



Republic v National Construction Authority & 2 others; Joint Building and Construction Council (Exparte) (Judicial Review Application E1120 of 2020) [2022] KEHC 333 (KLR) (Judicial Review) (28 April 2022) (Judgment)

Republic v National Construction Authority & another Ex Parte Joint Building and Construction Council [2022] eKLR

Neutral citation: [2022] KEHC 333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E1120 OF 2020**

AK NDUNG’U, J

APRIL 28, 2022

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL CONSTRUCTION AUTHORITY 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

JOINT BUILDING AND CONSTRUCTION COUNCIL EXPARTE

Court quashes the National Construction Authority (Defects Liability) Regulations, 2020.

Reported by John Ribia

***Statutes** – enactment of statutes – enactment of subsidiary legislation – enactment of the National Construction Authority (Defects Liability) Regulations (the Regulations) – claim that the regulations were gazetted without being tabled in parliament and without stakeholder consultation - whether the National Construction Authority (Defects Liability) Regulations (the Regulations) contravened the Constitution for being gazetted without being tabled in parliament and without stakeholder consultation - , section 42; , section 5 and 7(2)(k); , sections 5, 6, 7, 8 and 11.*



Brief facts

The crux of the applicant's case was that by the Kenya Gazette Supplement No. 51 of April 20, 2020, the Cabinet Secretary for Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (the Cabinet Secretary) gazetted the without stakeholder consultations. It was also contended that the process leading to the gazettment of the Regulations was contrary to Sections 5, 6, 7, 8 and 11 of the Statutory Instruments Act No. 23 of 2013.

The respondents contended that the Regulations were gazetted in line with the requirements of the Statutory Instruments Act and it would be against public interest to grant the orders sought. They further contended that the applicant sought to challenge the substance of the impugned Regulations as that was tantamount to challenging their merits which was beyond the scope of a judicial review court. They however did not avail any evidence in support of their averments.

Issues

Whether the National Construction Authority (Defects Liability) Regulations (the Regulations) contravened the Constitution for being gazetted without being tabled in parliament and without stakeholder consultation.

Relevant provisions of the Law

Section 5

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-

- (a) issue a public notice of the proposed administrative action inviting public views in that regard;*
- (b) consider all views submitted in relation to the matter before taking the administrative action;*
- (c) consider all relevant and materials facts; and*
- (d) where the administrator proceeds to take the administrative action proposed in the notice-*
 - (i) give reasons for the decision of administrative action as taken;*
 - (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and*
 - (iii) specify the manner and period within the which such appeal shall be lodged.*

Section 7(2)(k)

7. Institution of proceedings

- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if—*
 - (k) the administrative action or decision is unreasonable*

Sections 5, 6, 7, 8 and 11

5. Consultation before making statutory instruments

(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

- (a) have a direct, or a substantial indirect effect on business; or*
- (b) restrict competition; The regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.*

(2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—

- (a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and*
- (b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.*

(3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—



- (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
- (b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

5A. Explanatory memorandum

- (1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—
 - (a) a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of the Constitution;
 - (b) a brief statement of all the consultations undertaken before the statutory instrument was made;
 - (c) a brief statement of the way the consultation was carried out;
 - (d) an outline of the results of the consultation;
 - (e) a brief explanation of any changes made to the legislation as a result of the consultation.
- (2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.
- (3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.

6. Regulatory impact statements

If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.

7. Contents of regulatory impact statements

- (1) A regulatory impact statement shall include the following information about the proposed statutory instrument in clear and precise language—
 - (a) a statement of the objectives of the proposed legislation and the reasons for them;
 - (b) a statement explaining the effect of the proposed legislation, including in the case of a proposed legislation which is to amend an existing statutory instrument the effect on the operation of the existing statutory instrument;
 - (c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
 - (d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives;
 - (e) the reasons why the other means are not appropriate;
 - (f) any other matters specified by the guidelines;
 - (g) a draft copy of the proposed statutory rule.
- (2) The assessment of the costs and benefits shall include an assessment of the economic, environmental and social impact and the likely administration and compliance costs including resource allocation costs.
- (3) The responsible Cabinet Secretary shall ensure that independent advice as to the adequacy of the regulatory impact statement and of the assessment included in the regulatory impact statement is obtained and considered in accordance with the guidelines.
- (4) The responsible Cabinet Secretary shall before a statutory rule in respect of which a regulatory impact statement is required is made, give a certificate in writing specifying that—
 - (a) the requirements relating to regulatory impact statements in this Act and the guidelines have been complied with; and
 - (b) in the Cabinet Secretary's opinion, the regulatory impact statement adequately assesses the likely impact of the proposed statutory rule.



