory advocates for human right then it cannot be help in development because the ability of states to implement policies have been hindered by the need to comply with human rights.<sup>11</sup> That most of the developments which have succeeded have been because they have not been combined with human rights. The critics essentially think that there is no need to involve citizens in coming up with policies.<sup>12</sup>

Our Kenyan Constitution binds all state organs to the bill of rights under Article 20(1).<sup>13</sup> County government is mandated to ensure that they promote public participation in the conduct of their affairs.<sup>14</sup>

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<sup>7</sup> [en.wikipedia.org/wiki/Rights-based\\_approach\\_to\\_development](https://en.wikipedia.org/wiki/Rights-based_approach_to_development)

<sup>8</sup> *ibid*

<sup>9</sup> *ibid*

<sup>10</sup> [www.unfpa.org/human-rights-based-approach](https://www.unfpa.org/human-rights-based-approach) <accessed June 25, 2018>

<sup>11</sup> Nelson, Paul J, 'Human Rights, the millennium development goals and the future of development cooperation' *World Development* 35(12): 2041-2055 (2007),

<sup>12</sup> *ibid*

<sup>13</sup> The Constitution of Kenya, 2010, Article 20(1)

<sup>14</sup> Article 19, *ibid*

In summary the theory is based on ten fundamental principles namely; recognition, participation, empowerment, inclusivity, subsidiary, equity, accountability and social justice.<sup>15</sup>

The theory has a legal foundation both locally and internationally. Governments should therefore facilitate the right to participate in budget making processes at the county government level. The right to participation should be enjoyed by everyone regardless of their status in the society. County governments must come up with structures and procedures for participation as this is one of their duties.

Public participation is one of the principles of good governance.<sup>16</sup> Through public participation citizens determine their development objectives and it is the role of the people elected in office to get their citizens to participate. Public participation has many benefits which include citizen empowerment, generation of new, diverse and innovative ideas and actions, enhancement of citizens- government relationship, appropriate prioritization of projects, improved delivery of public services, government responsiveness.<sup>17</sup>

It is important that the citizens are given feedback as to whether their views were incorporated in decision making. The International Association for Public Participation (IPA2), an association of members who seek to promote and improve public participation advocated for feedback. That for participation to be effective it is important that those participating must as a matter of necessity be assured that their views will be considered during the decision making. It is expected that once the decisions are made, the public will get feedback on how much their input affected the final decisions. Citizen participation aim is to give a voice to the voiceless.<sup>18</sup>

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<sup>15</sup> Kenya Human Rights Commission, 'Training Manual on Human Rights Based Approach to Governance and Development' 2015

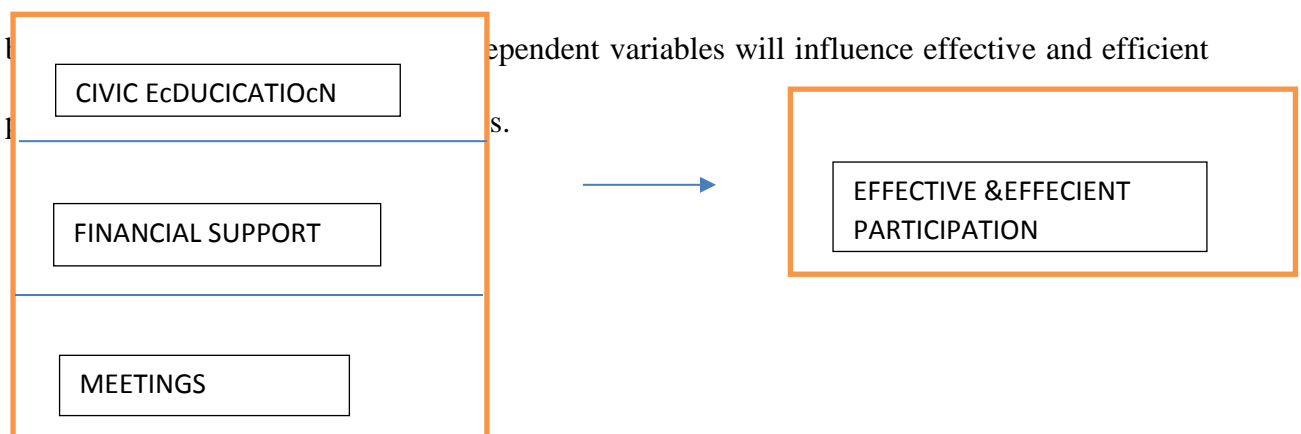
<sup>16</sup> Kenya National Commission on Human Rights 'National values and Principles of Governance' 2016

<sup>17</sup> Chrispine Oduor, Rose Wanjiru and Festus L. Kisamwa 'A review of status of Public participation and County Information Dissemination Frameworks' 2015

<sup>18</sup> <http://www.iap2.org>

Citizen participation through normal institutional channels of election, has little impact on the substance of government policies which lead to diminishing trust in government.<sup>19</sup> Participation should not only end at election but should be adopted as a measure for accountability and transparency in all sectors including financial matters.

Effective and efficient participation must however be supported by other factors. The study will seek to rely on the variables which come into play whenever public participation is exercised. Effective public participation is a dependable variable of civic education. The two cannot be separated because participants must be educated to be able to engage in meaningful participation especially during the budget making process. The precise interpretation of this framework is that for participation to be effective and efficient the independent variables must



### 1.9 Research Methodology

The research is doctrinal and case study methodology. The research will also rely on primary and secondary sources of information. Some of the primary sources will include legislations, decided cases, media publications, newspapers, government policy documents, existing surveys and reports. Secondary sources of information and online materials will be used.

<sup>19</sup>Mohamed Salah Eddin, 'Public participation; Theoretical perspective and application contexts of poverty and inequality' 2009



## 1.10 Literature Review

The literature review will focus on what has been written and research done on public participation.

### 1.10.1 Definition

Public participation is a process that directly engages public in decision making and gives full consideration to public input in making those decisions.<sup>20</sup>

It can also be defined as an action or a series of actions a person takes to involve themselves in affairs of the government and community.<sup>21</sup>

The World Bank defines it as the involvement of individuals and groups that are positively or negatively affected by a proposed intervention subject to a decision making process or are interested in it.<sup>22</sup>

It is a deliberative process by which interested or affected citizens, civil society organizations and government actors are involved in policy making before making a political decision.<sup>23</sup>

Some define it as the process by which an organization consults with interested or affected individuals, organizations and government entities before making a decisions.<sup>24</sup>

IAP2 defines it as the process by which organization consults with interested or affected individuals, organizations and government entities before making a decisions.<sup>25</sup>

There is no universal definition of what effective public participation is and how it should be done. Even though the definitions appear different, they all agree on one thing, that the people

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<sup>20</sup>[www.epa.gov](http://www.epa.gov)

<sup>21</sup><http://Uraia.or.ke> <accessed June 26,2019>

<sup>22</sup><http://siteresources.worldbank.org> <accessed June 26,2019>

<sup>23</sup><http://www.eukn.eu/eukn-research/policy-labs/public-participation-in-the-development-process/general-introduction/what-is-public-participation-different-levels-added-value-and-challenges><accessed June 26,2019>

<sup>24</sup>[https://depts.washington.edu/ccph/pdf\\_files/2-Definitions\\_of\\_CE\\_and\\_PP.pdf](https://depts.washington.edu/ccph/pdf_files/2-Definitions_of_CE_and_PP.pdf) <accessed July, 26,2019>

<sup>25</sup><https://www.iap2.org><accessed June 26,2019>

to benefit from a decision must participate and give their input in the decision making process. In Kenya there is no clear definition of what public participations is. The courts have however tried to define what it is. Judge G.V Odunga in *Judicial review Miscellaneous application number 61 of 2014* defines it as; “ *In my view Public participation ought to be real and not illusionary not to be treated as a mere formality for purposes of fulfillment of the Constitutional dictates.*<sup>26</sup>

In the case of *Doctors for Life Vs. Speaker of the National Assembly and others* the court noted that public participation is defined in the dictionary as taking part with others (in an action or matter). The active involvement of members of a community or organization in decision which affect them”<sup>27</sup>.

### 1.10.2 Typologies

A number of scholars have formulated typologies which outline different levels of participation. Arnstein Sherry comes up with the forms and functions of participation.

She came up with what she called a ladder of citizen participation.<sup>28</sup> She equates citizen participation to citizen power and defines it as the redistribution of power that enables the have nots citizens presently excluded from the political and economic pressures to be deliberately included in the future.<sup>29</sup>

The ladder has eight steps each representing a different level of participation. It is read from bottom to top and each step explains the extent of citizen participation and how much power citizen have to determine the process and outcome.

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<sup>26</sup> Robert W. Gakuru and Others Vrs The Governor Kiambu County and 3 others, High Court Petition 532 of 2013 Consolidated with Petition numbers 12,35,36,42,72

<sup>27</sup>Doctors for Life Vs. Speaker of the National Assembly and Others (CCT 12/05) {2006} ZACC 11: 2006 (12) BCLR 1399 (CC);2006 (6) SA 416

<sup>28</sup> Arnstein, S. ‘A ladder of citizen participation; Journal of the American Institute of Planners’ (1969) retrieved from [www.participatorymethods.org](http://www.participatorymethods.org)

<sup>29</sup>Ibid

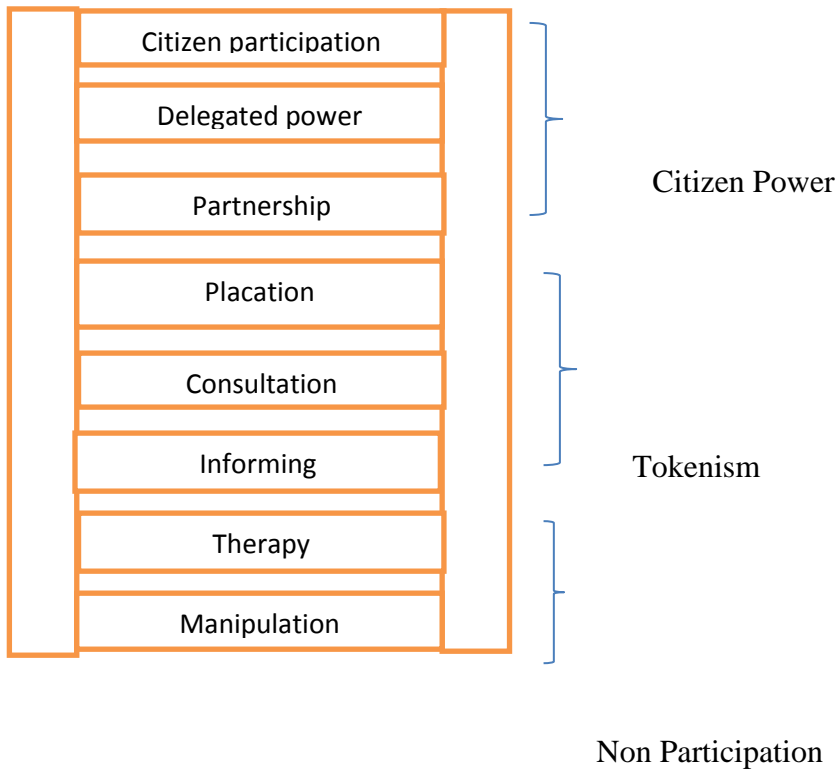


Figure1; Source: Arnstein's Ladder of citizen participation, 1996

The ladder can be further broken down into three main stages: non-participation, tokenism and citizen power. At the lowest end of the ladder, various forms of non-participation are used by powerful actors to impose their agendas. At this level the public is not directly involved in decision making but are tricked into believing they are part of the process. Those in power promise to help the citizens and make them part of decision making where all their opinions will be taken into consideration. They are manipulated through promises.

The second level is tokenism which occurs when participants hear about decisions and may say something about them; the level of involvement is to a certain extent. The citizens are informed about what is going on and then consultation begins. Consultation may affect the people in power since their views are taken into account. The next stage is placation; this is where the

citizens are picked to sit in decision making authorities.<sup>30</sup> For decisions to be effective at this stage, the ratio of citizens in the decision making bodies vis a vis the said authorities must be equal otherwise the decision may tilt to favor the power holders.

The third level of the ladder is the citizen power which has the citizens directly influencing the decision making process. At the partnership level both the power holder and the citizen are on equal footing. The power holder then delegates the power to the citizen to take control and has to start negotiating with the citizen. Majority of persons in the authority bodies are citizens and are able to tilt the decisions and as such are in control.<sup>31</sup>

However, the ladder has its' limitations, for example it does not bring out what obstacles are experienced at each level of participation.

The IAP2 has developed a Spectrum of public participation to guide public participation. It is informed by seven principles.<sup>32</sup> That public participation is based on belief that those who are affected by a decision have a right to be involved in the decision making process and that the exercise should be based on the promise that their views will influence the decisions being made.

The principles recognize that public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decisions makers. That the participants and stakeholder who are to be potentially affected or interested in the decisions should be sought out and facilitated.<sup>33</sup>

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<sup>30</sup><http://www.participatorymethods.org/method/levels-participation> <accessed June 26, 2019>

<sup>31</sup> Arnstein, S. 'The Ladder of citizen participation' 2006.

