



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.195 OF 2018

RED ROOF INN HOTEL LIMITED.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

TOURISM FUND.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner filed the petition dated 18th May, 2018 claiming contravention of Article 47 of the Constitution and Section 66 as read with Section 69(1)(a) of the Tourism Act, 2011. The petition was filed under Articles 10, 23, 47 and 50 of the Constitution.

The Petitioner's case

2. The petition as supported by the sworn averments of the petitioner's director, Isaiah Ngotho Waitthaka is that the mandate of local tourism is bestowed upon the County Governments under the Fourth Schedule of the Constitution. Parliament enacted the Tourism Act, 2011 which established the Tourism Fund under Section 66 of the Act. One of the functions of the Tourism Fund as captured under Section 69 (1)(a) of the Act is to 'collect the tourism levy imposed under Section 105 of this Act or any other written law.'

3. He depones that the petitioner as a hotel carries out its business as a bar, lodging and restaurant with its clientele being mechanics and traders in Nairobi and not tourists. To trade as such the petitioner states that it pays a total sum of Ksh.160,000/- to the Nairobi City County Government to obtain the license to operate its business.

4. He further depones that the 2nd respondent's officers have persistently visited its premises with a view to obtaining the tourism levy. That on 10th May 2018 the 2nd respondent's officers who had stayed in the premises the whole day, counted the number of people in the hotel and informed the petitioner that the levy to be paid was the sum total of Ksh.423866. This he says was not supported by any documentation.

5. In light of this, the deponent avers that Section 66 of the Tourism Act, 2011 appropriates the County Government's function of local tourism to a body that is not the County Government. Furthermore, that having paid its dues to the Nairobi City County Government, the 2nd respondent's action of seeking the tourism levy was in effect double taxation. Additionally it is his averment that the action of assessing levy through speculation in counting the number of people at the hotel contravenes Article 47 of the Constitution.

6. The Petitioner therefore seeks the following orders:

a) A declaration that Section 66 as read with Section 69(1)(a) of the Tourism Act are unconstitutional to the extent that they appropriate the function of Trade development and regulation, including local tourism to an entity other than the County Government;

b) A declaration that the action of the 2nd respondent enumerated under paragraph 27 – 36 of the petition, all-inclusive contravene Article 47 of the Constitution and are invalid;

c) *Any other order or relief that this Court will be pleased to issue;*

d) *Costs of this petition.*

The 1st Respondent's Case

7. The 1st respondent in response filed its grounds of opposition dated 12th June 2018 on 27th June 2018. The seven summarized grounds state that:

i. *There is a general presumption of law that statutes enacted by the Parliament are constitutional and that the burden falls on the person who alleges otherwise to rebut this presumption.*

ii. *Declaring a statute unconstitutional is a serious issue with deep seated ramifications and that the Court ought not to be overly enthusiastic in making such a pronouncement unless there are clear grounds in law established which is not the case herein.*

iii. *The Courts cannot act as regents over what is done in Parliament because such an authority does not exist.*

iv. *The impugned law is in operation and it is the machinery that aids the Kenyan Government in the development, management, marketing and regulation of sustainable tourism and tourism related activities and services and therefore to suspend any of its provisions will seriously jeopardize the operations of the 2nd respondent.*

v. *If there is a duplication of roles it is the role of Parliament to repeal, modify or amend legislation so as to avoid any unnecessary duplication and even so duplication of roles per se cannot render an Act of Parliament unconstitutional.*

vi. *Articles 6 and 189 of the Constitution, requires the governments at the national and county levels to consult, co-operate, co-ordinate and liaise with each other so as to achieve optimal delivery of service.*

vii. *The petition is incompetent, misconceived, misplaced and is an abuse of the process of the Court process.*

The 2nd Respondent's case

8. The 2nd respondent filed a replying affidavit sworn by its Chief Executive Officer, Joseph Cherutoi on 22nd October 2018. He avers that the 2nd respondent is a State Corporation under the National Government with the power to collect tourism levy in furtherance of its objectives. It sought to obtain tourism levy from the petitioner who is licensed as a hotel pursuant to Section 98 of the Tourism Act, 2011 and categorized as Class B in its Act's Schedule and also a beneficiary of its services. He depones that the tourism levy is KShs.25,423/- per month and the petitioner has not paid it since 2017. The arrears had accrued a penalty of KShs.5,000/- and another penalty at 3%.

