



**Fresh Produce Exporters Association of Kenya (FPEAK) & 3 others v Cabinet Secretary,
Ministry of Agriculture, Livestock and Fisheries through Attorney General & 3 others;
Kenya Flowers Council (Interested Party) (Constitutional Petition E236 of 2021)
[2022] KEHC 13591 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E236 OF 2021**

AC MRIMA, J

SEPTEMBER 30, 2022

BETWEEN

**FRESH PRODUCE EXPORTERS ASSOCIATION OF KENYA
(FPEAK) 1ST PETITIONER
FRESH PRODUCE CONSORTIUM OF KENYA 2ND PETITIONER
AVOCADO SOCIETY OF KENYA 3RD PETITIONER
AVOCADO EXPORTERS ASSOCIATION OF KENYA 4TH PETITIONER**

AND

**CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK AND
FISHERIES THROUGH ATTORNEY GENERAL 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
AGRICULTURE AND FOOD AUTHORITY 3RD RESPONDENT
HORTICULTURAL CROPS DIRECTORATE 4TH RESPONDENT**

AND

KENYA FLOWERS COUNCIL INTERESTED PARTY



JUDGMENT

Introduction

1. On 8th July, 2020, the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries, the 1st Respondent herein, published the Crops (Horticultural Crops) Regulations, 2020 (hereinafter referred to as ‘the Regulations’). That was vide Legal Notice No. 118 of the Special Issue of the Kenya Gazette Supplement No. 109.
2. The Petitioners and Interested Party in this case who are stakeholders in the horticultural sector were aggrieved by Regulations 32, 33, 34, 35 and 36 of the Regulations together with the Third Schedule thereto. I will refer to the same as ‘the impugned Regulations’. The gravamen being the introduction of a 0.25% levy on customs value of the export consignment.
3. They subsequently filed the instant Petition subject of this judgment.
4. The Petition was opposed by the Respondents and supported by the Interested Party, the Kenya Flowers Council.

The Petitioners’ case and submissions:

5. The Petition was filed alongside an application by way of a Notice of Motion both dated 23rd June, 2021. The application sought conservatory orders against the implementation of the impugned regulations. No such interim orders were issued.
6. The Petition was further supported by a Supplementary Affidavit sworn on 2nd August, 2021. The said Affidavit was in response to the 2nd Respondent’s Replying Affidavit. Both Affidavits were sworn by Hosea Machuki, the Chief Executive Officer of the 1st Petitioner herein.
7. The Petitioners and the Interested Party also filed joint written submissions dated 16th August, 2021 in buttressing their case.
8. On the proposal of the parties and the concurrence of this Court, the Petition and the application were heard together.
9. In the main, the Petitioners sought the following prayers: -
 - i. An order of Certiorari does issue quashing Regulations 32, 33, 34, 35 and 36 of the Crops (Horticultural Crops) Regulations 2020 as unconstitutional provisions of law.
 - ii. A declaration that Regulation 33 of the Crops (Horticultural Crops) Regulations 2020 is unfair for introducing a levy that increases the current levy of 30 cents per kilo by 4 times.
 - iii. A declaration that the third schedule to the Crops (Horticultural Crops) Regulations 2020 is oppressive and unconstitutional.
 - iv. A permanent injunction order does issue restraining the Respondents, their officers, servants and/ or agents from imposing, charging or enforcing collection of the 0.25% levy on customs value as envisaged under Regulation 33 of the Crops (Horticultural Crops) Regulations 2020.
 - v. Or such other order(s) that this Honourable Court shall deem fit.
10. The Petition is opposed.



11. The Petitioners pleaded violation and infringement of Articles 10, 20, 24, 27, 47, and 201 of the Constitution.
12. In their Petition, the Petitioners contended that on 8th July, 2020 the Regulations were gazetted by the 1st Respondent herein in absence of stakeholder and public participation. That, in the said regulations, the impugned regulations are aimed at financially frustrating the Petitioners and other stakeholders and also carry draconian consequences for non-compliance.
13. The Petitioners averred that before gazetting the Regulations there existed in place a direct simple levy at thirty cents per kilogramme of the export consignment. The said levy was calculated at the point of shipping and after weighing the export consignment.
14. It was contended that the above formula was easily administered by the 2nd and 3rd Respondents and invoices were issued to the Petitioners and payment done after exporting the consignment, in arrears.
15. With the impugned regulations came the 0.25% levy on customs value of the export consignment. Consequently, the Petitioners posited that the impugned regulations in addition to being oppressive, also brought difficulties in administration of the levy.
16. It was also contended that the impugned regulations would further burden the Petitioners and its membership with extra costs and expenses in addition to the already existing taxes which were more than forty in terms of levies, licenses, taxes and permits.
17. The Petitioners argued that there was difficulty in administration of the levy since the calculation of the levy was vague and was not predictable since the 2nd and 3rd Respondents had no clear legal platform to levy the tax, hence issuing contestable invoices.
18. It was argued that the parties could not determine the actual value of the export at the auction market, but only at the point of export, such that any prior calculation of levies lacked clarity and were arbitrarily imposed.
19. It was the Petitioners' case that the vagueness accorded the 2nd and 3rd Respondents sweeping powers open to abuse with direct negative effect to the Petitioners and specifically their membership. The case of *Grayned vs. City of Rockford* cited with approval in *Law Society of Kenya v Kenya Revenue Authority & Another* [2017] eKLR, was relied upon in support of the position.
20. The Petitioners posited that the above complexities originated from the lack of conducting public participation on the part of the Respondents.
21. The Petitioners deposed that they frantically sought audience with the Respondents to raise their concerns in futility.
22. The Petitioners contended that the effect of enforcing the impugned regulations had led to the Respondents harassing and intimidating the Petitioners' members with serious consequences should they fail to comply by the Regulations, with a final date for compliance set as the 30th June, 2021.
23. The Petitioners were also apprehensive that the 1st Respondent would issue further regulations without regard to public participation.
24. In their written submissions, the Petitioner jointly with the Interested Party, raised the following issues for determination: -
 - a. Whether there was adequate and practical public participation.
 - b. When does the liability to pay the levy accrue?