<sup>32</sup><https://sustainingcommunity.wordpress.com/2017/02/14/spectrum-of-public-participation/><accessed June 26, 2019>

<sup>33</sup>ibid

While seeking their input, the participants should be supplied with the information they need so as to participate in a meaningful way and while at it, their input should be sought in designing the manner in which they will participate.<sup>34</sup>

Lastly, the principles provide that once the participants give their input then those facilitating the exercise should communicate to the participants how their input affected the decisions.<sup>35</sup>

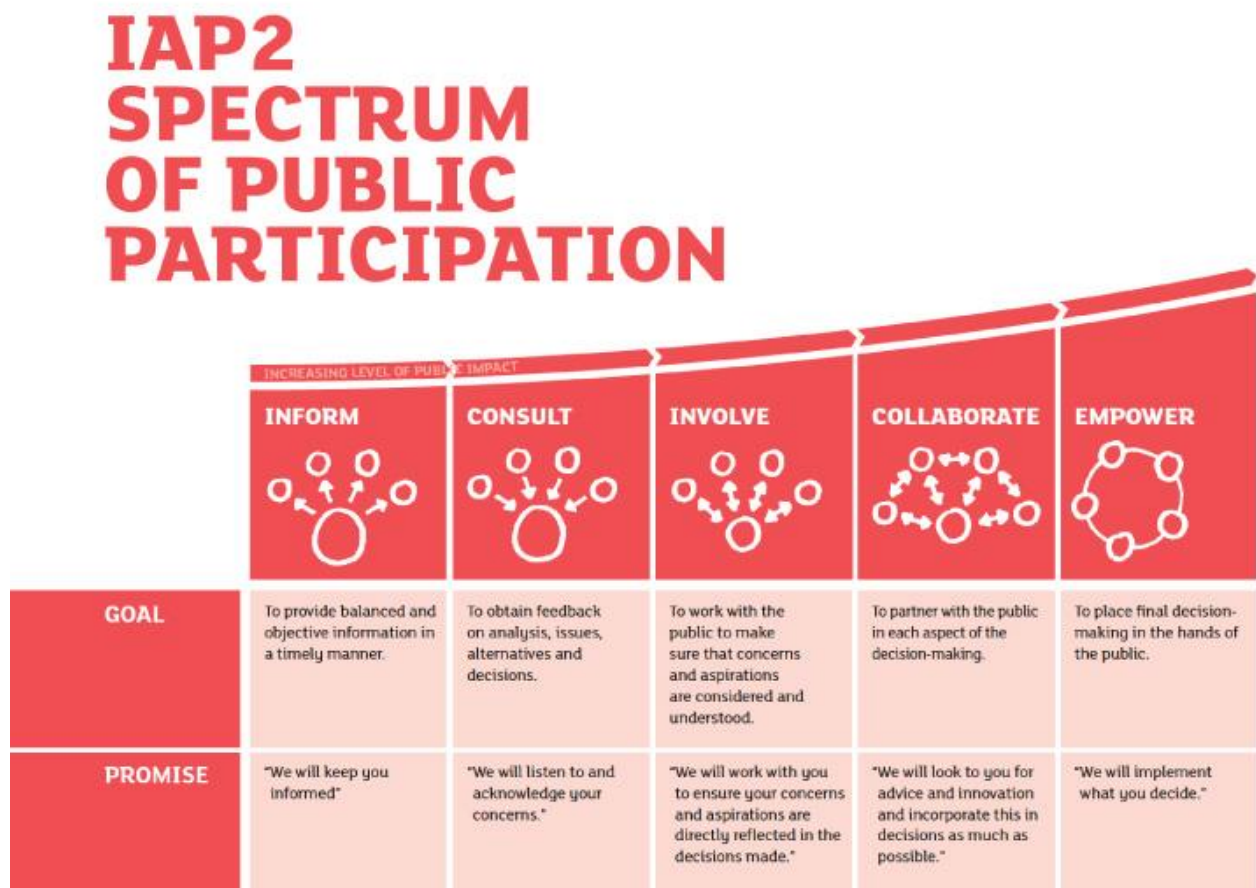


Figure 2; Source: [www.iap2.org](http://www.iap2.org)

<sup>34</sup>ibid  
<sup>35</sup>ibid

The above spectrum is informed by seven principles; careful planning and preparation, inclusion and demographic diversity, collaboration and shared purpose, openness and learning, transparency and trust, impact and action and sustained engagement and participatory culture.<sup>36</sup>

The said spectrum aims to achieve five goals from public participation, however, it does not recognize the challenges faced by participants before they achieve the goals it sets out. It also does not give solutions to the challenges which may be faced during participation. Despite public participation being a constitutional right in Kenya, citizens are not effectively participating in it because of various challenges. These challenges also faced by county governments during the budget making process.

Some of the challenges include, first, public finance is perceived as a technical and complex subject area and as such citizens may not really want to participate. Second, are the high levels of illiteracy and awareness about this exercise. Most Kenyans are not informed that there is such a constitutional duty which they are supposed to undertake.<sup>37</sup> The exercise is only known to the literate people who participate and as a result the interests of a few are taken care of. Other reasons include poverty, unemployment, political interference and many other problems citizens face.

### **1.10.3 Kenyan Scholars/Writers**

Concept of public participation is relatively new in Kenya. It came to Kenya with the passing of the 2010 Constitution which seek to guarantee citizen participation in all sectors on governance. Several researches have been undertaken on it and most agree that public participation is a human right however county governments still have a long way from fully

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<sup>36</sup> Atlee, T. Buckely, S. Godec, J.Harris, R.A Heierbacher, S. Nurse, L. McAllum, S.R (2009), ‘Core principles for public engagement’. Retrieved from

[http://www.thataway.org/files/Expanded\\_Core\\_Principles\\_Public\\_Engagement.pdf](http://www.thataway.org/files/Expanded_Core_Principles_Public_Engagement.pdf)

<sup>37</sup><https://www.icpak.com/wp-content/uploads/2015/09/Chapters-on-Public-Participation-in-Public-Finance-Management-and-Publi.pdf> <accessed June 6,2019>

achieving effective and efficient public participation. That there are various challenges affecting public participation.

The ultimate aim of the Kenyan Constitution is to protect the people's right to have a say in decision making.<sup>38</sup> There is need for governments to have an agreement with citizens on the processes and procedures on decision making.

Christopher Amasava in his research paper whose aim was to find out whether public participation has influence on project implementation and service delivery found out that majority of citizens were not given an opportunity to participate in development projects of the Nairobi county.<sup>39</sup>

In his sample size; 66.5% of the persons noted that they were never given an opportunity to participate in the projects.

The researcher notes that despite public participation being recognized, it did not necessarily translate to it being effectively and efficiently being undertaken. His findings were that the major causes of ineffective public participation at the County Government of Nairobi were poor public awareness, lack of access to information, lack of stakeholder engagement and poor conflict resolution management.<sup>40</sup>

Another research conducted by Geoffrey Rono on devolved system of governance for sustainable development in Kenya revealed several challenges experienced in Kenya in the integration of the concept of public participation in devolved governance. He notes the following as factors which hinder public participation; negative attitude towards public

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<sup>38</sup> Omollo A., 'Policy Proposals on Citizen Participation in Devolved Governance in Nairobi, Kenya: The Institute of Social Accountability'(2011)

<sup>39</sup> Christopher Amasava Ketoyo, 'Influence of public participation on the implementation of County Government Funded Projects: A case of Nairobi County, Kenya' (Masters Dissertation, Kisii University, 2017)

<sup>40</sup> Christopher Amasava Ketoyo, 'Influence of public participation on the implementation of County Government Funded Projects: A case of Nairobi County, Kenya' (Masters Dissertation, Kisii University, 2017)

participation, lack of willingness by citizens to participate, poor political goodwill, poor awareness of public meetings, lack of capacity, poor designed venues, political interference, demand for incentives, lack of time by citizens, nature of language used in the meetings, short notice to attend meeting hence people are not able to reflect and understand what they are going to discuss in the forums.<sup>41</sup>

His study was conducted in three major counties; Kericho, Bomet and Narok and his target population was about 1 million persons.

According to Sebugwango, citizens should be allowed to attend public meetings and know what is happening in public offices and participate in decision making.<sup>42</sup>

Macharia James in his thesis paper conducted a study on how county governments can enact laws and policies that can enhance participation of citizens in decision making. His study reveals that public participation is protected by both international and national laws. That meaningful public participation can only be achieved without any restrictions or any form of discrimination being placed on members of the public.<sup>43</sup>

He points out a case study of Machakos County Public Participation Act which confines the definition of public participation to sector representatives while Meru and Elgeyo Marakwet Acts refer to the exercise as applying to the general citizenry.

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<sup>41</sup>Geoffrey Ronoh, 'Challenges of integrating Public Participation in the Devolved System of Governance for sustainable development in Kenya' International Journal of Economics, Commerce and Management, Vol.VI, Issue 1, January 2018.

<sup>42</sup>Reddy. P, Democratic Decentralization and Local Democracy in South Africa, Re-Examined: Quo Vadis (2010) 29 (Politeia) 66

<sup>43</sup>Macharia James Muriuki, 'Right to public participation in devolved governance in Kenya: A Myth or Reality' (Thesis Report, Nairobi University),2012



He also points out that effective citizen participation is not being undertaken because of various challenges which other researchers and scholars have talked of. His study found out that for there to be real public participation citizens must come out and support the process.<sup>44</sup>

The researcher notes that effective public participation is not being implemented as contemplated by the constitution. Those counties have not done much in developing frameworks towards supporting a meaningful participation.<sup>45</sup>

In his research findings, Abraham Muriru notes that public participation in Local Authorities service delivery has either been very minimum or has been limited. That the only citizen participation being done is consultation on projects and even then the same is not binding.<sup>46</sup>

He notes that public participation has not been effectively been carried out because of various challenges which include short notice given for local authorities consultative meetings, limited access to information, focus on financial audits as opposed to service delivery by local authorities, limited technical and managerial skills.<sup>47</sup>

Abraham recommends that for effective and efficient public participation to occur then the following should be done;

First that there need to be separation of duties between the executive and legislative arms of local government. He proposes that the members who are elected to serve should play an oversight role on the process by formulating policies. The executive on the other hand should be the one to conduct the process of public participation.<sup>48</sup> Secondly, resource allocation for awareness should be raised for both the officials of local government and the citizens. Thirdly,

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<sup>44</sup>Macharia James Muriuki, 'Right to public participation in devolved governance in Kenya: A Myth or Reality' (Thesis Report, Nairobi University),2012

<sup>45</sup> Ibid

<sup>46</sup>Abraham Rugo Muriu, 'Decentralization, Citizen Participation and Local Public Service Selivery, (Thesis) University of Potsdam, October 2012

<sup>47</sup> ibid

<sup>48</sup>ibid

that public participation should be carried out with the convenience of the actors. That it should be planned in terms of resources and time. It should have regular timelines and the same be put in the legal frameworks.<sup>49</sup> Fourth, the process should be premised on long term development projects and goals as this will provide a sense of direction on what is to be addressed and at what times. Lastly, he recommends that citizen participation should be for all local governments' services not just a select few.<sup>50</sup>

Professor YashGhai acknowledges that public participation is the ability for the minorities to bring relevant facts to decision makers by arguing their position before the makers of the decision so as to establish their own institutions in specified areas. He notes that states should set up systems of government and administration which allows the minorities and indigenous people to participate in decision making. That the legislative procedures should be enacted in such a way that they will allow representatives and indigenous people to participate.

He advocates for setting up of institutions like the Ombudsman that will ensure fair treatment of the minorities and indigenous people.

It is worth noting that some tribes in Kenya do not allow for their women to air their views. The Australian Institute of International Affairs conducted a research in Kenya in April/May 2018 and the same revealed that eight years after the passing of the constitution, women in Kenya still struggle for political participation.<sup>51</sup>

Institute of Certified Public Accountants of Kenya notes that citizen participation on the public finance management in Kenya is low during the budget making procedure. The institute notes that despite various laws being enacted on citizen participation, citizens have not effectively

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<sup>49</sup>ibid

<sup>50</sup>Abraham Rugo Muriu, 'Decentralization, Citizen Participation and Local Public Service Delivery, (Thesis) University of Potsdam, October 2012

<sup>51</sup>Sarah Hewitt, Australian Institute of International Affairs, 'The struggle for Women's participation in Kenya' 1<sup>st</sup> Septemebr, 2018

participated in fiscal decision making for various reasons including it being viewed as a technical and complex exercise. The institute recommends citizen awareness on the budget process, simplification of the budget and outreach by concerned authorities to citizens.<sup>52</sup>

Professor Ben Sihanya argues that public participation is a two-way consultative process i.e. a bottom up approach as well as a top-bottom approach for effective decision making. He opines that public participation is a group of procedures designed to consult, involve and inform the public by allowing those who will be affected by the decision to give their input.<sup>53</sup> That counties must organize forums for the citizens to express their views and opinions.

He defines public participation as a process in which the key stakeholders influences the process of enactment of laws, policy making, allocation of resources and accessibility of public goods and services.<sup>54</sup> The good Professor proposes the need for forum groups for discussion. He opines that counties should have small forums groups of five to twelve members to represent the public. The forums should be gender balanced.

Moseti proposes various ways in which public participation can be undertaken. He proposes the formation of various forums namely; study circles, citizen advisory boards, public hearings and public watchdogs. For example, he notes that study circles should encompass people of different ethnicity, education level and religion. The citizen advisory board on the other hand should be for purposes of handling housing and economic development issues. That anyone can volunteer to be in the forum and the board should be independent of authorities. The writer forgets that citizen participation should involve all stakeholders. The decision makers must form part of the forum.<sup>55</sup>

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<sup>52</sup> The Institute of Certified Public Accountants of Kenya, 'Citizen participation in public finance management in Kenya' Concept notes, May,23,2018

<sup>53</sup> Sihanya B., 'Public participation and Public Interest Litigation under the Kenyan Constitution' Vol.9 (1), The Law Society of Kenya Journal 12,(2013)

<sup>54</sup> Ibid

<sup>55</sup> Y Mostei, 'Public Participation for sustainable development in local cities, Congress Kenya' (2010)

Even though the two scholars propose tools for participation, they do not tell us what criteria will be used to select the members of the forum having in mind counties have members of different tribes, races, religion and cultural values.

One write by the name Philip Adede analyses the concept of public participation in Kenya and acknowledges that indeed public participation experiences various challenges and the same is not up to standard. He notes that there is need for county government to build capacity of citizens, communicate effectively, mobilize resources for public participation.<sup>56</sup>The writer also acknowledges that effective public participation will be informed by how a given community is structured.

Francis Kairu and Mary Maneno emphasize that public participation is a principle which tries to bring a balance between governing for the people and governing by people. They argue that the fundamental aspect of public participation are the promotion of credibility and integrity in public institutions and can also help boost public confidence. That the key players in public participation are the people with interest and are likely to be affected by the decision.<sup>57</sup>

Justice Lenaola argues that promoting public participation is a demonstration that an institution represents the people in whom sovereign power vests and also enables the public to own institutions. He notes that by embracing public participation, the Judiciary will be sharing the successes and failures of the institution. Doing so will help develop processes that can track and be alive to the changing demands of the society.<sup>58</sup>

That public participation will reenergize the judicial system by opening up dialogues between the Judiciary and its stakeholders hence enabling them find long lasting solutions.

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<sup>56</sup>Philip Adede, 'An analysis of the Concept of Public Participation in Kenya' International Journal of Law and Policy, Volume 1 issue 2, pp 46-57, 2017,

<sup>57</sup>Francis Kairu and Mary Maneno, 'Public Participation, 'Kenya's Best Weapon Against Graft and Poor Governance' Adili newsletter, August, 2012.

<sup>58</sup>Justice Lenaola, 'Public Participation in Judicial Process; Mainstreaming Court Users' Committee' 2011.

Kenyan Judiciary has embraced public participation through the court users' committees which brings together all the stakeholders of the judicial system. The said committee is a review mechanism on how the courts are working and what they need to improve on.

From the above literature, all the scholars and writers agree that indeed public participation is an important ingredient for good decision making. However, the literature does not indicate clear defined structures, processes and procedures on how public participation should be undertaken. There is need to have a clear and defined structures, processes and procedures that will ensure meaningful participation. There is a disconnect between the law and how the process is being handled on the ground.

It should also be noted that the process is relatively still new in Kenya and as such not much literature had been prepared on the topic. County Governments are still grappling on what should be the best practice for effective and efficient participation. Many of the studies undertaken have been on the challenges facing public participation but have not addressed the exact structures and processes to be adopted in public participation.

