Consumer Federation of Kenya v Cabinet Secretary for Petroleum and Mining & 4 others (Constitutional Petition E219 of 2020) [2023] KEHC 24015 (KLR) (Constitutional and Human Rights) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24015 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E219 OF 2020

LN MUGAMBI, J

OCTOBER 26, 2023

BETWEEN

CONSUMER FEDERATION OF KENYA ..... PETITIONER

AND

CABINET SECRETARY FOR PETROLEUM AND MINING .. 1ST RESPONDENT

CABINET SECRETARY FOR THE NATIONAL TREASURY 2ND RESPONDENT

NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA ..... 3RD RESPONDENT

HONOURABLE ATTORNEY GENERAL ..... 4TH RESPONDENT

ENERGY & PETROLEUM REGULATORY AUTHORITY ..... 5TH RESPONDENT

JUDGMENT

1. The petitioner, Consumer Federation of Kenya (Abbreviated Cofek) filed the petition dated 21st July, 2020. It describes itself as a non-profit federation committed to consumer protection working towards a fair, just and safe market place for all Kenyans and regional consumers in all sectors of the economy.

Petitioner's Case

2. This filing of this petition was triggered by the publication of Legal Notice No. 124 of 10th July, 2020 which increased the Petroleum Development Levy by 625% (from 40 cents to 540 cents) with the said notice set to take effect starting 15th July, 2020.

3. The petitioner alleged that despite the levy being collected by oil marketers, the 5th passed over to the consumers in its price-setting on 14th July, 2020 which increased the cost of fuel by at least Kshs. 5/- per litre of fuel.

4. The petitioner alleged that the said legal notice violates various articles of *the constitution* as follows: -

   a. Article 10 on Public Participation- gazetting the petroleum development levy order, 2020 without consulting the petitioner, the relevant stakeholders and failing to meet principles of openness, accountability and transparency as it shrouded in mystery and hurried.

   b. Article 43(1) on Economic and Social Rights: The unilateral enactment would increase cost of transport and have ripple effect food prices and this will be making it difficult for Kenyans to access food of quality and standard thereby violating Article 43(1)(c).

   c. Article 46- Protection of consumer rights- the increase in fuel would transcend to increase in food prices and transport hurt Kenyan consumers struggling to make ends meet in the midst of covid 19 pandemic.

   d. Article 201- Principles of Public Finance: That the process did not comply with the principles of public finance set out in Articles 201 (a) and (b) as there was no openness, accountability and transparency since the public and the stakeholders were not involved in its development.

   e. Article 209 & 210 of Constitution: The levy is in form of tax or a charge but in enacting it, the respondents overlooked the canons of taxation set out in the aforesaid Articles 209 & 210 by not conducting public participation or demonstrating fairness, equity, efficiency and effectiveness in respect of the said levy.

   f. The petitioner further averred and amplified through the supporting affidavit the said levy also had violated various statutory provisions, namely:

      i. Public Finance Act, 2012 Sections 12, 24 and 207

      ii. Public Finance Management (National Government) Regulations 2015 – Regulations 6, 7, 207 and 208.

      iii. Section 9 of the Second Schedule to *Public Finance Management Act*, 2012.

      iv. *Statutory Instruments Act*, 2013.

      v. *Consumer Protection Act*, Section 3.

      vi. Interpretation and General Provision Act, Section 31 and 69.

5. The prayers in the Petition are: -

   a. That an order for a declaration that the Kenya Gazette Legal Notice No. 124 of 2020 dated 10th July, 2020 contravenes Articles 10, 35, 43, 46, 201, 209 and 210 of *the constitution* of Kenya and that the same is null and void for all intent and purposes.

   b. That an order for a declaration that the Kenya Gazette Legal Notice No. 124 of 2020 dated 10th July, 2020 be revoked.

   c. That an order for a declaration that fundamental rights and freedoms guaranteed to the petitioner especially Article 35, 43 and 46 of *the constitution* have been contravened by the respondents.

   d. That an order for a declaration that the enactment of Legal Notice No. 124 of 2020 dated 10th July, 2020 the 3rd and 4th Respondents failed in their duties to protect the public interest.

e. That this Honourable Court be pleased to issue such further or other order(s) as if may deem just and expedient for the ends of justice.

f. The costs of this petition be borne by the respondent.

6. The petition was supported by the affidavit of Henry Meshack Ochieng sworn on 29th July, 2020. The deponent mainly reiterated the contents of petition and exhibited/annexed the following documents: - The impugned Legal Notice No. 24 of 10th July, 2020 as (HM01).Extract of standard Newspaper dated 16th July, 2020 (HM02).Petroleum Development levy order 1992 revoked by 1st Respondent (HM03)

vii. Extract of laws (HMO4) .

viii. In paragraph 13 of the supporting affidavit he deposed that the action of the 1st Respondent purporting to set up a Fund was contrary to Section 24 (4)(5) of the *Public Finance Management Act* as this was the responsibility given to the 2nd Respondent hence the action by the 1st Respondent was illegal. Additionally (Para 14) he deposed that Executive Order No. 1 of 2018 assigned finance matters including the ones the 1st Respondent purported to exercise by appointing manager for the Fund to the 2nd Respondent since this is a manager answerable to the 2nd Respondent. He continued that under section 6 (d-f) of *Public Finance Management Act* (PFMA) it is PFMA which prevails should there be inconsistency. He stated that the petroleum development levy is at best a parallel taxation which by-passes the requirement of money bill contemplated under section 7 of PFMA which the 3rd Respondent failed to take up in the Budget and Appropriation Committee as well as the Committee on delegated legislation.

