REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 132 OF 2020

LAW SOCIETY OF KENYA.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF HEALTH

MUTAHI KAGWE.....2ND RESPONDENT

AND

THE NATIONAL COMMISSION

FOR HUMAN RIGHTS.....1ST INTERESTED PARTY

SPEAKER OF THE NATIONAL ASSEMBLY.2ND INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The Petitioner by way of a Petition dated 14th April 2020 supported by the Affidavit of Mercy Wambua, seeks the following Orders:-

a) A DECLARATION be, and hereby, issued that The Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 dated 6th April 2020 are unconstitutional and of no legal effect for lack of public participation , vagueness in penal sanction and non-compliance with the express terms of the Statutory Instruments Act, 2013;

b) An Order of CETIORARI be, and is hereby, issued calling into this Honourable Court The Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 dated 6th April 2020 for purposes of its being quashed and the same is quashed herewith;

c) A DECLRATION that the duty to provide healthcare to vulnerable persons/ and or members of the Kenyan society lies solely on the State and that this duty cannot be delegated to persons by way of imposing a mandatory regulation to wear face masks without provision of the said face masks or reasonable/adequate/affordable access thereto;

d) A DECLARATION be, and is hereby, issued that The Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 dated 6th April 2020 are discriminatory to the poor/needy/vulnerable persons in the society in contravention of Article 27 of the Constitution on account of their failure to provide for means by which the poor/needy/vulnerable person in society will acquire the face masks spelt out in Regulation 6 (1) (b) thereof;

e) In the ALTERNATIVE to Orders (a), (b), (c) and (d) above, an Order be, and is hereby, issued COMPELLING the Respondents to:

- ***i. Supply affordable/ free face masks to ALL vulnerable groups in the Kenyan society***

f) Any other relief that this honourable court deem fit to grant in the interests of justice and that may become apparent and necessary in the course of these proceedings;

g) The costs of the Petition be provided for.

THE PETITIONER'S CASE

2. The Petitioner alleges that *The Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020* are unconstitutional on the grounds that they infringe Article 27 (4) in that they indirectly discriminate against the poor and vulnerable who cannot afford to buy masks. Furthermore, the imposition of penal sanctions compounds the discrimination, and undermines the dignity of persons on the basis of their socio-economic status. The Petitioner further asserts that the proposition of cremating the bodies of those who died from the virus does not accord them with dignity and respect to their families.

3. The second ground for the Petition is the absence of Parliamentary approval. The Petitioner alleges that the Rules were published without being tabled before the National Assembly within 7 (seven) days and therefore void upon the expiry of the 7th day. The Petitioner points out that the Rules were published on 6th April 2020, as well as in the Daily Nation of 10th April 2020. However, there is no Gazette Notice published in the 6th of April 2020 at the eKLR website.

4. It is further alleged the creation of offences is ultra vires the Public Health Act Cap 242 and in particular Section 36 of the Act under which the Cabinet Secretary derives authority. The Petitioner complains that the Section does not empower the CS to create offences and prescribe penalties. Regulation 11 is additionally ultra vires Section 31 (e) of the Interpretation and General Provisions Act Cap 2 which states that where a subsidiary legislation is in breach there may be annexed a penalty not exceeding six thousand shillings or a term of imprisonment not exceeding six months.

5. The Petitioner alleges that the Regulation violates the socio economic rights under Article 43 of the Constitution as the omission to supply rations and face masks to individuals and families affected by the disruption of the transport system is a violation of their right to food, an adequate standard of living, and health.

6. Finally, the Petitioner asserts that Regulation 11 violates the right to fair trial under Article 50 (2) (n) of the Constitution, as it sets a penalty for the commission of an offence without creating or defining the offence. It is also argued that the requirement that both private and public vehicles carry 50% of their licensed capacity is unclear and subject to misinterpretation by law enforcement officers. Furthermore, it is contended that Regulation 11 infringes the principles of penal law being:-

a. The maxim nullum crimen sine lege certa (no crime without a precise law);

b. The maxim nullum poena sine lege (no punishment without law); and

c. The maxim nullum crimen sine lege (no crime without law)

THE 1ST RESPONDENTS CASE

7. The 1st Respondent filed Grounds of Opposition dated 15th April 2020 opposing the Petition on grounds that the proceedings have been instituted ultra vires the provisions of the Law Society Act as the Council for the Law Society of Kenya is yet to assume office as provided under Section 21 and 17 of the Act.

8. It is further alleged that the Petitioner's prayer for the issuance of a mandatory injunction at an interlocutory stage contravenes the principles of issuance of mandatory injunctions. Additionally, it is claimed that the orders sought by the Petitioner at the interlocutory stage are the same sought as final orders.

9. The 1st Respondent states that the Rules were made available to the public via its publication in the Daily Nation on 10th April 2020 as admitted by the Petitioner in its Petition; and furthermore it is asserted that the current public health emergency situation does not permit for effective and meaningful public participation.

10. It is asserted that in reliance on Section 10 of the Statutory Instruments Act Parliament has 1st instance jurisdiction on the issue of propriety of a statutory instrument and the Honourable Court should allow Parliament exercise its jurisdiction over the same.

11. In response to the concerns relating to vulnerable Kenyans, the 1st Respondent assures that the impugned measures provide measure to cushion the vulnerable in society from the implications of Covid-19. Additionally, it is averred that the Petitioner has failed to establish any socio-economic right that has been or is likely to be infringed by the application of the Rules.

12. It is the 1st Respondent's contention that the reliefs sought will cause disproportionate harm to the greater public interest.

THE 2ND RESPONDENTS CASE

13. The 2nd Respondent filed a Replying Affidavit dated 20th April 2020 sworn by Mutahi Kagwe. It is asserted that as opposed to the Petitioner's allegation, the Regulation were indeed forwarded to both the National Assembly and Senate on 16th April 2020; which was well

within the timelines provided under Section 11 of the Statutory Instruments Act which is seven sitting days from the date of publication.

14. Furthermore, the 2nd Respondent deposes that the Regulations have been made available to the public as admitted by the Petitioner in reference to the newspaper publication. Furthermore it is averred that the rules have been Gazetted as required by law.

15. It is the 2nd Respondent's assertion that the measures to be implemented under the rules are done so within the context of extreme necessity due to the rapid spread of Covid-19; and therefore the objective of the rules would have been defeated if the rules were subjected to public participation. According to Section 5 A (2) of the Statutory Instruments Act there are instances where statutory instrument may be promulgated without prior consultations.

1ST INTERESTED PARTY CASE

16. The 1st Interested Party filed an Affidavit in Support of the Notice of Motion dated 14th April 2020 and Petition, sworn by Dr. Bernard Mogesa and dated 20th April 2020.

17. The Deponent supports the instant Petitioner in toto in so far as it challenges the constitutionality of the **Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020.**

18. The 1st Interested Party contends that Section 24 (5) of the Statutory Instruments Act provides that the penalty for the breach of a statutory instrument may not exceed twenty thousand shilling or such term of imprisonment not exceeding six months or both. Additionally, according to section 11 of the Act, statutory instruments should be laid before Parliament within seven sittings days as opposed to calendar days as asserted by the Petitioner.

2nd Interested Party's Case

19. The 2nd Interested Party filed a Notice of Preliminary Objection and Replying Affidavit dated 17th April, 2020 opposing the Petition.