## **CHAPTER TWO: HISTORICAL BACKGROUND**

### **2.0 Historical Background of the Study**

This chapter will address the historical background of public participation in Kenya. It will briefly look at public participation history during the colonial, the pre- 2010 and post 2010 constitution periods in Kenya. It will also briefly state what challenges public participation experienced during these periods.

#### **2.1 Post Colonial period**

The history of citizen participation in Kenya began with their participation in community development projects. Government had tried to institutionalize decentralized planning and implementation of projects as early as 1960's through sessional papers. The most common sessional paper came into force in 1983, it was known as the District Forum for Rural Development. This was after Kenya had gained independence and enacted the 1996 Constitution. In the said year, a District Forum for Rural Development was created and its' aim was to encourage community participation in identification, planning and implementation of development projects at the district level. Officers from government were involved in planning and implementation of programs. The District focus however faced challenges since it lacked a legislative framework for running it and it eventually died.<sup>59</sup>

#### **2.2 Pre 2010 Constitution Phase**

In 1996, Kenya enacted the Physical Planning Act, which provided for community participation in the preparation and implementation of physical and development plans. However, participation did not succeed as it experienced various challenges. One of the challenges it experienced was the fact that physical planning would happen in major towns and

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<sup>59</sup>Preston O. Chitere and Onesmus. N. Ireri, 'District Focus for rural development in Kenya; its limitations as a decentralisation and participatory planning strategy and prospects for the future' 2004.

so citizens residing in remote areas could not engage in public participation. Secondly civic education was never carried out and as such the citizens never knew what the exercise was all about and as such they did not know how to engage in the exercise.<sup>60</sup>

In 2001, the Ministry of Local Government introduced the Local Authorities Service Delivery Action Plan (LASDAP) whose aim was to improve participatory planning, governance and service delivery in local authorities. The nature of the said programme was participatory such that it involved stakeholders, self-help groups, residents, organizations, religious groups, education institutions, health institutions, NGOs and individual groups. It created an opportunity for citizens to participate in decision making at the local level.<sup>61</sup>

Subsequently, in 2003, the Constituency Development Fund was also created with an aim to have communities participate in management of public finances through various projects.

The CDF and LASDAP faced numerous challenges amongst them public apathy, lack of what constitutes effective and quality participation, lack of clear timelines for participation, lack of standards to approach public participation, lack of adequate access to information to the public, lack of determinations of what the public was, heavy political control, poor civic education before participation and lack in inclusivity of minority groups.<sup>62</sup>

### **2.3 Post 2010 Constitution Phase**

Before the enactment of the new Constitution in 2010, details of the Kenyan budget making process was hidden deep within the confines of the Executive which included the Ministry of Finance. Parliament and the public remained in the dark as the experts in the Ministry of

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<sup>60</sup>Okello M. Oenga, I. and Chege P., 'Participatory Urban Planning Toolkit Based on the Kitale Experience; A guide to community Based Action Planning for effective infrastructure and service delivery' (2008)

<sup>61</sup>Christopher Finch, 'Participation in Kenya's Local Development funds; reviewing the past to inform the future' 2015.

<sup>62</sup>Kenya Human Rights Commission and Social and Public Accountability Network(SPAN), 'Harmonization of Decentralized Development in Kenya: Towards Alignment, Citizens Engagement and Enhanced Accountability (3020): National Taxpayers Association (NTA) Budget Transparency and Citizen Participation in Counties in Kenya' (2013).

Finance went about preparing the budget estimates. Members of the public only got to know the full details of the government's budget at the last minute when the Minister in charge of Finance presented the estimates before parliament. Mixed reactions and divided opinions were raised by professionals. Civil society would point out the pros and cons of the estimates. Various accusations would be raised, including accusations of political marginalisation of some sections of the society.

The professionals would accuse the Minister of having ignored certain key sections such as health, education e.t.c. However, these reactions had no effect, as the unpleasant truth was that people of Kenya and their elected representatives had been over –looked in the budget making process.<sup>63</sup>

Public finance management in Kenya has undergone fundamental changes since the enactment of the new Constitution which dedicated an entire chapter to public finance. This came against the backdrop of the repealed Constitution which had weak structures and policy framework for the management of public funds in general and public participation in particular.

The passage of the new Constitution was followed by the enactment of a new Public Finance Management Act whose aim is to promote accountability and transparency in the management of public finances by consolidating the laws on public finance management while repealing the old statutes that governed public finance pre-2010 so as to give effect to the new Constitution.

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<sup>63</sup>Maxwell, 'Administrative Law' (Legallaw.com 2005) retrieved from <http://www.ustawi.info.ke/index.php/public-finance/public-finance-under-the-new-constitution?showall=&start=12>



With the new constitution came the concept of devolution and the sharing of power, public funds and resources between the national and county governments, and among the counties themselves.

This decentralization is aimed in part at controlling imbalances in regional development and bringing into existence public participation in the management of public resources by bringing decision-making closer to the people, hence promoting poverty alleviation and improving service delivery.

Public participation in the budget making process of county governments aims at ensuring that development planning is done at the county and local levels where the communities' needs are best captured through participation in the identification, analysis and prioritization of development projects through participatory planning processes.<sup>64</sup>

In 2010, a new constitution was enacted and had public participation recognized as a national value and a principle for good governance.

The enactment of the said Constitution led to devolution and decentralization of power and public finances to county levels hence there was need to have a good public finance management system which would ensure that the devolved funds are properly managed.

One central objective of Chapter Twelve of the 2010 Constitution is to promote proper management of public finance management through the establishment of a sound institutional and regulatory environment at both national and county level. Article 10 provides for the national values and principle which are also aimed at promoting good management of the public finances. Among the national values provided for in Article 10 is public participation which, like other values, is to be applied by all state institutions and the persons working in

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<sup>64</sup>Institute of Economic Affairs, 'Development Planning, Implementation and Public Participation; Lessons from Constituency Development Fund and Issues of Policy Consideration' Issue No. 12, 2012

them. Public finance management is a public function and as such all entities which manage public finances must execute their functions with adherence to national values which include public participation.<sup>65</sup>

Chapter Twelve of the Constitution of Kenya,2010 provides for the principles and framework of public finance management which if strictly followed can lead to good management of public resources. Among the principles provided for are openness, accountability and public participation in financial matters.<sup>66</sup>

Public participation during budget making process is of fundamental importance as it provides an opportunity for the citizens to participate in management of public finances. If strictly adhered to, public participation will strengthen policy formulation which in turn will lead to development. It is also important because it will promote transparency and accountability which are key ingredients of good governance and management of public finances.

In order to operationalize the provisions of Chapter 12 of the Constitution on public finance management, Parliament enacted the Public Finance Management Act, 2012. Section 3 of the Act reiterates that the management of public finances at the county and national levels of government should be in accordance with the Constitution.<sup>67</sup> Section 35(2) provides that when making budgets the public must be allowed to participate.<sup>68</sup> The County Executive Committee members are to ensure that public participation is undertaken during the budget making process.

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<sup>65</sup> Constitution of Kenya,2010, Article 10(2),

<sup>66</sup> Constitution of Kenya,2010, Article 201(2),

<sup>67</sup> Public Finance Management Act, 2012, Section 3 (a)

<sup>68</sup> Public Finance Management Act,2012, Section 125 (2),

The Public Finance Management Act goes further to provide that there shall be regulations to the Act which should provide for the structure of public participation, public meetings and hearings, mechanism and procedures of public participation.<sup>69</sup>

Public participation in financial matters is therefore a civic duty aimed at contributing to the management of public finances and resources. However, this duty has been faced with numerous challenges and the citizens and institutions concerned are not supportive of the exercise. Institutions charged with this responsibility should ensure that public participation as a constitutional duty is implemented effectively and efficiently. This will require implementation of laws and structures which will promote this constitutional requirement in order to support the other principles of good financial management as provided for in the Constitution and the Public Finance Management Act, 2012, the regulations thereto and other laws which call for public participation.

Under the new Constitution, various state institutions have been created to manage public finances of the Country. These institutions are created for purposes of promoting good management of public resources so as to avoid wastage of public finances. Some of the institution includes the County Government, Parliament, Judiciary, Executive, Treasury, Commission for Revenue Allocation, and Office of the Controller of Budget, Office of the Auditor General and the Salaries and Remuneration Commission.

The Judiciary plays an auxiliary role in public finance management. Its' role is to ensure accountability and good governance is achieved in the management of the public finances. It does this by enforcing the public finance laws, interpreting the laws and providing advice to various institutions.

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<sup>69</sup> Public Finance Management Act, 2012, Section 207,

Devolution is considered as a way of promoting political stability, development and accountability by ensuring adequate representation and the participation of all Kenyans in the management of the public finance resources.

Under the new Constitution of Kenya (2010), public participation especially in budget making is expected to be more transparent, inclusive and allow the participation by stakeholders.<sup>70</sup>The key provisions dealing with public participation in the Constitution, the Public Finance Management Act and the County Government Act aim at promoting devolution and the process of fiscal decentralization to the forty-seven counties. Public participation is included in these laws as a way of ensuring citizens participate in the affairs of government.

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<sup>70</sup> *ibid*

## **CHAPTER THREE: THE LAW & PRACTICE OF PUBLIC PARTICIPATION IN THE COUNTY BUDGET PROCESS IN KENYA**

### **3.0 Introduction**

The chapter will look at the various legal frameworks which public participation is anchored on. Various laws have been enacted for purposes of ensuring that members of the public have a say during the budget making process and other decisions which may affect them.

### **3.1 Legal Framework for Public Participation in Governance in Kenya**

The need for Public participation in Kenya is anchored on various laws which are aimed at providing a platform where citizens can participate in the affairs of the country. The first amongst these is the Constitution of Kenya, 2010 which has various articles that give rise to public participation.

#### **3.1.1 Public Participation Under the Constitution of Kenya 2010**

The Constitution has various Articles which support public participation. They include Article 10 that places all sovereign power on the people of Kenya and provides for the national values of the country which include transparency, governance, accountability, inclusiveness and participation.<sup>71</sup>

There is also Article 61 which gives members of the public a right to have a say in the matters of land including acquisition, management, transfer and or disposal.<sup>72</sup>

The Constitution also requires Parliament to conduct its' affairs and sittings in an open manner. It should not exclude the media and the people from any sitting except where the Speaker thinks

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<sup>71</sup> Constitution of Kenya, 2010, Article 10

<sup>72</sup> Article 61, *ibid*

is justifiable.<sup>73</sup> County assemblies are equally required to conduct their business in an open manner and, in particular, to provide an opportunity for participation by residents in the affairs of governance.<sup>74</sup>

The Constitution also empowers communities to manage their own affairs and participate in financial matters under Articles 174(d) and 201.

### **3.1.2 Case reviews**

The constitutional provisions have come up for consideration by Kenyan Courts in a number of cases that have been filed since 2010. A review of some of these decisions reveals that the Courts and citizens are keen on public participation.

In **Kenya Union of Domestic, Hotels, Education and Allied Workers Union Versus Salaries and Remuneration Commission and Attorney General (Petition Number 284 of 2013)**, it was contended that the Salaries and Remuneration Commission did not ensure public participation when coming up with Remuneration and Benefits of State and Public Officers Regulations of 2013.<sup>75</sup>

Although the High Court dismissed the Petition, Justice Lenaola expressed his opinion that looking at the law as expressed in the Constitution, it would be expected that just like the Legislature and any other body empowered to make laws including County Assemblies, independent Commissions must engage the public before making regulations. In his opinion, public participation is a principle that must generally be adhered to.<sup>76</sup>

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<sup>73</sup>Constitution of Kenya, 2010,Article 118,

<sup>74</sup>Article 196

<sup>75</sup> Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission [2014] eKLR

<sup>76</sup>Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission [2014] eKLR

In **Republic V IEBC Ex Parte NASA & 6 Others Judicial Review No. 378/2017**, the NASA Coalition challenged the IEBC's decision to award the tender for the printing of ballot papers for the August 2017 general elections to Al Ghurair PLC on the grounds, among others, that the Commission did not facilitate public participation and/or consultations with the relevant stakeholders while awarding the tender.<sup>77</sup>

When the matter first came before the Judicial Review Division of the High Court, the IEBC argued that it should not be faulted for failure to facilitate public participation given that there were no guidelines on what exactly constituted public participation and who should be consulted. In the end, a three-Judge bench nullified the tender award after it agreed with the Petitioners' contention that mandatory public participation was not carried out in the tender process, saying that the mere absence of guidelines and regulations did not excuse the IEBC from undertaking public participation.<sup>78</sup>

Although the Court of Appeal agreed that public participation was mandatory, it disagreed with the High Court's definition of public participation, holding instead that the open invitation of bids from any qualifying company constituted adequate public participation.<sup>79</sup>

In **Robert N. Gakuru & Others Versus the Governor Kiambu County and 3 Others**, the High Court grappled with the obligation of county governments to undertake public participation before passing legislation. The Petition challenged the legality of the County

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<sup>77</sup> Republic Versus IEBC Ex parte NASA & 6 Others, Judicial Review No.378/2017

<sup>78</sup> *ibid*

<sup>79</sup> Republic Vrs IEBC Ex parte NASA & 6 Others (2017) eKLR, Judicial Review No. 378/2017

Government of Kiambu Finance Act on grounds that it was introduced and passed without the participation of the respondents.<sup>80</sup>

Judge Odunga held that the “*County assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation in question involving important aspects such as payment of taxes and levies, the duty is even more onerous.*”<sup>81</sup>

In the case of **Josephat Musila Mutual & 9 others Versus the Attorney General & 3 others** the court held that Sections 3(3) and 11(2) of the Auctioneers Act No. 5 of 1996 were inconsistent with and in contravention of the Constitution and therefore unconstitutional.

The Petitioner who were registered auctioneers had filed a petition on grounds that the auctioneers licensing board had reviewed the Auctioneers Act without taking into account the views of the stakeholders.<sup>82</sup>

The Petitioners alleged that the procedure which led to amendment of the said act had contravened Article 10 of the Constitution which advocates for public participation. That Article 118 had also been violated.

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<sup>80</sup> Robert N. Gakuru and Others Vrs the Governor Kiambu County and 3 Others, 2014eKLR, High Court Petition Number 532 of 2013

<sup>81</sup>Robert N. Gakuru and Others Vrs the Governor Kiambu County and 3 Others, 2014eKLR, High Court Petition Number 532 of 2013

<sup>82</sup>Josephat Musila Mutual & others Versus Attorney General & 3 others (2018) eKLR



Court dismissed a petition filed in **Lucy Wanjiru & Another Versus the Attorney General and Kajiado County Government**. The petitioners in the matter were seeking a declaration that Kajiado County Finance Act be declared unconstitutional as it did not engage the public.<sup>83</sup>

Court was of the opinion that the county government had taken reasonable steps to give public and stakeholders an opportunity to give their views on the Finance Act.<sup>84</sup> The Judge indicated that it was not necessary for each and every individual be given a hearing. What mattered was that residents and stakeholder be offered an opportunity to participate.

