



**Watamu Tourism Organization (WTO) (Suing through selected officials; Royjan Taylor, Robert Mwachengo & Emilie Van Aardt) & 37 others v Kenya Wildlife Service & 2 others; County Government of Mombasa & another (Interested Parties) (Constitutional Petition E007 of 2023) [2024] KEHC 10405 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10405 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CONSTITUTIONAL PETITION E007 OF 2023**

**M THANDE, J**

**AUGUST 23, 2024**

**BETWEEN**

- WATAMU TOURISM ORGANIZATION (WTO) (SUING THROUGH SELECTED OFFICIALS; ROYJAN TAYLOR, ROBERT MWACHENGO & EMILIE VAN AARDT) ..... 1<sup>ST</sup> PETITIONER**
- KENYA COAST TOURISM ASSOCIATION (KCTA) (SUING THROUGH ITS ELECTED OFFICIALS) ..... 2<sup>ND</sup> PETITIONER**
- WATAMU MUUNGANO DEVELOPMENT GROUP (SUING THROUGH ITS ELECTED OFFICIALS) ..... 3<sup>RD</sup> PETITIONER**
- WATAMU COMMUNITY BOAT OWNERS AND OPERATORS (SUING THROUGH ITS ELECTED OFFICIALS) ..... 4<sup>TH</sup> PETITIONER**
- THE MIDA CREEK HOTEL LIMITED ..... 5<sup>TH</sup> PETITIONER**
- GARODA RESORT LIMITED ..... 6<sup>TH</sup> PETITIONER**
- WATAMU VIEW LIMITED ..... 7<sup>TH</sup> PETITIONER**
- TURTLE BAY HOTELS LIMITED ..... 8<sup>TH</sup> PETITIONER**
- MEDINA PALMS LIMITED ..... 9<sup>TH</sup> PETITIONER**
- HEMINGWAYS WATAMU LIMITED ..... 10<sup>TH</sup> PETITIONER**
- OCEAN SPORTS MANAGEMENT LIMITED ..... 11<sup>TH</sup> PETITIONER**
- TRIBE WATER SPORTS LIMITED ..... 12<sup>TH</sup> PETITIONER**
- TURTLE BAY DIVES AND WATER SPORTS CENTRE LIMITED ..... 13<sup>TH</sup> PETITIONER**
- SWIMBO MANAGEMENT LIMITED ..... 14<sup>TH</sup> PETITIONER**



WATAMU PROPERTIES LIMITED .....	15 <sup>TH</sup> PETITIONER
AQUA VENTURES LIMITED .....	16 <sup>TH</sup> PETITIONER
AFRICA BORN LIMITED .....	17 <sup>TH</sup> PETITIONER
PELAGIC FISHERIES CONSULTING LIMITED .....	18 <sup>TH</sup> PETITIONER
EIRENE ADVISORY LIMITED .....	19 <sup>TH</sup> PETITIONER
THE CROCODILE RESTAURANT LIMITED .....	20 <sup>TH</sup> PETITIONER
ALEXANDER HUNTER .....	21 <sup>ST</sup> PETITIONER
SIMBA FISHING LIMITED .....	22 <sup>ND</sup> PETITIONER
TUHIFADHI DISABLED GROUP (SUING THROUGH ITS ELECTED OFFICIALS) .....	23 <sup>RD</sup> PETITIONER
JANE DE VOEST .....	24 <sup>TH</sup> PETITIONER
NICE TO SEE YOU SPA SALON LTD .....	25 <sup>TH</sup> PETITIONER
ANDREW THOMAS .....	26 <sup>TH</sup> PETITIONER
EMMA WICKINSON .....	27 <sup>TH</sup> PETITIONER
SANDRA RICHES .....	28 <sup>TH</sup> PETITIONER
TINA ALLEN .....	29 <sup>TH</sup> PETITIONER
MICHAEL LORD .....	30 <sup>TH</sup> PETITIONER
KHAMISI KOMBE .....	31 <sup>ST</sup> PETITIONER
NIGEL WARREN .....	32 <sup>ND</sup> PETITIONER
TOBY WARREN .....	33 <sup>RD</sup> PETITIONER
ROBERT BARNES .....	34 <sup>TH</sup> PETITIONER
JANICE BARNES .....	35 <sup>TH</sup> PETITIONER
JOHN ANDREWS .....	36 <sup>TH</sup> PETITIONER
KENTUNA LIMITED .....	37 <sup>TH</sup> PETITIONER
WANYEE KINUTHIA .....	38 <sup>TH</sup> PETITIONER

**AND**

KENYA WILDLIFE SERVICE .....	1 <sup>ST</sup> RESPONDENT
CABINET SECRETARY FOR TOURISM & WILDLIFE .....	2 <sup>ND</sup> RESPONDENT
ATTORNEY GENERAL .....	3 <sup>RD</sup> RESPONDENT

**AND**

COUNTY GOVERNMENT OF MOMBASA .....	INTERESTED PARTY
COUNTY GOVERNMENT OF KILIFI .....	INTERESTED PARTY



## **The Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 declared unconstitutional for want of effective public participation**

*The petitioners, Tourism stakeholders operating in Watamu, Malindi, and Mombasa, challenged the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 for lack of public participation, infringement of socio-economic rights, and jurisdictional overreach. The High Court found that while the Kenya Wildlife Service (the 1st respondent) had jurisdiction to levy and/or collect conservation fees within marine reserves, it failed to conduct meaningful and adequate public participation as required by article 10 of the Constitution, the Wildlife Conservation and Management Act, and the Statutory Instruments Act. The court declared the Regulations unconstitutional.*

Reported by Kakai Toili

**Constitutional Law** – national values and principles of governance – public participation – claim that the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 which introduced new issues, that went beyond what was considered in public participation fora, required further stakeholder consultation and public participation - what were the factors to consider in determining effective public participation – whether Regulations which went beyond issues that had been subjected to public participation ought to be subjected to further public participation - Constitution of Kenya, article 10; Statutory Instruments Act (cap 2A), sections 2 and 5.

**Environmental Law** - Kenya Wildlife Service – jurisdiction of Kenya Wildlife Service - whether the Kenya Wildlife Service had the jurisdiction to levy and/or collect conservation fees within marine reserves – Constitution of Kenya, article 187(2)(b) and the Fourth Schedule.

**Statutes** – interpretation of statutory provisions – interpretation of the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 (the Regulations) - whether the definition of “marine park” in the Regulations was complimentary to the Wildlife Conservation and Management Act and thus exempt from preparation of a regulatory impact statement – Statutory Instruments Act (cap 2A), section 9(g); Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023, regulation 5.

### **Brief facts**

The petition was provoked by the publication and intended implementation of the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 (the impugned regulations) and the Conservation Fees (Conservation Fees) published thereunder, which the petitioners termed as illegal and unconstitutional. The petitioners contended that the impugned regulations were violative of article 2(4) as read with article 10 of the Constitution for want of public participation or consultation of the persons directly affected by the same. Further, they stated that the impugned regulations were *ultra vires* and illegal because by dint of section 35 as read together with the Eleventh Schedule of the Wildlife Conservation and Management Act, the Malindi, Watamu and Mombasa conservation areas to which they applied, were under the control and management of their respective county governments (the Interested parties).

The petitioners claimed that the impugned regulations infringed upon the petitioners socio-economic rights for being unjustifiable and making the Kenyan coast unattractive to tourists and further infringed upon consumer rights in that they prejudiced the economic interests of the consumers. Further that the impugned regulations if implemented would be an affront to the rule of law and the Constitution and cause irreparable harm and put the petitioners’ business at risk of collapse. It was thus the petitioners’ case that the impugned regulations were unconstitutional and ought to be quashed.

### **Issues**

- i. Whether Regulations which went beyond issues that had been subjected to public participation ought to be subjected to further public participation again.
- ii. What were the factors to consider in determining effective public participation?



