



Kiragu & 2 others (Suing on behalf of, as the Chairperson, Secretary and Treasurer respectively of the Association of Gaming Operators of Kenya) v County Government of Nairobi; Attorney General & another (Interested Parties) (Constitutional Petition E277 of 2021) [2023] KEHC 385 (KLR) (Constitutional and Human Rights) (31 January 2023) (Judgment)

Neutral citation: [2023] KEHC 385 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E277 OF 2021
AC MRIMA, J
JANUARY 31, 2023

BETWEEN

JUDITH KARIGU KIRAGU 1ST PETITIONER

DANIEL MASI MOGENI 2ND PETITIONER

NICKSON MWANGI MAINA 3RD PETITIONER

**SUING ON BEHALF OF, AS THE CHAIRPERSON, SECRETARY AND
TREASURER RESPECTIVELY OF THE ASSOCIATION OF GAMING
OPERATORS OF KENYA**

AND

COUNTY GOVERNMENT OF NAIROBI RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

BETTING CONTROL AND LICENCING BOARD INTERESTED PARTY

Public engagement undertaken by way of a single newspaper advertisement is not adequate public participation prior to enactment of an Act.

The Nairobi City County Betting, Lotteries and Gaming Act, 2021 was in violation of articles 10, 174(c), 196 and 201(a) and section 87 of the County Governments Act for want of reasonable public participation and stakeholder consultations. Public participation undertaken by way of a singular newspaper advertisement was not adequate public participation.

Reported by John Ribia



Constitutional Law – national values and principles of governance – public participation - principles of public participation – adequacy of public participation - what were the guiding principles for public participation - whether public engagement undertaken by way of a single newspaper advertisement was adequate public participation prior to enactment of the Nairobi City County Betting, Lotteries and Gaming Act, 2021 – Constitution of Kenya, 2010 articles 10, 174(c), 196 and 201(a); County Governments Act (Cap 265) section 87.

Brief facts

The petitioner contended that Nairobi City County Betting, Lotteries and Gaming Act, 2021 was unconstitutional due to lack of adequate public participation. The petitioner contended that the only public participation conducted on the Act was a single newspaper advertisement on the Star Newspaper, a newspaper which the petitioner contended was not widely circulated.

Issues

- i. What were the guiding principles for public participation?
- ii. Whether public engagement undertaken by way of a single newspaper advertisement was adequate public participation prior to enactment of the Nairobi City County Betting, Lotteries and Gaming Act, 2021.

Held

1. A constitutional issue was one which confronted the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. The issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. The pleading provided the constitutional provisions allegedly violated, the manner in which the respondents were alleged to have infringed upon the rights and fundamental freedom of the petitioners and also the nature of injury suffered. The petition fell within the four corners of the precision threshold and ought to be considered on its own merit.
2. Public participation and consultation was a living constitutional principle that went to the constitutional tenet of the sovereignty of the people. It was through public participation that the people continue to find their sovereign place in the governance they had delegated to both the National and County Governments.
3. The guiding principles for public participation were as follows:
 1. as a constitutional principle under article 10(2) of the Constitution, public participation applied to all aspects of governance.
 2. The public officer and or entity charged with the performance of a particular duty bore the onus of ensuring and facilitating public participation.
 3. The lack of a prescribed legal framework for public participation was no excuse for not conducting public participation; the onus was on the public entity to give effect to that constitutional principle using reasonable means.
 4. Public participation must be real and not illusory. It was not a cosmetic or a public relations act. It was not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional



requirement. There was need for both quantitative and qualitative components in public participation.