In deciding the matter, the Judge relied on the **Borbet South AFRICA pLY Ltd & Others Versus Nelson Mandela Bay Municipality 3751of 2011 (2014) ZA EA PEHC 35(2014) 5 SA 256** where the courts held that the obligation to encourage public participation at local government level goes beyond a mere formulation in which public meetings are held and information is shared. That the concept of participation as envisaged in the constitution requires interplay between affected representatives, structures and participating community is address by appropriate mechanism. Steps must be taken to ensure people have the ability and capacity to participate.<sup>85</sup>

The Judge also relied on **Meru Bar Wines and Spirits Owners of Self Help Group Versus County Government of Meru** where court held that the respondents were able to produce evidence of publicized public meetings consultative forums was enough evidence to proof that public participation took place.<sup>86</sup>

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<sup>83</sup> Lucy Wanjiru & Another Versus The Attorney General and Kajiado County Government, Petition 3 of 2015 eKLR

<sup>84</sup> ibid

<sup>85</sup> Borbet South African Ply Ltd & Others Versus Nelson Mandela Bay Municipality 3751 of 2011 (2014) ZA EA PEHC 35(2014) 5 SA 256.

<sup>86</sup> Meru Bar Wines and Spirits Owners of Self Help Group Versus County Government of Meru (2014) eKLR

In Wilfred Manthi Musyoka Versus County Assembly of Machakos & Others court issued a declaration to the effect that the respondents had failed to facilitate public participation and involvement in the process of legislation that led to the amendment of Machakos County Standing Orders. That the same were in violation of Article 196 of the Constitution. Court issued an order for prohibition stopping the operation of the implementation of the standing orders.<sup>87</sup>

### 3.1.3 International Legal Framework for Public Participation

Kenya is a party to many international treaties on democracy and participation and has ratified many of them. Such treaties include the Universal Declaration of Human Right which provides. Under the Articles 21 that “*everyone has the right to take part in the government of his country, directly or through freely chosen representatives*”.<sup>88</sup>The said treaty considers participation as a human right.

Article 13 of the United Nations Convention Against Corruption to which Kenya is a signatory also provides for participation. The Article provides that state parties are to take appropriate measures within its domestic laws to promote active participation of individuals and groups outside the public sector such as the civil society, non-governmental organization and community based organizations in the prevention and fight against corruption.<sup>89</sup>

There is also the International Covenant on Civil and Political Rights which was ratified in Kenya on 1<sup>st</sup> May, 1972 and it provides for public participation under Article 25. The Article

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<sup>87</sup> Wilfred Manthi Musyoka Versus County Assembly of Machakos & Others (2019) eKLR

<sup>88</sup>Universal Declaration of Human Rights, Article 21(1)

<sup>89</sup>United Nations Convention Against Corruption, Article 13

provides that every citizen has a right to take part in public affairs, directly or through freely chosen representatives.<sup>90</sup>

These treaties are part of the Kenyan laws by virtue of Article 2(6) which recognizes that treaties and conventions which Kenya has ratified shall form part of its laws.<sup>91</sup>

### **3.1.4 National Legislation on Public Participation**

In accordance with the dictates of the Constitution and international law, there are various Acts of Parliament which provide for public participation in the management of public affairs in Kenya. These include the Public Finance Management Act, the County Governments Act, the Urban Areas and Cities Act and the Public Procurement and Disposal Act.

The County Government Act provides for public participation. Various sections of the said act provide for this exercise and they include Section 113 which makes public participation in county planning process compulsory.

The Act stipulates for various principles of public participation which include timely access to information and reasonable access to planning.<sup>92</sup>

Sections 88- 101 of the said Act places a mandate on counties to establish mechanisms which will facilitate communication and access to information using media with widest public outreach. Each county is to have an office for access of information. In a bid to support public participation, the counties are required to create an institutional framework for civic education.

The Public Finance Management Act, 2010 also provides for public participation. The Public Finance Management Act provides for it by virtue of the following sections;

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<sup>90</sup>Article 25, *ibid*

<sup>91</sup> Constitution of Kenya, 2010, Article 2(6),

<sup>92</sup> County Government Act, Section 87.

Section 10(2) which provides that Parliamentary Budget Officer should observe public participation in budgetary matters.

The Cabinet Secretary for Finance, County Executive Committee Member for Finance and Accounting Officers for urban areas are supposed to ensure public participation is carried out during the budget making process.<sup>93</sup>

Counties Governments are supposed to establish structures, mechanism and guidelines for citizen participation.<sup>94</sup>

Section 10(2) provides that the parliamentary budget officer should observe public participation in budgetary matters.

Section 35(2) requires that the Cabinet Secretary should ensure public participation provided for during the budget process and is also required under Section 36(5) to publish regulations prescribing the procedure on how, when and where members of the public shall engage in participation.<sup>95</sup>

The County Executive Committee is tasked with the duty of ensuring that there is public participation in the budget process under Section 125(2)<sup>96</sup> while Accounting officers of urban cities or areas are required to publish guidelines for public participation.<sup>97</sup>

The Act also states what the regulations should provide for. The regulations should amongst other matters provide for structures of participation, right and duties of the members of the community and notification and public comment procedure.<sup>98</sup>

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<sup>93</sup> Public Finance Management Act, 2012, Section 35(2), 125(2) and 175(9),

<sup>94</sup>Section 207, *ibid*

<sup>95</sup> Public Finance Management Act, 2012, Section 35(2)

<sup>96</sup>Section 125(2), *ibid*

<sup>97</sup>Section 175(9)(b) *ibid*

<sup>98</sup>Section 207, *ibid*

The third Act is the Public Procurement and Asset Disposal Act which also places emphasis on transparency of the procurement processes including the requirement by procuring entities to publicly avail procurement records to the public. The Act provides that members of the public are to participate in procurement proceedings without any discrimination.<sup>99</sup>

Other laws which provide for public participation include the Urban Areas and Cities Act, which provides for participation by residents in the affairs of the city through oral or written presentation. In fact, the Act makes participation as one of its' objectives.<sup>100</sup>

Under the said Act, cities and urban areas are required to develop a system of governance that encourages participation by residents in its affairs.<sup>101</sup>

Section 21 of the same Act requires that municipalities or cities should ensure that residents participate in decision making activities in their respective areas.

Owing to the lack of certainty over the true meaning and scope of public participation, there have been attempts to introduce a National Public Participation Law to help bring this clarity. The Public Participation Bill, 2016 was introduced for the first reading in Senate on 15<sup>th</sup> February, 2017 and is still pending to be passed into law. The bill's aim is to provide a general framework for effective public participation.

It seeks to promote and facilitate public participation so as to achieve the constitutional principle on democracy and participation.

Clause 4 of the bill provides for the guiding principles of public participation. These include the consideration of public view as part of the process, the development of appropriate feedback mechanism and access to information amongst others.<sup>102</sup>

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<sup>99</sup> Public Procurement and Asset Disposal Act, 2015, Section 157,

<sup>100</sup> Urban Cities Act.2011, Section 3(c),

<sup>101</sup> Urban Areas and Cities Act, 2011, Section 36

<sup>102</sup> Public Participation Bill, 2016, Section 4

The bill proposes that every public body should develop specific guidelines on public participation. To achieve this, the bill has general guidelines on public participation as a Schedule to the proposed Act. Under these guidelines, the bodied will be required to publish their specific guidelines on public participation in the Kenyan Gazette within three months of commencement of the Act and to prepare annual reports on the same.<sup>103</sup>

These reports are to contain a description of activities and outcomes of public participation exercises, any complaints raised against the institution in respect of the process, the action taken and the period with which the complaint was addressed. The reports are then to be tabled before the National Assembly, Senate and County Assemblies.<sup>104</sup>

The Bill also provides for establishment of an authority which is expected to provide reasonable and meaningful opportunity for the public to participate in public affairs.<sup>105</sup>

### **3.1.5 County Public Participation Laws**

Various counties have passed county public participation laws, including Nairobi, Nakuru, Baringo, Kisii, and Turkana, with similar laws in various stages of development in many of the other counties.

#### **Nairobi County**

Nairobi City County has a Public Participation Act that came into force on the 22<sup>nd</sup> April, 2016. The Act provides for, among others, the forms of public participation, notification procedure for public participation and the guiding principles for public participation. Citizens are to be notified of public participation through notices which shall be published in at least two daily

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<sup>103</sup>Section 7 ibid

<sup>104</sup>Section 8, ibid

<sup>105</sup>Section 5, ibid

newspapers, the official website of the county, radio and any other form of media. The notices are to be in English and Kiswahili.<sup>106</sup>

The act also provides that the County government shall set aside at least two percent of its annual budget for public participation.<sup>107</sup>

### **Kisii County**

Kisii County Public Participation Act was assented to on 7<sup>th</sup> May, 2015 and it came into force on 28<sup>th</sup> May, 2015 while the one for Nakuru will come into force when the Governor proclaims. These Acts are largely similar to the Nairobi County Public Participation Act that has been discussed.

In order to promote accountability for public participation within the County, the Kisii Public Participation Act establishes an office known as the Office of Public Participation whose function is to facilitate and coordinate public participation<sup>108</sup>.

Under the Act, the office shall comprise a Chairperson appointed by the Governor with the approval of the County Assembly, and three members nominated by the private sector, the informal sector and the civil society and Non-Governmental Organizations.<sup>109</sup> The three members shall be appointed by the Governor.

Other members include senior public officers representing the department responsible for finance, public works, agriculture, environment, education and planning. These senior public officers shall be ex – officio members. In addition, there shall be a Secretary who will also be an ex-officio member. The members are to serve on part time basis.<sup>110</sup>

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<sup>106</sup> Nairobi City County Public Participation Act, Section 9

<sup>107</sup> Nairobi City County Public Participation Act, Section 22

<sup>108</sup> Kisii County Public Participation Act, Section 8

<sup>109</sup>Section 6, *ibid*

<sup>110</sup>*ibid*

The office is supposed to establish the necessary mechanisms, processes and procedures which will enable the local community to participate in the affairs of the county. In discharging their mandate, they are required to take into consideration the needs of persons with disabilities and other disadvantaged groups.<sup>111</sup>

### **Turkana County**

Turkana County has a Public Participation Act that was passed on 30<sup>th</sup> October, 2014. The Act provides for public participation in matters of public interest in relation to policy and legislative processes. Section 11 of the Turkana County Public Participation Act provides for the establishment of a County Budget and Economic Forum to be chaired by the Governor. The said forum is to allow citizens to give their views on planning and budgeting.<sup>112</sup>The forum is composed of the representatives from professional bodies, business women, persons with disabilities and faith-based groups. The said county is required to set aside at least one percent of its annual budget for purposes of facilitating public participation.<sup>113</sup>

### **Makueni County**

Makueni County Government has put in place robust public participation structures right from the village level and is regarded, at least in 2018, as the poster child of effective public participation. This is evidenced by the fact that all Governors from around the country trooped to Makueni in July 2018 for a weeklong seminar and bench-marking trip on public participation.

For Makueni, the County Executive Committee in charge of devolution and public service is the one in charge of public participation. Public participation meetings are conducted at village level. The participation model for the said county is such that the top most forum will comprise

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<sup>111</sup>Section 22, *ibid*

<sup>112</sup> Turkana County Public Participation Act, Section 11

<sup>113</sup>Section 12, *ibid*



of 1,000 people, made up of 11 from 60 sub wards, 10 representatives from organized groups and 140 government officials. The county forum is chaired by the Governor and his deputy and is convened yearly.<sup>114</sup>

Below the County forum, there are six Sub County People's forums which comprise of 53-79 people, 11 from each ward and 20 representatives of organized groups. The Sub County Peoples forums meet bi-annually.<sup>115</sup>

Under the said forum is the Village Cluster Peoples Forum comprising of 315 forums. At the lowest level is the Village People's Forum.<sup>116</sup> Although Makueni County had proposed a bill for public participation, the same is yet to be passed into law. As such, the county only relies on a handbook on civic education to carry out the exercise.<sup>117</sup> The handbook provides for the establishment of the office of a Public Participation Coordinator who is to ensure public participation is well organized and coordinated by various departments.

Even though the counties are trying to embrace the concept of participatory budgeting, they are still experiencing challenges.

## **Baringo County**

The Baringo County Public Participation Act came into force on 23<sup>rd</sup> September, 2015.

It provides for establishment of a department of publicity and public participation and what its membership will be. It provides for Sub County and ward and village participation forums under Sections 16 and 17.<sup>118</sup>

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<sup>114</sup><https://www.standardmedia.co.ke/article/2000197718/village-forums-take-power-to-makueni-people-through-public-participation>

<sup>115</sup> ibid

<sup>116</sup> Inclusive and effective citizen engagement; participatory budgeting Makueni and West Pokot Counties, World Bank

<sup>117</sup><http://www.makueni.go.ke/node/182>

<sup>118</sup> Baringo County Public Participation Act, 2015, Section 17,

The Act bestows the power to convene these forums on the ward administrator or the member of the county assembly representing the wards.<sup>119</sup> Section 14 of the Act provides for how the forums will be convened and emphasizes that the same must be publicized. On allocation of fund toward the exercise, the act stipulates that the county assembly shall decide the money to be allocated.

### **Kisumu County**

Kisumu Public Participation Act came into force in December, 2015. The Act does not really differ from the ones mentioned above. Just like the Kisii Public Participation Act it provides for the establishment of the office of public participation which shall be composed of a chairman and members. It also provides for citizen participation at the ward, sub county and urban areas forum in which citizens will air their views.<sup>120</sup> The forums are to be convened by administrators of the members of the county assemblies for the various wards.

## **3.2 The Law On County Budget Process in Kenya**

The budget making process is a very important aspect of government planning and decision making. Budgets aim at achieving various objectives amongst them; reallocation of resources, economic stability, economic growth, and reduction of regional disparities.

Participation in budget making is important as it is a means of improving the performance and accountability of governments. Citizen engagement in the process can help them understand the hard choices that budgeting entails and assist in policy making.

The budget making process for Kenyan County Governments is provided for under the Public Finance Management Act which also places a premium on public participation.

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<sup>119</sup> *ibid*

<sup>120</sup> Kisumu Public Participation Act, 2015

Sections 35(1) and 125 of the Public Finance Management, Act, 2012 outline the stages in budget making processes at the national and county levels respectively for any financial year.<sup>121</sup>

Section 125 of the PFM Act provides that a county budget process starts with integrated development planning which should include both long and short term planning followed by planning and establishing medium term financing and economic priorities. An overall estimate of the County Governments revenues and expenditures is then done and an adoption of the fiscal strategy paper follows.