- iii. Whether the Kenya Wildlife Service had the jurisdiction to levy and/or collect conservation fees within marine reserves.
- iv. Whether the definition of marine park in the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 was complimentary to the Wildlife Conservation and Management Act and thus exempt from preparation of a regulatory impact statement.

### **Relevant provisions of the Law**

#### **Wildlife Conservation and Management Act (Cap. 376)**

*"marine park" means a protected marine area where no fishing, construction work or any disturbance is allowed unless with written permission of the Director-General;*

*"marine protected area" means any park or reserve covering the area of intertidal or sub-tidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law, and includes any dry land found within the gazetted boundary;*

*"national park" means an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means;*

#### **Statutory Instruments Act (Cap. 2A)**

##### **Section 2 - Interpretation**

*"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.*

#### **Held**

1. The Constitution of Kenya had placed certain obligations upon the State in respect of the environment. Article 69 of the Constitution enjoined the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. The State was also required to protect genetic resources and biological diversity and eliminate processes and activities that were likely to endanger the environment.
2. The law relating to the management and conservation of wildlife was contained in the Wildlife Conservation and Management Act the long title of which was an Act of Parliament to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. The natural habitat of wildlife was national reserves. Section 2 of the Wildlife Conservation and Management Act defined marine park, a marine protected area and a "national park".
3. Section 7 of the Wildlife Conservation and Management Act provided that the functions of the 1<sup>st</sup> respondent were *inter alia* to conserve and manage national parks, wildlife conservation areas and sanctuaries under its jurisdiction; provide security for wildlife and visitors in national parks, wildlife conservation areas and sanctuaries; set up a county wildlife conservation committee in respect of each county; promote or undertake commercial and other activities for the purpose of achieving sustainable wildlife conservation; collect revenue levies and charges due to the National Government from wildlife and, as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas.
4. Section 35 of the Wildlife Conservation and Management Act conferred upon the Cabinet Secretary the power to make a declaration of a national reserve. From section 35, once a national reserve had been declared by the Cabinet Secretary, such reserve shall be managed by the relevant county government in accordance with the provisions of the Wildlife Conservation and Management Act. Section 35(3) provided that the county government may manage the reserve within its jurisdiction or may opt to, with approval of the Cabinet Secretary and after consultation with the National Land Commission, enter into a management agreement with any management agent or the 1<sup>st</sup> respondent for the management of such national reserve.



5. One of the key aspects of the Constitution was the principle of devolution contained in Chapter Eleven. Article 174 of the Constitution provided that the objects of the devolution of Government were *inter alia* to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.
6. The principle objective of devolution was to decentralize power and distribute sufficient resources to previously starved areas. Functions were distributed between the two levels of Government. The distribution of functions between the National Government and the county governments was set out in the Fourth Schedule with Part 1 providing for National Government functions and Part Two providing for county government functions. Article 187(2)(b) of the Constitution provided that if a function or power was transferred from a government at one level to a government at the other level, constitutional responsibility for the performance of the function or exercise of the power would remain with the government to which it was assigned by the Fourth Schedule.
7. A clear reading of the Fourth Schedule to the Constitution would show that protection of the environment and natural resources was a function of the National Government. The 1<sup>st</sup> respondent had the jurisdiction to levy and/or collect conservation fees within marine reserves.
8. The principle of public participation had been entrenched in the Constitution as one of the national values and principles of governance that bound all State organs including the respondents, when, *inter alia* enacting law and formulating and implementing public policy decisions. Public participation was a constitutional imperative, which played a central role in legislative, policy and executive functions of Government. It informed stakeholders and the public of what was intended and afforded them an opportunity to express, and have their views taken into account.
9. The people exercised their sovereignty by having a say in how they were governed by the persons to whom they had delegated that power. Accordingly, every regulation-making authority bore the responsibility of ensuring and facilitating public participation before regulations were made. Public participation was not a matter of going through the motions. Nor could it be a public relations exercise where a few people attended a forum and signed attendance sheets.
10. Public participation must be real, meaningful and must make sense to the public participating. There must be reasonable notice and clarity including prior sensitization, to enable the public to understand subject matter. The process of participation must also be transparent, clear and simple inclusive with effective representation, reasonable and adequate opportunity to engage in the public participation. Additionally, after considering and incorporating the submitted views, validation fora must of necessity include the persons who submitted views so that they could confirm that indeed their views were incorporated or at the very least considered.
11. The WMCA (Wildlife Conservation and Management Act) made provision for public participation. The respondents were required to publish information on the impugned regulations including their contents, where they could be obtained from, where presentations and comments were to be submitted, to whom and the timelines. That publication was to be in the Gazette and in at least three national newspapers, at least 1 newspaper circulating in the Kilifi and Mombasa Counties in which the impugned regulations related and in at least 1 Kenyan radio station broadcasting in the counties. Additionally, the respondents were required to avail copies of the impugned regulations to the public at reasonable cost. Upon receiving presentations and comments, the respondents were to consider the same and thereafter publish, through the media, a notice that a copy of the decision in writing, and of the reasons, which was to be available for public inspection.



12. The 1<sup>st</sup> respondent published the Conservation Fees January, 2023 – December 2025 vide a newspaper advertisement of January 13, 2023 inviting comments from the public as to participate in various public participation forums across Kenya. The newspaper advertisement provided information on where to access the proposed conservation fees and the various ways the public could engage in public participation, including attending forums, or sending comments via email or post.
13. There was no evidence that the views of the petitioners were taken into consideration and addressed prior to promulgating the impugned regulations. There was also no evidence of publication of the conservation fees as required under the Fourth Schedule to the Wildlife Conservation and Management Act or notification of the decision made following consideration of the views expressed by the petitioners.
14. The impugned regulations had gone beyond conservation fees in respect of which the petitioners made representations to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent admitted that at the time of filing of the instant petition, the impugned regulations were not available to the public as the same were awaiting parliamentary scrutiny. The impugned regulations which introduced new provisions required stakeholder consultation and public participation. They were promulgated without any public participation on the same. Besides violating the provisions of the Constitution including article 10, the process of promulgating the impugned regulations did not comply with the express provisions of the Wildlife Conservation and Management Act including the elaborate provisions of the Fourth Schedule to the Act.
15. The impugned regulations were a statutory instrument as they were within the definition set out in section 2 of the Statutory Instruments Act. Section 5 of the Statutory Instruments Act required that consultation be carried out with persons who were likely to be affected by the proposed instrument. The impugned regulations were not made available to the public. Further, the petitioners as persons likely to be affected by the impugned regulations were not notified of the regulations or invited to make submissions as required under section 5(3) of the Statutory Instruments Act. Other than the correspondence with the Parliamentary Committee on Delegated Legislation, the respondents had not demonstrated that they carried out consultations on the impugned regulations as required under the Statutory Instruments Act. Therefore, the public in general and the petitioners in particular, who were likely to be affected by the impugned regulations did not have any, leave alone adequate opportunity to comment on its proposed content.
16. The respondents did not comply with the requirement to make appropriate or any consultations the petitioners as persons likely to be affected by the impugned regulations prior to making them. The impugned regulations imposed significant costs on park users and in particular on the petitioners and their clients. There was also no evidence of gazettment of the impugned regulations as provided for under section 11 of the Statutory Instruments Act.
17. As regards whether the preparation and publication of a regulatory impact statement was unnecessary under section 9(g) of the Statutory Instruments Act, the exemption would be applicable if the impugned regulations were substantially uniform or complementary with the Wildlife Conservation and Management Act.
18. The definition of marine park in the impugned regulations could not be said to be uniform or complementary to that in the Wildlife Conservation and Management Act. Similarly, regulation 5 of the impugned regulations had categorized parks, reserves and conservancies yet the Wildlife Conservation and Management Act made no such provision. The exemption in section 9(g) of the Statutory Instruments Act was not available in relation to the impugned regulations. The impugned regulations were made in violation of the provisions of the Statutory Instruments Act.
19. The 1<sup>st</sup> respondent was charged with the responsibility of collecting revenue, levies and charges due to the National Government from wildlife and, as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas. The 1<sup>st</sup> respondent had the right to collect any levy or



charges. Such right was however founded on the principle of legality and constitutionality. As such, the 1<sup>st</sup> respondent as a State agency could justify violation of the Constitution on the grounds that its operations would be adversely affected.