9. He avers that by virtue of Section 122 of the Tourism Act, 2011 as read together with Rule 9(1) of the Tourism Fund Regulations 2015, the 2nd respondent vide its letter dated 10th May 2018 informed the petitioner of its intended visit. The purpose of this visit was to verify and establish whether the petitioner was submitting its returns proportionate to the volume of the business.

10. At the conclusion of the visit the 2nd respondent's officers in line with Rule 12 of the Tourism Fund Regulations, 2015 determined the total levy payable to KShs.423,866/- which was set out in the verification form issued to the petitioner. According to him the petition seeks to determine the functions of the National and County Government in relation to collection of the tourism levy. This to him is outside jurisdiction of this court by virtue of Article 189(3) and (4) of the Constitution and Section 31 of the Intergovernmental Relations Act, 2012. He adds that the petitioner has failed to exhaust the existing mechanism and to enjoin the County Government of Nairobi in this petition.

11. He avers that the subject matter of this petition is similar to that in Constitutional Petition No.278 of 2017 which is pending determination. He finally depones that the 2nd respondent will suffer great prejudice if the petition is allowed since the decision will affect other hoteliers thus hampering its service delivery in the tourism industry.

The Petitioner's Submissions

12. The firm of Okubasu, Munene & Kazungu Advocates LLP on behalf of the petitioner filed written submissions dated 13th February 2019 and further supplementary submissions dated 3rd December 2021. The petitioner identifies the following as the issues for determination:

i. *Whether the actions of the 2nd respondent to levy and collect tourism license fees is constitutional; and*

ii. *Whether the manner in which the 2nd respondent calculated the tourism fee payable, through counting the customers is in violation of Article 47 of the Constitution.*

13. On a preliminary note Counsel notes that contrary to the 2nd respondent's argument that the petitioner failed to enjoin the Nairobi City County, a petitioner is required to plead with precision its case against a respondent. He submits that in this case the petitioner had no grievance against the Nairobi City County to make it enjoin it in this suit. See **Anarita Karimi Njeru v Republic [1979] eKLR**.

14. Counsel on the first issue submits that according to the black's law dictionary 8th Edition, a licensing fee is a charge imposed by a government authority for the privilege of pursuing a particular business or activity. He contends in light of this that the Tourism Fund as established under Section 66 and empowered by Section 69(1)(a) of the Tourism Act, 2011 does not form part of a County Government. This is because the Fourth Schedule of the Constitution of Kenya provides that the function of local tourism is a mandate of the County Government and not the Tourism Fund. Therefore charging of the tourism levy constitutes double taxation which is unconstitutional.

15. Counsel submits that for an Act of parliament to be declared unconstitutional the test that ought to be satisfied is a demonstration that either its purpose or effect or both are unconstitutional as held in the case of **Olum and another v Attorney General [2002] EA**. He argues that though the 2nd respondent asserts that the tourism function in levying the fees is shared by the two levels of government, it has failed to produce any evidence upon which the levy is sought as required under Section 105(3) of the Tourism Act.

16. Counsel contends that Section 98 of the Tourism Act makes it clear that for a business to carry out tourism activities it must obtain a license from the Kenya Tourism Board which the petitioner does not possess. He thus submits that the 2nd respondent in implementing the impugned sections against the petitioner and other restaurants that do not deal in tourism activities is acting unconstitutionally. In support reliance was placed on the case of **Stanley Waweru- Chairman & 3 others (Suing as Officials of Kitengela Bar Owners Association) v National Assembly & 2 others [2021] eKLR**.

17. In submitting further on double taxation counsel cited the following cases: (i) **Kenya Flower Council v. Meru County Government [2019] eKLR**.

(ii) **Keroche Industries Limited v. Kenya Revenue Authority and 5 others [2007] eKLR**.

18. On the second issue, Counsel submits that the impromptu visit to the petitioner's premises and imposition of a tourism levy fee of Ksh.423, 866/- without any justification or documentation was contrary to the dictates of Article 47 of the Constitution. To that end Counsel prays that the petitioner be granted the reliefs sought.

The 1st Respondent's Submissions

19. The 1st respondent filed written submissions dated 12th February, 2019 through learned counsel Betty Mwasao. She identifies the following as the issues for determination:

i. Whether Section 66 as read together with Section 69(1)(a) of the Tourism Act are unconstitutional; and

ii. Whether the actions of the 2nd respondent contravenes Article 47 of the Constitution.