(5) *The responsible Cabinet Secretary shall ensure that a copy of the regulatory impact statement and the compliance certificate is tabled in Parliament with the statutory instrument as provided under section 11.*

8. Notification of regulatory impact statements

(1) *Preparation of a regulatory impact statement for proposed statutory instrument shall be notified in the Gazette and in a newspaper likely to be read by people particularly affected by the proposed legislation.*

(2) *If the proposed statutory instrument is likely to have a significant impact on a particular group of people, the notice shall be published in a way likely to ensure members of the group understand the purpose and content of the notice.*

(3) *The notice shall—*

(a) *include a brief statement of the policy objectives sought to be achieved by the proposed legislation; and*

(b) *state where copies of the regulatory impact statement may be obtained or inspected;*

(c) *if a draft of the proposed legislation may be obtained or inspected, state that the draft may be obtained or inspected and where;*

(d) *state that anyone may comment on the proposed legislation;*

(e) *state how and when comments may be made; and*

(f) *state how consultation about the proposed legislation will take place.*

(4) *The notice shall allow at least fourteen days from publication of the notice for the making of comments.*

(5) *A copy of the regulatory impact statement may be available free, or on payment of a reasonable price, at the place, or each of the places, stated in the notice.*

(6) *The responsible Cabinet Secretary shall ensure that—*

(a) *all comments and submissions are considered before the statutory rule is made; and*

(b) *a copy of all comments and submissions is given to the Committee as soon as practicable after the statutory rule is tabled in the House or when requested by the Committee.*

11. Laying of statutory instruments before Parliament

(1) *Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting 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.*

(2) *Notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under Article 109 of the Constitution, all regulation-making authorities shall submit copies of all statutory instruments for tabling before the National Assembly.*

(3) *The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.*

(4) *If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so 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.*

Section 42

42. Power to make Regulations.

(1) *The Minister may in consultation with the Board, make regulations generally for the better carrying out of the purposes of this Act.*

(2) *Without prejudice to the generality of the foregoing, regulation made under this section may provide for—*

(a) *the manner of payment of the levy imposed under section 31;*

(aa) *the Building Code in the construction industry;*

(ab) *the manner of conducting mandatory inspections by the Authority;*

(b) *the manner of service of any notice required under Act;*



- (c) *the fees and charges to be paid in respect of any matter required for purposes of this Act;*
 - (d) *the manner and forms of accreditation and certification of contractors, skilled construction workers and construction site supervisors;*
 - (e) *the responsibilities and control of the officers and servants of the Authority;*
 - (f) *the performance of the functions, the exercise of the powers and discharge of the duties of the Authority under this Act, and*
 - (g) *any other matter to give effect to the provisions of this Act.*
- (3) *Regulations made under this section shall be tabled in Parliament for approval before taking effect.*