20. The supremacy of the Constitution was set out in article 2 of the Constitution. It was critical that the supremacy of the Constitution was protected and there could be no greater public interest than upholding the Constitution and the law. The court must ensure that every person and all State organs including the respondents were bound by the Constitution and anything done in the exercise of State authority was done in accordance with the Constitution. The impugned regulations having been enacted in violation of the Constitution and the law were therefore invalid and could not stand.

*Petition allowed.*

### **Orders**

- i. *A declaration was made that the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 published by the 2<sup>nd</sup> respondent via Legal Notice No. 215 were illegal and unconstitutional for want of effective public participation and public consultation as required under the Constitution of Kenya, the Statutory Instruments Act and the Wildlife Conservation and Management Act.*
- ii. *An order of certiorari was issued to remove to the court and quash the Legal Notice No. 215 publishing the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023.*
- iii. *An order of prohibition was issued restraining the 1<sup>st</sup> respondent whether acting alone or jointly with others, its servants, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 or any fees published thereunder or demanding payment of the entry fees or activity fees under the Regulations.*
- iv. *No order as to costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Mentioned)
2. *British American Tobacco Kenya Ltd v Cabinet Secretary for the Ministry of Health & 4 others* Petition 143 of 2015; [2016] KEHC 7530 (KLR) - (Explained)
3. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Explained)
4. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR) - (Mentioned)
5. *Kaps Parking Limited & another v County Government of Nairobi & another* Petition 104 of 2020; [2021] KEHC 5819 (KLR) - (Explained)
6. *Kiambu County Government & 3 others v Robert N Gakuru & others* Civil Application 97 of 2014; [2014] KECA 157 (KLR) - (Mentioned)
7. *Okiya Omtatah Okoiti v Commissioner General & 2 others* Petition 532 of 2017; [2018] KEHC 8263 (KLR) - (Explained)
8. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)

#### **South Africa**

- Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* CCT 86/08 [2010] ZACC 5 - (Explained)



## Statutes

### Kenya

1. Constitution article 2(4); 10; 43; 46; 187(2)(b); Schedule 4 - (Interpreted)
2. Statutory Instruments Act (cap 2A) section 5, 6, 11 - (Interpreted)
3. Tobacco Control Regulations, 2014 (cap 245A Sub Leg) In general - (Cited)
4. Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2025 (cap 376 Sub Leg) - (Unconstitutional)
5. Wildlife Conservation And Management Act (cap 376) section 4, 32, 35, 44, 119; Schedule 11 - (Interpreted)

### Advocates

None mentioned

## JUDGMENT

1. The petition herein dated 7 November, 2023 and amended on 29 December, 2023 was filed by the petitioners who describe themselves as persons and registered associations whose members operate different types of businesses in the hospitality and tourism industry including hotels, restaurants, tour operators, water sports, and fishing among others. They operate in Mombasa, Malindi and Watamu areas of the Kenyan coast.
2. The petition was provoked by the publication and intended implementation of the [\*Wildlife Conservation and Management \(Access and Conservation\) \(Fees\) Regulations, 2023\*](#) (the impugned Regulations) and the Conservation Fees (Conservation Fees) published thereunder, which the petitioners term as illegal and unconstitutional. The petitioners contend that the impugned regulations are violative of article 2(4) as read with article 10 of the [\*Constitution\*](#) for want of public participation or consultation of the persons directly affected by the same. Further that the impugned regulations are ultra vires and illegal because by dint of section 35 as read together with the Eleventh Schedule of the [\*WCMA\*](#), the Malindi, Watamu and Mombasa conservation areas to which they apply, are under the control and management of their respective county governments, the interested parties herein.
3. The petitioners added that the impugned regulations infringe upon the petitioners socio-economic rights under article 43 of the [\*Constitution\*](#) for being unjustifiable, exorbitant, duplicate and make the Kenyan coast unattractive to tourists and further infringe upon consumer rights under article 46 in that they prejudice the economic interests of the consumers. Further that the impugned regulations if implemented will be an affront to the rule of law and the [\*Constitution\*](#) and cause irreparable harm and put the petitioners' business at risk of collapse.
4. The petitioners alleged that the respondent in 2022 prescribed and collected park entry and activity fees in a similar fashion prompting the petitioners to file Petition No E006 of 2022. The court granted conservatory orders which are to remain in place pending the hearing and determination of that petition.
5. It is thus the petitioners' case that the impugned regulations are unconstitutional and deserving to be quashed by this court. They sought the following reliefs:
  - i. A declaration that the [\*Wildlife Conservation and Management \(Access and Conservation\) \(Fees\) Regulations, 2023\*](#) published by the 2<sup>nd</sup> respondent on via Legal Notice No 215 are illegal and unconstitutional for want of effective public participation and public consultation



as required under the Constitution of Kenya, 2010, the Statutory Instruments Act, 2013 and the Wildlife Conservation and Management Act.

- ii. An order of *certiorari* to remove to this honourable court and quash the Legal Notice No. 215 publishing the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023.
  - iii. A declaration that the Watamu National Marine Reserve, Mombasa National Marine Reserve and the Malindi National Marine Reserve fall within the jurisdiction and management of the County Governments of Kilifi and Mombasa County Governments under section 35 of the Wildlife Conservation and Management Act, 2013 and the respondent has no powers to demand or enforce payment of entry and activity fees in respect of the Watamu, Malindi and Mombasa National Marine Reserves.
  - iv. A declaration that the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, as prescribed and published by the 1<sup>st</sup> respondent violate the petitioner's socio-economic rights and consumer rights under articles 43 and 46 of the Constitution in the circumstances of this case and are therefore null and void ab initio.
  - v. An order of prohibition be and is hereby issued restraining the respondent whether acting alone or jointly with others, its servants, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/ or enforcement of Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 or any fees published thereunder or demanding payment of the entry fees or activity fees under the said regulations.
  - vi. The costs of this petition be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - vii. Any other or further order or relief that this honourable court deems fit to grant.
6. The 1<sup>st</sup> respondent opposed the petition vide the replying affidavits sworn on 20 December, 2023 and 6 March 2024 by Gladys Kosgey, its Senior Assistant Director Business Development & Marketing in which all allegations of the petitioners were denied. It was averred that around January 2023, the 2<sup>nd</sup> respondent through the 1<sup>st</sup> respondent commenced the process of enacting regulations with regard to Wildlife Conservation and Management and in particular access and conservation fees. This was with intended to enable the 1<sup>st</sup> respondent effectively discharge its mandate of is conservation and management of wildlife and its habitat for posterity. Further that the need for new and revised fees is informed by the need to improve the visitor experience within national parks, reserves and sanctuaries; align with government policies & directives; address inflation, arising economic factors and conservation challenges such as human wildlife conflict; enhance ecological integrity & sustainability of wildlife and promote benefit sharing among the local community.
7. The 1<sup>st</sup> respondent asserted that meetings were held across the country and attracted a large attendance of stakeholders and the general public including the petitioners herein. Further that it received various proposals inter alia product diversification by the respondent to ensure value for money by including fitness/wellness programmes, adventure, cave tourism, night game drives, bird watching, animal tracking and water sports; introduction Inclusion of special rates for citizens from other parts of Africa; increment of conservation fees per the circulated schedule and enhancement of fees proposed in the circulated schedule and in particular aircraft landing fees and vehicle fees; categorization of marine parks as is the case with terrestrial parks and in particular premium marine parks to include Watamu and Kisite Mpunguti; definition of water sports; special fees for senior citizens, persons living with disability and children.