20. Counsel on the first issue submits that the petitioner has not made out a case to support its argument that the impugned sections are unconstitutional. This is because the Board of Trustees that is tasked with management of the tourism fund is a creature of the National Government. That one of the National Government's mandates under the Fourth Schedule of the Constitution is the tourism policy. In light of this Counsel submits that in determining the constitutionality of an impugned Section in an Act, a Court must be guided by the object and purpose of the impugned Act as held in the case of **R v Big M Drug Mart Ltd.(1985)1 S.C.R.295**. This is accordingly set under Section 69 of the Tourism Act, 2011 which reveals that the purpose of the tourism levy is to establish, equip and control tourism and hospitality training institutions with the intention of realizing the Act's objects.

21. In addition Counsel argues that the tourism levy and business license as paid to the County Government are two distinct charges and as such payment of one does not negate payment of the other where required. It is in a nutshell their submission that Sections 66, 69 and 105 of the impugned Act are constitutional with regard to tourism policy and its development.

22. On the second issue, Counsel submits that the petitioner has failed to adduce evidence to support its allegation that being charged a tourism levy of KShs.423,866/- contravenes Article 47 of the Constitution and further that it has failed to prove its exhaustion of the appeal mechanism before the Tourism Tribunal under Section 87 of the Act. In essence it is their submission that this Court ought not to review an administrative action unless the mechanisms including internal mechanisms for appeal or review are exhausted by the petitioner as held in the case of **Geoffrey Oduor Sijeny v Kenyatta University [2018] eKLR** which is cited in support. To that end, Counsel submits that the petition lacks merit in its entirety.

2nd Respondent's Submissions

23. The firm of Lumumba & Lumumba Advocates filed written submissions dated 28th October 2019 on behalf of the 2nd respondent. Counsel submits that the issues for determination are:

i. Whether Section 66 as read together with Section 69(1)(a) of the Tourism Act is unconstitutional;

ii. Whether the actions of the 2nd respondent contravene Article 47 of the Constitution; and

iii. Whether this honourable Court has jurisdiction to determine the distributive functions of the National and County government.

24. On the first issue counsel submits that the petitioner's view that tourism is a sole preserve of the County Governments is misguided as the Fourth Schedule of the Constitution makes it clear that it is a shared responsibility with the National Government. It is further submitted that

Article 209 of the Constitution gives the National Government authority to impose taxes and charges in furtherance of the principles of devolution and promotion of social and economic development. In support reliance was placed on the cases of: (i) **Okiya Omtatah Okioti v Cabinet Secretary, National Treasury & 3 Others [2018] eKLR**. (ii) **CFC Stanbic Bank Ltd v Kenya Revenue Authority & another [2014] eKLR**, which appreciated the importance of Article 209.

25. Counsel as a result argues that the Tourism Act, 2011 fits within the principle of Article 209(2) of the Constitution. The reason being that Section 68 of the Act explains that one of the Act's objectives is to finance development of tourism products and services and financing of tourism research and related activities. The Board of Trustees is therefore empowered under section 69(1) to collect the tourism levy imposed under Section 105 of the Act or any other Act. He submits that the impugned sections are therefore constitutional.

26. On the second issue, counsel submits that Section 122 as read together with Rule 9(1) of the Tourism Fund Regulations 2015 mandates authorized officers of the 2nd respondent to enter without warrant any premises to ensure that the Tourism Act and its regulations are being complied with. He further submits that the petitioner was not ambushed by the visit as a letter dated 10th May 2018 had been sent to it. He was also notified of the amount through the issued verification form. It is submitted that the petitioner has not discharged its burden of proof by adducing any supporting evidence to rebut these averments as is required and was appreciated in the case of **Grain Bulk Handlers LTD v Kenya Revenue Authority & 2 others [2018] eKLR**.

27. It is counsel's submission that the petitioner has failed to exhaust the existing dispute mechanisms as was the case in **Kenya Revenue Authority & 5 others v Keroche Industries (Civil Appeal No.2 of 2008)**. Finally, counsel contends that the petition revolves around the distribution of functions of the National and County Government under the Fourth Schedule of the Constitution. He argues that for this reason this Court does not have jurisdiction to determine and distribute the functions of the National and County Government in light of Article 189(3) and (4) of the Constitution. He also submits that since a similar matter **Petition No.278 of 2018** is pending on appeal this one should not proceed on the issue of jurisdiction.