20. The Deponent, Michael Sialai, contends that the 2nd Interested Party is protected under Article 117 of the Constitution and Section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017 which guarantee parliamentary privilege.

21. Furthermore, it is averred that in accordance with Section 11 (1) of the Statutory Instruments Act, the 2nd Respondent was within the statutory timeframe to transmit the alleged impugned rules to the National Assembly. It is further claimed that in accordance with Section 11 (2) of the Statutory Declarations Act it is only upon the gazettment of the impugned rules and transmission to the National Assembly, that the National Assembly may exercise its legislative powers.

22. The 2nd Interested Party asserts that granting conservatory orders will interfere with the Parliamentary Scrutiny of Statutory Instruments process under Section 11 of the Statutory Instruments Act. The Deponent reassures that the said scrutiny process is active and live before the National Assembly, and any interference at this stage will prejudice the parliamentary process.

23. It is further argued that this Court lacks jurisdiction to hear and determine the Petition as there is no decision that has been made by the National Assembly or its Committee to be subjected to the juridical Review by this Honourable Court.

24. By a Preliminary Objection dated 17th April, 2020, the 2nd Interested Party has raised an objection on the Petition and Notice of Motion application all dated 14th April, 2020 on the grounds that:

a) The 2nd Interested Party is entitled to protection of parliamentary privilege under Article 117 of the Constitution as read with section 12 of the Parliamentary Powers and Privileges Act no. 29 of 2017.

b) The attempt by the Petitioner to come to court as against the 2nd Interested Party is premature a the legislative process is still on-going as the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 dated 6th April, 2002 were transmitted to the Clerk of the National Assembly on 15th April, 2020 for tabling in the House in accordance with section 11(1) of the Statutory Instruments Act No. 23 of 2013.

c) The 2nd Respondent was within the statutory time frame to transmit the impugned rules to 2nd Interested Party who had been on recess and only resumed its sittings on 14th April, 2020.

d) Pursuant to Section 11(2) of the Statutory Instruments Act, 2013, it is only upon gazettement of the impugned rules by the 2nd Respondent and transmission of the same to the National Assembly that it exercises its legislative powers under Articles 94, 95 and 109 of the Constitution and Part IV of the Statutory Instruments Act, 2013 on Parliamentary Scrutiny of Statutory Instruments.

e) Upon invocation of the legislative powers of the National assembly, the current petition amounts to interference with on-going proceedings before the National Assembly or any of its Committees and a violation of Article 117 of the Constitution.

f) The petition and the application fly on the face of Section 12(2) of the Parliamentary Privileges and Immunities Act No. 29

of 2017.

g) The prayers sought in the petition are premature and amounts to jumping the gun as reviewing and scrutinizing the alleged impugned rules to ensure they conform to the principles set out in Section 13 of the Statutory Instruments Act, 20201 is the singular mandate of the National Assembly.

h) This court lacks jurisdiction over the constitutionality of the impugned rules in that the court can only review rules upon conclusion of the ongoing legislative process under the Statutory Instruments Act, 2013.

SUBMISSIONS

25. The parties herein put in their respective submission in support and in opposition of their rival positions. I do not intend to reproduce the submissions as they are on record but will deal with the same as I deal with respective issues in the judgment.

ANALYSIS AND DETERMINATION

26. Upon consideration of the Petition; Respondents responses and the Interested Parties replying affidavit as well as the Preliminary objection by the 2nd Interested Party the following issues arise for consideration:-

a) Whether under the doctrine of separation of powers and the principle of ripeness or of the political question doctrine, the issues raised by the Petitioner and 1st Interested Party, were justiciable at the time they were brought to this court or whether they are premature?

b) Whether under doctrine of Judicial restraint, parliamentary immunity, and parliamentary privileges this Honourable Court lacks jurisdiction to interfere with the ongoing parliamentary process of the scrutiny of statutory instruments transmitted to it under Section 11 of the statutory instruments Act, 2013?

c) Whether the Rules should be declared void for lack of public participation and for being ultra vires the statute?

d) Whether the impugned Rules are discriminatory and invalid or unconstitutional?

A. WHETHER UNDER THE DOCTRINE OF SEPARATION OF POWERS AND THE PRINCIPLE OF RIPENESS OR OF THE POLITICAL QUESTION DOCTRINE, THE ISSUES RAISED BY THE PETITIONER AND 1ST INTERESTED PARTY, WERE JUSTICIABLE AT THE TIME THEY WERE BROUGHT TO THIS COURT OR WHETHER THEY ARE PREMATURE?

27. Under this issue the 2nd Interested Party raises the issue of the doctrine of ripeness, separation of powers and political question. In considering the issue first and foremost, it is appropriate to consider what ***Article 259 of the Constitution*** provides. ***Article 259 of the Constitution*** deals with the construing of the Constitution and provides that the Constitution should be interpreted in a manner that promotes its purposes, values and principles and advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and contributes to good governance. It should be appreciated that good governance, integrity, transparency and accountability form part of the national values and principles of governance as set out under ***Article 10 of the Constitution***.

28. The 1st Interested Party urges this Honourable Court as a custodian of Human Rights to adopt an interpretation that most favours the enforcement of a right or fundamental freedom in accordance with ***Article 20(3)(b)*** and ***Article 20(4) of the Constitution*** which provides that in interpreting the Bill of Rights, a Court, tribunal or other authority shall promote:

i) The values that underline an open and democratic society based on human dignity, equality, equity and freedom and

ii) The spirit, purport and objects of the Bill of Rights.

29. In the matter of the ***National Land Commission- Advisory Opinion No.2 of 2014 (2015) eKLR***, the Supreme Court at para 28 stated thus

"The constitution is to be interpreted in a holistic manner that entails reading it alongside other provisions and considering the historical perspective, purpose and interest of the provisions in question."

30. Further to the above in the **Re matter of Interim Independent Electoral Commission – application No. 2 of 2011 (2011) eKLR** the Supreme Court at para 86 stated in part:

"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Article 20(4) and 259(1). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction"

31. ***Articles 3(1)***; ***Article 258 and Article 165(3) (d) of the Constitution*** which confers jurisdiction upon the High Court to interpret the Constitution should be read together with ***Article 6(2), 94, 95 and 109 of the Constitution*** and ***Section 11 of the Statutory Instruments Act, 2013***.

32. In interpretation of the Constitution it is of great significance to take into account the contents of ***Article 10 of the Constitution*** on the national values and principles of governance, patriotism; national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; integrity, transparency and accountability which bind all citizens to which no party therein is exempt from the provisions of the Article.

33. ***Article 10(1) (a) – (d) of the Constitution*** provides:-

> ***"10. National values and principles of governance***
>
> ***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***
>
> ***a) applies or interprets this Constitution;***
>
> ***b) enacts, applies or interprets any law; or***
>
> ***c) makes or implements public policy decisions.***
>
> ***2) The national values and principles of governance include—***
>
> ***a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
>
> ***b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
>
> ***c) good governance, integrity, transparency and accountability; and***
>
> ***d) sustainable development."***

34. In addressing the issues under ***Article 10 of the Constitution*** the role of the National Assembly should be appreciated with regard to parliamentary oversight and scrutiny of statutory instruments under ***Articles 94, 95, and 109 of the Constitution*** and ***Section 11 of the Statutory instruments Act, 2013***.