Held

1. Judicial review was a special supervisory jurisdiction concerned with the legality, rationality and procedural propriety of the exercise of administrative actions whereby a recognizable public law wrong has been committed.
2. The Fair Administrative Action Act operationalized the right to fair administrative action enshrined in article 47 of . The enactment of statutory regulations by a cabinet secretary was an administrative act that could not escape the supervision of the High Court under judicial review and the process and the outcome had to be within the four corners of legality, rationality and propriety.
3. Section 107(1) and (2) of the provided that the burden of proof lay with the person that alleged. While the applicant had availed evidence to show the sections 5, 6, 7, 8, 9 and 11 of the Statutory Amendment Act were not complied with, the 2nd respondent had merely made assertions with no iota of evidence to support their claim. The applicant’s assertions remained uncontroverted and therefore proved. Had the contrary been true, nothing would have been easier than for the respondent to table evidence of compliance with the clear provisions of the law as the records of such compliance would be readily available. The process in the making of the impugned Regulations was tainted with procedural impropriety.
4. The cabinet secretary fell short of the lawful exercise of the cabinet secretary’s mandate set out in section 42 of the National Constructions Authority Act. The cabinet secretary derived power to make regulations under section 42 of the National Construction Authority Act in consultation with the Board and the regulations made therein must be tabled in Parliament before taking effect. There was nothing to show that there was consultation with the Board or that the 2nd respondent considered all views submitted, if at all, in relation to the impugned Regulations and that in making the impugned Regulations, all relevant and material facts were considered. There was no evidence at all to show that the Regulations were tabled in Parliament. The enactment of the Regulations fell the test of legality, rationality and propriety.

Application allowed.

Orders

Order of certiorari granted that quashed the Legal Notice No. 64 in respect of the National Construction Authority (Defects Liability) Regulations 2020 dated April 8, 2020 published by the Cabinet Secretary for Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works and further prohibited the 1st respondent from effecting the entire provisions of the National Construction Authority (Defects Liability) Regulations, 2020 dated April 8, 2020.

Citations

Cases

1. British American Tobacco Kenya Ltd v Cabinet Secretary for the Ministry of Health & 4 others (Petition 143 of 2015; [2016] eKLR) — Mentioned
2. Gateway Insurance Co Ltd v Jamila Suleiman & another (Civil Appeal 227 of 2017; [2018] eKLR) — Mentioned



3. Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others (Civil Appeal 266 of 1996; [1997] eKLR) — Mentioned
4. Munyendo, Moses & 908 others v Attorney General & another (Petition 16 of 2013; [2013] eKLR) — Mentioned
5. Mureithi & 2 Others (for Mbari Ya Murathimi Clan) v Attorney General & 5 Others (Misc Civ Appli 158 of 2005; [2006] eKLR) — Mentioned
6. Pastoli v Kabale District Local Government Council & Others ([2008] 2 EA 300) — Mentioned
7. Council for Civil Service Unions vs. Minister for Civil Service ([1985] A.C. 374)

Statutes

1. Constitution of Kenya (2010) — article 10,118, 47; section 7(2)(k) — Interpreted
2. Evidence Act (Cap 80) — section 107(1) — Interpreted
3. Fair Administrative Actions Act, 2015 (No 4 of 2015) — section 5, 7(2)(k) — Interpreted
4. National Construction Authority Act, 2011 (No 41 of 2011) — Regulation ; section 4(b); 6; 7; 8; 42 — Interpreted
5. Statutory Instruments Act, 2013 (Act No 23 of 2013) — section 5, 6, 7, 8 & 11 — Interpreted

Texts

1. John Uff, Construction Law (9th Edition, page 225-227)

Advocates

None mentioned

JUDGMENT

1. The *ex-parte* applicant (hereinafter “the applicant”) moved this court vide an application dated February 17, 2021 seeking for orders that:
 - 1) An order of *certiorari* do issue to bring to the High Court for purposes of quashing Legal Notice No 64 in respect of the [National Construction Authority \(Defects Liability\) Regulations 2020](#) dated April 8, 2020 published by the Cabinet Secretary for Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works.
 - 2) An order of prohibition do issue to restrain the 1st respondent from effecting the entire provisions of the [National Construction Authority \(Defects Liability\) Regulations, 2020](#) dated April 8, 2020 published by the Cabinet Secretary for Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works.
 - 3) That the costs of this application be provided for.
2. The application is supported by the grounds set out on the face of the application together with the statement of facts and verifying affidavit of Kairu Bachia of even date. The main grounds for the application are that by a Special Issue of the Kenya Gazette Supplement No. 51 of April 20, 2020, the Cabinet Secretary for Ministry of Transport, Infrastructure, Housing, Urban development and Public Works gazetted the National Construction Authority (Defects Liability) Regulations (hereinafter “the Regulations) whose purpose was to regulate defects liability in construction contracts without stakeholders consultations.
3. Mr Bachia contended that the regulations were never tabled before Parliament as required by law, disregarded global principles that govern construction contracts and custom and trade usage in the industry and were contrary to the foundational principles of laws of contract. Furthermore, various definitions and interpretations given to phrases and words in the regulations were either ambiguous,