Analysis and Determination

28. I find it prudent to address an issue raised by counsel for the 2nd respondent before commencing this determination. Counsel submits that the instant petition raises similar issues as those raised in Constitution Petition No.278 of 2017 which is pending determination.

29. A perusal of the said petition discloses first that the petitioner herein is not a party in those proceedings. Secondly, although Prayer 9 seems similar to that of the petitioner it is not the same. I say so because the petitioner seeks to have Section 66 as read together with Section 69(1) (a) of the Tourism Act, 2011 declared unconstitutional while in Constitution Petition No. 278 of 2017, the petitioners seek a declaration that local tourism excluding tourism policy is a function of the County Governments.

30. Besides what has been said I find it not fair and just to deny the petitioner the chance to prosecute its petition to completion based on an existing petition addressing the impugned Act. This would go against the petitioner's right to access justice under Article 48 of the Constitution. This Court will hence proceed to make a determination on the issues raised.

31. After considering the petition, affidavits, grounds of opposition, submissions authorities and the Law, I find the issues that arise for determination to be:

- i. Whether this Court has jurisdiction to determine the issues raised on the functions of the Government;*
- ii. Whether Sections 66 as read with Section 69(1)(a) of the Tourism Act, No.28 of 2011 are unconstitutional; and*
- iii. Whether the 2nd Respondent violated the Petitioner's right under Article 47 of the Constitution.*

Whether this Court has jurisdiction to determine the issues raised on the functions of the Government

32. This Court's jurisdiction to hear this matter has been challenged by the 2nd respondent on the ground that the petition is asking the Court to determine and distribute the functions of the National and County governments which essentially would be in contravention to Article 189(3) and (4) of the Constitution. These sub-articles provide as follows:

(3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

(4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

34. The question of jurisdiction was well captured in the case **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR** and **A.O.O & 6 Others v Attorney General & Another [2017] eKLR**. This Court's jurisdiction to entertain matters before it is found under Article 165 of the Constitution. Relevant to this matter is Sub-Article 3(d) which spells out that:

Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

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

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

contravention of, this Constitution;

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

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

35. Article 165(3) of the Constitution therefore makes it clear that this Court has jurisdiction to inquire into the legality of any act done or said to be done pursuant to the Constitution.

36. A perusal of the petition reveals that the main question revolves around the petitioner's contention that Section 66 as read together with Section 69(1) (a) of the Tourism Act is unconstitutional since the 2nd respondent purports to act on a mandate bestowed upon the County Government under the Fourth Schedule of the Constitution hence usurping its authority. This question raises a constitutional issue that falls squarely under this Court's jurisdiction under Article 165 (3) (d) of the Constitution.

37. This court has been bestowed with the mandate of interpreting the constitution and provisions of the Law and whether any provisions of any statutes contravene the constitution. This Court's role contrary to the 2nd respondent's view is therefore not to add or deduct any provision from the Constitution but to ensure each of its dictates are upheld by all persons including state organs. I find that this court has the jurisdiction to entertain the question raised in this petition.

Whether Sections 66 as read with Section 69(1)(a) of the Tourism Act, No.28 of 2011 are unconstitutional

38. The petitioner claims that the mandate of local tourism is bestowed upon the County Governments under the Fourth Schedule of the Constitution. Besides this, it states that Parliament enacted the Tourism Act, 2011 which established the Tourism Fund under Section 66 of the Act. Further that one of the functions of the Tourism Fund as captured under Section 69 (1)(a) of the Act is to collect the tourism levy imposed under Section 105 of this Act or any other written law. This the petitioner claims bestows upon the 2nd respondent the constitutional mandate of the County Government which in essence makes these sections unconstitutional.

39. On the other hand the respondents claim that the 2nd respondent is a State Corporation under the National Government in line with its function under the Fourth Schedule on tourism. For that reason, Articles 6 and 189 of the Constitution, require the governments at the national and county levels to consult, co-operate, co-ordinate and liaise with each other so as to achieve optimal delivery of service.