ix. Concerning section 12 (a) & (b) of PFMA, He stated that the 2nd Respondent has failed to promote transparency, effective management and accountability of public finances

Respondents' Case

7. In their joint grounds of opposition, the 1st, 2nd, 4th and 5th respondent relied on the following grounds:

i. That the Petitioner is seeking to circumvent the provisions of the law by seeking information from the Respondents through this Petition rather than the appropriate legal channels as outlined within the *Access to Information Act*.

ii. That the Petitioner has failed to demonstrate or provide any evidence of the nexus between the actions of the Respondents and any alleged violations of the Petitioners rights under Article 43 specifically the right to freedom to be free from hunger, and to have adequate food of acceptable quality.

iii. That the Petitioner has failed to demonstrate the manner in which the Respondents have violated the principles of taxation as outlined within *the Constitution* of Kenya.

iv. That the Petition is misleading and the Respondents are not in violation of any laws.

v. That the Petitioners allegations herein are speculative as the Petitioner lacks the requisite jurisdiction to determine questions of national petroleum policy and taxation.

vi. That the Petitioner has failed to demonstrate that the impugned legal notice was issued ultra vires or contains provisions which are in contravention of the law.

vii. That the Petition herein is seeking to illegitimately interfere with the exclusive mandate of the Respondents with regard to the determination of Petroleum and Tax policies in contravention of the separation of powers principle of law,

viii. That the questions raised therein on the illegality of the actions under the *Public Finance Management Act*, The Public Finance Management (National Government) Regulations 2015 Regulations, The *Statutory Instruments Act*, *Consumer Protection Act* and the *Interpretation and General Provisions Act* are not specific and fail to meet the requirements of rule 10 of the Mutunga Rules and the test in the Mumo Matemu Case, on specificity in drafting of Constitutional Petitions.

ix. That the Petitioner has failed to provide any evidence of the allegations in the Petition herein in contravention of the principles of the law of evidence, "He who alleges must prove' espoused under Section 107 of the Law of *Evidence Act*, Cap 80 of the Laws of Kenya.

x. That the Petition herein is premised on conjuncture and an abuse of the court process.

xi. That the orders sought by the Petitioners seek to violate the principle of separation of powers by having the court directly interfere with the mandate of the respondents.

1st Respondent Replying Affidavit

8. The 1st respondent through the Principal Secretary in the State Department of Petroleum, Ministry of Energy and Petroleum, Mohamed Liban swore the replying affidavit on 18th May, 2023 in answer to this petition.

9. He re-affirmed the contents of the affidavit of 2nd respondent, Ukur Yatani Kanacho that the Petroleum Development Levy Order No. 124 of 2020 was made in accordance with the law including complying wih the provisions of *Statutory Instruments Act*, 2013.

10. He asserted that Legal Notice No 124 of 2020 was a product of consultative study commissioned by 5th Respondent under the Cost of Service Study in Supply of Petroleum Products (COSSOP) which found that sufficient funds were required for development of petroleum sector and stabilization of pump prices in instances occasioned by high landed fuel costs above the threshold determined by the 5th respondent.

11. That it is the COSSOP study that proposed a levy that would facilitate growth of Petroleum Development Fund to achieve the following objectives: -

i. Creation of stabilization mechanisms for petroleum pump prices to cushion consumers from spikes in landed costs.

ii. Enhancement of capacity building in petroleum supply chain thereby creating stability in supply.

12. He asserted that before publication of Legal Notice No. 124 of 2020, the 1st respondent through the 5th respondent undertook a satisfactory public participation exercise in Nairobi, Mombasa, Nakuru, Nyeri, Kisumu and Eldoret (to represent Coastal, Rift Valley, Central and Western Regions of the Country respectively and published public notice (as evidenced by annexed bundle of documents, ML – 1).

5th Respondent Replying Affidavit

13. The 5th respondent through Engineer Edward Kinyua, the Director of Petroleum and Gas at the Energy and Petroleum Regulatory Authority (EPRA) swore the replying affidavit dated 8th may, 2020 which materially corroborated the factual account given on oath in the affidavit of the 1st respondent.

Replying Affidavit of the 2nd Respondent

14. The 2nd respondent (Cabinet Secretary for National Treasury) swore its replying affidavit on 14th January, 2021 through its the Cabinet Secretary, UKUR YATANI KANACHO whose position was substantially similar to the one taken by the 1st & 5th Respondent.

15. Additionally, he denied that the levy is intended to curtail the right of freedoms of citizens and affirmed that Legal Notice No. 124 of 10th July, 2020 fully complied with sections 6, 7 & 8 of the *Statutory Instruments Act* as evidenced by "the Ministry of Petroleum and Mining Impact Statement on Petroleum levy orders" (annexure UY 1) which was submitted to Parliament (3rd Respondent) and was approved on 17th July, 2020.

16. He stated that the said levy is collected by the Kenya Revenue Authority and is administered by the National Treasury through the Ministry of Petroleum and Mining (1st Respondent) where it is used to finance development expenditure and that the accounts of the Ministry are audited by Auditor General and submitted to Parliament hence there is sufficient accountability and transparency as required by the *Public Finance Management Act*.

Replying Affidavit of the 3rd Respondent

17. The 3rd respondent (National Assembly) through the replying affidavit of Serah Mbuli Kioko, on 21st September, 2022 (Acting Clerk then), affirmed that pursuant to Section 3(1) of the *Petroleum Development Fund Act* (No. 4 of 1991), the 1st respondent has power to make the Petroleum Development Order imposing a levy on petroleum fuels consumed in Kenya to be collected by Kenya Revenue Authority and the said order may also provide for the amendment of previous petroleum development levy and may make different provisions to apply to different provisions to apply to different description of fuel.