too restrictive, complicated or out rightly unreasonable. It was also his deposition that they presented a memorandum to the Cabinet Secretary dated 8th June, 2020 laying down the details of their concerns but the Cabinet Secretary never responded to the same but instead released a statement as a response, which in their view was still not satisfactory prompting this suit.

Response

4. The respondents opposed the motion through the replying affidavit of Maj Gen (Rtd) Dr Gordon Kihlangwa, CBS sworn on 22nd July, 2021. The deponent is the Principal Secretary in the Ministry of Transport, infrastructure, Housing, Urban Development & Public Works. He deponed that section 42 of the [National Construction Authority Act](#) gives the Cabinet Secretary power to make regulations for operationalizing the Act which process is lengthy with all the legal requirements adhered to. He confirmed that the Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works undertook all the requisite consultations with key stakeholders whose input was taken, considered and incorporated appropriately in the final Regulations.
5. He averred that the regulations were gazetted in line with the requirements of the [Statutory Instruments Act](#). He added that the regulations apply to everyone in the country and not just the applicant herein and allowing the orders sought will be against public interest. Accordingly, he urged that the application lacks merit in so far as it seeks to challenge the substance of the impugned regulations as that is tantamount to challenging their merits which is beyond the scope of a judicial review court. It was therefore urged that the application be dismissed with costs to the respondents.

Parties Submissions

6. The applicant filed written submissions dated October 6, 2021 in support of the motion. On the issue whether the 1st and 2nd respondents complied with the provisions of article 10 and 118 of the [Constitution](#) and the [Statutory Instruments Act](#), counsel submitted that section 5 of the said Act applies to the regulations and is crafted in mandatory terms and must be complied with. To buttress this argument, counsel cited the case of [Gateway Insurance Company Ltd v Jamila Suleiman & another](#), Civil Appeal No 227 of 2017 for the proposition that where the applicant have stated that the section was not complied with, it is upon the respondents to lay material before the court showing that there was compliance with the law.
7. Counsel further submitted that a regulatory impact statement ought to have been made by the 1st respondent pursuant to section 6, 7 and 8 of the Statutory Instruments Act while the 2nd respondent is enjoined to ensure independent advice is obtained on the adequacy of the regulations. Furthermore, the respondents have not exhibited proof of the publication in the gazette or any newspaper of the Statement as provided in section 8 of the Act. It was also submitted that the provisions of the [Statutory Instruments Act](#) and section 42 of the [National Construction Authority Act](#) was never complied with.
8. On the issue whether the provisions of the regulations offend the wednesbury rule, counsel submitted that section 4(b) of the Act embodies the principle in the Wednesbury case and anything not meeting these standards is unreasonable. It was submitted that a construction contract is an agreement between an employer or client and a contractor and come in form of standard construction contracts that have gained notoriety over the last 200 years so that the architect, quantity surveyors and other consultants are not parties to the main contract but are engaged by the employer under a separate contract.
9. Counsel submitted that they (architect, quantity surveyors and other consultants) act on behalf of the employer under the main contract and represent the interest of employer and the law governing their



relationship is the law of agency and therefore no privity of contract whatsoever between them and the contractor. To that end, counsel cited Construction Law, 9th Edition by John Uff, pages 225-227 and Keating on Construction Contracts 11th Ed. Sections 1 and 2 and Hudson's Building and Engineering Contracts 14th Ed Paragraphs 2-001-2-004. Counsel submitted that it is in this context that some of the provisions of the regulations will come as completely unreasonable. It was therefore urged that the application be allowed with costs.