County Assembly then approves the budget estimates and laws necessary to implement the estimates. Once the laws are enacted the budget is implemented.<sup>122</sup>

The key timelines in the budget process as well as the documents that facilitate budgeting are discussed below.

### **3.2.1 Budget Timelines**

The first step in the Budget making process at the County level is the formulation stage where the County Treasury issues a circular which is to be used to identify the major policy areas and issues which are to be considered during budget making process. The circular is issued on the 30<sup>th</sup> day of August and it contains a schedule for citizen participation.<sup>123</sup>

On 1<sup>st</sup> September, the County Planning Department table their Annual Development Plan to various county assemblies and thereafter within a period of seven days make the Annual Development Plans public.

Between 1<sup>st</sup> September and 15<sup>th</sup> February, the County Treasury is required to conduct public hearings for purposes of allowing the citizen give their views on what they would like

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<sup>121</sup> Institute of Certified Public Accountants, Kenya, 'Chapters on public participation in public finance management and public procurement in Kenya' 25<sup>th</sup> September,2015

<sup>122</sup> Section 125, Public Finance Management Act, 2012

<sup>123</sup>ibid

incorporated in the budget. These views will enable the County Treasury to prepare the County Fiscal Strategy Paper.<sup>124</sup>

County Treasuries then prepare and submit a County Budget and Review Outlook Paper to the County Assembly by 21<sup>st</sup> October which is then submitted to the County Budget and Economic Review Forum for review seven days after it has been tabled before the County Assembly.

After review, the County Treasury is then required to align the County Fiscal Strategy Paper with the Budgetary Policy Statement and table it before the County Assembly by 28<sup>th</sup> February.

Between 28<sup>th</sup> February and 7<sup>th</sup> March, County Treasuries are required to publish and publicize the papers which they have tabled before the County Assembly for the public to give their reviews. The paper is then approved by 14<sup>th</sup> March by the County Assembly.<sup>125</sup>

The second step is the amendment and approval; here the County Treasury submits to the County Assembly the County Budget Estimates by 30<sup>th</sup> April. During this time citizens' budget proposals are also tabled. The County Assemblies then consider the estimates with or without amendments in line with the finance laws. After they have approved the budget estimates the County Treasury consolidates the budget estimates and makes them public as approved budgets.

After they have been approved, the County Executive Member for Finance then prepares an Appropriation Bill of the approved estimates which is passed by 30<sup>th</sup> June.

### **3.2.2 Key Budget Documents**

From the foregoing budget process, it is clear that public participation is featured in almost all stages of the process. However, for it to be effective, the public must be adequately informed on what they are participating in. County Governments are therefore required to supply the

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<sup>124</sup><https://www.epickenyan.com> <accessed 9 May,2019>

<sup>125</sup><https://www.epickenyan.com><accessed 9 May,2019>

public with certain budget documents which the citizens will rely on during participation. These include the County Annual Development Plan, The County Fiscal Paper, County Budget Proposal, County Appropriation Act, The County Budget Implementation Reports, The County Budget Review And Outlook Paper and The County Audit Report .<sup>126</sup>

These documents serve various purposes towards ensuring that public participation in the budget process is both meaningful and effective.

The County Fiscal Strategy Paper enables members of the public to give their opinion and views on what they want to be prioritized in the upcoming financial year budget.<sup>127</sup> The County Fiscal Strategy Paper is a reflection of the government initial plan about the budget of the next financial year. The paper enables the public to know Government's debt position, revenue, expenditure and fiscal policy information.<sup>128</sup>

County Budget Proposal provides information to the public on the taxes collected and spent by government. It also provides information on the borrowing and expenditure plans of the County Government.<sup>129</sup>

The County Appropriation Bill enables the citizens to monitor the implementation of the budget as it provides information on the budget and it is normally enacted for the financial year.<sup>130</sup>

County Budget Implementation Reports provide the public with details of the budget and how it was implemented in a given financial year. If there are problems encountered during the implementation, then they can be addressed in these reports.<sup>131</sup>

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<sup>126</sup><https://www.internationalbudget.org/wp-content/uploads/ibp-kenya-county-budget-training-workshop-participant-manual-2016-mod-2.1-budgeting-processes.pdf><accessed 9 May,2019>

<sup>127</sup>ibid

<sup>128</sup>ibid

<sup>129</sup>ibid

<sup>130</sup>ibid

<sup>131</sup> ibid

The County Budget Review and Outlook Paper enables the public to gain access to information on the proposed sector budget ceiling for each department.

At the tail end of the budget making process, we have the County Audit Reports which are prepared by the Auditor General. They provide the public with information on whether funds were spent accurately and accordingly. The reports also inform the public on whether the financial management laws were adhered to.<sup>132</sup>

### **3.3 Public Participation in County Budget Process in Kenya**

#### **3.3.1 Budget Preparation**

The County Executive Member Finance (CEM-F) is responsible for managing the budget process for County Governments.

The process commences with budget formulation. The County Treasury commences the process by issuing a budget circular. A budget circular is an instruction to guide the process. The circular is issued by 30<sup>th</sup> August of every year.

Budget circular contains key timelines for various activities, procedure for review and projection of revenues and expenditures, key policy areas to be taken into consideration, procedure for public consultation and format for budget documentation.<sup>133</sup>

It is based on the circular that the County Budget and Economic Forum then prepares a county development plan which is tabled to the county assembly for approval. The Plan is then made public within seven days i.e. by September, 1<sup>st</sup>.<sup>134</sup>

The County Budget and Economic Forum undertakes consultation with the members of the public and other stakeholders. Their views are used to prepare the County Budget Review and

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<sup>132</sup><https://www.internationalbudget.org/wp-content/uploads/ibp-kenya-county-budget-training-workshop-participant-manual-2016-mod-2.1-budgeting-processes.pdf><accessed 9 May,2019>

<sup>133</sup><https://www.icpak.com><accessed 9 May,2019>

<sup>134</sup><http://devolutionhub.or.ke><accessed 9 May,2019>

Outlook Paper by 15<sup>th</sup> February which is then submitted to the County Assembly by the County Treasury after approval of the County Executive Committee by 21<sup>st</sup> October.<sup>135</sup>

The County Treasury is given a short period of time within which they are to align the County Fiscal Strategy Paper with the Budgetary Policy Statement which is then tabled in the County Assembly but after it has been made public for seven days. The County Fiscal Strategy Paper is then approved thereafter by the County Assembly.<sup>136</sup>

County Budget and Economic Forum is composed of the Governor as the Chairperson, other members of the County Executive Committee and several representatives equal to the number of executive members appointed by the Governor.<sup>137</sup>

### **3.3.2 Amendment and Approval**

During this stage the county budget proposals are submitted to the County Assemblies by April, 30<sup>th</sup> and its during this time the citizens' budget proposals are also made available.<sup>138</sup>

County Budget and Appropriation Committee then hold public hearings and table a report on the recommendations made by the public to the County Assembly. The public is required to give their input between April, 30 to June, 30 and thereafter the County Appropriation Act is enacted by the County Assembly.<sup>139</sup>

### **3.3.3 Budget Implementation**

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> quarter budget implementation reports are published during this stage. The public's role during this stage is to keep track of the executive and give feedback to the County Assemblies.

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<sup>135</sup><http://devolutionhub.or.ke><accessed 9 May,2019>

<sup>136</sup>ibid

<sup>137</sup> Public Finance Management Act, 2012, Section 137(1)

<sup>138</sup><https://www.internationalbudget.org/wp-content/uploads/ibp-kenya-county-budget-training-workshop-participant-manual-2016-mod-2.1-budgeting-processes.pdf><accessed 9 May,2019>

<sup>139</sup> ibid

### 3.3.4 Audit & Accounting

Once the County Budget review and Outlook Paper is submitted to the County Assembly for approval the auditor produces a report on the use of the monies allocated to the budget during the previous financial year which is tabled before the County Assembly. The Public Accounts Committee reviews the audit report and makes recommendations to the County Assembly

The budget cycle can be summarized as follows;

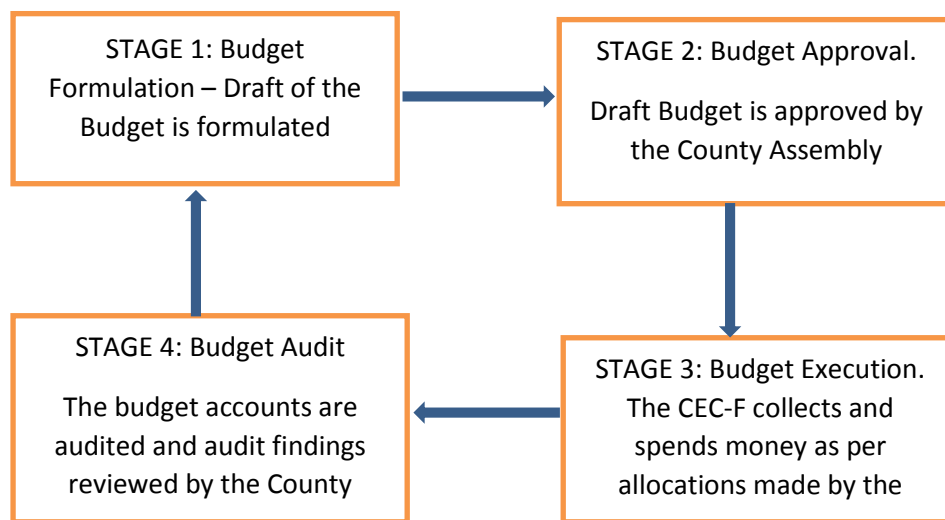


Figure 3

Public participation in the budget-making process outlined above is a mandatory requirement and it is the responsibility of the County Executive Committee member responsible for finance to ensure there is public participation in the budget processes.<sup>140</sup>

When the budget estimates are submitted to County Assemblies, the County Executive Committees are required to hold public hearings on the budget. The results and recommendation of the public hearing are collected and tabled before the county assembly.

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<sup>140</sup>Section 125(2) *ibid*



Participation during the budget making process is therefore in two stages;

- a. The pre –budget reading period which involves the composition of the County Budget and Economic Forum<sup>141</sup> which develops the county plans, the County Fiscal Strategy paper and the Budget Review Outlook Paper and allows citizens to give their views and inputs in the planning and budgeting process through representatives in the various forums. The forums include the county Assembly Budget Committee hearings, citizen foras, county planning units, county communication platform strategy.<sup>142</sup>
- b. The post budget reading period where the County Executive Committee members in charge of the County Treasury publishes an implementation report quarterly. Here, the citizens participate by requesting for copies of the report and reading through them. They then discuss the reports with the County Assembly members and provide feedback on them.<sup>143</sup>

## **Conclusion**

From the foregoing, it is clear that members of the public have a role to play in budget making and various county government officials are charged with a duty to ensure that citizens participate in the process. Since the public are affected by the implementation of these budgets, it is important that they be involved so as to assist County Government in setting its' priorities and also act as watchdogs of the County Governments to ensure the priorities set are met.<sup>144</sup>

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<sup>141</sup> Public Finance Management Act, 2012, Section 137(1)

<sup>142</sup> Ministry of Devolution and Planning and Transition Authority, 'Devolution and Public Participation in Kenya, Civic Education Trainer's Manual Executive Program' 2016.

<sup>143</sup>ibid

<sup>144</sup> Budget Making in Kenya by Transparency International, Adili Issue No. 146, July 2014

## **CHAPTER FOUR: CASE STUDIES**

### **4.0.Introduction**

This chapter of the paper presents some of the recent studies in order to distill the objectives of the study regarding the extent which county governments have implemented public participation. It will also distill the challenges that public participation experiences. These challenges are presented both from the perspective of county governments who seek to implement public participation and from that of ordinary citizens who seek opportunities for

meaningful engagement with their devolved government units in decision-making in the budget process.

#### **4.1. Surveys and Case Studies**

##### **Nairobi County**

One of the more recent studies was undertaken in 2017 by Willis Phabian Akala Opondo who investigated the level of public participation in the county budgeting process in Nairobi County.<sup>145</sup> The researcher interviewed 113 respondents<sup>146</sup> from various sub counties of Nairobi County, including Langata, Kibra, Roysambu, Embakasi, Ruaka, Dagoretti, Kamkunji, Starehe amongst others. 44% of the survey participants were female while 56% were male.<sup>147</sup>

The study sought to find out whether the residents of the target wards were participating in the county budget forums, the common reasons cited for not attending county budget forums, the frequency of participation and the sources of information about county budget forums.

The study revealed that only 36% of the respondents were aware of county budget forums while 64% never attended the meetings.<sup>148</sup> Among those who did not attend the forums, 63% indicated that they were busy while 29.6% reported that they only learnt about these forums long after they happened. A further 7.4% cited sickness as the reason for not attending.<sup>149</sup>

Knowledge among the respondents of the legal framework governing public participation in the county budget process was found to be low. The study revealed that 65% of the survey

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<sup>145</sup> Willis Phabian Akala Opondo, 'People's participation in county budgeting process; A case study of Nairobi County' December, 2017.

<sup>146</sup> *ibid*

<sup>147</sup> *ibid*

<sup>148</sup> *ibid*

<sup>149</sup> *ibid*

participants knew nothing of the legal framework and that only 35% were aware of the legislation governing the process.

The research also revealed that 65% were not aware of the public participation forums in planning and budgeting had been called by Nairobi County while 35% had knew that the forums had been called for.<sup>150</sup>

Of those who were aware of the county budget forums, 66% indicated that they got information about the forums from friends and relatives, 10% from the media, 5% from the newspaper and 19% from the county notice board.<sup>151</sup>

47% participated in county budget forums once while 43% indicated they have participated twice.<sup>152</sup>

Another survey was carried out by Economic and Social Rights Centre was conducted in September, 2016 with an aim of analyzing barriers and facilitators of citizen participation.

The survey was conducted in Nairobi County with a 300 respondents being interviewed. The respondents were clustered into middle income, low income and high income respondents.<sup>153</sup>

The objectives of the survey were to find out how many citizens were aware of planning and budget making process at national and county levels, how may were aware of policy and law

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<sup>150</sup>ibid

<sup>151</sup> Willis Phabian Akala Opondo, 'People's participation in county budgeting process; A case study of Nairobi County' December, 2017.

<sup>152</sup> ibid

<sup>153</sup> Economic and Social Rights Centre, 'Barriers and Facilitators of Citizen Participation in Governance Processes in Nairobi County' December, 2016.

formulation processes at county governments, how many were aware of the enabling legislations of public participation, whether they had knowledge of existing public participation forums, whether civic education was being carried out in public participation forums, whether citizens were being issued with adequate notice on the forums, whether they accessed the information in a timely manner, whether they understood the documents and were able to discuss them in the forums, the convenience of them accessing the forums, whether participation was meaningful, whether there was any follow up on the proposal and recommendations they presented in the public forums.<sup>154</sup>

The findings of the survey were as follows;

On whether the citizens were aware of the planning and budget making process at county level; 11% of the respondents agreed they had knowledge of the process, 41% did not agree while 6% had not comment.<sup>155</sup>

As to whether they were aware of policy and law formulation; 52% indicated they had knowledge on the same and 42% did not while 6% had no comment.<sup>156</sup>

On whether they knew of the legislative frameworks anchoring citizen participation; 60% indicated that they knew of the legislative framework, 25% indicating that they did not and they went ahead to indicate that the process was just a cosmetic one aimed at satisfying the constitutional and statutory requirements.<sup>157</sup>

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<sup>154</sup>Economic and Social Rights Centre, 'Barriers and Facilitators of Citizen Participation in Governance Processes in Nairobi County' December, 2016.