8. It was averred that after analyzing and incorporating the said comments, the 1<sup>st</sup> respondent prepared a second schedule of new and revised conservation fees which was also circulated to the general public and invited the stakeholders for a validation meeting on 17 August 2023. The 1<sup>st</sup> respondent thus stated that the assertion that the petitioners were not invited to the validation meeting is false and aimed at misleading the as the various stakeholders were invited through their various societies and/or association (umbrella organizations) including the Kenya Coast Tourism Association and Watamu Tourism Association.
9. It was further stated that following the public participation exercise and validation forum, the 1<sup>st</sup> respondent prepared the draft *Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023* for tabling before the Committee on Delegated Legislation as prescribed in the *Statutory Instruments Act, 2013*. The 1<sup>st</sup> respondent stated that amongst the proposals incorporated in the draft were categorization of marine parks ie special interest marine protected areas and other marine protected areas; special rates for the rest of Africa; product diversification through heli-tourism, virtual tours at KWS parks and reserves and payment for private translocation operations among others; exemption from paying of conservation fees for senior citizens, persons living with disability and children under the age of 5 years.
10. The 1<sup>st</sup> respondent further stated that the Committee on Delegated Legislation proposed and recommended amendments to the said regulations to include inter alia a clear definition of water sports and park categories and that reference be made to the applicable law when defining persons with disabilities, etc. Thereafter the regulations went through the parliamentary process and approval and on 11 December, 2023 the 2<sup>nd</sup> respondent published via the Kenya Gazette the impugned regulations in line with S116 of the *WMCA*.
11. On the conservation fees prescribed in the impugned regulations, it was averred that the same were subjected to adequate public participation in 2 working drafts dubbed Conservation Fees January 2023 -December 2025; that the 1<sup>st</sup> draft was subjected to public participation across the country between January 2023 and March 2023; that the petitioners were consulted on 14 and 15 February 2023 and gave their feedback. The 1<sup>st</sup> respondent incorporated the feedback from the general public and improved the 1<sup>st</sup> draft which was published on its website on 4 August, 2023. Stakeholders in the tourism industry were thereafter invited for a validation forum on 17 July 2023 and terms and conditions were furnished to the petitioners. Their feedback informed further review of the conservation fees. This culminated in the draft rules and regulations that were published and tabled before the Committee on Delegated Legislation (the Committee) for approval.
12. The 1<sup>st</sup> respondent maintained that it conducted effective and adequate public participation throughout the country as demonstrated in the attendance sheets, minutes, photos and records of parliamentary scrutiny by the Committee. Further that it is untrue that the 1<sup>st</sup> respondent failed to respond to the petitioners' emails and text messages as the minutes of the meetings at Mombasa Beach Hotel and Turtle Bay Beach Club contain the issues raised by the petitioners and the public and the responses thereto. It was further averred that the 1<sup>st</sup> draft of the Conservation Fees was published in the Standard Newspaper on 13 January 2023 inviting the public across the country to make comments and attend of public forums from 30 January 2023 to 23 February 2023.
13. In response to the allegation that new park categories were introduced, the 1<sup>st</sup> respondent asserted that the 2<sup>nd</sup> draft of the impugned regulations was published on its website on 4 August, 2023 and invitations to stakeholder consultation and validation forum on 17 August, 2023 contained the categorization of Watamu and Kisite Mpunguti Marine Parks and Reserves as special interest



- marine protected areas. It was further denied that there was ambiguity in the definition of commercial photography and videography in respect of which the regulations introduced fees.
14. Additionally, that under section 119 and the Eleventh Schedule of the [WCMA](#), Watamu, Malindi and Mombasa National Reserves are marine protected areas and that it is the 1<sup>st</sup> respondent and not the county governments, that has the mandate to manage and conserve the same and is duly gazetted in that regard. Further that there is no management agreement vesting the said reserves in the county governments has been exhibited.
  15. The 1<sup>st</sup> respondent further stated that under the [WMCA](#), it has the mandate to grant wildlife user rights for non-consumptive activities at a fee. Further that it is no longer sustainable for the 1<sup>st</sup> respondent to rely on the fees prescribed in 2013 regulations for its operational costs in light of the high cost of living. It was added that the petitioners and general public decried the poor infrastructure and facilities within the parks and reserves, which make them uncompetitive. This formed the basis upon which the 2<sup>nd</sup> respondent on recommendation of the 1<sup>st</sup> respondent revised the Conservation Fees to enable the 1<sup>st</sup> respondent discharge its mandate.
  16. According to the 1<sup>st</sup> respondent, 70% of its revenue is derived from tourism activities, 15% from Government subvention and 5% from donors. It will thus suffer irreparable harm should the orders sought herein be granted. The 1<sup>st</sup> respondent maintained that it had complied with the law in enacting the impugned regulations and that the petitioners who have been part of the process have not demonstrated with precision how their rights have been infringed or are likely to be infringed upon. As such, the petition should be dismissed with costs.
  17. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed grounds of opposition dated 2 April, 2024. The grounds raised are that the petition is premature, fatally defective, untenable and contrary to the provisions under which it is brought; that the petition is misleading and devoid of merit and does not meet the threshold set out in [Anarita Karimi Njeru v Attorney General](#) (1979); that the petitioners have not demonstrated the manner in which the 2<sup>nd</sup> respondent acted arbitrarily or outside his mandate in gazetting of the impugned regulations; that the impugned regulations are constitutional and proper as the 1<sup>st</sup> respondent has constitutional and legal mandate over the Mombasa, Watamu and Malindi marine parks.
  18. Murtaza Tajbhai, the County Solicitor of the 1<sup>st</sup> interested party swore a replying affidavit on 19 March, 2024, in support of the petition. He averred that the respondents did not give the affected persons and general public a reasonable opportunity to give their views on the impugned regulations, as required by the Constitution and the [Statutory Instruments Act](#) (SIA) and the [WMCA](#) before purporting to implement the same. Further that the regulations include substantive provisions in an unprocedural and non-participatory manner thereby making them fundamentally flawed and unconstitutional.
  19. The 1<sup>st</sup> interested party added that the impugned regulations have introduced substantive provisions that are not provided for in the parent statute and also directly contradict the same. The 1<sup>st</sup> interested party cited regulation 5 of the impugned regulations which purports to categorize parks, reserves and sanctuaries into marine, mountain, premium scenic, special interest and wilderness parks as well as urban safari and sanctuaries. It was asserted that this categorization directly contradicts and breaches the parent statute which does not recognize the same. Further that regulation 3 defines “marine park” in a manner that amends the definition in section 3 of the parent statute and is therefore unconstitutional.
  20. It is the 1<sup>st</sup> interested party’s further contention that the impugned regulations offend the provisions of sections 5, 6 and 11 of the [SIA](#) rendering them unlawful. The regulations further the [WCMA](#) and



in particular section 4, 35 and 44 thereof. It was asserted that the management of the Mombasa Marine National Reserve falls within the jurisdiction of the 1<sup>st</sup> interested party and that the respondents cannot purport to levy charges on entry/activator consultation fees thereon without prior authorization or consultation. Further that the respondents' purported actions of managing the Mombasa National Reserve without a management plan that takes into account the views of the public as required by section 44(5) of the *WMCA* are illegal. The 1<sup>st</sup> interested party urged that in light of the foregoing, the petition be allowed.

21. Although given adequate opportunity, the 2<sup>nd</sup> interested party did not file any pleadings.
22. I have given due consideration to the respective parties' written submissions together with the cited authorities. The issues that arise for determination are:
  - i. Whether the 1<sup>st</sup> respondent has jurisdiction to levy and/or collect conservation fees within marine reserves.
  - ii. Whether the impugned regulations violated the constitutional principle of public participation.
  - iii. Whether the impugned regulations violated the provisions of the Statutory Instruments Act.