18. This is the order that the 1st respondent made through Legal Notice Number 124 of 10th July, 2020 to raise sufficient funds for development of Petroleum Sector and stabilization of pump prices in instances caused by high landing costs above the threshold determined by 5th Respondent.

19. Through a letter dated 14th July, 2020; the 1st Respondent submitted to the 3rd respondent; the said Legal Notice Number 124 of 10th July, 2020 in compliance with Section 11(1) & (2) of *Statutory Instruments Act*, 2013 which is a mandatory requirement. That it was within the time provided for under Section 11(1) of the *Statutory Instruments Act*. That in the definitions section of the Act, Section 2, which define 'statutory instruments includes 'orders' as part of that definition the import being that 'Presidential and Ministerial orders' are also Statutory Instruments.

20. She stated that the petition does not question the constitutionality of Section 3(1) of *Petroleum Development Fund Act*, under which the 1st Respondent exercised the powers in publishing the legal notice in question.

21. She confirmed that the Committee on Delegated Legislation scrutinized the Legal Notice No. 124 of 10th July 2020 pursuant to its mandate under Section 13 of the *Statutory Instruments Act*. That in compliance with Section 16, which requires the committee to consult regulatory making-authority before tabling the report to Parliament, the committee met with the 1st respondent as well as the petitioner. The committee considered the views expressed by both and through its letter of 17th July, 2021, the 3rd Respondent informed the 1st Respondent that the impugned Legal Notice had been approved. The letter was exhibited through the affidavit as SMK 2.

22. The 3rd respondent insisted that the petitioner has failed to demonstrate how the legal notice that 1st respondent issued was in violation of *the constitution* or how its purpose and effect infringes on *the constitution*. The 3rd respondent stated declaring the legal notice unconstitutional will have grave ramifications as it would lead to destabilization of pump prices which would not be in public interest.

Petitioner's Supplementary Affidavit

23. Upon receipt of the aforesaid responses, the petitioner filed a supplementary affidavit through Henry Mechack Ochieng sworn on 9th June, 2023 in which he pointed out that the 1st, 2nd and 5th respondent had failed to provide the media notices (Print and Broadcast) calling for the public participation specific to – 'Petroleum Development Levy Order', 2020 but had instead availed documents on an unrelated matter "The Implementation Plan on Cost of Service, Study in the Supply of Petroleum products (COSSOP) and KPLC Fuel Tariff Workshop."

24. The deponent at paragraph 5 of the Supplementary Affidavit stated: -

> " 5. That if any public participation would have been held, then it would have been on "Petroleum Development Fuel Levy Order, 2020". A presentation of suspect signatures for unrelated event being styled as the right public participation for a totally different event is wrong, desperate, unacceptable and is a crooked means by respondent to impede justice..."

25. He further stated that the 1st, 2nd and 5th Respondent had disclosed in their affidavits that fund collections were enforced even before Parliamentary approval of the impugned Legal Notice No. 124 of 2020. That since the said Legal Notice No. 124 of 2020 came into force on 15th July, 2020 two days before its approval by 3rd respondent on 17th July, 2020; it is unlawful, illegal and unconstitutional having been enacted unlawfully, unconstitutionally and procedurally contrary to the procedure under the *Statutory Instruments Act*.

26. He faulted 1st respondent for relying on documents by 5th respondent as proof that the 1st respondent undertook public participation yet there was no correspondence to show it had directed 5th respondent to undertake the public participation on its behalf. He stated in paragraph 13 of supplementary affidavit: -

> " ... there would have been as a matter of government protocol, communication for 1st respondent to the 5th respondent, vide Ministry of Energy. None exist and none has been annexed...."

27. Further at paragraph 17, he swore thus: -

> " 17. That even then, the 1st respondent was in charge of Petroleum Policy. The 5th respondent was and still remains a regulator, supposedly independent of 1st respondent. There is no way, therefore, that public participation/hearings on impugned legal notice by the 5th respondent (which) were conducted in the absence of the 1st respondent and/or that agents or assignees can be used as public participation record for 1st respondent...."

28. In paragraph 19, he doubted the existence of the fund by stating thus: -

> " 19. That clause 3 of the impugned legal notice that states: - "The levy shall be paid to the Petroleum Development Fund" is superfluous as the Fund does not exist in the manner envisaged and the respondent have never made any disclosure of how much was paid into

the fund, for which period and the movement of the said funds. Instead the funds were put into Consolidated Fund and diverted to other appropriations..."

29. At paragraph 21, the deponent states: -

> " 21. That the Honourable court was jurisdiction to stop the respondents form wasting its precious time in a fishing expedition for selecting unrelated purported evidence in order to defeat the cause of justice..."

Petitioner's Submissions

30. The petitioner through the firm of Sikuta and Associates filed written submissions dated 10th April, 2023.

31. The same were highlighted in open court on 3rd July, 2023 by Mr. Kipkemoi Sang who held brief for Mr. Sikuta.

32. Mr. Kipkemoi argued that the impugned Legal Notice 124 of 10th July, 2020 that increased the Petroleum Development Levy and caused petrol and oil prices to go up violated Articles 10, 46, 201 and 209, 210 of *the Constitution* as well as Sections 31, 5 of interpretation of General Provisions Act and Section 5, 6 & 8 of Statutory Instruction Act. He submitted that constitutional requirements for public participation was carried out by the 1st respondent prior to the said publication.

33. Citing Article 46 of *the Constitution*, the petitioner's counsel submitted the same was done without regard to prevailing circumstances of Kenyans who were undergoing the biting effects of Covid 19 Pandemic.