<sup>155</sup>ibid

<sup>156</sup>ibid

<sup>157</sup>ibid

Participants were asked whether they had knowledge on the existence of public participation forums. Their response was that 67% were aware, 27% were not while 6% did not know. 71% of the respondents indicated that they had never received any civic education prior to involvement of the processes that are required during participation. 21% indicated that they had received civic education while 7% said they had not.<sup>158</sup>

The participants were also asked on whether they receive adequate notice on the forums; 65% stated that the notice was inadequate. 78% of the respondents intimated that they did not have timely access of documents that formed basis for discussion during public participation while 14% indicated that they accessed the documents in good time.<sup>159</sup>

On whether they understood the documents, 31% indicated that they did, 59% were not able to while 10% did not have any comment.

The respondents were also asked on whether the forums were being held on convenient days. 55% indicated that the forums were not on convenient days while 28% felt that they forums were being held on convenient days. 18% did not have any comment.<sup>160</sup>

57% of the respondents were of the view that the time allocated for the forums was not adequate while 23% believed the time was adequate. 20% declined to give their views.<sup>161</sup>

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<sup>158</sup>ibid

<sup>159</sup>ibid

<sup>160</sup>Economic and Social Rights Centre, 'Barriers and Facilitators of Citizen Participation in Governance Processes in Nairobi County' December, 2016.

<sup>161</sup>ibid

For any participation to be meaningful, the persons undertaking it must be able to understand the documents being discussed. In the survey 45% of the respondents indicated that they did not understand the documents, 43% indicated that they understood the documents while the rest were unresponsive.<sup>162</sup>

Responsible participants should ensure that they do a follow up on their proposals. 74% of the respondents indicated that they did not follow up on the proposals that they made in the forums, 19% stated that they followed up while 8% had no comment. 69% of the respondents also indicated that they were never involved in the monitoring and evaluation of the projects while 23% of them said they did.<sup>163</sup>

In sum, the findings of the study demonstrate that there are low levels of awareness about county budget forums in Nairobi County, that a majority of the population in the county are not aware of the governing law, and that only a small percentage takes part in these important platforms for citizen engagement on the county budget.

When placed in the right context, these findings paint a grim picture of the situation obtaining in public participation across the 47 county governments in Kenya. It should be noted that Nairobi boasts one of the highest literacy levels in the country, with much better roads, short distances between populations and an advanced public transport system. Barring other factors, it would be expected that Nairobi would register the highest levels of public participation in county budget forums compared to other counties which lower literacy levels and poor road network spread across vast hostile terrain.

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<sup>162</sup>ibid

<sup>163</sup>ibid

This is confirmed in part by the findings of a 2017 study<sup>164</sup> conducted by URAIA, an NGO based in Kenya, which investigated citizen engagement across the 47 counties in Kenya. The organization conducted investigations into how many participants had attended the forums within a period of 1 year and the challenges hindering citizens from attending the forums. They also sought to determine whether the citizens were positive about their views being addressed in the forums, and whether citizens have been monitoring the use of funds in their counties.<sup>165</sup>

The survey's findings were that 60% of the citizens had never attended the forums, 40% have attended, 28% felt that their views were being addressed while 72% did not feel their views had been addressed. Additionally, 90% of the participants were not aware of how the monies allocated at the counties were being used while 10% had knowledge on the same.<sup>166</sup>

### **Kisumu County**

In 2018, Transparency International conducted a survey in Kisumu on participation frameworks and processes in the County. The survey involved citizens, various stakeholders and county government officials. Data was collected in questionnaire form.<sup>167</sup>

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<sup>164</sup>URAI, 'Public participation in Kenya; what are the milestones, challenges and prospects' 2017.

<sup>165</sup> ibid

<sup>166</sup>ibid

<sup>167</sup> Transparency International, 'A Case Study of Public Participation Frameworks and Processes in Kisumu' County, 2018



The survey findings were on source of information on county forums which revealed that 40% of the citizens learned of the forums from the media, 34% from the county officials, 14% from leaders and 8% from the NGO's/CBO's. 67% of the people interviewed were aware of the existence of laws governing public participation, 33% were not aware.<sup>168</sup>

In their recommendation the said organization recommended that various issues need to be addressed so as to improve the exercise. Amongst the recommendation it made were that there is need to undertake extensive civic education to educate citizens, decentralization of public participation, allocation of funds for public participation and building capacity.<sup>169</sup>

African Center for Open Governance conducted survey in various counties. The survey was aimed at ascertaining public perception on various key issues majoring on constitutional and democratic rights. The survey revealed that 51% of the Kenyans are not satisfied with the way their counties organized participations, 34% were neutral with 10% being satisfied. The survey also revealed that 73% found it difficult to participate in the county budgeting exercise while 76% found that it was difficult to influence counties decisions. 74% of the participants indicated that they experienced difficulty in accessing information on county budgets.<sup>170</sup>

Another survey was conducted in Mombasa, Kilifi, TaitaTaveta and Kajiado County by an organization known as TAKE PART (Towards Accountability through Kenyan's Empowerment in Participation and Active Request for Transparency). The objective of the study was to assess the effectiveness of public participation mechanisms in the said counties.

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<sup>168</sup>Transparency International, 'A Case Study of Public Participation Frameworks and Processes in Kisumu' County, 2018

<sup>169</sup> *ibid*

<sup>170</sup> Africa Centre for Open Governance, 'Citizen Perception Survey' 2016

The survey was carried out amongst citizens who have participated in county forums since 2013. 183 persons who posed knowledge of the mechanisms being used for public participation so as to determine the effectiveness of public participation. 59 from Mombasa County, 40 from Taita Taveta, 42 from Kajiado and 42 from Kilifi. Data was collected by use of questionnaires.

Participants were questioned on what the participation avenues and dynamics were, whether the information was adequate and whether they were satisfied with the resources availed to them for participation, whether they knew of the existence of the laws governing participation, whether their views were being taken into account in the budget making process.<sup>171</sup>

The research findings on the above questions for the various counties were as follows;

**Mombasa County;**

On civic education, 36% of the respondents in the said county indicated that they had undertaken the exercise with 74% acknowledging that civic education had improved their participation in the forums. 64% indicated that they had not undergone civic education with 26% saying that the said exercise had not improved their participation. 70% of the respondents indicated that they had participated in county forums while 30% said they had not. 32% of the respondents were of the view that their input and proposals were being taken into account while the majorities (68%) were of the contrary opinion.<sup>172</sup>

On resource allocation and access to information; 25% of the participants agreed that they were being issued with adequate information and 75% had a contrary opinion. 19% of the respondents were satisfied with the forums sources of information while 81% were not.<sup>173</sup>

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<sup>171</sup>TAKE PART, 'Effective Public Participation Mechanisms in Mombasa, Kilifi, TaitaTaveta, Kajiado Counties' July, 2017.

<sup>172</sup>ibid

<sup>173</sup>ibid

### **Taita Taveta County;**

On civic education, 60% of the respondents in the said county indicated that they had undertaken the exercise with 55% acknowledging that civic education had improved their participation in the forums. 40% indicated that they had not undergone civic education with 45% saying that the said exercise had not improved their participation. 80% of the respondents indicated that they had participated in county forums while 20% said they had not. 37% of the respondents were of the view that their input and proposals were being taken into account while 63% were of the contrary opinion.<sup>174</sup>

On resource allocation and access to information; 50% of the participants agreed that they were being issued with adequate information and 50% had a contrary opinion. 38% of the respondents were satisfied with the forums sources of information while 62% were not.<sup>175</sup>

### **Kilifi County;**

On civic education, 23% of the respondents in the said county indicated that they had undertaken the exercise with 90% acknowledging that civic education had improved their participation in the forums. 77% indicated that they had not undergone civic education with 10% saying that the said exercise had not improved their participation. 93% of the respondents indicate that they had participated in county forums while 7% said they had not. 22% of the

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<sup>174</sup>ibid

<sup>175</sup>TAKE PART, 'Effective Public Participation Mechanisms in Mombasa, Kilifi, TaitaTaveta, Kajiado Counties' July, 2017.

respondents were of the view that their input and proposals were being taken into account while 78% were of the contrary opinion.<sup>176</sup>

On resource allocation and access to information; 12% of the participants agreed that they were being issued with adequate information and 88% had a contrary opinion. 5% of the respondents were satisfied with the forums sources of information while 95% were not.<sup>177</sup>

### **Kajiado County;**

On civic education, 17% of the respondents in the said county indicated that they had undertaken the exercise with 67% acknowledging that civic education had improved their participation in the forums. 83% indicated that they had not undergone civic education with 33% saying that the said exercise had not improved their participation. 83% of the respondents indicate that they had participated in county forums while 17% said they had not. 63% of the respondents were of the view that their input and proposals were being taken into account while 37% were of the contrary opinion.<sup>178</sup>

On resource allocation and access to information; 69% of the participants agreed that they were being issued with adequate information and 31% had a contrary opinion. 67% of the respondents were satisfied with the forums sources of information while 33% were not.<sup>179</sup>

Another study was conducted in UasinGishu County by Carolyn WacukaGitegi with the objective of finding out factors affecting public participation on the said county. She conducted

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<sup>176</sup>ibid

<sup>177</sup>ibid

<sup>178</sup>ibid

<sup>179</sup>TAKE PART, 'Effective Public Participation Mechanisms in Mombasa, Kilifi, TaitaTaveta, Kajiado Counties' July, 2017.

the survey which targeted 105 residents of the said county who were chosen randomly and interviewed. Her findings were that public participation was affected by poor accesses to information, lack of citizen awareness on the exercise and poor accountability of county governments to the needs of its citizens.<sup>180</sup>

She noted that the said county government was not being accountable to the need of its citizens and was not undertaking projects which reflected their needs.

That majority of the residents had not been involved in public participation forums and those who had been involved felt that their view was being taken with some seriousness. Most residents indicated that they were being provided with information on the forums but the channels for distributing the information were not convenient and the information was not being distributed in a timely manner.<sup>181</sup>

The residents have low levels of awareness and as such they were of the view that they had no role to play in the forums. Majority of the respondents also confirmed that they had not been trained on what they were to discuss and as such were not familiar with the legislative framework of the exercise.<sup>182</sup>

The above-mentioned surveys clearly reveal that the public participation exercise faces numerous challenges. The challenges are numerous and they seem to cut across the surveys conducted. They are discussed below;

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<sup>180</sup>Carolyn WacukaGitegi 'Factors Affecting Public Participation in Effective Devolved Governance in Kenya: A case study of Uasin Gishu County' 2016

<sup>181</sup>ibid

<sup>182</sup>ibid

## **4.2. Challenges Faced in Public Participation**

The studies cited above reveal common challenges bedeviling the uptake of public participation in the country budget process across the country. Some of these challenges are:

### **1. Lack of awareness amongst the citizens**

Citizen awareness is one of the driving forces of public participation. The public cannot participate in the budget process if they are not aware of the opportunities to participate and how to participate. For citizens to participate they must be conscious of what they are participating in.<sup>183</sup>

All the surveys above show have shown that majority of the respondents lack awareness of the exercise. Further to the above surveys, Transparency International conducted a research on public awareness between the period of April to May, 2014. Their findings were that only 15% of Kenyans have participated in the citizen forums at the county level. Their poll indicated that 38% of Kenyans had heard about the forums, demonstrating that County Government had not done enough to broaden channels of communication to publicize such forums and engage with the public.<sup>184</sup>

The survey also reported that 7% of Kenyans knew about county fiscal strategy paper, 16% were aware of county integrated development plan while 41% knew about the county's budget with 10% reporting as having a copy of the budget. 83% of the Kenyans were unaware of the funds allocated to the Counties.<sup>185</sup> This finding show that indeed the public is not fully participating in the budget process.

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<sup>183</sup>Carolyn WacukaGitegi 'Factors Affecting Public Participation in Effective Devolved Governance in Kenya: A case study of Uasin Gishu County' 2016.

<sup>184</sup> Transparency International in Kenya, Annual Report 2013/2014

<sup>185</sup> *ibid*

Section 98 of the County Government Act provides for the principles of civic education. They include empowerment and enlightenment of citizens and government, continual and systematic engagement of citizens and government and valued and principles of devolution in the Constitution.<sup>186</sup> Civic education and public participation are two sides of the same coin and civic education should aim at preparing citizens for participation by educating and giving them information on the budget process and the relevant laws.

A case in point is where lack of civic education affected the Local Authority Service Delivery Action Plan which was introduced in Kenya with the aim of enhancing citizen participation in the distribution of funds. The plan suffered citizen awareness challenge as the citizens were not aware of budget process and as such final decisions were mostly made by the Councilors and the local elites. Citizens had no idea of how, when and where to participate.<sup>187</sup>

## **2. Lack of adequate access to information by the public**

Lack of information is a challenge faced by public participation. A survey conducted by Transparency International after disbursement of devolved funds revealed that only 39% of Kenyans were aware of amount of cash disbursed to their County Government.<sup>188</sup> Article 35 of the Constitution provides for right to access information. That every citizen had the right to access information held by the state and any other person.<sup>189</sup> It is based on this article that the public is to get information as a matter of right provided by the said article. The public ought

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<sup>186</sup>Section 98, County Government Act, 2012

<sup>187</sup>Murui Abraham, 'How does citizen participation Impact Decentralized Service Delivery? Lessons from the Kenya Local Authority Service Delivery Action Plan (LASDAP, 2002-2010)' (2014).

<sup>188</sup> Transparency International in Kenya, Annual Report 2013/2014

<sup>189</sup>, Constitution of Kenya, 2010, Article 35

to be given information which will assist them in understanding, how and what the budget making process is all about. The information should include revenue collected by County Governments. Such information will help the public understand the problems, alternatives, opportunities and in turn offer solutions on how their funds are to be managed.

Most Kenyans also do not know that such an exercise exists. As stated earlier, the survey conducted by Transparency International revealed that only 38% knew of such forums while that one conducted in Nairobi, Mombasa, Kilifi Counties revealed that majority of the respondents did not have access to information. Most of the respondents were of the opinion that they did not understand why there is need for public participation in budget making process as they lacked the information or had no knowledge on it.

Timely and easily accessible budget information is critical in ensuring effective and meaningful public participation. From the above surveys majority of the respondents confirmed that they did not have timely access to information.