10. The respondents on their part filed written submission dated October 12, 2021 opposing the motion. On the issue whether there was public participation in making the regulations, counsel submitted that there was adequate public participation with all stakeholders involved in the making of the impugned regulations which are yet to come into force. To that end, counsel cited the case of Moses Munyendo & 906 others v Attorney General & anor, Pet No 16 of 2013 for the proposition that all the stakeholders mentioned therein were consulted. Counsel also cited the case of British Tobacco Kenya Limited v Cabinet Secretary, Ministry of Health & 4 others [2016] eKLR for the proposition that regulations cannot properly be impugned on the basis that the petitioner's views were not taken into considerations that is, there is no requirement that a regulation will be invalidated simply because there was a perception that a certain level of public participation was not achieved.
11. On the issue whether the applicant has made out a case deserving the orders sought, counsel relied on the cases of Kenya National Examination Council v Republic ex parte; Geoffrey Gathenji Njoroge & 9 others [1997] eKLR and Mureithi & 2 Others (for Mbari Ya Murathimi Clan) v Attorney General & 5 others Nairobi HCMCA No 158 of 2005 and submitted that the applicant herein is questioning not the process but the outcome of the impugned Regulations which does not fall within the purview of judicial review. Counsel therefore urged that the application be dismissed with costs to the 2nd respondent.
12. In a rebuttal, counsel for the applicant filed written submissions dated October 12, 2021. Counsel submitted that the impugned regulations have been published and are *prima facie* "legal" and the 1st respondent is free to effect them and lay sanction on any party that has breached them and it is that act of effecting them that is in contention before this court. Indeed, counsel submitted that there has been no attempt to place before this court material to show that the law as laid down in the Statutory Instruments Act and the Construction Authority Act was followed.

Analysis and Determination

13. I have considered the arguments advanced by the parties herein and the main issue for determination is whether the process and eventual gazettment of the National Construction Authority (Defects Liability) Regulations was procedural and whether the regulations are unreasonable. Based on the answer to the main issue, the court has to determine what orders should issue.

Applicable Legal Principles

14. Judicial review is a special supervisory jurisdiction concerned with the legality, rationality and procedural propriety of the exercise of administrative actions whereby a recognizable public law wrong has been committed. These parameters for judicial review were set out in the Ugandan case of Pastoli v Kabale District Local Government Council & others (2008) 2 EA 300 where the court cited with



approval the case of *Council for Civil Service Unions v Minister for Civil Service* (1985) AC 374, at 401D and an application by *Bukoba Gymkhana Club* (1963) EA 478 at 479 and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.” [Emphasis added]

15. The statutory instrument that ring fences the right of citizens in so far as administrative action is concerned is the *Fair Administrative Action Act* which operationalizes the right to fair administrative action enshrined in article 47 of *the Constitution*. The enactment of statutory regulations by a Cabinet Secretary is an administrative act that cannot escape the supervision of this court under judicial review and the process and the outcome must be within the four corners of legality, rationality and propriety.
16. Section 5 of the *Fair Administrative Action Act* provides that:
 - (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall
 - (a) issue a public notice of the proposed administrative action inviting public views in that regard;
 - (b) consider all views submitted in relation to the matter before taking the administrative action;
 - (c) consider all relevant and materials facts; and
 - (d) where the administrator proceeds to take the administrative action proposed in the notice-
 - (i) give reasons for the decision of administrative action as taken;
 - (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and
 - (iii) specify the manner and period within the which such appeal shall be lodged.
17. Further, section 7(2)(k) of the Act provides as follows:
 - (2) A court or tribunal under subsection (1) may review an administrative action or decision, if —.....
 - (k) the administrative action or decision is unreasonable...”
18. The crux of the splicant’s case is that by the Kenya Gazette Supplement No 51 of 20th April, 2020, the Cabinet Secretary for Ministry of Transport, Infrastructure, Housing, Urban development and Public Works gazetted the National Construction Authority (Defects Liability) Regulations without



stakeholder consultations. It was also contended that the process leading to the gazette of the regulations was contrary to sections 5, 6, 7, 8 and 11 of the Statutory Instruments Act No 23 of 2013.