35. The power to legislate is in accordance with constitutional doctrine of separation of powers, the preserve of the legislature with only provisions for delegation to persons or bodies in accordance with ***Article 94 of the Constitution of Kenya*** which provides for the legislative authority of parliament as follows:-

> ***"94. Role of Parliament***
>
> ***(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.***
>
> ***(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.***
>
> ***(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.***
>
> ***(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.***
>
> ***(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.***
>
> ***(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority."***

36. It is my view that where a constitution has reposed specific functions in an institution or organs of state, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of the constitution.

37. The Supreme Court of Kenya took position similar to the above in the case of ***Justus Kariuki Mate & another v. Martin Nyaga Wambora & another (2017) eKLR*** where the Court held:-

"[84] From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate allocation under Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of government responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practise from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case."

38. In addition to the above the Court of Appeal in ***Civil Appeal No. 11 of 2018 Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others (2013) eKLR*** held that:-

"Where the Constitution has reposed specific functions in an institution or organs of state, the court must give those organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the Constitutionals spheres of other organs, particularly when they are invited to substitute their judgment over that of other of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have."

39. Further in the Supreme Court decision in the case of ***Speaker of Senate & another vs. Attorney General & Others (2013) eKLR*** it was stated thus:-

"this Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another."

40. From the reading of ***Article 94(5) and (6) of the Constitution*** it is clear that the legislative mandate of the minister is a delegated authority which while declaring that legislative power has to act in accordance with ***Article 94(5) and (6) of the Constitution***.

41. In the case of ***SDV Transami Kenya Limited & 19 others vs. Attorney General & 20 Others & another (2016) eKLR***, Hon. Justice E. Muriithi held as follows:-

"[171] The Statutory instruments Act, No. 23 of 2013 has of course clarified the rationale and procedure for laying subsidiary legislation before Parliament. While the procedure therein laid out is new and will not be applied to the regulations which pre-date it, the reason for laying of instruments before Parliament as laid out in Section 10 thereof is relevant.

[172] Before the Statutory Instruments Act, No.23 of 2013 the applicable provision for the laying before parliament of subsidiary legislation was the Interpretation and General Provisions Act, Cap. 2 Laws of Kenya which provided at Section 34 thereof (repealed by the Statutory Instrument Act No. 23 of 2013) that-

34.(1) All rules and regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and, if a resolution is passed by the Assembly within twenty days on which it next sits after the rule or regulation is laid before it that the rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule or regulation.

(2) Subsection (1) shall not apply to rules or regulations a draft of which is laid before the National Assembly and is approved by resolution before the making thereof, nor to rules of Court.

(3) In this Section, "rules" and "regulations" mean respectively those forms of subsidiary legislation which may be cited as rules or regulations, as the case may be."

This provision for the laying of subsidiary legislation in Parliament was subsequently repealed by Statutory Instrument Act No. 23 of 2013, s.27, which has similar provision for the tabling of the subsidiary legislation before the Committee of the National Assembly under section 12 thereof.

[173] Section 10 of the Statutory Instruments Act, 2013 gives the rationale for tabling before Parliament as follows:

"10. The purpose of this Part is to ***facilitate the scrutiny by Parliament of statutory instruments and to set out the circumstances and manner in which the statutory instruments, or provisions of the statutory instruments, may be disallowed, as well as the consequences of the disallowance."***

[173] The criteria for consideration of the Statutory Instruments, or what the Act calls by its marginal notes ***"relevant considerations"*** *are given in Section 13 of Act as follows:*

"13. The Committee shall, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument –

a) Is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law;

b) Infringes on fundamental rights and freedoms of the public

c) Contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament

d) Contains imposition of taxation;

e) Directly or indirectly bars the jurisdiction of the Courts;

f) Gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

g) Involves expenditure from the Consolidated Fund or other public revenues;

h) Is defective in its drafting or for any reasons the from or purport of the statutory instrument calls for any elucidation;

i) Appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

j) Appears to have had unjustifiable delay in its publication or laying before Parliament;

k) Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions.

l) Make rights, liberties or obligations unduly dependent insufficiently defined administrative powers;

m) Inappropriately delegates legislative powers;

n) Imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

o) Appears for any reason to infringe on the rule of law;

p) Inadequately subjects the exercise of legislative power to parliamentary scrutiny; and

q) Accords to any other reason that the Committee considers fit to examine."

[174] clearly although the Judiciary is the final arbiter of constitutionality, Parliament would have done the initial sweep for mines that render the statutory instruments unconstitutional, ultra vires and, therefore, void, and for consideration apart from the question of constitutionality whether the legislation should more properly be dealt with as an Act of Parliament. I would venture to suggest that had this been done, there may be not have been any petition of the kind before the court today. There is always merit in the judicial policy that where the constitution or statute has made provision for dealing with a particular matter that mechanism should be followed strictly before the matter is presented to the Court, see Speaker of the National Assembly v. Karume [2008] KLR (EP) 425."

42. In the ***Mumo Matemo v. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR*** the Court of Appeal stated as follows:-

"(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separating of powers does not only proscribe organs of overmen from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:

"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent…"

43. It is noted that Part IV of the statutory provisions Act makes provision for parliamentary scrutiny of statutory instruments. Section 11 and 19 extensively set how Statutory Instruments are to be scrutinized and this power is only vested with parliament. Section13 clearly sets out the relevant considerations which include whether the Statutory Instruments is in accord with the provisions of the Constitution and the Act pursuant to what it is made or other written law. It should be noted unlike the honourable court, parliament has extensive powers which would allow it to consider all reasons for the enactment of Rules, the rationale, public welfare, justification and other public interest implications.

44. It is further clear that an additional safeguard is provided for under ***Section 11(4) of the Act*** which provides that a statutory instrument only remains inforce pending parliament's scrutiny, provided it is laid before the relevant House of Parliament in accordance with the Act. It is clear that parliament is given the jurisdiction in the first instance to oversight the exercise of delegated legislative powers by relevant bodies, as the Rules are currently still subject of Parliaments' consideration; I find that this honourable Court ought to exercise deference.

The parliament should be afforded time to discharge its mandate.

45. In the instant Petition as evidenced in supporting affidavit of Cabinet Secretary of Health Hon. Mutahi Kagwe, which averments have not been controverted by the Petitioner or Interested Party, it is averred that the Rules in issue were indeed submitted to the relevant Houses, contrary to the allegations by M/s Mercy Wambua. It is notworthy that even the 2nd Interested Party, the speaker of the National Assembly has admitted that the same was done within the time prescribed in the Statutory Instruments Act. It is noted that the Petitioner herein admitted that the Rules were published, in the supporting affidavit to the Petition sworn by M/s Mercy Wambua. She admits the 2nd Respondent caused the publication of the Rules in a Daily Newspaper of national circulation. The provisions of the Statutory Instruments Act require Statutory Instruments to be published in the Kenya Gazette, and which the 2nd Respondent complied with by having the same published as required.