**Whether the 1<sup>st</sup> respondent has jurisdiction to levy and/or collect conservation fees within marine reserves**

23. The petitioners have challenged the impugned regulations for want of jurisdiction. Their contention is that under sections 32 and 35 of the *WMCA* as read with the Eleventh Schedule thereto provide that national parks such as Watamu, Malindi and Mombasa National Reserves fall within the jurisdiction and management of the respective county governments, namely the interested parties herein. They urged the court to take judicial notice of the fact that the Masai Mara National Reserve is under the management of the County Government of Narok and that pursuant to the cited provisions, the 1<sup>st</sup> respondent has no jurisdiction over the reserve. The petitioners thus argued that the enactment and prescription and enforcement of collection of entry fees is a usurpation of jurisdiction and mandate by the 1<sup>st</sup> respondent over Watamu, Malindi and Mombasa Marine reserves and therefore illegal and unconstitutional.
24. For the 1<sup>st</sup> interested party, it was submitted that the architecture of the *WMCA* is embedded with the principles of devolution, appreciative of the fact that all natural resources ultimately belong to the people. As such, management and conservation of natural resources must devolve to the people and their representatives at the lowest local level. Relying on section 32 of *WMCA* it was submitted that the Mombasa Marine National Reserve is a preserve of the 1<sup>st</sup> interested party and that the 1<sup>st</sup> respondent cannot levy entry or activity fees without prior authorization of consultation.
25. The 1<sup>st</sup> interested party further submitted that under section 44 of the *WMCA* every marine protected area must be managed by a management plan that accommodates participation of all stakeholders, which the 1<sup>st</sup> respondent failed to actualize. It was contended that the enactment of the impugned regulations without consulting the 1<sup>st</sup> interested party was statutory breach. It is also contrary to the spirit and letter of the *Constitution*, particularly article 189 thereof which calls for cooperation between the 2 levels of government.
26. The 1<sup>st</sup> interested party further submitted that under section 4(i) of Part 2 of the Fourth Schedule all public amenities in Mombasa County including the beaches are under the 1<sup>st</sup> interested party. Additionally, that the provision in the impugned regulations for tourism fees for commercial



- photography and videography, photo sessions, horse riding and other activities in beaches, is a blatant abuse of the Fourth Schedule of the Constitution. The 1<sup>st</sup> interested party concluded that the 1<sup>st</sup> respondent in enacting the impugned regulations took up a role that the Constitution expressly assigned to the 1<sup>st</sup> interested party.
27. The submissions by the petitioners and the 1<sup>st</sup> interested party were countered by the 1<sup>st</sup> respondent which submitted that the Malindi, Watamu and Mombasa National Reserves are gazette National Reserves under the management of the 1<sup>st</sup> respondent. And operate as such pursuant to sections 2 and 119 of the WMCA. Further that the said reserves are a habitat of wildlife species which if not conserved, are in danger of extinction. That this is in line with article 69 of the Constitution which recognizes the need for the State to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, which includes wildlife.
  28. It is the 1<sup>st</sup> respondent's case that it is not automatic that gazette reserves are under the jurisdiction of county governments and that a particular country government must demonstrate capacity to manage a reserve and meet the threshold set out in section 35(3) of the Act. Further that neither the petitioners nor the interested parties have exhibited any signed memorandum of agreement between them and the 1<sup>st</sup> respondent for the management and conservation of the reserves in question or that the same have been degazetted. The 1<sup>st</sup> respondent asserted that it has jurisdiction to manage and conserve all gazette national reserves while the interested parties have no jurisdiction to manage and conserve the reserves in Malindi, Watamu and Mombasa.
  29. I have considered the rival submissions. The Constitution of Kenya has placed certain obligations upon the State in respect of the environment. Article 69 enjoins the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. The State is also required to protect genetic resources and biological diversity and eliminate processes and activities that are likely to endanger the environment.;
  30. The law relating to the management and conservation of wildlife is contained in WMCA the long title of which is Act of Parliament to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. The natural habitat of wildlife is national reserves.
  31. Section 2 of WMCA defines "marine park" as a protected marine area where no fishing, construction work or any disturbance is allowed unless with written permission of the Director-General. A "marine protected area" is defined as any park or reserve covering the area of intertidal or sub-tidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law, and includes any dry land found within the gazetted boundary. Section 2 goes on to define a "national park" as an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means.
  32. At the heart of the dispute herein is whether the 1<sup>st</sup> respondent has jurisdiction to levy and/or collect conservation fees within marine reserves in Malindi, Watamu and Mombasa. The 1<sup>st</sup> respondent maintains it has the requisite jurisdiction while the petitioners and the 1<sup>st</sup> interested party dispute this.
  33. In order to make a determination on this issue, it is necessary to examine the mandate of the 1<sup>st</sup> respondent. Section 7 of the Act provides that the functions of the 1<sup>st</sup> respondent are inter alia to conserve and manage national parks, wildlife conservation areas, and sanctuaries under its jurisdiction; provide security for wildlife and visitors in national parks, wildlife conservation areas and sanctuaries; set up a county wildlife conservation committee in respect of each county; promote or undertake



commercial and other activities for the purpose of achieving sustainable wildlife conservation; collect revenue levies and charges due to the national government from wildlife and, as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas.

34. Section 35 of the [WMCA](#) confers upon the Cabinet Secretary the power to make a declaration of a national reserve as follows:
1. The Cabinet Secretary may, upon recommendation of the relevant county government and after consultation with the National Land Commission, by notice in the Gazette, declare any land under the jurisdiction of a county government to be a national reserve where the land is—
    - a. rich in biodiversity and wildlife resources or contains endangered and threatened species;
    - b. an important catchment area critical for the sustenance of a wildlife conservation area; or
    - c. an important wildlife buffer, zone, migratory route, corridor or dispersal area.
  2. The national reserve declared under subsection (1) shall be managed by the relevant county government in accordance with the provisions of this Act.
  3. Notwithstanding the provisions of subsection (2), the county government may, with approval of the Cabinet Secretary after consultation with the National Land Commission, enter into a management agreement with any management agent or the Service for the management of a national reserve which shall clearly specify among other things—
    - a. the duration of the agreement;
    - b. the terms and conditions under which the management agent or the Service shall manage the national reserve;
    - c. management fees and charges payable to the management agent or the Service;
    - d. a management plan to be followed by the management agent or the Service;
    - e. the mechanism for settlement of disputes arising in respect of the agreement; and
    - f. the circumstances under which the agreement may be terminated.
35. It is evident from the above section that once a national reserve has been declared by the Cabinet Secretary, such reserve shall be managed by the relevant county government in accordance with the provisions of [WMCA](#). Sub section 3 provides that the county government may manage the reserve within its jurisdiction provides or may opt to, with approval of the Cabinet Secretary and after consultation with the National Land Commission, enter into a management agreement with any management agent or the 1<sup>st</sup> respondent for the management of such national reserve.
36. One of the key aspects of our [Constitution](#) is the principle of devolution contained in Chapter Eleven thereof. Article 174 provides that the objects of the devolution of government are inter alia to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.



37. In the Supreme Court case of *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR) (1 November 2013) (Advisory Opinion), Mutunga, CJ set out the rationale of devolution as follows:

The current devolution provisions in Chapter 11 of the new *Constitution* are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check.

The learned Judge went on to state:

Devolution is the core promise of the new *Constitution*. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state.

38. The learned Judge added:

Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the *Constitution* endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen chapters, only in Chapter Twelve (on public finance with respect to devolution) does the *Constitution* express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units.

39. The principle objective of devolution is to decentralize power and sufficient resources to previously starved areas. Functions were distributed between the 2 levels of government. The distribution of functions between the national government and the county governments can be found in the Fourth Schedule with Part 1 providing for national government functions and Part 2 providing for county government functions. Article 187(2)(b) provides that if a function or power is transferred from a government at one level to a government at the other level constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.