34. On failure to abide by statutory requirements counsel submitted that Section 5 of *statutory Instruments Act* makes it mandatory for a regulatory body to engage the public and/or hold stakeholder forums before making a statutory instrument which was also not done in the present case.

35. He also pointed out that the 1st respondent sought parliamentary approval from the 3rd respondent through the letter dated 14th July, 2020 yet the legal notice was slated to take effect the following day, the 15th July, 2020; with that approval coming two day later on, that is 17th July, 2020.

36. Counsel contended that under section 4 of the *Statutory Instruments Act*, the 1st respondent was under an obligation to conduct a regulatory impact assessment through a notification to the Public through Kenya Gazette and a newspaper with national-wide circulation of its intention to make the instrument but the 1st Respondent did not do that. Counsel thus submitted: -

> " ... Ideally and as provided by law, the legal notice would have been published and time given to Parliament to scrutinize it before approving for its enactment and coming into force.... instead thus particular one was so hurried to be published and brought into effect and to make it worse, in the middle of ravaging Covid 19 Pandemic...."

37. Concerning breach of principles of public finance, it was argued on the behalf of the Petitioner that Articles 201, 209 and 201 of *the Constitution* require that taxation to confirm to principles of fairness and public participation in tax policy making but this was not adhered to because no form of public participation was carried out. This also offended Article 10(1) and 10(2) of *the Constitution*.

38. Counsel submitted that the increase in the levy was against *Consumer Protection Act* Section 3(4) (b) because instead of reducing or mitigating the disadvantage to the consumers, the action had subjected them to more economic hardship.

39. The petitioner relied on case of Wilfred Manthi Musyoka Vs County Assembly of Machakos - Governor County Government of Machakos and 2 others (interested party) (2019) eKLR, Doctors of Life International Vs Speaker of National Assembly and Others 9CCT12/05) [2006] ZACC11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), where the importance of public participation was underscored by the courts.

40. Also cited was the case of Matatiele Municipality and Others Vs President of the Republic of South Africa and Others (2) CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), where Ngcobo J held that in public participation, what the constitutional scheme requires is the achievement of balanced relationship between representative and participatory element in democracy where additional and more direct role of the people is underscored, so that the government is partly representative and partly participatory by giving members of public an opportunity to participate in the making of laws that affect them.

41. On the same point, he relied on the case of Republic Vs County Government of Kiambu ex parte Robert Gakuru & another (2016) eKLR as well.

42. Counsel stressed the fundamental importance of public participation by the following quotation in the case of Doctors of Life International Vs Speaker of National Assembly and Others 9CCT12/05) [2006] ZACC11; 2006 (12)BCLR 1399 (CC); 2006 (6) SA 416 (CC), where it was held thus: -

> "...If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy..."

43. The Petitioner's counsel also submitted on access to information. He argued that the petitioner was entitled to be provided with information relating to public participation that conducted in respect of the Petroleum Development levy in respect of Legal Notice No. 124 of 2020. He quipped -

'...If people do not know what is happening to the society, if action of those who rule are hidden from them, then they cannot take a meaningful part in the affairs of that society....

Information is not just a necessity for people, its essential part of good government, bad government needs secrecy to survive. It allows inefficiency, wastefulness and comply to strive...."

Submissions by the 1st, 2nd & 5th Respondents

44. The respondents (1st, 2nd and 5th respondents faulted the contention by the petitioner challenge that the 1st respondent had no authority to gazette the Petroleum Development levy order. The petitioner's argument being that the authority is vested on the Cabinet Secretary in Charge of National Treasury under Section 24 (4) & (5) of the *Public Finance Management Act* which provide thus: -

(4) The Cabinet Secretary may establish a national government public fund with the approval of the National Assembly.

(5) The Cabinet Secretary shall designate a person to administer every national public fund established under subsection (4).

45. The 1st, 2nd and 5th Respondent submitted that the funds contemplated under Section 24(4) of PFMA are those envisaged by Article 204, 206, 207 and 208 of *the Constitution*; not Petroleum Development Levy Fund.

46. For the Petroleum Development Levy Fund, the contention by 1st, 2nd & 5th Respondents is that the fund is already in existence as is clearly declared in the preamble to the Act which describes it as: -

> " An Act of Parliament to provide for the establishment of a Petroleum Development Levy and connected purposes...."

47. On the who is the Minister responsible for implementation of an Act, counsel for 1st, 2nd, 4th & 5th Respondent referred to 2 of the interpretation General provisions Act, which defines the 'Cabinet Secretary' to mean:

> " ...the Cabinet Secretary for the time being responsible for the matter in question, the president where the Executive Authority is retained by him..."

48. By parity of reasoning, it was thus pointed out Section 3(1) of Petroleum Development Levy Fund which states: -

'the Minister may under a Petroleum Development Levy order imposing a levy on all Petroleum fuels consumed in Kenya to be collected by the Commission and the order may provide for amendment of previous Petroleum Development Levy order and may make different provision in relation to different description of fuel' thus refers to the Cabinet Secretary of Energy and Petroleum and not Cabinet Secretary of Finance as suggested by the Petitioner.

49. On failure to conduct public participation, the 1st, 2nd and 5th Respondents maintained that it was conducted by through the 5th Respondent as evidenced by the annexures provided.

50. The 1st, 2nd and 4th Respondent firmly maintained in their submissions that the Petroleum Development Levy Order had been subjected to Parliamentary scrutiny in conformity with the *Statutory Instruments Act* and Parliament gave its seal of approval.