46. It is trite law that all pieces of legislation have the legal presumption of constitutionality. In the case of ***Law Society of Kenya v. Attorney General & another (2019) eKLR***, the Supreme Court reiterate as follows:-

> *"[36] Before determining the above issues, we consider it pertinent to restate the approach that every court should take when determining the question whether any statutory provision is unconstitutional or not. It is alleged in the Petition of Appeal that the cited provisions of WIBA should be struck off for being in violation of the former and present Constitutions. In addressing that issue, it must always be borne in mind that the Legislature's primary constitutional mandate is the making of laws. Those laws set the ultimate direction of all activities in a State and the actions of all persons. Thus, there exists principles that underline the determination of constitutional validity of a statute, or its provisions because it is the function of the Courts to test ordinary legislation against the governing yardstick: the Constitution.*
>
> *[37] At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with the Constitution. The party that alleges inconsistency has the burden of proving such a contention."*

47. In ***Katiba Institute & another V. Attorney General & another (2017) eKLR***, the learned Judges adopted

> *"In examining the constitutionality of a statute it must be assumed the legislature* ***understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience*** *and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."*

48. It is clear from the provisions of the Statutory Instruments Act, that it makes provision for the making, scrutiny, publication and operation of Statutory Instruments and for matters connected thereto. ***Section 4 of the Act*** provides for objective of the Act as follows:

> *"The object of this Act is to provide a comprehensive regime for the making, scrutiny, publication and operation of statutory instruments by-*
>
> *a) Requiring regulation-making authorities to undertake appropriate consultation before making statutory instruments;*
>
> *b) Requiring high standards in the drafting of statutory instrument s to promote their legal effectiveness, clarity and intelligibility to anticipated users;*
>
> *c) Improving public access to statutory instruments;*
>
> *d) Establishing improved mechanisms for parliament scrutiny of statutory instruments; and*
>
> *e) Establishing mechanism to ensure that statutory instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed*
>
> *Section 5A (2) of the Act provides that;-*
>
> *'where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.'*

49. The 2nd Interested Party contends that under the principle of ripeness or of the political question doctrine, the issues in the petition are not justiciable because at the time this petition was brought to this Honourable courts, either the Public Health (COVID-19 Restriction of movement of persons and measures) Rules, 2020 dated 6th April 2020 were yet to be submitted to the National Assembly, or the same were and are currently undergoing parliamentary process which is the scrutiny of statutory instruments transmitted to it under ***Section 11 of the Statutory Instruments Act 2013***.

50. There is clear and uncontroverted evidence from the affidavit of Mr. Michael Sialai, that the National Assembly received the Public Health (COVID 19 Restriction Movement of Persons and measures) Rules, 2020 dated 6th April 2020 together with accompanying explanatory memorandum on 16th April 2020. The Rules were subsequently registered and tabled in the National Assembly on 22nd April 2020 in accordance with ***Section 11(3) of the Statutory Instrument Act, 2013*** and the same are currently undergoing parliamentary scrutiny.

51. There is no dispute that the Public Health (COVID 19 Restriction movement of person and measures) Rules 2020, dated 6th April 2020 are still under scrutiny by the relevant constitutional organs and as such at the time of filing this Petition there was no actual live dispute or issue for determination by this Honourable Court. I therefore agree with the 2nd Interested Party that the questions which have been brought to this court for determination had not reached constitutional ripeness for adjudication by this Court. The dispute between the Petitioner and the Respondents is premature as it is still upon to the Petitioner and the Interested Party to submit their grievances to the relevant committees of the National Assembly or Appeal to the National Assembly, if they have any objection to the Public Health (COVID 19 Restriction of Movement of Persons and Measures) Rules 2020.

52. The 2nd Interested Party in support of its submission on the Principle of ripeness or of the political question doctrine referred to the case of ***Republic v. National Employment Authority & 3 Others Ex-parte Middle East Consultancy Services Limited (2018) eKLR*** in which Hon. Justice Mativo held as follows in a similar case:-

> *"45. This brings into focus the principle of ripeness which prevents a party from approaching a Court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. None of the parties deemed it fit to address this pertinent legal point. The principle of ripeness was aptly captured by Kriegler J in In Ferreira vs Levin NO & others; Vrynhoek v Powell No & others 1996(1) SA 984 (CC) at paragraph [199] in the following words:-*
>
> *"The essential flaw in the applicants; cases is one of timing or, as the Americans and, occasionally the Canadians call it. "ripeness" … Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ….The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."*
>
> *46. Lord Bridge of Harwich put it more succinctly when he stated in the case of Ainsbury vs Millington[1987] 1 ALL ER 929 (HLR), which concluded at 930g:13.:-*
>
> *"It has only always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce an abstract questions of law when there is no dispute to be resolved."*
>
> *It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in equation in such action have actually been infringed. The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function. On the other hand, mootness involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being.*
>
> *47. Ripeness refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent further events that may not occur as anticipated, or indeed may not occur at all. The final decision was yet to be made, hence, there is no decision to be quashed. The goal of ripeness is to present premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.*

48. The U.S. Supreme Court fashioned a two-part test for assessing ripens challenges in Abbott Laboratories vs. Gardner(39) as follows:

> *"without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies form judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."*
>
> *49. A justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory. In the present case the ex parte applicant was asked to provide a status report. The report was necessary in deciding vetting the application. Instead of providing the report, the ex parte applicant moved to this Court. Sadly, the exparte applicant filed this case before the decision was made whether or not to allow the registration. First, the anticipated decision had not been made. The effect is that this case was file pre-maturely and ripe for adjudication. I find and hold that the facts presented in this case do not disclose a ripe dispute for judicial adjudication. On this ground alone this case is a non-starter and must fail."*

53. Similarly in the case of ***Okiya Omtatah Okoiti v election Panel for the National Land Commission & 3 Others; Gershom Otachi Bw'omanwa & 7 others (Interested Parties) [2019] eKLR,*** Hon. Lady Justice Hellen Wasilwa after considering with the approval, the decisions in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*** and ***Robert Gakuru v. Governor Kiambu County & 3 Others [2013] eKLR,*** held as follows:

> *"62. Having considered the arguments above, it is my finding that this Court will not interfere with the process currently before the Parliamentary committee because the Petitioner still has a chance to raise issues he is currently raising before that committee. I therefore find that though this Court has jurisdiction to entertain this Petition, by virtue of the doctrine of ripeness and exhaustion of process, I will not delve into the issues as raised at the moment."*

54. In the unanimous decision by the judges on this issue, the Court of Appeal in the case of ***National Assembly of Kenya & another v***

Institute for Social Accountability & 6 others [2017] eKLR, held as follows:

> *"[73] Since there was no actual live dispute between the national and country governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the Court. In reality, TIISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA."*

55. I have very carefully considered the pleadings herein, the arguments advanced before this court, I find that though the issues raised in this petition would have fallen squarely within the jurisdiction of this Court, the same are currently before the parliament where the Petitioners and 1st Interested Party have a chance to raise the issues currently being raised in this Petition. I find that notwithstanding this Court's jurisdiction, by virtue of ripeness, separation of powers and political question doctrine I will not delve into the issues as raised at the moment.

B. WHETHER UNDER DOCTRINE OF JUDICIAL RESTRAINT PARLIAMENTARY IMMUNITY, PARLIAMENTARY PRIVILEGES, THIS HONOURABLE COURT LACKS JURISDICTION TO INTERFERE WITH THE ONGOING PARLIAMENTARY PROCESS OF THE SCRUTINY OF STATUTORY INSTRUMENTS TRANSMITTED TO IT UNDER SECTION 11 OF THE STATUTORY INSTRUMENTS ACT, 2013?