40. A clear reading of the Fourth Schedule will show that protection of the environment and natural resources is a function of the national government. Section 22 of Part 1 of the Fourth Schedule stipulates in part:

Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—

- (a) fishing, hunting and gathering;
- (b) protection of animals and wildlife;
- (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams;



41. In light of the foregoing provision, I find and hold that the 1<sup>st</sup> respondent has the jurisdiction to levy and/or collect conservation fees within marine reserves.

Whether the impugned regulations violated the constitutional principle of public participation

42. The petitioners challenge the constitutionality and legality of the impugned regulations principally for want of proper public participation. While they concede that stakeholder meetings were held in Mombasa and Watamu on 14 February 2023 and 15 February, 2023 relating to the 2023 - 2025 conservation fees, the same did not address the critical issues raised by the stakeholders. Specifically, that the 1<sup>st</sup> respondent's officers failed to address issues raised, despite undertaking to consult and give feedback.

43. It is the petitioners' contention that the so-called stakeholder validation meeting held in Nairobi on 17 August 2023 to which they were not invited cannot be deemed as evidence of further public participation. Further, that the 1<sup>st</sup> respondent cannot purport to fulfil its obligation in respect of public participation by inviting the Chief Executive Officer of the Coast Tourism Association to this meeting. This is because the said CEO was not at the previous meetings and did not raise the issues that needed to be addressed.

44. The petitioners submitted that the single meetings held did not fulfil the requirement of public participation as contemplated under the Constitution. Further that the 1<sup>st</sup> respondent had an obligation to demonstrate that it reasonably responded to or considered the concerns and issues raised by the public. Additionally, that whereas the 1<sup>st</sup> respondent stated that it held meetings in various parts of the country, it does not indicate that it took into account the uniqueness of the petitioners' concerns which relate to marine parks as opposed to terrestrial parks.

45. It was further submitted for the petitioners that the 1<sup>st</sup> respondent admitted that the impugned regulations were not available to the public at the time the petition was filed as the same were awaiting parliamentary scrutiny. Additionally, that what was presented at the February 2023 meeting was the schedule of fees only and which they assert lacked adequate participation and therefore unconstitutional. Further, that the impugned regulations contain matters which were not in the 2013 regulations but were introduced for the first time and therefore needed public participation. These include new classes of activities, new designation of conservation areas, new requirements for compliance by industry players. They have classified seasons into high and low seasons; classified parks into premium, scenic, special interest and wilderness parks; introduced security fees and annual licence fees based on classification of businesses by size as well as fees for activities like vlogging, sundowning, photography, etc. As such, the impugned regulations in their entirety are unconstitutional for want of adequate public participation.

46. The 1<sup>st</sup> interested party submitted that the impugned regulations are illegal, unconstitutional and null and void for want of public participation. Citing the response by the 1<sup>st</sup> respondent, the 1<sup>st</sup> interested party submitted that that the 1<sup>st</sup> respondent conceded that the impugned regulations were not available to the public for their participation, at the time of filing of the petition. Further that even though the 1<sup>st</sup> respondent stated that the schedule of fees had been subjected to the process, the impugned regulations went beyond prescribing fees and created new classes of activities. As such, public participation on the same was not conducted before promulgation. This was in contravention with section 4 of the WMCA and Principle 10 of the Rio Declaration on Environment and Development (1992). The 1<sup>st</sup>

47. For the 1<sup>st</sup> respondent, it was submitted that it circulated to the general public the 1<sup>st</sup> draft of the conservation fees namely Conservation Fees January, 2023 – December 2025 vide a newspaper advertisement of 13 January 2023 inviting comments from the public as to participate in various public



participation forums across the country. It was submitted that the newspaper advertisement provided information on where to access the proposed conservation fees and the various ways the public could engage in public participation, including attending forums, or sending comments vis email or post. Further that the public was granted 14 days to submit their views.

48. It is the 1<sup>st</sup> respondent's case that the public was consulted between January to March 2023, and that they gave feedback, recommendations and proposals. Further that the petitioners were consulted on 14 and 15 February 2023 and they gave their feedback for consideration, including a request for terms and conditions for water sports activities. Additionally, that it can be seen from the minutes exhibited in the 1<sup>st</sup> respondent's replying affidavit, that it incorporated some of the proposals and recommendations by the public which it deemed fit in promoting conservation and management of wildlife.
49. The 2<sup>nd</sup> & 3<sup>rd</sup> respondent reiterated that submissions of the 1<sup>st</sup> respondents. They asserted that that the 1<sup>st</sup> draft of the conservation fees were circulated *vide* a newspaper advertisement on 13 January, 2023 inviting comments and participation in public participation forums. The advertisement also contained information on where the draft could be accessed, the dates and venues of the forums email and postal address for submission of memoranda and timelines. Citing the High Court case of *Robert N. Gakuru & Others v Kiambu County Government & 3 others* [2014] eKLR, and the Court of Appeal decision in *Kiambu County Government & 3 others v Robert N Gakuru & others*, the respondents asserted that sufficient public participation was carried out by the 1<sup>st</sup> respondent when coming up with the impugned regulations.
50. I have considered the submissions by the parties. The principle of public participation has been entrenched in our *Constitution* as one of the national values and principles of governance that binds all state organs including the respondents, when, inter alia enacting law and formulating and implementing public policy decisions. Article 10 of the *Constitution* as follows:
- (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them--
    - (a) applies or interprets this Constitution;
    - (b) enacts, applies or interprets any law; or
    - (c) makes or implements public policy decisions.
  - 2) The national values and principles of governance include--
    - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
    - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
    - (c) good governance, integrity, transparency and accountability; and;
    - (d) sustainable development.
51. In *Okiya Omtatab Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR, Mativo, J. (as he then was) stated:
49. In a recent decision of this court, I observed that "my analysis of the constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government." Both local and foreign jurisprudence are awash with decisions holding that public participation ought to be real and not illusory and ought not to



be treated as a mere formality for the purposes of fulfilment of the constitutional dictates. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.

52. In the case of *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment) (the BAT case), the Supreme Court underscored that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.
53. Article 10 of the *Constitution* stipulates that the national values and principles of governance are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law, or makes or implements public policy decisions. Public participation is a constitutional imperative, which plays a central role in legislative, policy and executive functions of Government. It informs stakeholders and the public of what is intended and affords them an opportunity to express, and have their views taken into account.
54. In the oft cited South African case of *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 Others* CCT 86/08 [2010] ZACC 5, the court captured the essence of public participation thus:
- Engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.
55. Information in respect of which views are sought must be reasonably accessible to the public in a timely fashion. Understanding of the issue is also critical and the public must be sufficiently sensitized to enable them give informed views on the same. Factors such as illiteracy and language barriers, disability, etc. must also be taken into account. Additionally, adequate time must be given to the public to interrogate and process the information. Further the manner in which the public is to give their views or otherwise participate in the matter must be clearly defined.
56. It is well settled that persons most affected by a policy, legislation or action must have a say in that policy, legislation or action as the case may be and that their views must be more deliberately sought and taken into account. The decision-making body must in recognizing the sovereignty of the people and their right to have their views taken into account demonstrate that it meaningfully considered their views.
57. In the case of *Kaps Parking Limited & another v County Government of Nairobi & another* [2021] eKLR, Mrima, J. set out basic minimum parameters for adequate public participation as follows:
137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes



of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.

138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of the Constitution and the law will be achieved. (See Robert M Gakuru's case (*supra*) among others).
58. In the *BAT case* (*supra*), the Supreme Court set out the guiding principles for public participation as follows:

From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while courts have pronounced themselves on this issue, in line with this court's mandate under section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:

“Guiding principles for public participation

- i. As a constitutional principle under article 10(2) of the Constitution, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.



- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- ix. Components of meaningful public participation include the following:
  - a. clarity of the subject matter for the public to understand;
  - b. structures and processes (medium of engagement) of participation that are clear and simple;
  - c. opportunity for balanced influence from the public in general;
  - d. commitment to the process;
  - e. inclusive and effective representation;
  - f. integrity and transparency of the process;
  - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

59. As can be seen from the foregoing decision of the Supreme Court, the people exercise their sovereignty by having a say in how they are governed by the persons to whom they have delegated this power. Accordingly, every regulation-making authority bears the responsibility of ensuring and facilitating public participation before regulations are made. Public participation is not a matter of going through the motions. Nor can it be a public relations exercise where a few people attend a forum and sign attendance sheets. Public participation must be real, meaningful and must make sense to the public participating therein. To this end, there must be reasonable notice and clarity including prior sensitization, to enable the public to understand subject matter. The process of participation must also be transparent, clear and simple inclusive with effective representation. reasonable and adequate opportunity to engage in the same. public participation. Additionally, after considering and incorporating the submitted views, validation fora must of necessity include the persons who submitted views so that they can confirm that indeed their views were incorporated or at the very least considered.

60. The *WMCA* also makes provision for public participation. The Fourth Schedule thereto stipulates the provisions as to public consultation as follows:

1.

- (1) Where this Act imposes a requirement for public consultation, the responsible authority shall publish a notice in relation to the proposal— in the Gazette



- a. in the Gazette
  - b. in at least three national newspapers
  - c. in at least one newspaper circulating in the locality to which the proposal relates; and
  - d. in at least one Kenyan radio station broadcasting in the locality.
- (2) The notice shall in each case—
- a. set out a summary of the proposal;
  - b. state the premises at which the details of the proposal may be inspected;
  - c. invite written and or oral presentations and comments on the proposal;
  - d. specify the person or body to which any such presentations and comments are to be submitted; and
  - e. specify a date and place by which any such comments are required to be received, not being a date earlier than sixty days after publication of the notice.
2. The responsible authority shall make arrangements for the public to obtain copies, at reasonable cost, of documents relating to the proposal which are in the possession of the responsible authority.
  3. The responsible authority shall consider—
    - (a) any written comments or objections received on or before the date specified under paragraph 1(2)(e);
    - (b) any comments whether in writing or not, received at any public meeting held in relation to the proposal at which the responsible authority was represented, or pursuant to any other invitation, to comment.
  4. The responsible authority shall publish, through the same media as were employed pursuant to paragraph 1, notice of the fact a copy of the decision in writing of the responsible authority in relation to the proposal, and of the reasons thereof, is available for public inspection at the same premises as were notified under paragraph 1(2)(b).
  5. Where rules made under this Act so require, the responsible authority shall cause a public meeting to be held in relation to a proposal before the responsible authority makes its decision on the proposal.
61. The respondents were required to publish information on the impugned regulations including their contents, where they could be obtained from, where presentations and comments were to be submitted, to whom and the timelines. This publication was to be in the Gazette and in at least 3 national newspapers, at least 1 newspaper circulating in the Kilifi and Mombasa Counties in which the Impugned Regulations relate and in at least 1 Kenyan radio station broadcasting in the said counties. Additionally, the respondents were required to avail copies of the impugned regulations to the public at reasonable cost. Upon receiving presentations and comments, the respondents were to consider the same and thereafter publish, through the aforesaid media, a notice that a copy of the decision in writing, and of the reasons thereof, is available for public inspection.



62. From the material placed before the court, it is evident that that the 1<sup>st</sup> respondent published the Conservation Fees January, 2023 – December 2025 vide a newspaper advertisement of 13 January 2023 inviting comments from the public as to participate in various public participation forums across the country. It is not disputed that the newspaper advertisement provided information on where to access the proposed conservation fees and the various ways the public could engage in public participation, including attending forums, or sending comments via email or post. The petitioners' case however is that the public participation on the said conservation fees was not adequate given that only one meeting was held. Further that they raised issues which the 1<sup>st</sup> respondent undertook to address, but failed to do so.
63. Further what has come out clearly, is that what was placed before the public was the conservation fees 2023-2025. The 1<sup>st</sup> respondent exhibited minutes of the meetings held in Mombasa on 14 February 2022 and in Watamu on 15 February 2024. It is noted that for instance that there was a proposal that entry fees be charged per day instead of single entry and extension to midnight. A further proposal was that implementation date of the fees should be changed from 1 July, 23 to 1 January, 24 given existing contracts. Additionally, stakeholders sought a definition of water sports. In response, the 1<sup>st</sup> respondent stated that it would address the issues and also come up with guidelines which would be communicated. There is no evidence that the views of the petitioners were taken into consideration and addressed prior to promulgating the impugned regulations. There is also no evidence of publication of the conservation fees as required under the Fourth Schedule to WMCA or notification of the decision made following consideration of the views expressed by the petitioners.
64. The court notes that the 1<sup>st</sup> respondent stated that the views of the stakeholders and public were incorporated and a validation meeting in respect of the took place on 17 August, 2023. I have looked at the exhibited letter of invitation dated 4 August, 2023 to the validation forum on 17 August, 2023 at Clubhouse in Nairobi National Park. Among the invitees is the Chief Executive Officer of the Kenya Coast Tourism Association. The Petitioners contend that this invitee was not at the previous meetings and did not raise the issues that needed to be addressed. To my mind, sending this invitation to the Chief Executive Officer of the Kenya Coast Tourism Association did not satisfy the requirement to make appropriate consultations with persons likely to be affected by the impugned regulations, such as the petitioners.
65. Additionally, the impugned regulations have gone beyond conservation fees in respect of which the petitioners made representations to the 1<sup>st</sup> respondent. included therein are new matters that were not in the 2013 regulations and which were not placed before the public for consultation. These include new classes of activities, new designation of conservation areas, new requirements for compliance by industry players. They regulations also classify seasons into high and low seasons, classified parks into premium, scenic, special interest and wilderness parks. They further introduce security fees and annual licence fees based on classification of businesses by size as well as fees for activities like vlogging, sundowning, photography, etc. None of these was subjected to public participation.
66. The 1<sup>st</sup> respondent has readily admitted that at the time of filing of the petition herein, the impugned regulations were not available to the public as the same were awaiting parliamentary scrutiny. The impugned regulations which introduced new issues required stakeholder consultation and public participation. As matters stand, they were promulgated without any public participation on the same.
67. Besides violating the provisions of the Constitution including article 10, the process of promulgating the impugned regulations did not comply with the express provisions of WMCA including the elaborate provisions of the Fourth Schedule to the Act.



68. Having appraised the material praised before me, I am left with no doubt that the respondents did not meet the test set out in the *BAT* case, in undertaking public participation in respect to the impugned regulations. The same were promulgated in violation of article 10 of the *Constitution* as well as the provisions of *WMCA*.

#### **Whether the impugned Regulations violated the provisions of the Statutory Instruments Act**

69. The petitioners challenge the impugned regulations for contravening the provisions of the *SLA*, specifically sections 5, 6 and 8 of the same. They contend that the 1<sup>st</sup> respondent did not provide evidence to show that the impugned regulations were published in the Kenya Gazette or a newspaper, as required by the *SLA* or enacted in accordance with the Act.

70. In support of the petitioner in this regard, the 1<sup>st</sup> interested party submitted that given that the impugned regulations had a direct impact on the petitioners, the 1<sup>st</sup> respondent was required to undertake appropriate consultations with affected persons and to prepare a regulatory impact statement. Further that the impugned regulations imposed significant costs on the community and the 1<sup>st</sup> respondent cannot therefore benefit from the exemption in section 9 of the *SLA* as claimed.