51. Placing reliance on the case of Law Society of Kenya Vs Attorney General and another, National Commission for Human Rights and Another (Interested parties [2020] eKLR, he quoted the a passage in which Makau J, held:

> " ... where *the constitution* has reposed specific functions in an institution or organs of state, the court must give those organs sufficient time or lee way to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of *the constitution*..."

52. Further, the Supreme Court of Kenya in Justus Kariuki Mate & another Vs Martin Nyaga Wambora and another (2017) eKLR where it was held that no governmental agency should encumber another to stall the constitutional motions of the other; and also, the Supreme Court Case of Speaker of Senate & Another Vs Attorney General & Others (2013) eKLR, where it was held that the court will not question each and every procedural infraction that may occur in either houses of Parliament as it is not proper to endanger the institutional comity between the three arms by unwarranted intrusion of one arm by another.

53. Counsel for the 1st, 2nd and 5th Respondents thus submitted: -

> "... the petitioner has not challenged the constitutionality or legality of the decision by Parliament to enact the Petroleum Development Levy, 2020 as demonstrated in any way that Parliament is discharging its mandate... or that their decisions are so perverse or so manifestly irrational that they cannot be allowed to stand under the principle and values of *the constitution*..."

54. Concerning the submission by petitioner that in order to effectively present this petition, it is necessary for the court to compel the 1st respondent to provide information on public participation that was conducted; the 1st, 2nd and 5th respondent invoked the *Access to Information Act* and submitted that the petitioner was required to first seek the information in writing from 1st and 5th respondent before approaching the High Court for such orders.

3rd Respondent Submissions

55. On jurisdiction, the 3rd respondent argued that the petition was in violation of the principle of exhaustion of remedies. The 3rd respondent submitted that the petition was filed on 21st July, 2020; the matter had not been placed for consideration before the 3rd respondent pursuant to provisions of *Statutory Instruments Act*. Consequently, the 3rd respondent invited this court to find that the petitioner had prematurely placed matters before the court which were still alive and in process of being considered by the 3rd respondent. The 3rd Respondent thus invited the court to uphold its preliminary objection dated 14th August, 2020.

56. Additionally, the 3rd respondent reiterated that it had considered the impugned legal notice and confirmed that it had complied with the Statutory Instrument Act as stated in its replying affidavit.

57. The 3rd Respondent relied on the case of Paul Musili Wambua Vs Attorney General & 2 Others (2015) eKLR where Justice Odunga cited with approval the case of Mahashilwa State Board of Secondary 7 High Secondary Education and Another Vs Kumarstuent (1985) LRC, where it was held thus:

> "...so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."

58. On submission by the petitioner that the regulation came into force prior to approval by the 3rd Respondent, the 3rd Respondent relied on Section 23(1) of *Statutory Instruments Act* which provides as follows:

(1) A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable."

59. Consequently, the 3rd respondent submitted: -

> "…. Therefore, a regulation published by a regulatory making authority is deemed to be in force from the date of publication or the date specified in the regulations until National Assembly Committee on delegated legislation, finalizes their consideration and either approve or annuls the regulations…"

Analysis And Determination

60. Having reviewed the pleadings, affidavits and the rival submissions by parties herein, it is my considered view that the following issues arise for determination:

a. Whether the 1st Respondent was the responsible Cabinet Secretary mandated by law and/or relevant policy to gazette Petroleum Development Levy Fund?

b. Whether the Provisions of *Statutory Instruments Act* were complied with in the process of publishing the petroleum development levy fund order no. 124 of 10th July, 2020.

c. Whether the principles of public participation, openness, accountability and transparency was observed in the process of enacting the said petroleum development levy fund number 124 of 10th July, 2020.

d. If the constitutional rights under article 35, 43 and 46 were violated by the respondents following the enactment of the said petroleum development fund levy?

e. Who bears the cost of this petition?

Whether the 1st Respondent was the Responsible Cabinet Secretary mandated by the law and/or existing policy to gazette petroleum development levy fund.

61. In the supporting affidavit of the Petitioner to the petition, the Petitioner stated that the action of the 1st Respondent in purporting to set up the petroleum development levy fund was in contravention of Section 24 (4) & 5 of the *Public Finance Management Act* as that responsibility is assigned to the Cabinet Secretary for Finance (2nd Respondent) by the said Act, which act supersedes the *Petroleum Development Fund Act* in case of conflict as per section 6 (d-f) of the *Public Finance Management Act*. That in fact, Executive Order Number 1 of 2018 assigned all matters finance on the 2nd respondent including those that the 1st Respondent purported to exercise in appointing a manager for the fund. The Petitioner thus argued that the ensuing order, legal notice number 124 of 10/7/2020 is unlawful because in the petitioner's view, the 1st respondent does not have the mandate he purported to exercise by issuing legal notice 124 of 10/7/2020.

62. In response, all the respondents unanimously asserted that under Section 3 (1) of the *Petroleum Development Fund Act* (No. 4 of 1991) the power to make the order imposing a levy on petroleum products vests on the 1st Respondent, and is collected by the Kenya Revenue Authority. In the submissions of the 1st, 2nd, 4th & 5th respondents, it was contended that the *Petroleum Development Fund Act* is a specific statute whose preamble describes it as "An Act of Parliament to provide for the establishment of a petroleum development levy and connected purposes' thus underscoring

the specific objective underlying the Act. As to which Cabinet Secretary is responsible for the implementation of the Petroleum Development Levy Act, the respondents cited Section 2 of the Interpretation of Statutes and General Provisions Act and argued that the Cabinet Secretary in charge of the implementation of the *Petroleum Development Fund Act* and who is responsible for exercising that mandate under section 3 (1) of the Petroleum Development Levy Order is the 1st Respondent, being the Cabinet Secretary of Energy and Petroleum and not the Cabinet Secretary of Finance as suggested by the Petitioner.