- c. Whether the conservatory orders should issue.
25. On the first issue, the Petitioners submitted that public participation requires state and public officers to always involve the public and consult stakeholders, whenever any decision or implementation is undertaken and would affect the public. The Petitioners cited Articles 10, 118 and 201 of *the Constitution* and Section 5 of the *Statutory Instruments Act* 2013 which they contended demanded consultation and public participation.
 26. It was further submitted that administrative actions that were likely to affect other persons called for prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to hear those affected and to make representations in that regard. Reference was made to Section 4(3) of the *Fair Administrative Actions Act*.
 27. Further submissions were made that Section 40(1) of the *Agriculture, Fisheries and Food Authority Act*, No. 13 of 2013 called for public participation as well.
 28. As to what constitutes public participation, the Petitioners submitted that it constituted a reasonable timely opportunity being accorded to the affected parties, with adequate access to relevant information on the issue at hand so that the parties may appreciate the issues and be afforded the opportunity to make a response.
 29. Furthermore, it was further submitted that the legislative or regulatory body must be guided by and consider the principle that those most affected by a policy, legislation or action must have a bigger say and their views more deliberately sought and put into account.
 30. To that end, the Petitioners cited the decisions in *Doctor's for life International v. Speaker of the National Assembly & Others* (CCT 12/05) [2006] ZACC 11, 2006(12) BCLR 1399(CC), 2006 (6) SA 416 (CC) as approved and quoted in Court of Appeal case in *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] Eklr; *Mui Coal Basin Local Community & 17 Others Permanent Secretary Ministry of Energy & 15 Others* [2015] eKLR; and in *Republic Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another* [2017]eKLR.
 31. It was contended that a public body faced with allegations of failure to carry out adequate public consultation must adduce evidence of having sought the intentional inclusivity of the relevant stakeholders and must demonstrate that it actually considered the views of the stakeholders, much as it is not bound by the views.
 32. In the instant scenario, the Petitioners maintained that the alleged public participation fell short of the standard required by the law. Reference was made to the 2nd Respondents Replying Affidavit sworn by Benjamin Tito as deposed to what transpired and taken as public participation.
 33. The Petitioners challenged the stakeholders' engagement undertaken by the Respondents. They contended that it ought to have been public participation instead. However, even if it was stakeholder's participation, it was utterly selective and excluded critical players in the sector, such as the Petitioners. That, only inter-governmental consultations were conducted by the Respondent as evidenced by annexures. The Petitioners denied the holding of any meetings where the regulations were discussed.
 34. The evidence by the Respondents was faulted in that there was no documentary evidence showing that there was sufficient notice given, the agenda, or the attendees. Minutes provided were undated and unsigned, thus raising suspicion as to their authenticity. Reliance was placed on *Dricon Transporters*



35. The Petitioners, however, conceded that the public was invited to participate in the formulation of the Regulations by way of written memoranda and public forums. That, the Petitioners were formally informed of the Regulations and were given 3 weeks to submit their views. That they were only invited to one meeting despite the great impact of the Regulations, thus the one meeting was inadequate.
36. The Petitioners claimed that they ought to have been actively engaged from the initial discussions on the Regulations since 2015. That, they would have had sufficient time to provide their informed decisions. The Petitioners maintained that by such failure, the public participation was inadequate, insufficient and below the legal standard as per the law required.
37. On the second issue, the Petitioners submitted that cess levy payments were made in arrears after exports. That, with the impugned regulations, the vendor's, in this case Petitioners' members, ought to make the tax payment before the transaction is complete, meaning that the liability to pay the levy accrued before the consignment had been shipped. The Petitioners contended that since the sector was unique with exports and auctions markets, there lies a lot of uncertainty compounded by the Regulations.
38. It was the Petitioners' submissions that the vague character of the impugned regulations posed a threat to individual freedom, constricts economic growth and discourages legitimate enterprise. Complicated by the fact that there was no recourse for compensation in the event of an over-computation or under-computation of customs value by the Petitioners, thus infringing on the Petitioners' economic rights. That resultantly, the demand for pre-payment of cess will be complex to administer. The case of *Law Society of Kenya v Kenya Revenue Authority & another* (Supra) is cited.
39. On the third issue, the Petitioners contended that as under Article 23 of *the Constitution*, the Court is vested with powers to issue conservatory orders. That the guiding principle is consideration by Courts as to whether, on examination and evaluation of the material put before it, a prima facie case by the Applicant was established to warrant granting conservatory orders. The case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court* Petition No. 16 of 2011 (2011) eKLR, was relied upon.
40. It was also posited that the Petitioners, fearful of the consequences of non-compliance to the Regulations, elected to pay the contested levies in protest, just so to save their businesses and licences thereto.
41. They argued that there was hence real danger of closure of the businesses if no orders are issued as the Petitioners members were likely to default on the payment of the colossal taxes. They argued that there was real danger, as discussed in *Martin Nyaga Wambora Speaker of the County of Assembly of Embu & 3 others* (2014) eKLR case.
42. In the end, the Petitioners sought that the Petition be allowed as prayed.