40. Determination of this issue requires an interpretation of the impugned sections alleged to be unconstitutional and a reading of the relevant provisions of the Constitution that are purported to have been violated. It is accordingly vital to bear in mind the relevant guiding principles in interpretation of both the Constitution and an Act of Parliament.

41. The principles to be considered in interpreting the Constitution were reiterated by the Court of Appeal in the case of **Center for Rights Education and Awareness & Another v John Harun Mwau & 6 others [2012] eKLR** as follows:

"a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by Article 259.

b. The spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

c. It must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism."

d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle)."

42. Likewise, there are a number of well-established principles that are employed in the interpretation of an Act of Parliament and making of a declaration of the constitutionality or lack thereof of a statute. The first as appreciated by the respondents is that there is a general presumption that every Act of Parliament is constitutional and as such this Court must always put that as the starting point whenever such an issue arises. This principle was captured in the Court of Appeal of Tanzania decision in the case of **Ndyanabo vs. Attorney General [2001] EA 495** being a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534** It was thus opined:

"Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

See **Hamdard Dawakhana v Union of India Air [1960] AIR 554, 1960 SCR 671.**

43. Another fundamental guiding principle requires this Court to examine the purpose and effect of the impugned provision. This principle was indicated in the case of **R v Big M Drug Mart Ltd (supra)** as follows:

"Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of

legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

This principle was also applied by the Constitutional Court of Uganda in the case of **Olum and another v Attorney General** (supra).

44. In addition, this Court is required to interrogate the intention articulated in drafting the Act of Parliament as guided by the Court of Appeal in the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** where the court stated as follows:

"The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context..."

45. Turning over to the impugned Act, the Tourism Act, No. 28 of 2011 in its preamble discloses that its purpose is to *provide for the development, management, marketing and regulation of sustainable tourism and tourism-related activities and services, and for connected purposes*. In order to achieve its goal the Act set up two financial bodies to assist it generate revenue so as to fund its activities. One of these bodies is the Tourism Fund which is funded by amongst others, the tourism levy.

46. The impugned provision in the Act, Section 66 establishes the Tourism Fund and provides as follows:

(1) There is established a fund to be known as the Tourism Fund which shall vest in and be operated and managed by the Board of Trustees.

(2) There shall be paid into the Fund —

(a) monies appropriated by Parliament for the purposes of the Fund; (b) monies received under section 105(4), fees and other monies charged upon tourism activities and services;

(c) income from investments made under section 69(e) or (j) by the Board of Trustees;

(d) grants, donations, bequests or other gifts made to the Fund; and (e) monies from any other source approved by the Minister for the time being responsible for matters relating to finance.

47. The objects and purposes of this Fund are set out under Section 68 of the Act. A Board of trustees is established under Section 67, and its functions are stipulated under Section 69 of the Act. The petitioner challenges one of the Board's functions as set out under Section 69(1) (a). This specific Section provides as follows:

(1) The functions of the Board of Trustees shall be to—

(a) collect the tourism levy imposed under section 105 of this Act or any other written law;

(b)

48. The Tourism levy is discussed under Section 105 of the Act as follows:

Tourism levy

105.(1) The Minister may, by order, require the payment by persons engaged in tourism activities and services of a tourism levy.

(2) The tourism levy order may make different provisions in relation to different tourism activities and services.

(3) A tourism levy may contain provisions as to the evidence by which a person's liability to the tourism levy, or his discharge of that, may be established, and as to the time at which any amount payable by any person by any of tourism activity and service shall become due.

(4) All monies received in respect of the tourism levy shall be paid into the Fund established under section 67 of this Act. (5) A person who fails to comply with any provision of a tourism levy order commits an offence.

49. One of the main contentions by the petitioner under this issue is that the Tourism Fund in imposing the tourism levy usurps the County Governments function as stipulated in the Constitution thus making the impugned sections unconstitutional. It is accordingly necessary to read these sections against the Fourth Schedule of the Constitution.

50. The Fourth Schedule of the Constitution has to be read in tandem with Articles 185(2), 186(1) and 187(2) of the Constitution. The Schedule provides for the distribution of functions between the National Government and the County Governments. The petitioner claims that the role of tourism is a preserve of the County Government. The relevant part cited by the petitioner reads as follows:

Part 2 County Governments)

Part 2(7) Trade development and regulation, including--

(a)

(b)

(c)

(d) local tourism;

(e)

51. On the other hand it is submitted by the respondents that this function is not a sole preserve of the County Governments but shared with the National Government. They add that this function is well captured under the Fourth Schedule as well. The relevant part quoted by the respondents reads as follows:

Part 1 – National Government

Part 1(35) Tourism policy and development.