5. Public participation was not an abstract notion; it must be purposive and meaningful.
6. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
7. Public participation was not necessarily a process consisting of oral hearings, written submissions could also be made. The fact that someone was not heard was not enough to annul the process.
8. Allegations of lack of public participation did 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 was to be determined on a case to case basis.
9. Components of meaningful public participation include the following:
 - i. clarity of the subject matter for the public to understand;
 - ii. structures and processes (medium of engagement) of participation that were clear and simple;
 - iii. opportunity for balanced influence from the public in general;
 - iv. commitment to the process;
 - v. inclusive and effective representation;
 - vi. integrity and transparency of the process;
 - vii. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.
4. The respondent undertook public engagement. The respondent placed a single advertisement in the Star newspaper on September 28, 2020. It, thereafter proceeded on with the rest of the processes and eventually the impugned Act was enacted. There had been serious public outcry on the effects of betting in Kenya. The impugned Act, therefore, presented an opportunity where the public could have aired their proposals over the issue. As the impugned Act affected the entire public, there was need for serious and wider public engagement.
5. Unless one was on the lookout for the advertisement, high were the chances that the advertisement could easily pass unnoticed. There was also the level of circulation and the prominence of the Star Newspaper in the country compared to other newspapers. There were other newspapers with wider and higher circulation and prominence to the Star Newspaper.
6. The very nature of the legislation coupled with the general literacy levels in Nairobi County meant that more effective ways of reaching the public ought to have been put in place. The nature of the public engagement undertaken by way of a single newspaper advertisement was very superficial and did not yield to the expected serious and meaningful engagement. The level of engagement was too far below the reasonably expected legal bar.
7. The level of engagement did not pass the required constitutional muster. The provisions of articles 10, 174(c), 196 and 201(a) of the Constitution embracing public participation were infringed.
8. In the event the court dealt with the issue whether article 209(3)(b) of the Constitution permitted a County Government to levy taxes on the gross winnings of all betting, lotteries and gaming activities as entertainment tax. then that would be tantamount to the court acting in abstract and, dangerously so, usurping the role of the legislative arm of the Government. The court must, as a call of duty, exercise restraint so as to accord the other entities to, in the first instance, deal with the matter. The court declined the invitation to express itself on the issue.

Petition partly allowed.



Orders

- i. Declaration issued that the Nairobi City County Betting, Lotteries and Gaming Act, 2021 was in violation of articles 10, 174(c), 196 and 201(a) and section 87 of the County Governments Act for want of reasonable public participation and stakeholder consultations.
- ii. Declaration issued that the Nairobi City County Betting, Lotteries and Gaming Act, 2021 was unconstitutional, null and void and of no legal effect. It was quashed with immediate effect.
- iii. No orders as to costs.

Citations

Cases

Kenya

1. *Atal, Rapinder Kaur v Manjit Singh Amrit* Petition 236 of 2011; [2011] eKLR - (Mentioned)
2. *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) - (Applied)
3. *Cereals Growers Association & Another v County Government of Narok & 10 Others* Petition 385 of 2013; [2014] eKLR - (Explained)
4. *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* Constitutional Petition 496 of 2013; [2013] KEHC 6919 (KLR) - (Explained)
5. *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Applied)
6. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR) - (Explained)
7. *Legal Advice Centre & 2 others v County Government of Mombasa & 3 others* Civil Appeal 46 of 2017; [2018] KECA 381 (KLR) - (Applied)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) - (Mentioned)
2. *Fredricks & Other v MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC) - (Explained)
3. *Minister of Safety & Security v Luiters*, (CCT23/06) [2006] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC); (2007) 28 ILJ 133 (CC) - (Explained)

Statutes

Kenya

1. Betting, Lotteries and Gaming Act (cap 131) sections 10(2)(a), (e) & (f), 16(e) & (h), 31; 32; 62(b), (c) - (Interpreted)
2. Constitution of Kenya articles 10, 27, 29(a), 40, 46, 47, 174, 196, 201, 209; Schedule fourth; part 2(4) - (Interpreted)
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rules 9, 10(3)(4) - (Interpreted)
4. County Governments Act (cap 265) section 87 - (Interpreted)
5. Entertainments Tax Act (cap 479) In general - (Cited)
6. Intergovernmental Relations Act (cap 265F) In general - (Cited)

Advocates

Mr. Amoko for the petitioners

Mr. Theuri for the respondent



JUDGMENT

Background:

1. The petitioners herein, Judith Karigu Kiragu, Daniel Masi Mogeni and Nickson Mwangi Maina are the Chairperson, the Secretary and Treasurer of The Association of Gaming Operators of Kenya (hereinafter 'AGOK') respectively.
2. Through the Petition dated July 16, 2021, supported by the three Affidavits of Judith Karigu Kiragu deposed to on July 16, 2021, July 27, 2021 and August 5, 2021, the petitioners sought to have this court declare the *Nairobi City County Betting, Lotteries and Gaming Act, 2021* (hereinafter 'Betting Act' or 'the impugned Act') unconstitutional and of no legal effect for various constitutional infractions.
3. Briefly, the petitioners contended that prior to the year 2010, betting, casinos and other forms of gambling were regulated by the National Government under the *Betting, Lotteries and Gambling Act*.
4. However, with the establishment of Counties, regulation of the gaming industry was split between the National Government and the relevant County within which the gaming activity took place.
5. The petitioners pleaded that whereas the National Government retained responsibility of licensing of gaming activities, other functions including supervision of casinos, authorization of lotteries and spot checks on betting and other forms of gambling licences were transferred by the Transitional Authority (TA) (now defunct) to the County Government of Nairobi through Legal Notice No 177 of 2013.
6. The petitioners pleaded that despite the separation of roles between the National Government and the County Government of Nairobi uncertainty still reigned as to which body was responsible for what function in the gaming industry.
7. It is their case that in a bid to address the confusion, extensive consultation was carried out in a structured manner through an Inter-agency Technical Committee held between 8th to July 11, 2014.
8. The petitioners pleaded that the consultations yielded consensual allocation of functions and the modalities of resolving outstanding issues. A report to that effect was generated.
9. The petitioners contended that notwithstanding the foregoing consensus, the respondent jumped the gun by enacting *NCCBLG Act*.
10. Propriety of the said *Act* was challenged through Consolidated Constitutional Petition No 295 of 2014, 315 of 2014 and No 1 of 2015 (hereinafter 'the Consolidated Petitions')
11. The petitioners contended that final judgment on the Consolidated Petitions was rendered on May 3, 2017, where Lenaola J as he then was delimited the functions of the National and County Governments based on the report of the Transition Authority.
12. It is the petitioner's case that The learned judge also suspended the enforcement of the *impugned Act* until when it was published in the Kenya Gazette, a fact, the petitioners contended, has never been done.
13. Further to the foregoing, the petitioners posited that in May 2019, the National Assembly introduced the Gaming Bill 2019.



14. It was committed to the National Assembly Committee for consideration whereupon public participation was invited through three advertisements in the *Daily Nation*, *The Standard* and *The Star* Newspapers.
15. It is their case that subsequently, the Committee received representations and views from stakeholders including various ministries, state agencies The National Treasury, Communication Authority, the Kenya Revenue Authority and the Commission on Revenue Allocation.
16. They posited that subsequently, a stakeholder's forum was held in Nairobi on August 22, 2019 to consider the representations.
17. Amidst the foregoing legislative process towards enactment of Gaming Bill, the petitioners contended that the Impugned Bill (Nairobi City County Betting, Lotteries and Gaming Bill, 2020) was presented before the County Assembly.
18. The petitioners claimed that 1st reading took place on July 1, 2020 after which it was referred to the Assembly's Committee on Culture and Community Services for consideration.
19. It is the petitioner's case that the Committee placed one advertisement in *The Star* Newspaper on September 28, 2020 inviting members of public and to that end received only three written memoranda.
20. The petitioners pleaded the Bill was subsequently assented to on April 22, 2021 as the [*Nairobi County Betting, Lotteries and Gaming Act, 2021*](#).
21. It is the foregoing conduct of the respondent in enactment of The [*Nairobi County Betting, Lotteries and Gaming Act, 2021*](#) and various provisions of the Act that led to the institution of the instant Petition.
22. Petitioners contended that the process was contrary to the [*Constitution*](#) for failing to conform to the dictates of public participation provided for under Article 10 and 196 of the [*Constitution*](#).
23. The petitioners were also aggrieved that the said enactment fell short of the objects of devolution and public participation expected of County Governments under article 174 of the [*Constitution*](#).
24. The petitioners further took issue with section 32(1) of the [*impugned Act*](#) which provides for entertainment tax.
25. They posited that it imposes tax on all betting, lotteries and gaming activities at the rate of 10% on the gross winnings of all betting and gaming activities illegally.
26. It is the petitioners' case that under article 209 of the [*Constitution*](#), a County Government may only impose entertainment taxes and any other tax it is authorized to impose by Act of Parliament; an Act passed by the National Assembly.
27. It was their case that there is no Act of Parliament authorizing the respondent to levy entertainment taxes.
28. It was the petitioners' further contention that the impugned enactment was not in consonance with the final judgment in the Consolidated Petitions and Gazette Notice 8753 of 2017 for donating functions to the County Government including regulating and licencing gaming activities in the County, establishing and maintaining a register of all gaming machines and the devices in the County, establishing a central electronic real time game monitoring systems among others, contrary to the said Consolidated Petitions and the Gazette Notice.