The Responses and submissions:

43. In opposing the Petition, the 1st Respondent filed Grounds of Opposition dated 2nd August, 2021 and written submissions dated 22nd October, 2021.
44. The 2nd Respondent filed a Replying Affidavit sworn on 19th July, 2021 by Benjamin Tito, the Director in charge of the 3rd Respondent which is under the 2nd Respondent.



45. Further, in opposing the Petition, the 2nd Respondent filed their written submissions dated 24th September, 2021.
46. By consolidating the Respondents' responses and submissions, it was the Respondents' case that the Petitioners had not challenged the statutory functions and mandate of the 2nd Respondent. That, neither Section 40 nor Section 35(5)(b) of the *Crops Act*, were challenged, which are the basis of the Regulations and sets the basis for the levies on the value of the crops. To affirm their mandate, the decision in *Michael Kipyegon Yator v Institute of Public Accountants of Kenya (ICPAK); Independent Electoral & Boundaries Commission (Interested Party)* [2021] eKLR was relied upon.
47. The Respondents submitted that there were non-contested facts in the matter including that the substantive statutes granting the 2nd Respondent the authority to enforce the provisions of the *Crops Act* and the *Agriculture and Food Authority Act* are not being challenged; that the provisions of Sections 35(5) (b) and 40 of the *Crops Act* which lays the basis for the enactment of the regulations and the imposition of levies are not being challenged; that the 3rd Respondent lacks legal capacity to be sued and proceedings against it should be struck out.
48. The Respondents mainly raised three issues in challenging the Petition. They were that the Petitioners and Interested Party had their concerns considered in the formulation of the regulations and by their own admission; that the Petitioners' argument on the liability to pay the levy or the levy being vague does not amount to a constitutional issue and that the issue of granting of conservatory relief does not arise as an earlier application on the same was subsumed in the main Petition, thus the Court is dealing with the substantive issues and reliefs.
49. The 2nd Respondents formulated the following issues for determination: -
- a. Whether the petition met the threshold of a constitutional petition;
 - b. Whether the regulations are unconstitutional;
 - c. Whether these was adequate public participation in the formulation of the Regulations;
 - d. Reliefs.
50. On the first issue, the Respondents cumulatively submitted that the Petition has its foundation on the enforcement of the Bill of Rights as per *the Constitution* and the subject Regulations. Thus, Petition ought to comply Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.
51. In particular, the Respondents referred to Rule 10 which provides for the form of Petition and what it must disclose. They argued that under Rule 10(2)(d) of the Rules, the Petition must contain the nature of injury to the Petitioners which aspect was missing in the instant Petition, hence, making it very difficult to delineate the approach to be adopted by the Respondents and the Court in these proceedings.
52. The Respondents submitted that it is trite law that Petitions must be pleaded precisely and specifically as to the infringement and violations of *the Constitution*. That, in the instant Petition the Petitioners made a general condemnation of the regulations against provisions of *the Constitution*. They argued that there was no connection between the facts and the constitutional provisions alleged to be have been violated. The disconnect, it was argued, deprived the Court and the Respondents a chance to interrogate the alleged grievances properly. Reliance was placed on the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* [2013] eKLR.