63. The *Public Finance Management Act* No. 18 of 2012 generally provides for the establishment of national government public funds in Section 24 and under the sub-heading 'Establishment of Parliamentary Fund and other National Government Public Funds'.

Section 24 (4) & (5) which the Petitioner relied on states as follows:

> S. 24(4)- The Cabinet Secretary may establish a national government public fund with the approval of the National Assembly.
>
> (5) The Cabinet Secretary shall designate a person to administer every national public fund established under sub-section (4).

Under section 2 of the *Public Finance Management Act* No. 18 of 2012, 'Cabinet Secretary' means the Cabinet Secretary responsible for matters relating to finance'. It follows therefore that there would be no doubt as to who would be responsible for setting up 'other national government public fund'.

64. The question to ask then is, does petroleum development fund levy fall under 'other national public funds to which the Cabinet Secretary for Finance was responsible for setting up?' My humble view is that it does not. Petroleum development levy fund does not fall under the general classification described in section 2 of *Public Finance Management Act* 'as any other national government fund' since the petroleum development levy fund is a product of a specific statute which establishes it. That Act is the *Petroleum Development Fund Act*, 1991.

65. One of the canons of Statutory Interpretation that aids in interpretation where there is a general and specific statute on a particular matter is expressed in the Latin maxim of 'generallis specialibus non-derogant', which simply means that general laws do not derogate from specific. This principle comes in to aid a court when it is required to decide which of the two statutes should apply. The Petitioner in the present case has submitted that the provisions of the *Public Finance Management Act* No. 8 of 2012 prevail over those of the Petroleum Development Levy Fund, Act 1991.

66. In the American case of Rogers Vs. United States (1902) U.S. 831185 it was held thus:

> " ...It has come to be an established rule that a subsequent Act, treating a subject in general terms and not expressly contradicting the provisions of prior special statute, is not to be considered as intended to affect the more particular and specific provisions of earlier Act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all..."

67. Going by the above principle, it is evident that *Public Finance Management Act*, No. 18 of 2012 is coached in general terms as it speaks of 'other national government public funds' whereas the *Petroleum Development Fund Act*, 1991 is the specific Act that establishes a specific levy, the petroleum development levy fund. It proceeds to make comprehensive provisions for setting up and implementation of the same. The provisions of the *Public Finance Management Act* being a general

statute compared to the *Petroleum Development Fund Act*, 1991 cannot without expressly stating so override the specific provisions of the *Petroleum Development Fund Act*, 1991.

68. Who then is the Cabinet Secretary responsible for making the levy order under Section 3 (1) of the Petroleum Development Fund, Act 1991? The Act uses the word 'Minister' but does not define which Minister. Under the *Interpretation and General Provisions Act*, Cap 2; the definition of 'Cabinet Secretary' who would be the equivalent of Minister under the old constitution is elaborated in section 2. It provides:

> 'Cabinet Secretary' means the Cabinet Secretary for the time being responsible for the matter in question, or the President where executive authority is retained by him. Provided for purposes of the administration of laws relating to the legal sector, the expression shall, subject to any assignment under Article 132 (3) (c) of *the Constitution*, include the Attorney General.
>
> For purposes of administration of laws relating to the Energy Sector, and other incidental purposes, it would be imprudent for this Court to hold that the Cabinet Secretary responsible for the matter in question is the 2nd and not the 1st Respondent. The implementation of this Act which deals with matters petroleum is the function 1st Respondent, hence there was nothing illegal for the 1st respondent to publish order 124 of 10/7/2020 and not the 2nd Respondent (Cabinet Secretary for Finance). In fact, even the 2nd Respondent had (Cabinet Secretary for National Treasury) who the Petitioner argued was the responsible disputed that assertion and in his replying affidavit acknowledged that it was the responsibility of the 1st Respondent.
>
> Whether the Provisions of *Statutory Instruments Act* were complied with in the process of publishing the petroleum development levy fund order no. 124 of 10th July, 2020.

69. The Petitioner claimed after reading the affidavits of the 1st, 2nd and 5th Respondent it was evident that the petroleum levy collection commenced before getting Parliamentary approval of the impugned Legal Notice No. 124 of 2020. He pointed out that the 1st respondent sought parliamentary approval from the 3rd respondent through a letter dated 14th July, 2020 yet the legal notice was slated to take effect the following day, the 15th July, 2020; with the approval coming two days after the commencement of the levy, that is 17th July, 2020, hence it was unprocedural, unlawful and unconstitutional.

70. The 1st Respondent submitted that Legal Notice Number 124 of 10th July, 2020 complied with Section 11(1) & (2) of *Statutory Instruments Act*, 2013 on the timeframe for presentation of statutory instrument before Parliament. In countering the submission by the petitioner that the regulation had come into force before getting the approval by Parliament (3rd Respondent), the 3rd Respondent relied on Section 23(1) of *Statutory Instruments Act* which provides that a statutory instrument instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, on the date of its publication in the Gazette subject to annulment where applicable."

71. Consequently, the 3rd respondent submitted: -

> "…. Therefore, a regulation published by a regulatory making authority is deemed to be in force from the date of publication or the date specified in the regulations until National Assembly Committee on delegated legislation, finalizes their consideration and either approve or annuls the regulations…"

72. The question thus is whether legal notice number 124 of 10/07/2020 coming into force on 15th July,2020 two days prior to the Parliament (3rd Respondent) giving its approval offended the relevant provisions of the *Statutory Instruments Act*.

73. Under Section 11 of *Statutory Instruments Act*, the sub-heading thereof reads 'Laying of Statutory Instruments before Parliament.'