29. Based on the foregoing factual and legal foundation, the petitioners prayed for the following reliefs;
- a. A declaration that the *Nairobi City County Betting, Lotteries and Gaming Act, 2021* is therefore null and void and of legal effect.
 - b. A declaration that, in any event, section 10(2)(a), (e) & (f), 16(e) & (h), 31 32 and 62(b), (c) are unconstitutional null and void and therefore and of no legal effect.
 - c. Such other and/or further relief as this honourable court may deem fit to grant.
 - d. An order that the cost of and occasioned by this Petition be borne by the 1st respondent.

The submissions

30. The petitioners urged their case further through written submissions dated October 8, 2021.
31. On the aspect of Public Participation, they relied on the decision of the Court of Appeal in *Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others* (2018) where the learned Judges made reference to the South African decision in *Doctors for life International v Speaker of the National Assembly & Others* and imposed upon public authorities the constitutional duty to facilitate public participation as a matter of right. it was observed as follows;
- “It is common ground that public participation plays a central role in both legislative and policy functions of the government whether at the National or County level. It is one of those modes that citizens who are vested with sovereign power participate in decision affecting them or in the conduct of public affairs notwithstanding that they have delegated the exercise of sovereign power to elected representatives.”
32. Based on the foregoing authority, the petitioners submitted that the single isolated advert in low circulation, low penetration newspaper with minimal reach during one of the Covid-19 lockdowns could not have met the threshold of ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.
33. The petitioners found support in the case of *Robert Gakuru & Others v Governor of Kiambu County & 3 Others* (2014) eKLR where facilitation of public participation was described to be the following;
- ...facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.
34. On the foregoing findings, the petitioner’s asserted that the more the intense the effect on the interest of the particular segment for example gaming legislation, the more reasonable it would be to expect that legislature ensures that the potentially affected section of the populace is given sufficient notice of what the County Government proposes and reasonable opportunity to have a say.
35. The petitioners faulted the *impugned Act* for information regarding its enactment having not been made available nor a forum created through which the public could adequately ventilate their issues.
36. With respect to section 32 of the *impugned Act*, the petitioners submitted that the relevant legislation is *Entertainment Tax Act*, cap 479. It was their case that entertainment tax is chargeable on sales of tickets at premises which charge for such admissions and as such the tax imposed by section 32 of the *impugned Act* is not such tax.



37. They submitted further that the effect of section 32 of the *impugned Act* reintroducing additional 10% to the 20% Gaming tax undercuts the national economic policy reducing the tax burden to betting, gambling and lotteries owners and therefore does not pass the constitutional muster.
38. The petitioners urged the court to allow the Petition as prayed.