53. Similarly, the Respondents asserted that the main complaint by the Petitioners was the purported difficulty in implementation of the Regulations. To the Respondents, the complaint fell under an administrative aspect and not a constitutional issue and that there existed mechanisms that handled such matters.
54. The Respondents held that the Petitioners has not explored exhaustively the other available mechanisms thus making the Petition premature; for want of exhaustion. The Respondents maintained that the Petitioners had not provided justifications as to why they ought to be excused from complying with the existing structures. The case of *Ledidi ole Tauta & others v Attorney General & 2 others* [2015] eKLR was cited.
55. It was also argued that from the Petitioners' pleadings, there was a revelation that the Petitioners and Interested Party have made efforts to engage the relevant Cabinet Secretary, in absence of the Respondents, post enactment of the Regulations despite the mandate of advising on crops levies chargeable being on 2nd Respondent by law.
56. It was vehemently argued by the Respondents that the concerns raised by the Petitioners were already taken into consideration before enactment of the Regulations, as evidenced by Respondent's response in the undisputed letter dated 5th January, 2021.
57. In the end, the Respondents contended that the complaints by the Petitioners and Interested Party fell short of the constitutional threshold requirements, that the Petition was premature and an abuse of the Courts process thus it ought to be struck out.
58. On the second issue, the Respondents cited Article 210(1) of *the Constitution* and Section 40(1) of the *Crops Act*. The Article relates to imposition, varying, or waiving of taxation and licensing fee. The section empowers the Cabinet Secretary, in consultation with the Authority (2nd Respondent) and County Governments, to make regulations for the better carrying into effect of the provisions of the Act or for prescribing anything which is to be prescribed under the Act.
59. Additionally, Section 32(5) (b) of the *Act* caps the levies not to exceed four per cent of the value of the chargeable crop. Section 40 of the Act is also cited and deals with forms and fees payable under the Act.
60. This Court was asked to take judicial notice that the purpose of the Regulations was to create harmony in levies charged in the horticultural sub-sector, so as to level it with applicable charges for other crops such as coffee, tea, sugar all of which fell under the *Crops Act*.
61. On alleged violation of Article 27 of *the Constitution*, the Respondents asserted that the said provision was neither pleaded by the Petitioners nor proved by tendered evidence.
62. On Article 47 of *the Constitution* and provisions of Fair Administrative Actions Act, the Respondents posited that the same were not applicable in the instant situation. The Respondents argued that the issue of levy is expressly provided by the statute and that mandate granted to the Respondents amongst others. The levy and its computation thereof, is set in law.
63. On the allegations of difficulty in implementation of the Regulations, the Respondents maintained that there was certainty and thus no risk of arbitrary levy being imposed more so given that Regulation 33 of the subject regulations set the levy at the rate of 0.25 percent of the customs values.
64. Further, the Respondents argued that Regulation 32 made provisions for computation of the levies in accordance with the Third Schedule where the amount to be charged on an exporter was clearly identified.



65. The argument that any challenges in computation of the custom value is not a ground for holding parts of the Regulations as null and void was also raised and the cases of *Bidco Oil Refineries Limited v Attorney General & 3 others* [2013] eKLR, and *Mark Obuya, Tom Gitogo & Thomas Maara Gichubi Acting for or on Behalf of Association of Kenya Insurers & 5 others vs. Commissioner of Domestic Taxes & 2 others* [2014] eKLR, were relied upon.
66. The Respondents also asserted that levying of taxes under the Excise Duty Tax Act, whose provisions are not being challenged, is the domain of the Kenya Revenue Authority who assesses and collects taxes and that the levies chargeable by law are based on the customs value declared by the exporter to the Kenya Revenue Authority.
67. The 2nd Respondent described its role in the matter of tax imputation as clerical; that is the issuing invoices and requesting for their payments and not an administrative process that necessitates active engagement. That, it was simply a matter of percentage application and as contained in the formula on the consignment value; custom value having been declared by the exporter. More specifically, it was argued that the KENTRADE window platform was usually used in the process.
68. The Respondents further submitted that the Petitioners and Interested Party had not demonstrated any aspect of arbitrariness or faulted the tabulation thereof to warrant the Court's intervention. They argued that the fact that the Petitioners considered the levy to be costly was not in itself a validation of the alleged arbitrary nature.
69. On the third issue, the Respondents in conceding that public participation was provided for under Article 10 of *the Constitution*, submitted that there was adequate public participation in coming up with the Regulations. Further, they argued that the Petitioners and Interested Party had agreed that public participation was conducted, save for the contention that it was inadequate.
70. The Respondents contended that the stakeholder engagement took the form of technical input by the 2nd and 3rd Respondents, Intergovernmental technical committee, Attorney General's Office, County Executive Committees, Associations (such as the Petitioners and the Interested Party), the general public (including through publication in the Kenya Gazette and in the newspapers, emails and general memorandum) and through Parliament under Statutory Instrument Act.
71. It was asserted that the engagement of the members of the Petitioners and Interested Party representing the horticulture crops farmers commenced in November 2015. That, on 12th November, 2015 the then Chief Executive Officer of the Interested Party, also representing the Kenya Horticultural Council, attended a consultative meeting as evidenced by the list of attendees for stakeholder constitutional session held at the 3rd Respondents office.
72. That further, a subsequent session was held on 8th December, 2015 which focused on horticultural levies wherein several named persons representing the Kenya Flower Council attended and signed against their names on the attendance list. On a follow up meeting held on 12th January, 2016 the 1st Petitioner organization was invited to attend.
73. The Respondents also posited that through a letter dated 11th January, 2016, the 2nd Respondent via the 3rd Respondent invited stakeholders, including CEO of the Interested Party, for a meeting to further discuss the export levy, which was at that time at 29%. The was discussed and it was agreed that further follow up engagements be made.
74. That true to the foregoing, the Respondents averred that a further follow up consultative meeting was undertaken to discuss the levy issue. The 1st Petitioner and the Interested Party's organizations



were duly represented and, upon deliberations, it was resolved that the status quo as to the levy, be maintained.