### **3. Illiteracy**

Access to information is key to public participation. Successful, effective and meaningful participation can only be achieved if the citizens are literate. They must be knowledgeable and know what discussions are going on so that they can give meaningful contribution. For there to be meaningful participation in financial management matters will largely depend on literacy too. Literacy helps in articulation of issues and demands in a systematic way.<sup>190</sup> Due to low literacy levels in Kenya, many citizens do not participate as they find such discussions technical and complex and as such see no need to attend. The educated people would most effectively do meaningful participation compared to the illiterate.

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<sup>190</sup>Carolyn WacukaGitegi 'Factors Affecting Public Participation in Effective Devolved Governance in Kenya: A case study of Uasin Gishu County'2016.



Since the budget process involves variety of mechanisms to engaging citizens, it is important that the citizens understand the budget making process stages. A survey done by Knoema , a US based company shows that adult literacy levels in Kenya stood at 78% in 2015.<sup>191</sup> This survey has however not told us whether the literacy level is spread all over the county or concentrated in particular areas. The Kenya national Bureau of Statistics and the Society for International Development conducted a search which revealed that Turkana and Wajir Counties have the lowest literacy levels with Nairobi having the highest level of literacy at 87%.<sup>192</sup>

#### **4. Poor timelines for participations**

The surveys listed above had majority of the respondents indicating that the timelines for participation were not convenient. The survey is further supported by The Institute for Social Accountability survey on lessons in participation on the county budget in Baringo, Kitui, Nairobi, Marsabit and Turkana Counties. The institute designed a public participation program whose aim was to inform, organize and engage citizens in the said counties and assist counties in implementing public participation and social accountability through the establishment of public participation frameworks. County citizens engaged the organization and were able to have meaningful conversations on public participation exercise. One of the challenges they found out from the said research was that despite adequate mobilization they undertook, members of the County Assembly failed to turn up for the exercise citing busy schedules.<sup>193</sup>

The same research conducted in Wajir county revealed that citizens were complaining that the county leaders were absent at the ward level. The people complained that their leaders had insufficient contact with them. They complained that the only thing they are involved in was use and application of taxes. This poses a challenge because these leaders are the only people

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<sup>191</sup><https://knoema.com/atlas/Kenya/topics/Education/Literacy/Adult-literacy-rate>

<sup>192</sup> Mark Kapchanga, 'Turkana and Wajir Counties Have Highest levels of Illiteracy' Star Newspaper 26<sup>th</sup> November, 2013

<sup>193</sup>[https://www.tisa.or.ke/images/uploads/PP-SA\\_Report.pdf](https://www.tisa.or.ke/images/uploads/PP-SA_Report.pdf)

who should be able to engage with their citizens so as to be able to know what challenges they face.<sup>194</sup>

Another survey was conducted by one Cleophas Ndiege and Dr. Ephantus Kihonge of Nairobi County Government revealed that most public participation sessions are conducted during the weekdays and most people revealed that they would like for the same to be conducted during weekends.<sup>195</sup>

Having the forums during weekends would indeed increase the attendance because during weekdays people are working and would mostly not have time to attend this forum hence the forums end up having few people in attendance. This in turn affects the quality of the exercise as the views received do not reflect the true situation of the citizens needs and wants. This also prevents invention of new ideas and suggestions on how the funds should be utilized. In Kenya, people work from 8am to 5pm and as a result most would really not be able to participate in these forums if they are held on weekdays.

##### **5. Lack of determination as to who the public is**

There is no certainty as to what extent of participation is considered as public participation. Kenyans have filed cases in court and argued that certain bodies have not allowed public participation. The Courts are left to interpret what amounts to public participation. The emerging decisions demonstrate further that there seems to be no standard measure of what public participation is.

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<sup>194</sup>ibid

<sup>195</sup>Cleophas Ndiege Kaseya and Dr. Ephantus Kihonge, 'Factors Affecting the Effectiveness of Public Participation in County Governance in Kenya; A case study of Nairobi County' International Journal of Scientific and Research Publications, Volume 6, Issue 10, October 2016

In Civil appeal no 224 of 2017, an appeal from the decision of the High Court in **Republic Vrs IEBC Exparte NASA & 6 Others (2017) eKLR, Judicial Review No. 378/2017**, the Court of Appeal held that public participation does not necessarily require individual input of each member of the public.<sup>196</sup>

The Court of Appeal reversed the decision of the High Court in the above matter and went ahead to state that public participation was not required in the matter. In the opinion of the Court of Appeal, the invitation of bids from interested companies during tendering was sufficient public participation. Where a public entity opts for direct procurement from a supplier or service provider, public participation becomes unnecessary due to the nature of direct procurement.<sup>197</sup>

In reaching this determination, the Court of Appeal stated that the High Court relied only on Article 10 of the Constitution in interpreting the law while ignoring the provisions of Section 103 of the Public Procurement Asset Disposal Act and Article 227 of the Constitution.

In the above case there seems to have been a conflict between the constitution and the procurement law. While the constitution provides for public participation the procurement restricts direct procurement from the exercise.

In **Robert . N. Gakuru & Others Versus the Governor Kiambu County and 3 Others**, Judge Odunga held that the “County assemblies ought to do whatever is reasonable to ensure that as

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<sup>196</sup>Republic Vrs IEBC Exparte NASA & 6 Others (2017) eKLR, Judicial Review No. 378/2017

<sup>197</sup>IEBC Vs, NASA & 6 Others, Civil Appeal No. 224 of 2017, ekLR

many of their constituents in particular and the **Kenyans in general** are aware of the intention to pass legislation in question. (emphasis added).<sup>198</sup>

It is evident, from the reading of the above decision, that County Governments should reach out to all Kenyans including those from outside their jurisdiction whenever undertaking public participation, something that has not been happening.

The challenge on the definition and scope of public participation is not only restricted and unique to Kenya. The question on what participation is, emerged in a South African case of **Doctors for Life International Versus Speaker of the National Assembly, et.al (2006) ZACC11** where the applicant challenged the validity of four drafts relating to health rights. One bill allowed registered nurses to perform abortions at certain public and private hospitals. The Applicant alleged that the National Council of Provinces and the provincial legislatures failed to fulfill obligations under Section 72(1) and 118(1)(a) of the Constitution which required them to facilitate public participation in the legislative process. The applicant alleged that the National Council of Provinces failed to invite written submissions from the public and did not conduct public hearings on the bills. The applicant alleged that only one province was therefore seeking that the court declares the bills invalid.<sup>199</sup>

The Constitutional Court of South Africa declared the statutes invalid and held that indeed the National Council of Provinces had failed to comply with the obligation bestowed upon it to facilitate public participation as required under the Constitution as only one province participated in the process.<sup>200</sup>

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<sup>198</sup>Robert N. Gakuru and Others Vrs the Governor Kiambu County and 3 Others, 2014eKLR, High Court Petition Number 532 of 2013

<sup>199</sup>Doctors for Life Versus Speaker of National Assembly, et.al (2006) ZACC11, 2006 (12) BCLR 1399(CC) at 24 (South Africa)

<sup>200</sup>Doctors for Life Versus Speaker of National Assembly, et.al (2006) ZACC11, 2006 (12) BCLR 1399(CC) at 24 (South Africa)

However, the dissenting Judge held that the fact that most provinces did not participate does not make the legislations invalid.

It is apparent from these decisions that there is uncertainty – including in the courts, over the true meaning and scope of public participation, which is why guidelines should be introduced to bring the much needed clarity.

#### **6. Lack of specific structures which provide for a standard approach to public participation**

The challenges facing public participation in Kenya are compounded by the absence of structures which provide a standard approach to public participation. Due to this gap, each county government has been left to come up with its own laws to guide public participation.

As discussed above, some of the 47 counties have passed public participation acts which they are to use for this purpose. Others such as Makueni and Taita Taveta have only guidelines.

In 2016, Parliament proposed a bill for public participation but the same has not been passed into law. The bill proposes that every public body should adopt specific guidelines for public participation.<sup>201</sup>

#### **7. Public cynicism and distrust**

One of the goals of public participation is to reduce distrust and cynicism by citizens toward government. However, the public feels that participation is not worth the effort and that their views will not normally be taken into consideration. There is also a general feeling that the exercise is merely a formality since decisions will already have been made in many instances.

#### **8. Lack of Feedback**

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<sup>201</sup><http://kam.co.ke/public-participation-bill-2016/> (accessed 26, July, 2019)

One of the principles of an effective and efficient framework for public participation is that there should be feedback.

When members of the public engage in the budget process, it is expected that they will receive regular feedback on whether or not their views were incorporated into the budget. However, this does not happen. It is not clear how lessons learnt during participation are used to improve county budgets.<sup>202</sup> The survey discussed above had the respondents indicate whether they were receiving adequate feedback on the proposal. Majority indicated that they were not receiving any feedback on their proposal and in fact they indicated that the exercise was a just for purposes of complying with the law.

#### **9. Threshold and mode of participation**

Determining the threshold that should be met for public participation to be termed as effective and efficient is a challenge. Even though courts have tried to define the threshold the same is still a challenge as it will normally differ on a case to case basis.

**Republic Vrs IEBC Exparte NASA & 6 Others (2017) eKLR, Judicial Review No. 378/2017** Court held that public participation does not dictate that everyone must participate and give their views. That the exercise must however show intentional inclusivity and diversity.

In the South African Case of the **Minister of Health and Another Vs. New Click South Africa (Pty) Ltd**, Sachs J. held that forms of facilitating the degree of participation in law making process are indeed capable of infinite variation. He also stated that what matters at the end of the day is that a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and have an adequate say, and that what amounts to a reasonable opportunity will depend on the circumstances of the case.<sup>203</sup>

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<sup>202</sup>ibid

<sup>203</sup>Minister for Health Vs. New Click South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC14;2006 (2) SA 311(CC)

In the case of **Moses Muyendo & 908 Others Versus The Attorney General and Minister for Agriculture** where court observed that the National Assembly had the discretion and wider powers of determining how public participation would be achieved. The courts noted that how it would be carried out would vary from case to case but there must be a reasonable level of participation being given to members of the public.<sup>204</sup>

In the instant case, the facts were that the petitioner had moved to court seeking for the Crops Act, 2012 and the Fisheries and Food Authority Act, 2012 be declared unconstitutional on grounds that the same were enacted without the participation of the public. The petition was dismissed on grounds that the acts were not enacted without public participation.<sup>205</sup> Court was of the opinion that not every person or professional ought to be invited in public participation forums so as to satisfy Article 10 of the constitution.

In the case of **Law Society of Kenya Versus Attorney General of Kenya** courts held that the law was not that all persons must give their views and that they must be heard orally. That all legislations being passed should not be brought to each and every person and that if participation should occur then reasonable measures should be taken to facilitate the exercise.<sup>206</sup>

In the said matter the Petitioner case was that the Statute Law (Miscellaneous Amendment) Act, 2015 had been passed without meaningful and qualitative participation because majority of the Kenyans had not given an opportunity to participate in it.<sup>207</sup>

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<sup>204</sup>Moses Muyendo & 908 Others Versus Attorney General and Minister for Agriculture (2013) eKLR

<sup>205</sup> ibid

<sup>206</sup> Law Society Versus Attorney General, Constitutional Petition (2016)eKLR

<sup>207</sup>ibid

Questions arise as to whether this threshold has been met. Should the threshold be determined in terms of number of views received, number of forums held or number of people who have participated. What data should indicate that effective participation has taken place? It must be accepted that this threshold will normally differ from county to county depending on the population, terrain, infrastructure and diversity of the population. If so, does it mean that effective public participation may not be objectively prescribed.<sup>208</sup> There is need to therefore determine what is the standard threshold for the exercise.

The issue of how the participation is done is also a challenge as some courts have argued that it participation does not necessarily mean physical presence of members of the public.

In the case of **Association of Gaming Operators Kenya & 41 Others Versus Attorney General & 4 others** Justice Majanja held that even though public participation is required, the legislature should provide an opportunity for the same. This may include members of the public making written submission. In his view the public was given an opportunity to give their views through their memorandum.<sup>209</sup>

Justice Majanja indicated that he shared the same view as those expressed in the case of **King Versus Attorney Fidelity Fund Bd of Control & Another 2006 (B) BCLR 462(SCA) (South Africa)** in which the court held that public participation might be through submission of commentary and representation. That the Constitution has set a base for the standard of public participation but Parliament had the leeway of fulfilling the said duty.

The petitioner had sought for the Finance Act, 2012 to be declared unconstitutional because the legislative process leading to the enactment of the act had complied with Article 118 and 201 of the Constitution requiring public input.

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<sup>208</sup> County Public Participation guidelines, Ministry of Devolution and planning and Council of Governors, January 2016

<sup>209</sup> Association of Gaming Operators Kenya & 41 Others Versus Attorney General & 4 others (2014) eKLR



He therefore dismissed the Petition on the basis that the Finance Act, 2012 had not violated the constitution.

In determining whether there was sufficient and appropriate public participation in the enactment of paragraph 6 of the Nairobi County Finance Bill, Justice Lenaola dismissed the petition in the case of **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others Versus County of Nairobi Government and 3 Others**. Court held that the county had sufficiently invited members of the public to participate in the passing of the clause. That the county involved members of the public as there were meetings with members of the public, stakeholder, lobby groups etc.<sup>210</sup>

It did not matter how the exercise was effected but whether the public was accorded reasonable level of participation.

#### **10. Lack of resources for holding public participation**

The County Governments have not allocated adequate resources to facilitate public participation. Participants and the facilitators need to be taught on what they are to engage and how they can tackle and understand budgetary issues.

Kisii and Nairobi counties have allocated 1% and 2% of their budget for public participation. These allocations are not enough to conduct civic education and awareness in all wards in the said counties. Citizens should be made aware of the budget choices and manners in which the same is implemented including costs and timelines. Such process is wide and demands a lot of education and demand. To do so will require counties to invest heavily on human and financial resources. Civic education will for example require professional to be able to teach citizens on

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<sup>210</sup>Nairobi Metropolitan PSV Saccos Union Limited & 25 Others Versus County Government & 3 Others (2013) eKLR

the budget process, they will require materials to use while educating the citizens and many other things which come along with the exercise including transport costs.

### **11. Cultural differences**

A 2016 study conducted by the World Bank in West Pokot County found that women would not be able to participate because their culture did not permit them to speak in the presence of men. Arrangements had to be made to have the women speak separately.<sup>211</sup> Being a patriarchal society where most decisions were left for men to make, the women were not permitted to sit with the men.

Such cultural issues undermine the voices of key segments of the population when they are denied room to speak openly on issues that concern them.

### **12. Selective involvement of citizens in matters requiring public input**

Public participation is only happening in matters which leaders feel require public participation. Those matters which are not seen as requiring the input of citizens are not tabled before the members of the public for their input.