19. For purposes of clarity, I will reproduce the said sections 5, 6, 7, 8 and 11 of the *Statutory Instruments Act* as follows:

5. Consultation before making statutory instruments

- (1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
 - (a) have a direct, or a substantial indirect effect on business; or
 - (b) restrict competition; The regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.
- (2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
 - (a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
 - (b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
- (3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—
 - (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
 - (b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

5A. Explanatory memorandum

- (1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—
 - (a) a statement on the proof and demonstration that sufficient public consultation was conducted as required under articles 10 and 118 of *the Constitution*;
 - (b) a brief statement of all the consultations undertaken before the statutory instrument was made;
 - (c) a brief statement of the way the consultation was carried out;
 - (d) an outline of the results of the consultation;
 - (e) a brief explanation of any changes made to the legislation as a result of the consultation.
- (2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.



- (3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.

PART III – Regulatory Impact Statements

6. Regulatory impact statements

If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.

7. Contents of regulatory impact statements

- (1) A regulatory impact statement shall include the following information about the proposed statutory instrument in clear and precise language—
- (a) a statement of the objectives of the proposed legislation and the reasons for them;
 - (b) a statement explaining the effect of the proposed legislation, including in the case of a proposed legislation which is to amend an existing statutory instrument the effect on the operation of the existing statutory instrument;
 - (c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
 - (d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives;
 - (e) the reasons why the other means are not appropriate;
 - (f) any other matters specified by the guidelines;
 - (g) a draft copy of the proposed statutory rule.
- (2) The assessment of the costs and benefits shall include an assessment of the economic, environmental and social impact and the likely administration and compliance costs including resource allocation costs.
- (3) The responsible Cabinet Secretary shall ensure that independent advice as to the adequacy of the regulatory impact statement and of the assessment included in the regulatory impact statement is obtained and considered in accordance with the guidelines.
- (4) The responsible Cabinet Secretary shall before a statutory rule in respect of which a regulatory impact statement is required is made, give a certificate in writing specifying that—
- (a) the requirements relating to regulatory impact statements in this Act and the guidelines have been complied with; and
 - (b) in the Cabinet Secretary’s opinion, the regulatory impact statement adequately assesses the likely impact of the proposed statutory rule.
- (5) The responsible Cabinet Secretary shall ensure that a copy of the regulatory impact statement and the compliance certificate is tabled in Parliament with the statutory instrument as provided under section 11.

8. Notification of regulatory impact statements



- (1) Preparation of a regulatory impact statement for proposed statutory instrument shall be notified in the Gazette and in a newspaper likely to be read by people particularly affected by the proposed legislation.
- (2) If the proposed statutory instrument is likely to have a significant impact on a particular group of people, the notice shall be published in a way likely to ensure members of the group understand the purpose and content of the notice.
- (3) The notice shall—
 - (a) include a brief statement of the policy objectives sought to be achieved by the proposed legislation; and
 - (b) state where copies of the regulatory impact statement may be obtained or inspected;
 - (c) if a draft of the proposed legislation may be obtained or inspected, state that the draft may be obtained or inspected and where;
 - (d) state that anyone may comment on the proposed legislation;
 - (e) state how and when comments may be made; and
 - (f) state how consultation about the proposed legislation will take place.
- (4) The notice shall allow at least fourteen days from publication of the notice for the making of comments.
- (5) A copy of the regulatory impact statement may be available free, or on payment of a reasonable price, at the place, or each of the places, stated in the notice.
- (6) The responsible Cabinet Secretary shall ensure that—
 - (a) all comments and submissions are considered before the statutory rule is made; and
 - (b) a copy of all comments and submissions is given to the Committee as soon as practicable after the statutory rule is tabled in the House or when requested by the Committee.

“11. Laying of statutory instruments before Parliament

- (1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting 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.
- (2) Notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under article 109 of the *Constitution*, all regulation-making authorities shall submit copies of all statutory instruments for tabling before the National Assembly.
- (3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.
- (4) If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so 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.”