75. Additionally, it was contended that the 3rd Respondent formally invited the 1st and 2nd Petitioners and the Interested Party to discuss the Regulations. That was via a letter dated 18th March, 2019 which related to a public forum to be held on 26th March, 2019.
76. The Respondents held the position that the Petitioner and Interested Party were intentionally misleading the Court by claiming to have known of the Regulations upon its gazette on 1st March 2019 despite evidence that members of the Petitioners, the Interested Party together with other stakeholders in the horticultural crops' sub-sector, tendered their proposals on the levies.
77. The 2nd Respondent, in particular, focused on the correspondences by a letter by the 1st Respondent dated 5th January 2021 to Clement Tulezi and subsequently a letter from the said Clement to the 1st Respondent dated 17th May, 2021 in buttressing the fact that the Petitioners were not in Court with clean hands.
78. Further, the Respondents asserted that the Petitioners conceded, through a Supporting Affidavit sworn by Hosea Machuki and affidavit sworn by Clement Tulezi, that they actively participated in the formulation of the Regulations before gazettement. The Respondents urged the Court to examine the correspondences as annexed.
79. The Respondents averred that the Petitioners and Interested Party lobbied to have the impugned regulations, which they considered to punitive, to be abandoned. They however, failed hence, the instant proceedings.
80. The Respondents further argued that previously, the levy rate was proposed at 2% which through wider consultation was agreed to be reduced to the current 0.25% of the custom value. However, the Petitioners and Interested Party desired to have the old charge of 30 cents on a kilogram doubled to 60 cents per kilogram, hence, the disharmony.
81. The Respondents reiterated that all necessary parties and the public were fully involved in consultations and the Petitioners and the Interested Party were well represented and actively participated in the process and that it amounted to dishonesty to claim otherwise. The case of *Mui Coal Basin Local Community (supra)* was cited.
82. The Respondents argued that the public participation conducted was adequate and that the Petitioners and Interested Party's expectation to have an individualized opportunity to express their concerns so as to concede that public participation was sufficient was unreasonable more so given that they already put forth their positions. The decisions in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another [2017]* and the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (supra)*, were relied upon in support of the position.
83. The Respondents maintained that the Regulations were subjected to legislative authority, the substantive Act, the Statutory Instrument Act, *the Constitution* and all other relevant laws and were further considered by the Parliament, the Cabinet Secretary, and the Attorney General and fully complied with the aspect of public participation.
84. On the fourth issue which was on the reliefs sought, the Respondents pointed out that the submissions by the Petitioner and Interested Party were mainly on conservatory orders, which reliefs were overtaken by events. That instead, the Court ought to focus on the prayers as sought in the Petition.



85. Nevertheless, the Respondents submitted that the reliefs as sought in the Petition ought not to be granted as discussed hereinabove. That, before seeking to examine the merits of the Petition, it ought to be dismissed at the preliminary stage for having not met the constitutional threshold.
86. Additionally, the Respondents argued that no orders were sought against Regulation 37 which repeals and invalidates the previous Regulations that had set payment of tax at 30 cents per kilogramme thereby meaning that if the present Petition was granted then there would have been a lacuna since there would be no legal basis for the 30 cents per kilogram levy which the Petitioners advocated for.
87. It was also argued that the substantive statutes being the *Agriculture and Food Authority Act* and the *Crops Act* and in particular Sections 40(2) and 35(2)(b) thereof, respectively, which formed the basis for the levy of 0.25% remain unchallenged and are therefore constitutional. That, the sole challenge on Regulations in isolation remains superfluous.
88. The Respondents further argued that allowing the prayers sought will force the Court to legislate and direct what ought to happen in the intervening period, an act which the Court ought to exercise serious restraint.
89. It was also argued that in any case, the perceived oppressive nature of the Regulations did not amount to a ground for invalidating a legal instrument which had been properly enacted under *the Constitution* and relevant statute. Moreover, it was pointed out that that the Petition challenged the entire Third Schedule, yet the Petitioners only raised concerns with one single levy. Such a challenge of the entire Schedule has the potential of exposing the whole sector to a crisis.
90. It was posited that the alleged administrative challenges, if any, cannot be resolved through the prayers sought before this Honourable Court. That, of particular, it is the Kenya Revenue Authority vested with the mandate to assess and collect taxes using the set parameters which have not been challenged and which the 2nd Respondent is only implementing.
91. The Respondents, therefore, submitted that the Petitioner and interested party did not prove their case to warrant granting of their prayers and that conversely, they inadvertently illustrated that the Regulations were enacted in compliance to *the Constitution* and all other applicable laws.
92. The Respondents urged this Court to dismiss the Petition with costs.