The Respondent's Case

39. The Nairobi City County opposed the Petition through the Replying affidavit of Geoffrey Mwithimbu, the Acting Director Betting, Lotteries & Gaming Department, deposed to on August 3, 2021.
40. It was his deposition that based on the potential security threats associated with lottery, it was necessary to have close supervision, regulation and surveillance in order to forestall terrorism financing and money laundering.
41. He deposed that the petitioners did not identify the constitutional rights infringed.
42. It was his case that the imperative of the impugned legislation from its objects and purpose is the better management of its delineated functions and to generate earnings for the purposes for developing the economic and social agenda of the County.
43. In response to the assertions made by the petitioners in respect to the consolidated Petitions, it was his deposition that the only issue is whether the impugned legislation was enacted in strict conformity to the delineated functions.
44. In reference to the objects of the *impugned Act*, it was his deposition that its enactment was necessitated by the need to enforce within the county regulation and compliance with both county and national legislation, betting, casinos and other forms of gambling.
45. He deposed that the *impugned Act* was passed in strict compliance with the *Constitution*, the Consolidated Petitions and Gazette Notice No 8753 of 2017 on delineation of functions.
46. It was further his case that the *impugned Act* repealed the earlier Nairobi City County Betting, Lotteries and Gaming Act No. 5 of 2014 in order to conform to the final orders of the consolidated Petitions and Gazette Notice No 8753.
47. In asserting propriety of the *impugned Act*, it was his deposition that part 2(4) of the Fourth Schedule to the *Constitution* mandates the County to regulate cultural activities, public entertainment and public amenities including betting, casinos and other forms of gambling.
48. He deposed that the respondent enacted the *impugned Act* in exercise of its constitutional mandate and pursuant to its legislative authority for the effective performance of its functions as conferred to it by article 185(1) and (2) of the *Constitution*.
49. It was his case that under article 209(3) of the *Constitution*, County Governments may impose property rates, Entertainment taxes and any other tax that is authorized by an Act of Parliament.
50. In response to the Gaming Bill, it was his case that it has no effect to the present petition since it has not been enacted to law, that the County Assembly has no constitutional or statutory obligation to wait for its enactment having already been assigned its functions.
51. He deposed that in the event there will be conflict of laws between the Gaming Bill and the *impugned Act*, the two levels of Governments would pursue dispute resolution mechanism provided for under the *Intergovernmental Relations Act*.



52. In rebutting the challenge on lack of public participation, he deposed that the respondent published in the Star a newspaper with country wide circulation as well as its websites the draft bill and notices inviting comments on the Bill.
53. He referred to the report of departmental committee on culture and community to demonstrate there was qualitative public participation.
54. In challenging the claim that entertainment tax was not a function of the County Government, it was his deposition that such position is not accurate as per the provisions of article 209(3)(b) of the Constitution.
55. He asserted therefore that an Act of Parliament is not required where there is a clear provision of the Constitution.
56. He deposed further that according to Clause 4 of the Fourth Schedule to the Constitution, County Governments have functions and powers over 'cultural activities, public entertainment and public amenities including betting, casinos and other forms of gambling.
57. The respondent deposed that the impugned Act in section 10(1)&(2), 16(e) & (h), 32 and 62 which the petitioners seek to declare unconstitutional are in consonance with the final judgment in the Consolidated Petitions and Gazette Notice No. 8753 of 2017 because the said sections mandate the respondent the responsibility to regulate and control licence gaming activities within the County.
58. It was the respondent's position that allowing the Petition would be tantamount to crippling the County Governments operations.
59. It was its position that the Nairobi City County Betting, Lotteries and Gaming Act, 2021 is Constitutional. It was urged that the Petition to be dismissed.

The submissions

60. In its submissions dated October 28, 2021, the respondent identified the issues for determination as being; whether the Petition sets with reasonable precision constitutional violation and whether the impugned Act is unconstitutional.
61. On the first issue, it was its case that the save from listing violation of article 27, 29(a), 40, 46 and 47 of the Constitution, it did not set out with any reasonable precision the rights that were violated and the manner of violation.
62. On the issue of constitutionality of the Impugned Act, the respondent reiterated its position as in its the replying affidavit that the pursuant to part 2(4) of the Fourth Schedule to the Constitution, the Betting, Control and Licensing Board devolved 80% of its staff to the Counties with effect from 1st July 2013.
63. It was is emphasis further that under article 209(3) of the Constitution, Counties were mandated to impose entertainment taxes.
64. It was their case further that final decision in The Consolidated Petitions and Gazette Notice No. 8753 of 2017, informed the contents of the impugned Act which delineated the concurrent functions of the national and the County Government.
65. With respect to entertainment tax, it was submitted that the according to the Court of Appeal decision in *Cereals Growers Association & Another v The County Government of Narok & 10 Others* (2014), County governments have the powers to impose entertainment tax and any other tax as authorized by an Act of Parliament.