71. For the 1<sup>st</sup> respondent, it was submitted that the section 116 of the *WMCA* gives the Cabinet Secretary powers to make rules and regulations prescribing the conservation fees payable under the Act. Further that in order to address the emerging challenges of poaching, illegal fishing, human wildlife conflict, fires, drought, etc, in the face of global inflation and high cost of living and ever-changing methods of conservation and management of wildlife, it became necessary for the 1<sup>st</sup> Respondent to urgently come up with regulations relating to conservation fees. Further that the impugned regulations seek to align with government policies and directives, enhance ecological integrity and sustainability of wildlife, improve visitor experience within parks and reserves and promote benefit sharing among the local community. It is thus the 1<sup>st</sup> respondent's case that the impugned regulations are substantially uniform and complementary to the *WMCA* and are therefore exempt from the requirements of a regulatory impact statement required under section 9(g) of the *SLA*.

72. It is not disputed that the impugned regulations are a statutory instrument as they fall within the definition set out in section 2 thereof as follows:

“statutory instrument” means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

73. Section 5 of *SLA* requires that there be consultation before making statutory instruments as follows:

1. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
  - b. have a direct, or a substantial indirect effect on business; or
  - c. restrict competition;the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.



2. In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
  - a. drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
  - b. ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
3. Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—
  - a. involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
  - b. invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.
74. The above provision clearly requires that consultation be carried out with persons who are likely to be affected by the proposed instrument. I have already found based on the 1<sup>st</sup> respondent’s admission that the impugned regulations were not made available to the public. Further, the petitioners as persons likely to be affected by the impugned regulations were not notified of the regulations or invited to make submissions thereon as required under section 5(3) of the [SIA](#). Other than the correspondence with the Parliamentary Committee on Delegated Legislation, the respondents have not demonstrated that they carried out consultations on the impugned regulations as required under the [SIA](#). It follows therefore that the public in general and the petitioners in particular, who are likely to be affected by the impugned regulations did not have any, leave alone adequate opportunity to comment on its proposed content.
75. In cases where a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, Section 6 places an obligation upon a regulation making authority to, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument. Section 7 stipulates the contents of regulatory impact statements and the responsibilities of the Cabinet Secretary in regard to the same. Section 8 goes on to provide for notification of the regulatory impact statement for proposed statutory instrument in the Gazette and in a newspaper likely to be read by people particularly affected by the proposed legislation. Section 9(g) provides that such regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legislation only provides for, or to the extent it only provides for a matter arising under legislation that is substantially uniform or complementary with legislation of the National Government or any County.
76. In the case of [British American Tobacco Kenya Ltd v Cabinet Secretary for the Ministry of Health & 4 others](#) [2016] eKLR, a decision that was upheld by the Court of Appeal, Ngugi, J. (as she then was) was persuaded that a regulatory impact statement was unnecessary in respect of the [Tobacco Control Regulations](#) which were under consideration. The learned Judge stated:

However, I am persuaded by the argument, in reliance on section 9(g) of the Statutory Instruments Act, that the regulatory impact statement is not required to be published where the contemplated legislation is a matter arising under legislation that it is substantially uniform or complementary with. The Tobacco Control regulations arise under the provisions of the Tobacco Control Act. They are complementary with the provisions of the



Act, and are intended to advance government policy with regard to safeguarding members of the public from the dangers posed by consumption of tobacco products. To that extent, they fall under the exceptions under section 9(g) of the Statutory Instrument Act. It is my finding therefore that the failure by the respondents to publish the regulatory impact statement did not render the regulations unlawful.

77. The petitioners have claimed that the impugned regulations have far reaching implications on their operations. Further that they have introduced new matters including classification and determination of entry fees into parks and sanctuaries based on low and high seasons; introduction of activity fees payable per individual, for every classified activity, over and above entry fees; classification of different wildlife activities such as water sports, island picnics, sundowner, bush breakfast and dinner, which were not previously classified or chargeable. Additionally, that these fees are payable on a daily basis. Further that for the first time, Watamu and Kiste Mpunguti Marine National Parks and Reserves have been classified as special interest Marine Protected Areas. The petitioners further contend that the impugned regulations and activity fees are exorbitant and unjustifiable and discourage tourists from visiting the Kenyan coast preferring other tourist destinations that are cheaper. As a result, the petitioners' businesses are directly affected.
78. It is quite evident from the foregoing that the respondents did not comply with the requirement to make appropriate or any consultations the petitioners as persons likely to be affected by the impugned regulations prior to making them. It is also evident that the impugned regulations impose significant costs on park users and in particular on the petitioners and their clients. There is also no evidence of gazettment of the impugned regulations as provided for under section 11 of the [SIA](#).
79. As regards whether the preparation and publication of a regulatory impact statement was unnecessary under section 9(g) of the [SIA](#), it is noted that the exemption would be applicable if the regulations are substantially uniform or complementary with the [WMCA](#). The 1<sup>st</sup> respondent contended that they are.
80. The attention of the court has been drawn to the definition of "marine park". Section 3 of the Act provides as follows:
- "marine park" means a protected marine area where no fishing, construction work or any disturbance is allowed unless with written permission of the Director-General;
- While the regulation 3 provides:
- "marine park" means a park in aquatic environments dedicated in conserving and managing marine ecosystem including coral reefs, seagrass beds and underwater canyons.
81. The definition in the regulations cannot be said to be uniform or complementary to that in [WMCA](#). Similarly, regulation 5 has categorized parks, reserves and conservancies yet the [WMCA](#) makes no such provision. In light of this, I do find that the exemption in section 9(g) of the [SIA](#) is not available in relation to the impugned regulations. It follows that the case of British American Tobacco Kenya Ltd (supra) cited by the 1<sup>st</sup> respondent in support of its proposition in this regard, is not applicable to the circumstances herein.
82. After considering the foregoing, the court finds that the impugned regulations were made in violation of the provisions of the [Statutory Instruments Act](#).



83. The law is that the 1<sup>st</sup> respondent is charged with the responsibility of collecting revenue, levies and charges due to the national government from wildlife and, as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas. It is the 1<sup>st</sup> respondent case that 70% of its revenue is derived from tourism activities and will thus suffer irreparable harm should the orders sought herein be granted. The court recognizes the right of the 1<sup>st</sup> respondent to right to collect any levy or charges. Such right is however founded on the principle of legality and constitutionality. As such, the 1<sup>st</sup> respondent as state agency can justify violation of the Constitution on the grounds that its operations will be adversely affected.
84. The supremacy of the Constitution is set out in article 2 of thereof as follows:
1. This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
  2. No person may claim or exercise State authority except as authorised under this Constitution.
  3. The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.
  4. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
85. It is critical that the supremacy of the Constitution is protected and there can be no greater public interest than upholding the Constitution and the law. To this end, the court must ensure that every person and all state organs including the respondents herein are bound by the Constitution and that anything done in the exercise of state authority is done in accordance with the Constitution. The impugned regulations having been done in violation of the Constitution and the law are therefore invalid and cannot stand.
86. Having considered the petition, the rival submissions and applied my mind to the Constitution, the law and the authorities cited, I find that the petition herein is merited and I make the following orders and declarations:
1. A declaration be and is hereby made that the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 published by the 2<sup>nd</sup> respondent *via* Legal Notice No 215 are illegal and unconstitutional for want of effective public participation and public consultation as required under the Constitution of Kenya, 2010, the Statutory Instruments Act, 2013 and the Wildlife Conservation and Management Act.
  2. An order of certiorari be and is hereby issued to remove to this honourable court and quash the Legal Notice No. 215 publishing the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023.
  3. An order of prohibition be and is hereby issued restraining the 1<sup>st</sup> respondent whether acting alone or jointly with others, its servants, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 or any fees published thereunder or demanding payment of the entry fees or activity fees under the said regulations.
  4. No order as to costs.



DATED SIGNED AND DELIVERED IN MALINDI THIS 23<sup>RD</sup> DAY OF AUGUST 2024

.....

M. THANDE

JUDGE