Issues for Determination:

93. Upon examination of the documents on record, the following issues arise for discussion: -
 - a. Whether the Petition is drafted with precision so as to properly invoke the jurisdiction of this Court.
 - b. If the answer to (a) above is in the affirmative, a look at the principles in constitutional interpretation.
 - c. Whether the process of formulating the Crops (Horticultural Crops) Regulations, 2020 contravened Articles 10, 118 and 201 of *the Constitution* for want of public participation.
 - d. Whether Regulations 32, 33, 34, 35 and 36 of the Crops (Horticultural Crops) Regulations, 2020 together with the Third Schedule contravene Articles 201 of *the Constitution* for not sharing the tax burden fairly.
94. This Court will deal with the issues in seriatim.



Analysis and Determination:

a. Whether the Petition is drafted with precision so as to properly invoke the jurisdiction of this Court:

95. On issue (a) above, the Respondent have contended that the Petition is not drafted with precision to as to bring forth substantive constitutional issues for determination, consequently, implying that the jurisdiction of this Court is not properly invoked.
96. As a matter of priority, any challenge on the jurisdiction of a Court must be addressed first. Such is the settled legal position. Jurisdiction goes to the root of a dispute and any dispute resolution purportedly done without jurisdiction is a nullity ab-initio.
97. The various facets of the doctrine of jurisdiction have been the subject of many decisions. Jurisdiction of a Court or tribunal can be impugned on many fronts including the successful raising of the lack of precision judicata.
98. In recent times, in Nairobi High Court Constitutional Petition No. E008 of 2022, *Okiya Omtatah Okiiti v Attorney General & another* [2022] eKLR, this Court briefly discussed the operational dimensions of the doctrine of jurisdiction. This Court rendered itself thus: -
22. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 *Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others* consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 spoke to the doctrine of jurisdiction in general as follows: -
36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:
- By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.
37. The locus classicus on jurisdiction is the celebrated case of Owners of the *Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:
- ...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of



proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. The Supreme Court in the Matter of *Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

99. Due to the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions.

100. Rule 10 thereof provides seven key contents of a Petition as follows:

Form of petition.

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

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



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

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

102. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

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

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

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

The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

105. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

106. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or *the Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened or threatened and



the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security vs. Luiters*, (2007) 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

107. Whereas it is largely agreed that *the Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal vs. Manjit Singh Amrit* case (supra) ‘... Courts must interpret it with all liberation they can marshal...’
108. This Court has perused the Petition. Without belaboring the issue, this Court affirms that indeed the Petition is clear on the alleged constitutional violations, how they are alleged to have been occasioned and by who and the reliefs sought as a result of the alleged violations.
109. It is this Court’s position that the Petition fully complied with Rule 10 of the Mutunga Rules as well as the requirements in Communications Commission case (supra). I must therefore find and hold, which I hereby do, that the submission that the Petition is devoid of clarity and that it fails to properly invoke the jurisdiction of this Court cannot be maintained. The same is for rejection.
110. As the first issue is answered in the affirmative this Court will now deal with the next issue.

(b) – The principles in constitutional interpretation:

111. This Court has been called upon to interpret *the Constitution* and to further interrogate the constitutionality of some impugned provisions of the law. As such, it is in order to briefly deal with the manner in which *the Constitution* and statutes ought to be interpreted.
112. This Court dealt with this subject recently in Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) *Okiya Omtatah Okoiti vs. Public Service Commission & 73 Others* (unreported). The Court rendered itself as follows: -
 54. As regards the interpretation of *the Constitution*, suffice to say that *the Constitution* itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).
 55. Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.
 56. Courts have also rendered how *the Constitution* ought to be interpreted. The Supreme Court in a ruling rendered on 21st December, 2011 in *In the Matter of Interim Independent Electoral Commission [2011] eKLR* discussed the need for Courts, while interpreting *the Constitution*, to favour a purposive approach as opposed to formalism. The Court stated as under: -
 - (86) The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect



historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

- (87) In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.
- (88) Article 10 states clearly the values and principles of *the Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.
- (89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting *the Constitution*, is a task distinct from interpreting the ordinary law. The very style of *the Constitution* compels a broad and flexible approach to interpretation.

57. On the principle of holistic interpretation of *the Constitution*, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR affirmed the holistic interpretation principle by stating that:

This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that *the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of *the Constitution* was addressed by the Supreme Court in In the Matter of the *Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012*; [2014] eKLR. The Court at paragraph 26 stated as follows: -

...But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

59. In a Ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the Court was of the firm position that *the Constitution* should be read as an integrated whole. The Court observed as follows: -

.... the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony,



the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....

60. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

(21) Before the High Court embarked on the interpretation of the contentious provisions of *the Constitution*, it restated the relevant principles of interpretation of *the Constitution* as extracted from case law thus: -

- that as provided by Article 259 *the Constitution* 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.
- that the spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
- that *the Constitution* must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- that 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).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of *the Constitution* has fidelity to *the Constitution* and has to be guided by the letter and spirit of *the Constitution*.

61. In Advisory Opinion Application No. 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court spoke to purposive interpretation of *the Constitution*. It had the following to say: -

...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of *the Constitution*.