66. Further to the foregoing, it was reiterated that under clause 4 of the fourth schedule County Government have the right over cultural activities, public entertainment and public amenities.
67. On the aspect of public participation, the respondent relied on the decision in *The implementation of the Constitution v Parliament of Kenya & Another & 2 Others* [2013] eKLR to assert position that failure to incorporate particular views in the enactment of the Act would not invalidate the legislation in question. In the said case it was observed *inter alia* that;

The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the Public.

68. In the end it was urged that the Petition was without merit and ought to be dismissed with costs.

The Interested Parties' cases:

69. The 1st and 2nd interested parties did not participate in the dispute.

Analysis:

70. On a careful consideration of the Petition and the response thereto alongside the written submissions and the judicial decisions referred to, three issues emerge for consideration. They are as follows: -
- a. Whether the Petition has attained the precision threshold.
 - b. Whether the *Impugned Act* is in violation of articles 10, 174(c), 196 and 201(a) of the *Constitution* for want of public participation and stakeholder consultations.
 - c. Whether article 209(3)(b) of the *Constitution* permits a County Government to levy taxes on the gross winnings of all betting, lotteries and gaming activities as entertainment tax.
71. Going forward, the issues will be dealt with in seriatim.

a. The precision threshold:

72. Due to the unique nature of constitutional petitions, courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as 'the *Mutunga Rules*') also provide for the contents of Petitions.
73. Rule 10 thereof provides seven key contents of a Petition as follows:

Form of petition.

10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—
 - (a) the petitioner's name and address;



- (b) the facts relied upon;
- (c) the constitutional provision violated;
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.

74. Rule 10(3) and (4) of the *Mutunga Rules* also has a bearing on the form of Petitions. It provides as follows: -

- (3) Subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the court.

75. Rules 9 and 10 are on the place of filing and the notice of institution of the Petition respectively.

76. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR had the following to say in the manner in which constitutional Petitions ought to be presented before court for adjudication: -

Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

77. But what is a constitutional issue? In *Fredricks & Other v MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a constitutional court as follows: -

the Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and



upholding of the Constitution are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the constitutional court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

78. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.
79. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the *Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security v Luiters*, (2007) 28 ILJ 133 (CC): -
- ... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values...
80. Whereas it is largely agreed that the *Constitution of Kenya, 2010* is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal v Manjit Singh Amrit* case (*supra*)
- ‘... Courts must interpret it with all liberation they can marshal...’
81. This court has perused the Petition. The pleading provides the constitutional provisions allegedly violated, the manner in which the respondents are alleged to have infringed upon the rights and fundamental freedom of the petitioners and also the nature of injury suffered.
82. It is this court’s position that the Petition squarely falls within the four corners of the precision threshold and ought to be considered on its own merit.
- b. Whether the *Impugned Act* is in violation of articles 10, 174(c), 196 and 201(a) of the *Constitution* for want of public participation and stakeholder consultations:
83. The parties’ positions on this issue have already been captured on the preceding part of this decision.
84. As the issue under consideration is whether there was adequate public engagement prior to enactment of the *impugned Act*, it is this court’s position that the aspect of public engagement is a well-trodden path within the judicial circles. Indeed, the parties have ably and concisely referred to many decisions on the subject; of which there may be no need to reproduce them herein. In other words, this court will not attempt to re-invent the wheel.
85. As an addition thereto, in Petition No 5 of 2017 *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 (The Affected Party)* [2019] eKLR, the Supreme Court upon reviewing several decisions of the High Court and the Court of Appeal on the subject summed up the aspect of public participation as follows:



(96) 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.

86. The *County Governments Act*, No 17 of 2012, also provides for citizen and public participation. Section 87 provides for, and in mandatory terms, the principles guiding citizen participation. The provision states thus: -

Citizen participation in county governments shall be based upon the following principles—

- a. timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;
- b. reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;
- c. protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;
- d. legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;
- e. reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;
- f. promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and
- g. recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

87. With the above legal framework on public participation, this court will now proceed to consider whether the *impugned Act* is unconstitutional for limited public participation in the process leading to its enactment.