> Section 11 (1) reads: Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) days after the publication of a statutory instrument ensure that a copy of the Statutory Instrument is transmitted to the responsible clerk for tabling before the relevant House of Parliament. ''Within' is a common English word which means 'not outside of' or simply 'inside of'. Consequently, the timeframe begins from the date of publication of the statutory instrument and the requirement is that tabling before Parliament must not go beyond/or exceed the seventh days from the date it was published. In the present case, the publication was done on 10th July, 2020 and the forwarding to Parliament was done on 14th July, 2020; three days before the expiration of the 7th day period, hence it was 'inside' or 'within' the prescribed period.

74. The next issue that the Petitioner complained of was that implementation of the legal notice commenced before getting Parliamentary approval. Does the law strictly require that approval must precede implementation? When one reads Section 11 (4), it is becomes crystal clear that Parliamentary approval need not precede the actual implementation of the statutory instrument, especially during the seven day window. It reads as follows:

> " If a copy of a Statutory instrument that is required to be laid before the relevant house of Parliament is not laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void."

75. It means that a Statutory Instrument can commence operating even before it is laid before Parliament but this is for a limited duration of seven days only from the date of its publication. Beyond the seventh day, if it is not presented before Parliament, it ceases to operate although what has been done during the seven-day space is saved and is not invalid. The contention by the Petitioner that the legal notice number 124 of 10/07/2020 is unprocedural, illegal and unconstitutional just because the commencement of the same came before obtaining Parliamentary approval thus lacks merit.

76. Indeed, to further cement the position that approval by Parliament is not a condition precedent for the commencement of a published Statutory Instrument, Section 23 (1) of the *Statutory Instruments Act* similarly provides:

Section 23 (1)- A Statutory Instrument shall come into operation on the date specified in that behalf in the Statutory Instrument or, if no date is specified, then, subject to sub-section

> (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable.

77. It thus apparent that commencement of statutory instrument is not conditioned on prior Parliamentary approval as submitted by the Petitioner. That is a misconception not supported by the *Statutory Instruments Act* as demonstrated above. Indeed, Parliamentary approval need not be given within seven days; all what is required is that once the instrument is published, it must be tabled before Parliament within seven days, and may continue operating unless it is annulled by Parliament.

Whether the principles of public participation, openness, accountability and transparency were observed in the process of enacting the said petroleum development levy fund number 124 of 10th July, 2020.

78. The Petitioner faulted the respondents for not carrying out public participation prior to publication of the petroleum development fund levy order, 2020. It argued that the 1st, 2nd and 5th Respondent had not provided any media notices (Print and Broadcast) calling for public participation specific to the Petroleum development levy order, 2020. Responding to the replying affidavit by the respondents, he stated that what the respondents had availed to demonstrate they had carried public participation were unrelated documents on the 'Implementation plan on cost of service, study in supply of petroleum products (COSSOP) and KPLC Fuel Tariff Workshop.'

The Petitioner stated:

> "A presentation of suspect signatures for unrelated event being styled as right to public participation for totally different event is wrong, desperate, unacceptable and is a crooked means by the respondent to impede justice..."

He also faulted the 1st respondent for claiming it relied on public participation carried out by the 5th Respondent yet there was no correspondence to show it directing the 5th respondent to undertake that public participation on its behalf.

79. In the submissions it was submitted for the petitioner that failure to carry out public participation was a violation of Articles 10, 201 of *the Constitution* and Section 5 of *Statutory Instruments Act*. That it also infringes on the principles of openness and fairness in tax policy making per Article 209 and 210 of *the Constitution*.

80. The 1st Respondent was categorical that Legal Notice Number 124 of 2020 was enacted after a consultative study which had been commissioned by the 5th Respondent known as 'Cost of Service Study in Supply of Petroleum Products (COSSOP)' which found that sufficient funds were required for the development of petroleum sector and stabilization of pump prices due to high landed costs above the threshold determined by the 5th Respondent. The 1st respondent stated that the consultative meetings took place in Nairobi, Mombasa, Nakuru, Nyeri, Kisumu and Eldoret (as the representative of regions, namely-Coastal Region, Rift Valley, Central and Western Regions respectively). The 1st Respondent also provided alongside the lists of participants, published public notices in the bundle of documents attached to the 1st Respondent affidavit marked ML-1.

81. Article 10(2)(a) of *the Constitution* encompasses public participation as a national value and principle of governance. State organs, State officers, public officers and all persons are bound by *the Constitution* to undertake public participation before making or implementing public policy decisions.

82. Public participation is now a key feature for all important policy and legislative decisions in this country. In Okiya Omtatah Okoiti vs. Refugee Affairs Secretariat (RAS) Kenya & 2 others [2020] eKLR, Justice W. Korir explained:

> "...Public participation in the decisions of administrators is confirmed as a national value and principle of governance under Article 10 of *the Constitution*, and therefore everyone would anticipate that all policy decisions and administrative actions would involve their input. By failing to hold any public forum to gauge the concerns and obtain the input of the refugee community, the respondents did infringe the legitimate expectation held by the refugees

that the Guidelines governing the election of their leaders would be subjected to public participation."

83. In Electronic Cargo Trading System (ECTS) Vs. Kenya Revenue Authority PET. 84/2017 (2017) eKLR the Court held thus:

> "...The essence of public participation in any decision-making process is to give public an opportunity to have a say in decision making so that at the end of the day, they feel they had an input in the process to the making of eventual decision even if they may not agree with the final outcome of that process..."

84. In the case of Doctors for Life International vs. Speaker of the National Assembly & others [2006] ZACC 11, the Court held that:-

> "...The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected....91. Significantly, the ICCPR guarantees not only the 'right' but also the 'opportunity' to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation."