52. The above provisions when read alongside Articles 185(2), 186(1) and 187(2) of the Constitution clearly reveal that the tourism mandate is a shared function by both governments. It can therefore be deduced that in line with Part 1(35) of the Fourth Schedule the National Government in enacting the Tourism Act rightfully invoked its legislative authority. Furthermore, it is not in dispute that one of the constitutional functions of the National Government is its power to impose taxes and charges as envisaged under Article 209 of the Constitution. Undoubtedly it is clear that the Constitution purposefully intended that the National Government would enact a statute that would in turn foster the development of the tourism industry.

53. The implication of tax revenue has a public interest connotation whereby the development of a nation is dependent on the taxes and charges collected by the two levels of government. It is reasonable to infer as such that failure by both levels of governments to ensure that the revenues due and owed are collected would be failing their constitutional mandate.

54. The petitioner complains that imposition of the tourism levy is in essence double taxation as it already pays other charges to the County Government of Nairobi. In the circumstances of this case I will refer to some decisions on this matter. In the case of **Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others vs. Commissioner of Domestic Taxes & 2 others [2014] eKLR** the 2 Judge bench pronounced itself as follows:

“32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional.”

55. In the same way, the Court while quoting with approval a citation from the case of **Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013[2014]eKLR** at Paragraph 33 states thus:

“[24] Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. Article 209 of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax. (See Bidco Oil Refineries v Attorney General and Others Nairobi Petition No. 177 of 2012, paras. 53 – 56.)...

34. The decision whether to impose a tax and to who is within legislative authority...This Court cannot therefore intervene...”

56. Owing to the foregoing analysis, it is clear that the tourism function is shared by both levels of government. Based on the material placed before this Court, the petitioner has failed to sufficiently show that in collecting the tourism levy the 2nd respondent acted outside the confines of its mandate as provided for in the Act. In addition it has failed to show how paying the various charges permitted by the Constitution constitutes double taxation. Failure to charge the tourism levy would render the objects and purposes of the Tourism Act ineffective and would also go against the principles and values of the Constitution. I find no unconstitutionality in section 66 as read with section 69(1) (a) of the Tourism Act, No. 28 of 2011.

Whether the 2nd Respondent violated the Petitioner’s right under Article 47 of the Constitution

57. The petitioner submits that as a hotel it carries out its business as a bar, lodging and restaurant with its clientele being mechanics and traders in Nairobi and not tourists. In essence the petitioner alleges that its business does not engage in tourism and does not possess the tourism activities and services license indicated under Section 98 of the Act. The petitioner nevertheless submits that the 2nd respondent's officers visited its premises on 10th May 2018 with a view of collecting the tourism levy. The petitioner claims that on the material day the officers counted the number of people in the hotel and informed it that the levy to be paid was the sum total of Ksh.423866 without issuing any documentation in support.

58. On the contrary, the 2nd respondent asserts that it sought to obtain the tourism levy from the petitioner since it is licensed as a hotel within the meaning of the Tourism Act. Further that the petitioner was in arrears of the levy payment and had been notified of the visit as required by the law.

59. The key theme as can be discerned from this matter is that first, the petitioner opposes the 2nd respondent's argument that it falls under the field of tourism and secondly that the alleged visit and failure to justify the sum of KShs.423,866/- in essence violated its right under Article 47 of the Constitution. The Tourism Act, under Section 2 offers the following insight:

“tourism activities and services” means any of the activities and services specified in the Ninth Schedule of this Act.

60. The Ninth Schedule in the Act relates to the regulated tourism activities and services as classified from Class A to H enterprises. Of relevance to this case is the Class “A” enterprise which states as follows:

Class “A” Enterprises

(i) Hotels;

(ii)

61. I find that under the Act all hotels are deemed as providing tourism activities or services and hence should be regulated as outlined in the Act. This Act does not differentiate between hotels that provide tourism activities and services and those that do not as submitted by the petitioner. It is therefore reasonable to assume that it includes all hotels within the meaning of Section 2 which defines HOTEL as *“includes a facility used for reception of guests and travelers desirous of dwelling or sleeping therein”*. This inevitably means that the petitioner falls within this category and is subject to the dictates of the Act as relates to hotels.