62. The Court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in *R -vs- Drug Mart* (1985) when it made the following remarks: -



The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

63. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), went further and stated that a purposive approach is ‘a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.’
 64. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in *S-vs- Zuma* (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.
 65. The Supreme Court embellished the need to pay attention to legal history while interpreting not only *the Constitution* but also statutes. It observed as follows: -
 8. 11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting *the Constitution*, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.
 66. The Court of Appeal while dealing with holistic interpretation of *the Constitution* in Civil Appeal 74 & 82 of 2012, *Centre for Rights Education and Awareness & Another v John Harun Mwanu & 6 others* [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.
113. With such a profound basis on constitutional interpretation, the next issue follows.

(c) Whether the process of formulating the Crops (Horticultural Crops) Regulations, 2020 contravened Articles 10, 118 and 201 of *the Constitution* for want of public participation:

114. The subject of public participation has been dealt with by Courts in quite some detail. The Supreme Court in *Petition No. 5 of 2017 British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR made a comprehensive analysis of the jurisprudence on public participation in the superior Courts and summed it up as under:
 - (96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:



Guiding Principles for public participation

- i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
 - (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
 - (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
 - (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
 - (v) Public participation is not an abstract notion; it must be purposive and meaningful.
 - (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
 - (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
 - (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
 - (ix) Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.
115. With the above legal framework on public participation, this Court will now proceed to consider whether the Regulations are unconstitutional for limited or lack of public participation in the process leading to their enactment.
116. In this matter, there is no dispute that public engagement was undertaken. The issue is the sufficiency thereof.
117. On evaluation of the evidence on record, it appears that the parties rightly so appreciated the constitutional principle of public participation. They referred to several decisions on the issue by the superior Courts, which this Court has also approved of.



118. On whether there was adequate public participation, in consideration of the affidavit evidence on record and the parties' submissions, it comes to the fore that there were stakeholder meetings, discussions and communications.
119. On their part, the Respondents alluded to the fact that after undertaking public engagement, the Regulations were gazetted and successfully subjected to Parliament under the *Statutory Instruments Act*. The Parliament, as well, approved of the aspect of the adequacy of the public engagement.
120. In consideration of the evidence and the law, this Court is convinced that the foregoing constituted adequate public participation and consultation. The Petitioners and the Interested Party were accorded ample opportunity and they presented their case. The problem seems to have been that their proposals were not adopted as the final position on the matters.
121. The High Court in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others Machakos*, High Court Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR had the following to say on views presented during public engagement: -

97.

Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

122. In the end, this Court finds that there was reasonable and meaningful public participation and answers the issue in the negative.
- (d) Whether Regulations 32, 33, 34, 35 and 36 of the Crops (Horticultural Crops) Regulations, 2020 together with the Third Schedule contravene Articles 201 of *the Constitution* for not sharing the tax burden fairly:
123. It was hotly contested that the impugned regulations (Regulations 32, 33, 34, 35 and 36 of the Crops (Horticultural Crops) Regulations, 2020 together with the Third Schedule) contravene Article 201 of *the Constitution* in not sharing the tax burden fairly and thereby being oppressive.
124. Article 201 of *the Constitution* provides as follows: -
201. Principles of public finance:
- The following principles shall guide all aspects of public finance in the Republic-
- (a) there shall be openness and accountability, including public participation in financial matters;
- (b) the public finance system shall promote an equitable society, and in particular—
- (i) the burden of taxation shall be shared fairly;



- (ii) revenue raised nationally shall be shared equitably among national and county governments; and
- (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- (d) public money shall be used in a prudent and responsible way; and
- (e) financial management shall be responsible, and fiscal reporting shall be clear.

125. Regulations 32, 33, 34, 35 and 36 of the Crops (Horticultural Crops) Regulations, 2020 provides as follows: -

32. The applicable fees for services rendered under these Regulations shall be as set out in the Third Schedule.

33(1) There shall be a levy, based on the customs value, imposed on all horticultural crops destined for export other than those canned, bottled, preserved, dehydrated or delivered to operators for canning and processing factories at the rate of 0.25 percent of the customs value.

(2) There shall be a levy imposed on horticultural crops:-

- a. Imported as finished products at the rate of four percent of the import value and;
- b. Imported as fresh products or raw materials at a rate of two percent of the import value.

(3) The levy due under sub regulation (3) shall be remitted to the Authority not later than the tenth day of the month following the month during which the levy was due.

(4) Any levy imposed under this regulation which remains unpaid shall be recovered by the Authority as a civil debt due to it from the person by whom it is payable.

(5) A person who fails to remit any levy on time as provided under these regulations shall, where directed by the Authority in writing, in addition to paying the levy:-

- a. Pay an interest of twenty-five percent for the first month or part of the month in which the levy remains unpaid and;
- b. Pay twelve percent compound interest for each subsequent month or part of the month in which the levy remains unpaid.

(6) The interest rate set out in sub regulation (2) shall be payable on a monthly basis.

(7) The levy imposed under paragraph (1) and (2) shall be used for the operations of the Authority and development of the industry.

34(1) The Authority may alter, suspend or revoke a license or certificate issued under these Regulations if in its opinion the Act, these Regulations or a condition of the license has been contravened.

(2) The Authority shall, before altering, suspending or revoking a license, give the person a fourteen days' notice to make representations.