20. The applicant's assertion is supported by a letter dated June 17, 2020 annexed to Mr Bachia's verifying affidavit and marked as "KB-3" from the Clerk of the National Assembly confirming that the impugned regulations were yet to be submitted to the National Assembly for scrutiny in accordance with section 11 of the Statutory Instruments Act. There is also on record a Memorandum presented to the Cabinet Secretary and marked "KB-5" challenging compliance with section 5, 6, 7 and 8 of the Statutory Instruments Act and a statement of response by the Cabinet Secretary marked as "KB-6" which in the applicant's view was not satisfactory and avoided fundamental issues that they had raised.
21. The respondents on the other hand argued that the regulations were gazetted in line with the requirements of the Statutory Instruments Act and it would be against public interest to grant the orders sought. In any event, they contended that the applicant seeks to challenge the substance of the impugned regulations as that is tantamount to challenging their merits which is beyond the scope of a judicial review court. They however did not avail any evidence in support of their averments.
22. Section 107(1) of the *Evidence Act* provides that

"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

While the applicant has availed evidence to show the sections 5, 6, 7, 8, 9 and 11 of the Statutory Amendment Act were not complied with, the 2nd respondent has merely made assertions with no iota of evidence to support their claim. Thus the applicant's assertions remain uncontroverted and therefore proved. Had the contrary been true, nothing would have been easier than for the respondent to table evidence of compliance with the clear provisions of the law as the records of such compliance would be readily available. The process in the making of the impugned regulations is thus tainted with procedural impropriety.

23. The Cabinet Secretary fell short of the lawful exercise of his mandate which is clearly set out in section 42 of the *National Constructions Authority Act* as follows;

42. Power to make Regulations.

- (1) The Minister may in consultation with the Board, make regulations generally for the better carrying out of the purposes of this Act.
- (2) Without prejudice to the generality of the foregoing, regulation made under this section may provide for—
 - (a) the manner of payment of the levy imposed under section 31;
 - (aa) the Building Code in the construction industry;
 - (ab) the manner of conducting mandatory inspections by the Authority;
 - (b) the manner of service of any notice required under Act;
 - (c) the fees and charges to be paid in respect of any matter required for purposes of this Act;
 - (d) the manner and forms of accreditation and certification of contractors, skilled construction workers and construction site supervisors;
 - (e) the responsibilities and control of the officers and servants of the Authority;



- (f) the performance of the functions, the exercise of the powers and discharge of the duties of the Authority under this Act, and
 - (g) any other matter to give effect to the provisions of this Act.
- (3) Regulations made under this section shall be tabled in Parliament for approval before taking effect.
24. My reading of the above provision of the law is that the Cabinet Secretary derives power to make regulations under section 42 of the [National Construction Authority Act](#) in consultation with the Board and the regulations made therein must be tabled in Parliament before taking effect. I have carefully examined the process leading to the gazettment of the impugned regulations and there is nothing to show that there was consultation with the Board nor that the 2nd respondent considered all views submitted, if at all, in relation to the impugned regulations and that in making the impugned regulations, all relevant and material facts were considered. There is no evidence at all to show that the regulations were tabled in Parliament. The enactment of the regulations fails the test of legality, rationality and propriety and the motion herein succeeds.
25. Having so found, what orders then, are available to the applicants? The applicant sought orders of *certiorari* and prohibition. The Court of Appeal in the case of the [Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge](#) [1997] eKLR explained in great detail what prerogative writ and at what stage the same should be granted to a successful party. The Cabinet Secretary has in our instant suit made and caused the gazettment of the impugned regulations. The appropriate order in this matter is an order of *certiorari* to quash the Legal Notice No 64 in respect of the [National Construction Authority \(Defects Liability\) Regulations 2020](#) dated April 8, 2020 published by the Cabinet Secretary for Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works and further prohibit the 1st respondent from effecting the entire provisions of the [National Construction Authority \(Defects Liability\) Regulations, 2020](#) dated April 8, 2020.
26. The upshot is that the notice of motion dated February 17, 2021 is wholly successful. The same is allowed in terms of prayers 1 and 2 with costs to the applicants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

A. K. NDUNG'U

JUDGE