56. In the instant Petition it is not in dispute that the Public Health (COVID 19 Restriction of Persons and Measures) Rules 2020 dated 6th April 2020 are currently before the National Assembly for scrutiny. ***Section 169 of the Public Health Act (Cap 242) Laws of Kenya*** provides thus:

> *"169. General Powers to make rules*
>
> *The Minister shall have power to make rules generally for the carrying out of the purposes of this Act."*

57. There is clear evidence from the Respondent's affidavit that the Public Health (COVID 19 Restriction of Movement of Persons and related measures), 2020 were gazetted under Gazette Notice No. 41 dated 6th April 2020 by the current Cabinet Secretary, of Health Hon. Mutahi Kagwe.

58. The Petitioner avers that the rules were published on 6th April 2020, yet the same have not been tabled before the National Assembly within seven (7) days and that the same were published in Daily Nation on 10th April 2020.

> 59. Under ***Statutory Instrument Act No. 23 of 2013 a "Statutory Instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued***.

60. ***Section 10 of Statutory Instruments Act***, provides for scrutiny by parliament of Statutory Instruments and sets out the circumstances and manner in which the statutory instruments or provisions of the Statutory Instruments, may be disallowed, as well the consequences of the disallowance.

61. ***Section 11 of the Act*** sets out procedure on laying of statutory instruments before parliament in the following terms:

> *"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 he 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 an act done under the statutory instrument before it became void."*

62. It is on record that the Cabinet Secretary of Health in compliance with ***Section 11(1) of the Statutory Instruments Act 2013***, he transmitted the impugned Rules to the clerk of the National assembly on 16th April 2020. ~This was within a period of 6 sitting days, considering the Parliament was in session then, making it to be within the statutory time frame provided by law.

63. The impugned Rules were subsequently tabled in the National Assembly on 22nd April 2020 in accordance with ***Section 11(3) of the Statutory Instrument Act, 2013*** which provides as follows:

> ***"11. (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."

64. Further ***Section 12 of the Statutory Instruments Act, 2013,*** provides for referral of statutory instrument to the relevant committee upon tabling before the respective House of Parliament for reviewing and scrutiny. ***Section 13 of the Statutory Instruments Act, 2013*** provides that in carrying out its scrutiny of any statutory instruments or published Bill, a Committee of the relevant House of Parliament shall be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instruments:

"a) Is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law;

b) infringes on fundamental rights and freedoms of the public

c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament

d) contains imposition of taxation;

e) directly or indirectly bars the jurisdiction of the Courts;

f) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

g) involves expenditure from the Consolidated Fund or other public revenues;

h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation;

i) Appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

j) Appears to have had unjustifiable delay in its publication or laying before Parliament;

k) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions.

l) make rights, liberties or obligations unduly dependent insufficiently defined administrative powers;

m) inappropriately delegates legislative powers;

n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

o) appears for any reason to infringe on the rule of law;

p) inadequately subjects the exercise of legislative power to parliamentary scrutiny; and

q) accords to any other reason that the Committee considers fit to examine."

65. In addition to the aforesaid sections 14 to 19 of the Statutory Instrument Act, 2013 outlines the provisions of the relevant committee of parliament and other procedures in the scrutiny and review of statutory instruments by parliament.

66. From the provisions of the Statutory Instruments Act, 2013, the reference to the question as to whether the impugned Rules are constitutional, or have any legal effect for lack of public participation or are vague in penal sanction or whether or not are in compliance with the Statutory Instruments Act, 2013 are among the matters the relevant parliamentary committee will be considering after taking into account all facts and evidence submitted before it and the law.

67. In the case of ***SDV Transmi Kenya Limited v Attorney General 7 2 others & another [2016] eKLR***

"[174] Clearly, although the Judiciary is the final arbiter of constitutionality, Parliament would have done the initial sweep for mines that render the statutory instruments unconstitutional, ultra vires and, therefore, void, and for consideration apart from the question of constitutionality whether the legislation should more properly be dealt with as an Act of Parliament. I would venture to suggest that had this been done, there may not have been any Petition of the kind before the court today. There is always merit in the judicial policy that where the constitution or statute has made provision for dealing with a particular matter that mechanism should be followed strictly before he matter is presented to the Court."

"[179] There is public law duty of Court not to interfere with the constitutional functioning of public bodies trace-able to the constitutional doctrine of Separation Powers. As a consequence, I, respectfully, agree that there is a duty not to hamstring public bodies in exercise of their constitutional or statutory mandates. The Court of Appeal in East African Cables v. Public Procurement Complaints, Review and Appeals Board & Anor. (2007) eKLR on an application for stay pending appeal from a High Court decision in Judicial Review proceedings challenging an award of tender said:

'We think that in a case like this one we must consider the likely effect of the order south by the applicant. We should take into account the special nature of the set up of the 2nd Respondent. It is common ground that it is the sole supplier of electricity in the country and that it has the duty to satisfy its ever surging number of consumers of that vital commodity. While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not breached, nevertheless, the court has a reciprocal duty to ensure that it does not hamstring such bodes like the 2nd Respondent from performing their lawful duty or duties as bestowed upon them by the relevant law.

We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.

We have further considered the fact that the value of the items tendered for by the applicant is in the region of Shs.5.9 billion and if the applicant's bid was successful it would have commissioned a new factory which would have employed directly a good number of Kenyans."

68. In view of the foregoing I find that the submissions by the Petitioner and 1st Interested Party are premature as the relevant committee's deliberations and recommendations to the House are yet to be made. This Court cannot assume the duty of supervising the workings of parliament as that would be contrary to the provisions of ***Article 94, 95 and 109 of the Constitution*** and ***Part IV of the Statutory Instruments Act 2013***. I further find the matter in question is one that falls squarely within the constitutional mandate of the National Assembly and the Court should accordingly, not pre-empt the recommendations likely to emanate from the report by the relevant parliamentary committee.

69. In the recent holding in the Supreme Court of Kenya in ***Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR***, the Supreme Court made the following resounding statement of principles with regard to the doctrine of separation of powers and the extent to which courts can interfere with parliamentary processes:

"From the course of reasoning emerging form such cases, it is possible to formulate certain principles, as follows:

a) Each arm of Government has an obligation to recognize the independence of other arms of Governments;

b) Each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;

c) The Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;

d) For the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interest attending each case;

e) In the performance of the respective functions, every arm of Government is subject to the law."

70. In ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*** the Court stated as follows in respect of the doctrine of separation of power.

"(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government form interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function."

71. I find that even though this court has jurisdiction to review the manner in which National Assembly may carry out the parliamentary scrutiny process in respect of the impugned rules, in view of the doctrine of judicial restraint and lack of the conclusiveness of the process, I will not intervene with ongoing process nor question the committees findings unless there is evidence that the National Assembly disregarded the Constitution and the law.