85. In the case of Republic vs. County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR the Court held: -

> "...However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case..."

86. Other than *the Constitution*, Section 5 of the *Statutory Instruments Act* requires that consultations be made before the regulatory making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to have a direct or substantial indirect effect on business by consulting persons who are likely to be affected by the proposed instrument.

87. The 1st Respondent in annexure ML-1 provided lists of stakeholder consultative forums conducted through the 5th Respondent concerning the implementation plan on the cost of services study in the supply of petroleum products (COSSOP) and KPLC fuel tariff workshops that took place on 9/8/2019 at Hilton Hotel Nairobi, 2nd August, 2019 at the Royal Hotel, Mombasa; 6th August, 2019 at the Milele Resort, Nakuru; 19th July, 2019 at the Outspan Hotel, Nyeri; 26th July, 2019 at the

Acacia Primier Hotel Kisumu and 25th July, 2019 at the Nobile Hotel, Eldoret as evidence of extensive consultations it conducted.

88. In countering this evidence, the Petitioner said it comprised of unrelated events and participants. He wanted the respondent to provide one that specifically dealt with the 'Petroleum development levy'.

89. The Petitioner is now acting like a deer in headlights. Cornered by evidence of wide consultative forums that proceeded the proclamation of the fuel levy which it is now unable to confront, the petitioner has resorted to use trivializing statements that have no evidential basis.

90. I find that based on the evidence provided by the respondent, sufficient public participation took place before the fuel fund was gazetted. The fact that those forums may have been used to discuss other tariffs or levies in the sector instead of being specific to the petroleum development levy is immaterial. What is important is that the levy featured in the deliberations and the participants expressed their views on it even though was alongside others in the energy and petroleum sector, this is a fact asserted by the respondent which the petitioner could not dislodge. The Petitioner also attempted to question the veracity of the 5th Respondent conducting the public participation on behalf of the 1st Respondent by stating that the 5th Respondent is independent and thus the 1st respondent should have exhibited correspondence showing that it had made the request to 5th Respondent to conduct public participation on its behalf. This is another plain statement. The fact that the 5th Respondent corroborated on oath the disposition of the 1st Respondent on this point is good enough. There is nothing provided to discredit the firm position asserted by the 1st and 5th Respondent on this fact.

91. The petitioner's claim that there was no public participation is thus unmeritorious.

Whether the Constitutional rights under Article 35, 43 and 46 were violated by the respondents following the enactment of the said petroleum development fund levy

92. Citing Article 43, the Petitioner's position was that the unilateral decision to enact the petroleum development levy would increase the cost of fuel and transport with the consequence that it would have a ripple effect on food prices hence making it hard for Kenyans to afford food of quality and standard in violation of Article 43 (1) (c) of *the Constitution*. In respect of Article 46 on rights of consumers, it contended that high food prices and fuel would impact heavily on struggling consumers under the prevailing Covid 19 at the time. The Petitioner further contended that to enable it present the petition effectively, it the 1st respondent should be compelled to provide it with the evidence on public participation which it had conducted and not doing so was in violation of Article 35 of *the Constitution*.

93. The Respondents denied infringing any of the above-mentioned constitutional rights and stated that prior to the enactment of the impugned legal notice, the 1st Respondent duly complied with all the requirements of Section 6,7 & 8 of the *Statutory Instruments Act* and compiled the 'The Ministry of Petroleum & Mining Impact Statement on Petroleum Levy Orders' (Annexure UY 1) which the Legislature had considered and before granting its approval of the statutory instrument.

94. In my view, the fault I find in the Petitioner's claim on violation of the alleged rights is lack of evidence to back its specific assertions of violation instead making general statements. The Petitioner did not carry out and present any research-based evidence on the impact of the said levy to counter the 'Impact Statement on Petroleum levy orders' (UY 1) relied upon by the respondents other than the broad declarations it was making. Generalities cannot take the place of evidence. I find no evidence to substantiate the alleged violation of Article 43 and 46. The Respondents claim that the levy is meant to stabilize pump prices caused by high landed costs and is intended to cushion consumers from unpredictable fuel costs has not been displaced by any counter evidence offered by the Petitioner.

95. The claim that petroleum levy order did not take into account the prevailing circumstances caused by Covid 19 pandemic cannot succeed as the respondent provided the impact statement which apparently took into account all the surrounding circumstances. For instance, in clause 2.1 (ii) it states: "Stability in petroleum prices in instances of spiked landed costs will boost affordability of goods and services by consumers".

Additionally, in clause 2.0, it reads: Statement of effect of the proposed levy Order-'

> " The proposed levy order is expected to have long term positive effect on inflation since petroleum is key driver in the Country's economy especially in the manufacturing, mechanized agriculture and transportation sectors..."

96. On violation of Article 35, I also find it was necessary for the Petitioner to demonstrate that it had first sought that information in writing from the 1st Respondent (Section 8 of *Access to Information Act*). This was not done. Further, even where the Respondent may have refused to provide the information (which should ought to be provided within 21 days per Section 9), the recourse was to refer the matter to Commission on Administrative Justice (per Section 14) before approaching the court. This procedure is provided for in the *Access to Information Act* and the Petitioner should have followed it. It is thus premature to seek an order of the Court when those statutory remedies are yet to be exhausted.

97. This Petition thus fails in its entirety.

98. As for who pays for the cost of the Petition, I do find that the Petition was brought in public interest and not for advancing the private interest of the Petitioner. Each party shall bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 26TH DAY OF OCTOBER 2023.

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L.N. MUGAMBI

JUDGE