A separate study conducted in Wajir County by The Institute of Social Accountability revealed that the community members accused the county government officials of cherry-picking persons who should attend the county's public participation forums, and that even after the selected members attended the forums, they never held Barazas with the other community members to inform them of the matters they presented to the county for purposes of seeking for funds. .<sup>212</sup>

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<sup>211</sup>World Bank, 'Participatory Budgeting Manual For County Governments in Kenya' July 2018

<sup>212</sup>The Institute for Social Accountability , 'Jihusishe: Lessons in Participation in the County Budget' 2015

This goes to show that some of the decisions made at the counties are left to a few select people who make decisions on behalf of others and they may end up representing the interests of few people.

### **4.3. Conclusion**

From the above case studies and surveys, it is clear that county governments have not implemented public participation fully as required under the law. It is also clear that public participation has various challenges which hinder it from being effectively undertaken. Some of these challenges require policy solutions and others administrative intervention. The next chapter will discuss possible solutions for these challenges.

## **CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS**

### **5.0.Introduction**

The chapter will look at the benefits of having clear defined structure of meaningful participation in the budget making process of county governments as this allows the public to be identified with decisions which affect them. It will also look at the possible solutions to the challenges hindering county governments from effectively implementing public participation during the budget making process.

### **5.1.Benefits of public participation**

Public participation has the following benefits;

#### **1. Improved understanding of people’s needs by county governments**

By engaging in the exercise during budget making process, the people get to air their needs to the County Governments. Through effective and meaningful participation the budget exercise becomes legitimate and acceptable as competing and conflicting interests are identified and resolved.<sup>213</sup> The exercise also ensures inclusivity as the needs of the minority are also able to lobby for their needs.

#### **2. Promotes prevention of corruption and mismanagement of public resources**

One tool of fighting corruption is transparency and accountability in decision making and implementation. In order to suppress corruption, the process should be inclusive. Fight against corruption cannot be won without citizen support and participation. It is during the citizen participation meetings where members get to know how the public finances are spent and counties have to be transparent and accountable. During public participation there is scrutiny of the plans and budgets of the County Assemblies. By screening county governments, political

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<sup>213</sup>Economic and Social Rights Centre, ‘Citizen participation in the budget process’ 2013.

figures and business sector the citizens' perform a watchdog role. The County Government can also use these forums to raise awareness about corruption issues.

### **3. Improvement in peoples understanding of the public finance management**

Whenever citizens engage in public participation they get a better understanding of how public finances are managed and the processes involved. Those who participate in the process have a better understanding of how the budget making process works.

### **4. Promotes transparency and accountability in decision making.**

Citizen participation in the budget making process promotes accountability and transparency by exerting pressure on government to be transparent in its revenue raising and expenditure activities, This is because the citizens are watchful and vigilant and as such County Governments are forced to open up by sharing information hence making it possible for citizens to monitor whether the resources are used effectively and efficiently.<sup>214</sup>

### **5. Leads to better decisions**

Public participation enables county government to understand and appreciate different opinions and concerns. Before policies are approved they undergo a comprehensive review and revision thus ensuring that policies and laws and development plans are robust. Participation provides additional skills, knowledge, concerns and generation of new ideas that might have been overlooked if the process was limited to government officials only. Public participations should result in better decision and great ownership by all stakeholders.<sup>215</sup> During participation citizens come up with new ideas and views of how the budget should look like.

### **6. Helps setting citizen priorities by county governments**

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<sup>214</sup>Economic and Social Rights Centre, 'Citizen Participation in the budget process' 2013.

<sup>215</sup> Ministry of Devolution and Planning and Council of Governors, 'County Public Participation Guidelines' January 2016

Public participation ensures potential areas of contention are identified and addressed before a decision is made. The fears and interests of such individual groups are addressed and become part of the decisions making. In most cases those needs which citizens give value to are what are a priority to them. It is during the process of participation that county governments are able to know what these needs are and prioritize them. A consensus is reached and the potential for conflict is minimized if not eliminated altogether.<sup>216</sup>

### **7. Sustainable development**

Public participation and sustainable development are interconnected. Sustainable development is development that aims at meeting the needs of the present without compromising the ability of future generations to meet their own needs. In terms of public participation, it is enhanced for purposes of meeting the future needs of the people. When engaging in the exercise citizens give solutions to their present as well as the future needs of the society.

### **8. Conflict management as it reduces misunderstandings between citizens and county governments**

Since the public needs are diverse there is bound to be conflicts. Public participation ensures the potential areas of conflict are identified and addressed before a decision is made. The fears and interests of the various group are identified and addresses by being made part of the budget making process hence people do not feel marginalized.<sup>217</sup>

### **9. Strengthening democracy and governance**

Engaging in public participation is a constitutional right thus the process is a representative one. By inviting the public to give their views is promoting openness and democracy while

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<sup>216</sup>Institute for Social Accountability, 'Public Participation framework in the County Assembly' April 2015

<sup>217</sup>ibid

limiting public participation limits the power of the people to engage in democratic governance.<sup>218</sup>

## **10. Generation of new ideas, actions and other innovations**

Public participation brings a lot of people together and by doing so it allows for new ideas to develop. Citizens can be a source of innovation and new ideas. Engaging in public participation can lead to new ideas being discovered because the contributions they make are normally varied and may lead to divergent thinking and perspective on the budget needs.<sup>219</sup> Public participation leads to behavioral change because it makes people informed and aware that they can bring change.

### **5.2.Recommendations: Improving Public Participation in Kenya**

The managers/ stakeholders of public participation do not implement the exercise seriously. The stakeholders in participatory budgeting will require patience and consistency for it to yield results. There is need to strengthen public participation and it should be recognized as a process not an exercise. Improving the process can be done as follows;

#### **1. Come up with administrative structures**

The County Governments need to come up with good structures which will manage the exercise. The counties can come up with an office for the coordinator of public participation who will work with the county executive, the county assembly and all the county units. County governments can pool resources for public participation and civic education.<sup>220</sup>

Public participation is a guaranteed process in Kenya. Counties such as Laikipia, Nairobi, Kisumu and Nyeri have passed Public Participation Acts to aid them in carrying out the

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<sup>218</sup> Ministry of Devolution and planning and Council of Governors, 'County Public Participation Guidelines' January 2016

<sup>219</sup> Davies. A. Simon. J., 'The value and role of citizen engagement in social innovation' (2012)

<sup>220</sup> <http://taitataveta.go.ke/> <accessed 8,May, 2019>

exercise. Laikipia County has attempted to do this. It has a Public Participation Act which provides for the establishment of a public participation office which shall be responsible for providing support and advice to the County Assembly on management of the process of public participation.<sup>221</sup> The Act also provides for establishment of a committee of a County Assembly responsible for providing general direction to public participation process.<sup>222</sup> Ward forums have also been established and members of the County Assembly are required to convene the ward forums quarterly for purposes of deliberating on governance policy, service delivery and matters concerning the ward residents.<sup>223</sup>

Kisumu Public Participation Act also provides for establishment of the public participation office and committees to run the said office. The office of public participation has been given powers to establish committees to aid in running the exercise.<sup>224</sup>

In coming up with administrative structures, the legislatures should also consider having penal consequences for public officers who are mandated to carry out the exercise. The exercise is seen as voluntary process as opposed to a duty which must be carried out.

## **2. Financing public participation**

There is need to have funds set aside for public participation. The budgetary allocation should be distributed in all villages, wards, and sub counties. Officers in charge of the public participation exercise should submit their proposal for the public participation for each financial year.<sup>225</sup> Counties should lobby Treasury for additional budgetary allocation of funds to cater for the exercise. Counties should facilitate transportation of the participants to the meetings.

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<sup>221</sup> Laikipia Public Participation Act, 2014, Section 5,

<sup>222</sup> Laikipia Public Participation Act, 2014, Section 7,

<sup>223</sup> Section 8, *ibid*

<sup>224</sup> The Kisumu County Public Participation Act, 2015

<sup>225</sup> <http://taitataveta.go.ke/>



### **3. Civic Education**

Section 100 of the County Government Act provides that each county should implement a civic education programme.<sup>226</sup> Civic education is very important and critical to public participation process. It empowers the public by making them understand the process hence making them engage in a meaningful participation process. Civic education should be conducted before a public participation exercises.

### **4. Inclusivity**

There should be a conscious initiative to ensure that minorities and historically marginalized groups are included in the exercise of public participation during budget making process. Inclusivity is about recognizing differences between individual and groups and can only be achieved when everyone is represented and feels engaged.

### **5. Communication and access to information**

The right to access information is enshrined in the Constitution of Kenya.<sup>227</sup> Access to information aims at creating awareness on matters to be discussed in the budget making process, promotion of citizen understands of the budget making process and promotion of accountability and transparency. Communication should be in a language that the public can understand and in a medium of communication which can be accessible to everyone. Multiple medium of communication should be used. Such mediums can include brochures, traditional medium e.g. using chiefs, notices being put up in facilities which offer services to the public, social media, television, radio, mobile messaging, focus groups etc.

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<sup>226</sup> County Government Act, Section 100

<sup>227</sup> Constitution of Kenya, 2010, Article 35

Communication should be tailored to meet the needs of everyone in the society, both the literate and illiterate. Such communication should contain all the details relevant to the budget making process, the venue, time, documents needed for the exercise and how they can be accessed. The communication should also be timely and be done in advance so as to enable participants prepare.

Section 8(2) provides that the County Government shall take into account the language preferences and usage in the county, persons with special needs and preferences to the different mediums of communication. Section 9 provides that notices required for public participation be publicized in at least two daily newspapers with national circulation, be on the official website of the County Government, by means of radio or any other media or social platform which can reach interested persons.<sup>228</sup>

#### **6. Feedback to the public.**

International Association of Public Participation spectrum provides that public participation should involve consultation and that in the process of consulting the public, feedback should be given on how their input influenced the decisions made.<sup>229</sup>

It would be prudent for County Governments to give feedback to the public. As stated earlier one of the problems affecting public participation is the fact that citizens do not get feedback and as such do not see the need to attend the events. Counties ought to inform the public on the outcome of the public participation process. The public needs to know if their views were taken into account. Such feedback will instill the public with confidence as they will actually see that the counties listen and does not take their views for granted.

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<sup>228</sup> Nairobi County Public Participation Act, 2015, Section 7 & 9,

<sup>229</sup> <https://www.iap2.org> accessed 9, August, 2019>

While giving feedback the counties should do an evaluation process of the exercise. This will enable them know what to improve on and how best the process can be done. Evaluation of the process should involve the public as they are the participants of the process.<sup>230</sup>

### **7. Come up with plans for public participation;**

Any public participation should include a detailed timeline of the planning, program development and decision making process as well as the activities in the process. The plans will enable the participation have order and achieve the goals its seeking to in an effective way. Plans will also enable the County Government identify the roles and responsibilities of the participants of the exercise.

While coming up with plans, the counties should also ensure that the proper records for previous participation are kept for reference purposes. Counties should invest in proper record keeping tools including electronic mechanisms. This will enable both the counties and citizens know whether what was proposed was implemented and if not, how the same can be planned for in the next budgets.

### **8. Develop various tool with which public participation can be done**

County governments should come up with various tools with which citizens can engage in public participation during budget making process. Article 119 of the Constitution provides that every citizen has the right to petition parliament to consider any matter within its authority including enacting, amending and repealing any legislations.<sup>231</sup> This article also applies to County Assemblies by virtue of Section 15 of the County Government Act which provides that

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<sup>230</sup> <http://taitataveta.go.ke/> <accessed 16 August, 2019>

<sup>231</sup> Constitution of Kenya, 2010, Article 119

every citizen has the right to petition a County Assembly to consider any matters within its authority.<sup>232</sup> Each County is required to come up with a prescribed procedure for petitions.

One way of participation is therefore through petitions which are normally guided by the Petitions to Parliament (Procedure) Act which prescribed the procedure and format of petitions. Laikipia County have a legislation for which petitions can be made to its county assembly.

Counties should come with various other forms of participation including through websites, emails, written and oral submissions. In coming up with these tools, each county should appreciate the uniqueness and cultural differences that they have.

One write by the name Philip Adede analyses the concept of public participation in Kenya and acknowledges that indeed public participation has various challenges and the same is not up to standard. He notes that there is need for county government to build capacity of citizens, communicate effectively, mobilize resources for public participation. He opines that how a given community is structured will greatly impact the manner in which public participation should be conducted in that area.<sup>233</sup>

### **9. Capacity building of officers.**

The officers participating in the participation process must have a good understanding of the process and issues being discussed. The said officers should be trained adequately and have the technical expertise on the matters being discussed.

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<sup>232</sup> County Government Act of Kenya, Section 15

<sup>233</sup> Philip Adede, 'An analysis of the Concept of Public Participation in Kenya; International Journal of Law and Policy' Volume 1 issue 2, pp 46-57, 2017,

In building the capacity of officers' counties and citizens should also have in mind that there are instances where public participation may call for them to engage experts. Where such instances arise then there will be need to have the experts educate the public on what they are about to engage in and why there is need to do so.

### **10. Stakeholder mapping**

For the process to be more effective and efficient, the stakeholders should be involved in it. Those persons who may and will be directly affected by the decisions to be made should be included in the public participation sessions.

### **11. Functional websites.**

The world had become a global village and very active on website and the internet and social media platforms. Information is now being shared widely through these social media platforms and websites. The counties should come up with functional and social media sites where the public can give their views at the comfort of their homes and their offices. Websites should be launched with full access of information on budgets. A well-functioning website will promote transparency and accountability by county governments.<sup>234</sup>

Public participation is the best weapon against corruption and poor governance. Kenyan County Government and the National Government should take a proactive role to ensure citizen participation during the budget making process. Citizens should act as watchdogs and ensure they participate in the managing of public finances as they are the biggest stakeholders.

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<sup>234</sup>Centre for Peace and Development Initiative, 'Study on budget making process at District level in Punjab, Pakistan, Citizen Network for Budget Accountability' 2014-2015.

### **5.3.Conclusion**

Citizens must therefore guard public participation jealousy as it's the only way to ensure their needs are being met. Participatory budgeting also called participatory management is therefore an important exercise in the management and distribution of funds and resources in any particular community. Its' implementation should therefore be taken seriously for it to bring change. Citizen should take it up as a right and endeavor to participate in the exercise. County governments must come up with clear structures on how public participation in each county.

The research questions in the project have been answered as follows;

First that challenges affecting public participation have been identified, the history of public participation has also been identified, third the legislative structure governing public participation has also been defined and lastly the extent to which county governments has implemented public participation has been identified through the case studies. It is clear that county governments have not implemented public participation as required under the law. The research has also given possible solutions to these challenges.

Further research should be undertaken on what would be the best mode of public participation for counties and what are the exact tools which should be used so as to achieve effective and efficient public participation. Public participation is a concept which if seriously implemented; it will alleviate citizens from bad leadership, corruption, misuse of public funds and impunity.

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