62. On the next concern, Article 47 of the Constitution provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Was this Article violated as claimed by the petitioner? It is worthy to note that the Court in this context is concerned with the decision making process and whether the process afforded by the 2nd respondent was one that complied with the dictates of the law.

63. One of the dictates of the Tourism Act as already highlighted is the payment of the Tourism levy under Section 105 of the Act by all enterprises in the ninth schedule. In this regard the Tourism Levy Order, 2015 provides under Section 2, 3 and 4 as follows:

2. There shall be paid by the owner of tourism activities and services specified in the Ninth Schedule of the Tourism Act, 2011 under class "A" and "B" enterprises, a levy at the rate of two per centum of the gross receipts derived from their monthly sale of food, drinks, accommodation and all other services.

3. Every owner shall maintain or cause to be maintained a monthly record in the form set out in the Schedule.

4. The original form of the record maintained under paragraph 3 shall be submitted to the Board together with the levy payable for that month on or before the tenth day of the following month.

64. In the same way the Tourism Fund Regulations, 2015 detail the manner in which this levy is to be paid under Rule 3 as follows:

(1) If any money due in respect of levy is not received on or before the date prescribed by the Levy Order, such money shall be a civil debt recoverable summarily by the Board.

(2) If any person fails to pay any amount payable by him by way of the levy on or before the date prescribed by the Levy Order, such person shall be liable to an instant penalty of five thousand shillings and thereafter to an additional penalty of three per centum of the amount of the levy due, for each month or part thereof during which the amount due remains unpaid.

(3) Notwithstanding the provision of paragraph 2 above, any person who fails to comply with any provision of these Regulations commits an offence.

65. With reference to the impugned visit the Tourism Fund Regulations, 2015 under Rule 9 provide as follows:

Power to enter and inspect Premises

(1) Any person authorized in writing by the Board for the purpose, may, at all reasonable times —

(a) enter without warrant any premises on which he has reasonable ground for believing that a regulated tourism activity or service is being carried on, to see whether the Act and regulations and any other written law is being complied with, and —

(i) examine and take copies of any register, book, account or document found on the premises relating to or appearing to relate to any regulated tourism activity or service;

(ii) take possession of any register, book, account or document found on those premises which he has reasonable grounds for suspecting to be or to contain evidence of an offence under the Act and regulations or any other written law;

(b) require any person who appears to be carrying on or employed in any regulated tourism activity or service on those premises to render such explanation and give such information relating to that business as he may reasonably require in the performance of his duties; (c) require any person who appears to be carrying on any business of a regulated tourism activity or service on those premises by notice in writing to that person produce to him, at a particular time and place, all or any of the registers, books, accounts and documents relating or appearing to relate to that business.

66. A perusal of the facts of this case discloses that the petitioner received a written communication dated 10th May 2018 from the 2nd respondent with regard to the intended visit. The purpose of the meeting as captured in the letter was ‘levy verification by assessing the petitioner’s day’s sales’. This entailed perusal of the petitioner’s documents and records. The officers then issued a verification form. The verification form detailed the monthly levy, the penalty per month, a 3% penalty totaling 12 months and in conclusion the sum total of KShs.423,866/-

67. The standard of proof as set out in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** places the onus of proof on the petitioner to prove the elements that constitute the violation of the said right. This is detailing sufficient facts that describe the manner in which the right is violated to justify a finding that the said right was indeed violated. While the petitioner alleges that the tabulation of the sum figure was based on the number of people at the hotel that day the verification form indicates otherwise. The petitioner has failed to demonstrate that the said figure was arrived at by other means other than those stated in the Tourism Fund Regulations, 2015. In the same way no evidence is adduced to show that the 2nd respondent’s visit was not in line with the dictates of the law.

68. My finding is that the 2nd respondent acted within the tenets of the law when its officers visited the petitioner’s premises. A justification for the amounts due was duly given to it. That being the case I conclude that the 2nd respondent did not violate the petitioner’s right to fair administrative action under Article 47 of the Constitution.

69. The upshot is that the petitioner has failed to prove that it is deserving of any of the prayers sought. The result is that the petition fails and is dismissed with costs.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 21ST DAY OF FEBRUARY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

Judge of the High Court