72. The Court of Appeal in the case of ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*** stated as follows with regards to the role of the Court;

"(77) For the avoidance of doubt, we also reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently. It must be accepted that the institutional environment is controlling on the manner in which an organ disposes of its issues. We not the holding of the High Court in Washington Jakoyo Midiwo v. Minister, Ministry of Internal Security and 2 others [2013] eKLR where the Court stated:

"The facts presented by the petitioner are drawn directly from the proceedings of the National Assembly. Members of the National Assembly in these debates express various views and it is not for the Court to judge the quality of the debates. What is clear is that the issue of whether and to what extent KDF can be deployed in the country was a matter within the competence of the legislature. In effect what the petitioner wants is for the Court to evaluate the debate in the National assembly and on that basis issue the declarations sought in the petition. I decline to adopt this courts as this would be interfering with what is clearly within the mandate of the legislature."

73. Having considered the relevant authorities relied upon by the parties and the pleadings, I am of the view that it is only prudent that the impugned rules be left for scrutiny by the Parliament Pursuant to its oversight mandate under ***Article 94, 95 and 109 of the Constitution*** and ***Part IV of the Statutory Instruments Act, 2013***. The orders sought if granted will interfere with constitutional mandate of the National Assembly as regards scrutiny of the rules. The Court should let the National Assembly in acting in its official capacity and by virtue of parliamentary privilege and ***Article 117 of the Constitution*** discharge its mandate in its official capacity. ***Article 117 of the Constitution*** provided.

"117. Powers, privileges and immunities

(1) There shall be freedom of speech and debate in Parliament.

(2) Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members."

74. On the other hand ***Section 12(2) of the Parliamentary Provisions and Privileges Act No. 29 of 2017*** provisions as follows:-

"12. (2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by theme in the discharge of the functions of their office."

75. I find that the ***Parliamentary Privilege Act*** underpins the independence of the legislature and protects the appropriate speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in discharge of their functions of their office within the provisions of the law. In the ***Court of Appeal Civil Appeal No. 157 of 2007 John Harun Mwau vs. Dr. Andrew Mullei & another*** it was held :-

"45. In our analysis and with the foregoing provisions in mind, one of the primary functions of Parliament is to debate and pass resolutions freely on subjects of its own choosing. This is one of the cornerstones for parliamentary democracy. The performance of this function is secured by the members of Parliament each having the right to say what the will (freedom of speech) and discuss what they will (freedom of debate). These freedoms, the single most important parliamentary privilege are the cornerstone to Section 4 and 12 of the National Assembly (powers and privileges) Act, Chapter 6 of the Laws of Kenya. The privilege embodies the concept of parliamentary immunity. In practical terms, the freedom of speech and debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament. Tied to this concept is the doctrine of parliamentary legislation is contrary to the Constitution and rule of law.

46. As a general principle, a person wronged by parliamentary proceedings cannot apply for judicial review except where an Act of Parliament is unconstitutional. Consequently, statements made in Parliament may not be used to support a cause of action arising out of proceedings in Parliament. (See Prebble vs Television New Zealand (1995) 1 AC 321. The privilege and immunity conferred to parliamentary proceedings is wide and absolute – it is not excluded by the presence of malice or fraudulent purposes. In the Kenyan context, all proceedings in parliament are covered by parliamentary privilege and the absolute immunity. Proceedings in Parliament include 'everything done by a member in the exercise of his functions as a member in a committee of wither House, as well as everything said or done in either House in the transaction of parliamentary business.' (See First Report from the Select Committee on the Official Secrets Act HC (1937-38) 173; Report from the Select Committee on the Official Secret Act HC (1938-39) 101)."

76. It is clear therefore any person aggrieved by any contents of a report adopted by a parliamentary committee has the right in the instance to appeal against the recommendations, of the house. In this Petition, the matter is at the consideration stage and I find that no prejudice will be occasioned or suffered by the petitioner if the same goes through the scrutiny of the National Assembly, and who can exercise their right of appeal when the report is finalised and tabled for adoption. It should be appreciated that the jurisdiction of this court can only be invoked in the event of the excess of jurisdiction by way of breach of the constitution by parliament.

C. WHETHER THE RULES SHOULD BE DECLARED VOID FOR LACK OF PUBLIC PARTICIPATION AND FOR BEING ULTRA VIRES THE STATUTE?

77. The Petitioner contend that the Public Health (COVID 19 Restriction of Movement of Persons and Related Measures), 2020 dated 6th April 2020 is unconstitutional and of no legal effect for lack of public participation, vagueness in penal sanctions and non-compliance within the express terms of Statutory Instrument Act, 2013.

78. It is Petitioner's averment that the Regulations are unconstitutional because

"i) They are indirectly discriminatory against the very poor who cannot afford face masks:

ii) They introduce a criminal penalty;

iii) They are void for vagueness;

iv) They were never subjected to any form of public participation; and

v) They were never approved by Parliament contrary to the Statutory Instruments Act."

79. The 1st Interested Party in its submissions urge that public participation is a national value and principle of governance enshrined under ***Article 10(2) (a) of the Constitution***. It is further their submission that this is a sacred expression of the sovereignty of the people articulated in ***Article 1 of the Constitution***. It is further averred that public participation is a golden and sacred thread running throughout the entire constitution from the preamble which provides that ***"we the people of Kenya…. Give this constitution to ourselves and to our future generations."***

80. In ***British American Tobacco Ltd v. Cabinet Secretary for the Ministry of Health & 5 Other (2017) eKLR*** a three Judge Bench of the Court of Appeal held:-

"Public participation is a national value and principle of governance enshrined under Article 10(2)(a) of the Constitution. It is the 1st Interested Party's humble submission that this is a sacred expression of the sovereignty of the people articulated in Article 1 of the Constitution. Public participation is a golden and sacred thread running throughout the entire Constitution form the preamble which provides that "we the people of Kenya….give this Constitution to ourselves and to our future generations". In British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR a three Judge Bench of the Court of Appeal held that "… public participation and consultation has been entrenched. Indeed, the concept is consistent with the principle of sovereignty of the people that perineates the Constitution and in accordance with Article 1(4) of the Constitution is exercised at both national and county levels" [At paragraph 47]

81. It is 1st Interested Party's submission that there was dismal failure of public participation and blatant disregard for the law in coming up with the impugned Rules. It is asserted that the impugned Rules were enacted without affording members of the public and/or their elected representatives an opportunity to interrogate the contents thereof. It is further stated that the 2nd Respondent, did not at all facilitate any (meaningful or otherwise) public participation and/or engagement with the Rules in public or in parliament. The Rules according to the 1st Interested Party were gazetted on 6th April 2020 and enforcement commenced immediately and as such it is urged there was no meaningful opportunity to facilitate compliance especially for members of the public who work and travel into and out of the Nairobi Metropolitan.

82. The 1st Interested Party further contend that the Rules have been extremely difficult to obtain, even for those who might have been in a position to access the legal Notice electronically making it exceptionally hard for the public to know with certainty which conduct was prohibited and punishable. The 1st Interested Party contend that this is not only fundamentally limited public participation but also made it impossible for the public to know what conduct was expected of them, and that it was not by accident that many were stranded at the different check points for entry /exit into Nairobi metropolitan.

83. The 1st Interested Party submit further that prior publication of the draft Rules with a call for submission of memoranda was imperative to inform the public and accord them an opportunity to participate by giving their submissions. That, failure to facilitate participation it is urged renders the impugned Rules unconstitutional, null and void.