88. In this case, the respondent undertook public engagement. The contention is on the adequacy and sufficiency of that process.

89. In discharging its mandate, the respondent placed a single advertisement in *The Star* newspaper on September 28, 2020. It, thereafter proceeded on with the rest of the processes and eventually the *impugned Act* was enacted.



90. To say the least, there has been serious public outcry on the effects of betting in our country. The *impugned Act*, therefore, presented an opportunity where the public could have aired their proposals over the issue. As the *impugned Act* affected the entire public, there was need for serious and wider public engagement.
91. In this case, unless one was on the look out for the advertisement, high are the chances that the advertisement could easily pass unnoticed. There is also the level of circulation and the prominence of *The Star* newspaper in the country compared to other newspapers. There is no doubt there are other newspapers with wider and higher circulation and prominence to *The Star* newspaper.
92. Further, this was a case which called for other ways of reaching the public. The very nature of the legislation coupled with the general literacy levels in Nairobi County meant that more effective ways of reaching the public ought to have been put in place. For instance, this case called for public hearings. An example at hand is the manner in which the National Assembly undertook public participation while considering the Gaming Bill, 2019 as deposed to in paragraph 17 of 1st petitioner's affidavit sworn in July, 2021.
93. In that case, the National Assembly took out three advertisements in *The Daily Nation*, *The Standard* and *The Star* newspapers inviting public comments on the Bill and also undertook public hearings as well as stakeholders' engagement. That was a deliberate effort to reach and engage the public.
94. The nature of the public engagement undertaken in this matter by way of a single newspaper advertisement was, hence, very superficial and did not, therefore, yield to the expected serious and meaningful engagement. The level of engagement was too far below the reasonably expected legal bar.
95. The effect of the foregoing is that the level of engagement did not pass the required constitutional muster. As a result, the provisions of articles 10, 174(c), 196 and 201(a) of the *Constitution* embracing public participation were infringed.

(c) Whether Article 209(3)(b) of the Constitution permits a County Government to levy taxes on the gross winnings of all betting, lotteries and gaming activities as entertainment tax:

96. This Court was looking forward to express itself on this issue had the second issue been answered in the affirmative. However, since the *impugned Act* has been found not to have complied with the required constitutional and legal parameters relating to public participation, the *impugned Act* does not, hence, have any legal leg to stand on. In fact, the *impugned Act* has been rendered void ab initio.
97. With such a scenario, there is no basis for consideration of the instant issue since it is non-existent. The respondent as well as the public will have another bite of the cherry to deal with the issue. They will define what entertainment tax is and what it entails in the context of the intended legislation.
98. In the event this court goes ahead to deal with the instant issue, then that will be tantamount to the court acting in abstract and, dangerously so, usurping the role of the legislative arm of the Government. This court must, as a call of duty, exercise restraint so as to accord the other entities to, in the first instance, deal with the matter. As such, this court declines the invitation to express itself on whether article 209(3)(b) of the *Constitution* permits a County Government to levy taxes of the gross winnings of all betting, lotteries and gaming activities as entertainment tax.

Disposition:

99. Deriving from the foregoing, the Petition is successful to the extent that there was no meaningful public participation towards the enactment of the *impugned Act*.



100. As I come to the end, this court wishes to profusely apologize for the late delivery of this judgment. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest. The court was also transferred in July 2022, on need basis, to a new station which had serious demands that called for urgent attention. The totality of it all yielded to the delay herein. Galore apologies once again.
101. In the end, the Petition herein is determined as follows: -
- a. A Declaration hereby issue that the *Nairobi City County Betting, Lotteries and Gaming Act, 2021* is in violation of articles 10, 174(c), 196 and 201(a) and section 87 of the *County Governments Act* for want of reasonable public participation and stakeholder consultations.
 - b. A Declaration hereby issues that the *Nairobi City County Betting, Lotteries and Gaming Act, 2021* is unconstitutional, null and void and of no legal effect. It is hereby quashed.
 - c. There shall be no order as to costs as the Petition is a public interest litigation.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF JANUARY, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Amoko, Learned Counsels for the Petitioners.

Mr. Theuri, Learned Counsel for the Respondent.

No appearance for the Interested Parties.