35. A person who contravenes the provisions of these Regulations for which no specific penalty is provided commits an offence and is liable, on conviction, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months or both.
36. Any certificate or license issued before these Regulations come into operation shall remain valid until expiry, and subsequent certificates or license shall be issued under these Regulations.
126. In defining their argument, the Petitioners through the Supporting Affidavit sworn by one Hosea Machuka on 23rd June, 2021 deposed as follows in paragraphs 6, 7 and 8 thereof: -
6. That precisely, Regulations 32 to 36 of the Crops (Horticultural Crops) Regulations 2020 import a 0.25 levy on the customs value of the Petitioners' export consignment without a clear basis for computation of the said levy among other unsettling issues like:
- i. The fact that the 2nd and 3rd Respondents cannot pre-determine the actual value of the export consignment at the destined auction market for levying purposes.
 - ii. The fact that even the Petitioners' members are not able to tell the customs value for the envisaged pre-payments through the single window trade net set up by the 2nd and 3rd Respondents for compliance purposes.
 - iii. That with the computation value not determined, the 2nd and 3rd Respondents cannot logically raise invoices. As such, the invoices being raised by the Respondents reflects values picked out of midair and imposed on the Petitioners' members for compliance.
7. That all these point at one thing; the 1st Respondent has donated sweeping powers to the 2nd and 3rd Respondents with everything left at the whims of the 2nd and 3rd Respondents' officials with a big scope of abuse to the detriment of the Petitioners' members. (Attached and marked "HM3" are sample invoices with correspondences demonstrating the difficulties already being felt by the Petitioners' members in terms of complying with the subject Regulations.)
8. That this has simply birthed an administrative difficulty with a cumbersome process to administer. It is simply next to impossible to determine the pre-shipment prices Free on Board or consignment prices at the end of auction market. Additionally, it is the lack of clear and practical public participation that has precipitated all these at the detriment of the Petitioners' members.
127. By placing the above affidavit contents and the impugned regulations side by side, the contention by the Petitioner that there is no clear basis for computation of the levies seems not to hold. I say so because in Regulation 33(1), the levy is imposed on the customs value of the crops destined for export whereas in Regulation 33(2), the levy is imposed on the value of the imported crops.
128. The crops destined for export and their customs value as well as those for import and their values are provided for in the Third Schedule to the Regulations. There is clarity on the levies. Any administrative issues arising from the computation of the levies cannot amount to constitutional issues. Such issues can be sorted out by the concerned parties.
129. As to whether the levies under the impugned regulations are unfair and oppressive, this Court takes the position that the issue is evidential in nature and called for adequate evidence in support.
130. The Petitioners contended that they were already subjected to over 40 licenses and permits so as to be able to undertake their businesses and that the additional levies are oppressive and may lead to inability to obtain the requisite licenses.



131. The matter before Court is a constitutional Petition. Like other disputes, the conduct of constitutional Petitions is generally governed by the Constitution and the law.
132. The practice and procedure in constitutional Petitions is further provided for under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as ‘the Mutunga Rules’).
133. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the Mutunga Rules provide for the summoning and examination of witnesses.
134. The conduct of constitutional Petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional Petitions and affidavits in Section 2 thereof. The provision provides as follows: -
1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi’s Court, but not to proceedings before an arbitrator.
 2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.
135. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows:
- 107(1) 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- and
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
136. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR as follows: -
- Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.



137. Turning back to this matter, the allegations put forth by the Petitioners were largely technical in nature. Proof of the said allegations called for consideration of various facets of the public finance vis-à-vis the levies in the horticultural industry at large. The alleged oppressive manner occasioned by the impugned levies had to be empirically demonstrated at least by an expert as against the other sectors.
138. The Respondents deposed that the levies were arrived at as a result of public engagement and a joint technical committee comprised of experts from the National and County Governments, the Respondents, stakeholders, among others. The findings of the said Committee especially on the issue of the levies being contrary to Article 201 of *the Constitution* and were oppressive, therefore, called for contrary expert evidence. (See *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR).
139. In this matter, not even the types of the levies and names of the licenses within the horticulture industry were disclosed. There was, as well, no expert evidence tendered save the averments by the Petitioners through the affidavits. The Petitioners seemingly made blanket averments which were not supported by evidence. In a nutshell, the Petitioners failed to prove how the impugned regulations infringed Article 201 of *the Constitution*.
140. As a result, the contention that the impugned regulations contravene Article 201 of *the Constitution* is not proved and hereby fails.

Disposition:

141. As I come to the end of this judgement, I must profusely apologize for the late delivery of this decision. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest, hence, the delay.
142. Having said so and from the above discussion, it follows that the Petition is unsuccessful.
143. Consequently, the following final orders do hereby issue: -
- a. The Petition and the Notice of Motion dated 23rd June, 2021 are hereby dismissed.
 - b. The Petitioners shall jointly bear the costs of the Petition.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Situma, Learned Counsel for the Petitioner and the Interested Party.

Mr. Moimbo, Counsel for the 1st Respondent.

Mr. Kibungei, Counsel for the 2nd Respondent.

Kirong/Benard – Court Assistants.