84. In ***Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC),*** Ngcobo, J who delivered the leading majority judgment expressed himself as follows on the issue of public participation:

"The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs: and a more specific right to vote and /or to be elected… Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that tier citizens have an opportunity to exercise their right to political participation…… **[At Paragraph 90-91]**

85. Further in the Constitutional Court of South Africa, the apex court (the equivalent of our Supreme Court), further observed that:

"The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in Article 25(b) of the ICCPR, represents one institutionalisation of the right to take part in the conduct of public affairs. The broader right, which is provided for in Article 25(a) envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation……." **[At Paragraph 98].**

86. The 1st Interested Party submission is that the Public participation, which was not conducted, should have been conducted and the failure thereof renders the impugned Rules, unconstitutional and null and void.

87. ***Article 10 of the Constitution*** on national values and principles of governance binds all state organs, State Officers, public officers, and all persons and therefore, it is clear under the aforesaid Article the national values and principle of governance include public participation.

88. The Respondents through the affidavit of Cabinet Secretary Hon. Mutahi Kagwe under paragraph 23 of his affidavit he did not deny that public participation was not conducted but depones that in view of the emergency circumstances occasioned by the rapid spread of COVID 19 and the need for immediate action to prevent and control the spread of the same, public consultation were not feasible prior to the publication of the rules. That the precipitate measures, that the rules sought to implement were undertaken within the context of extreme necessarily and in the context of the rapid spread of COVID 19, as a situation that would be permitted in law within the context of the prevailing circumstances.

89. It is further deponed by the Cabinet Secretary, that he verily believe that the objectives of the rules would have been defeated if the rules were to be subjected to public participation prior to their promulgation, in that the purpose of the rules was to restrict movement into and out of identified infected areas and disclosing the rules prior to publication, especially through public participation, would reasonably have lead to panic reactions and pre-emptive mass movements from the infected areas with attendance consequences that the rules would have served no meaningful purpose.

90. Dealing with instant Petition I find it would be catastrophic if we fall short of sight, that the provisions of ***Section 5A (2) of the Statutory Instruments Act*** contemplates of instances when statutory instruments may be made without prior public consultation. In the instance case the 2nd Respondent has explained in the Replying Affidavit sworn on 20th April 2020, in detail such instances which would be applicable where Statutory Instruments may be promulgated without prior public participation. This has not been controverted by the Petitioner or the 1st Interested Party.

91. It is clearly explained by the 2nd Respondent that between the date of publication of the Rules on 21st April 2020, the COVID 19 infections were rapidly escalating with more people losing their lives and that there was urgent need for immediate urgent action to contain the spread of the virus; one of which was the formulation of Legal Regulations to restrict the movement of people in and out of infected zones, which was premised on experts opinion of public Health Practitioners.

92. It is common knowledge that had the 2nd Respondent failed to take the advised action by the experts, uncontrolled interactions between persons – including those with asymptomatic infected individuals, would have accelerated community transmission across the country, thereby jeopardising efforts at containing the spread of the disease. I find in the 2nd Respondent action he had in mind, the need for necessary precipitate pre-emptive actions, which I find reasonable and justified, and as such that would not have allowed the 2nd Respondent to undertake extensive public participation further to the one done under Public Health (Prevention, control and suppression of COVID – 19) Rules.

93. Further as deponed upon by the 2nd Respondent and which has not been controverted by the Petitioner and the 1st Interested Party, Public Participation in the circumstances as explained by the 2nd Respondent would have undermined and completely defeated the objectives of the Rules, noting public participation would have led to panic reactions and pre-emptive mass movements from the infected areas, with the consequences, that the rules would have served no meaningful purpose. This is underscored by the fact that traditionally Kenyans travel upcountry for Easter festivities, which would have led to possibilities of mass transmission of COVID 19 from the identified hotspots areas to rural areas Easter Holiday falling between 10th April 2020 on 13th April 2020.

94. It should be noted that the issue of restriction of activities within an infected area generally had been subjected to public participation under the Public Health (Prevention, Control and suppression of COVID-19) Rules, with the Petitioner being among persons who submitted extensive views on the same ***Rule 12 of the Public Health (Prevention Control and Suppression of COVID-19) Rules*** provides:-

> ***"12. (1) The Cabinet Secretary may, by notice in the Gazette and in a newspaper with a wide circulation, declare any place to be an infected area, and thereupon regulate and/or prescribe such activates and conduct that may be carried out within the infected area where it is deemed necessary for preventing the spread of or for the eradication of Codvid-19."***

95. From the above I find the general issue of restriction of movement had indeed been subjected to public participation. I find that government has right to put in place precautionary and restrictive measures in order to slow the spread of COVID -19 in line with the precautionary Principle and Public Health (Prevention, Control and Suppression of COVID – 19) Rules.

96. The importance of urgent preventive measures cannot be down -played in any society and the same has been recognized and upheld in a number of jurisdictions. In the case of ***Friends of Danny Devito, Kathy & others vs. Tom Wolf, Governor, And Rachel Levine, Secretary of Pa Department of Health, No. 68 Mm 2020*** the Petitioners grievances included the assertion that they had been deprived of procedural due process. The learned Judges rejected the argument in the following terms:

> ***"Under the circumstances presented here, namely the onset of the rapid spread of Covid-19 and the urgent need to act quickly to protect the citizens of the Commonwealth from sickness and death, the Governor was not in a position to provide for pre-deprivation notice and an opportunity to be heard by Petitioners (and every other business in the state on the non-life-sustaining list). The result would have been to delay the entry of the Executive Order by weeks, months, or even years, an entirely untenable result given the duties and obligations placed on the Governor under the Emergency Code to abate the looming disaster. As such, Petitioners were not entitled to pre-deprivation notice and an opportunity to be heard."***

97. A review of previous decision of the Courts as relates to the issue of public participation show that indeed public participation may not always be applicable as a blanket requirements. For instance in the case of ***National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Co-ordination of National Government & 3 Others [2017] eKLR*** the Court held that public participation was not applicable at the time of imposition of the curfew because information relating to matters of national security cannot be shared with members of public in

view of the limitations in ***Section 6(1) of the Access to Information Act No. 31 of 2016***.

98. Further in ***Independent Electoral and Boundaries Commission (IEBC) v national Super Alliance (NASA) Kenya & 6 Others (2017) eKLR*** the Court of Appeal held that allegations of lack of public participations must be considered in the peculiar circumstances of each case. The judges proceeded to find that whereas as a general principle public participation is a requirement in all procurement by a public entity, the same did not extend to direct procurement.

99. From the above I am of the view that the issue of public participation must be considered on case to case basis as public participation may not be applicable in all cases depending on the circumstances in existence at the time, and lack of public participation, must in my view be considered in the peculiar circumstances of each case as no two cases are similar. I therefore find that the Petitioner's and 1st Interested Party contention that the Rules should be declared unconstitutional for lack of public participation have failed to take into account the peculiar circumstances of the current environment and the fact that indeed the Respondents facilitated consultation as relates to restrictions of movement generally. I find therefore public participation could not be applicable at the time the Rules were made. I find no basis or justifiable reasons to declare the rules unconstitutional, null and void.

100. ***Odunga J in in George Bala v Attorney General [2017] eKLR*** held that the values and principles of governance enumerated in ***Article 10 of the Constitution*** are not exhaustive (and therefore as held by the High Court (Mr. Justice W. Korir in the curfew case Petition 120 of 2020) precautionary principle is a principle of good governance that may be included under Article 10.) when he held that;-

> ***The norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:***
>
> ***"the National values and principles of governance include…"***
>
> ***107. By employing the use of the term "include" the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting Constitution, enacting, applying or interpreting any law, or applying or implementing any public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time."***

101. The Petitioner and 1st Interested Party urge ***Regulation 11 of the Rules*** is ultra vires the statute since the Public Health Act does not empower the Cabinet Secretary to create offences and in the alternative the fine imposed thereunder exceeds the maximum prescribed amount under ***Section 31(e) of the Interpretation and General Provisions Act***.

102. It is further submitted ***Section 36 of the Public Health Act***, from which the Cabinet Secretary purports to derive Authority to gazette the Regulations, does not empower him to create offences and prescribe penalties, hence it is asserted that ***Regulation 11*** is ultra vires; the empowering Statute / the parent statute.

103. The 1st Interested Party submits that the penalty imposed for a violation of impugned Rules is unduly excessive and unreasonable.

104. The Petitioner's arguments are that no offence may be created under a regulation yet on the other hand acknowledges that offences may be created provided, the prescribed punishment does not exceed what is prescribed under the interpretation and General Provisions Act. The Petitioner under paragraphs 32 to 39 of the Petition, extensively cites the Provisions of the ***Statutory Instruments Act, No. 23 of 2013,*** however it appears the Petitioner deliberately ignores or disregard **Section 24(5) of the Act** which clearly provides as follows:

> ***"There may be annexed to the breach of statutory instrument a penalty, not exceeding twenty thousand shillings or such term of imprisonment not exceeding six months, or both, which the regulation making authority may think fit."***

105. From the above I find that Petitioner's and 1st Interested Party, arguments under the above ground has no legal support as the 2nd Respondents', action is expressly founded on an enabling legislation. ***Regulation 11 of the Rules*** is not therefore ultra vires, the Statute thus the Public Health Act.

106. The Petitioner and 1st Interested Party raised the issue of accessibility of the rules. From paragraph 42 of the Petitioner's Petition it is stated that the rules were published on 6th April 2020, and the same were not tabled before the National Assembly within seven (7) days and that the same were published in the Daily Nation on 10th April 2020. The admission that there was publication of the rules in Kenya Gazette on 6th April 2020 and also in the Daily Nation on 10th April 2020, contradicts the Petitioner's and Interested Party's allegation that the Rules have not been made available to the Public. I therefore find from the Petitioner's own admission, the Rules were made available to the Public.

107. The Petitioner allege that the Rules prescribe a penalty for commission of an offence. The Rules do not indeed create offense for contravening the specific provisions listed there under. Criminal sanction and penal policy is within the Constitutional competence of the legislature which in the present case is delegated to the 2nd Respondent hence the same cannot be challenged by the Petitioner merely because it has different view on appropriate sentences or penal sanctions.

108. It is further the Petitioner's allegation that the requirement that both private and public vehicles should not carry more than 50% of their licensed capacity is not clear. Under ***Section 3 of the Traffic Act*** as well as ***Section 4(2) of the National Transport and Safety Act, 2012 the National Transport and Safety Authority (NTSA)*** is responsible for the registration and licensing of motor vehicles. The licensed capacity is therefore as approved by the NTSA during registration and licensing.

D. WHETHER THE IMPUGNED RULES ARE DISCRIMINATORY AND INVALID OR UNCONSTITUTIONAL?

109. The Petitioner aver that the imposition of a mandatory requirement to wear masks, with panel sanctions, without provisions of masks by the government to those who genuinely cannot afford them is indirectly discriminatory and violates ***Article 27(4) of the Constitution***.

110. It is further urged by the Petitioner that the penalty under the regulations, in as much as they seek to punish persons, who are caught without masks, have the effect of punishing and undermining the dignity of persons on the basis of their socio-economic status and punish persons who are not able to afford masks because of their economic reality.

111. It is contended that enforcement of this Regulations will in effect, bring about a criminal justice response to a socio economic issue which has the effect of criminalizing poverty. It is also urged by failing to provide the needy, the poor and the vulnerable with masks, the 1st Respondent's Regulations, unfairly and illegally, potentially targets persons who are poor.

112. As of now there is no doubt that it is common knowledge that face masks help protect against transmission of COVID-19 and in particular where the infected persons is asymptoms (pre-symptomatic) but can still transmit the virus to others. It is for this reason that it is fundamentally important that people wear masks when in public places so as to "flatten the curve" and eventually overcome COVID-19 altogether. The Rules set out in the Respondent's Replying Affidavit, do not require Kenyans to purchase single use surgical masks as purported by the Petitioner, nor wear a certain mask design. There is no standard requirement of the masks to be worn. The Kenyans have alternative of wearing homemade masks of various types so long as they cover their mouth and nose when in public places. In deed all Kenyans are not always required to wear a mask. The Rules are clear that they only apply in restricted areas which are considered a hotbed of the COVID-19 spread, currently and in particular Nairobi City, Mombasa, Lamu, Kilifi and Mandera Counties.

113. The Rules apply irrespective of race, sex, mental status, health status, ethnic origin, age, religion, conscience, belief, culture or social status and in such circumstances I find the rules are not discriminatory in any way.

114. In ***CKW v Attorney General & another [2014] eKLR,*** the Court while relying on the pronouncement in ***The National Coalition for Gay and Lesbian Equality & Another Vs. The Minister of Justice & 2 Others Cct No. 11 of 1998 [1998] Zacc 15,*** held that one of the factors to be considered when dealing with alleged discriminatory provision is:

> ***"The nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy or important societal goal, such as for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainant shave in fact suffered the impairment in question."***

115. It is of general notoriety that people aged 60 years and above and those with underlying health conditions are at the highest risk of death if they contract Covid-19. The government has a constitutional obligation to protect such persons and all Kenyans. As was appreciated in **Zeitun Juma Hassan Petitioning On Behalf of the Estate of Abdul Ramadhan Biringe (Deceased) v. Attorney General & 4 Others [2014] eKLR** it was stated:-

> ***"23. Apart from ensuring that every person enjoys the right to life to the fullest extent, the right to life imposes a positive duty on the State to protect the right to life by enacting laws that protect life which are backed by effective law enforcement machinery for the prevention, suppression and sanctioning of breaches of such laws."***

116. In the **Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties) [2020] eKLR,** Korir J made the following observations:

> ***"130. In a crisis like the one facing the country, it can be presumed that the 2nd Respondent issued the Curfew Order in line with the 'precautionary principle' as was elucidated in the case of Republic v Ministry & 3 others Ex-parte Kennedy Amdany Langat & 27 others [2018] eKLR as follows:-***
>
> ***"126. Therefore, applying the precautionary principle, which principle is designed to prevent potential risks, I find and hold that it is the duty of the state to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence or extent of risks to the health of consumers. The state may take protective measures without having to wait until the reality and the seriousness of those risks are apparent."***
>
> *131. It was further held that:-*
>
> ***"128. At the core of this precautionary principle are many of the attributes of public health practice including a focus on primary prevention and a recognition that unforeseen and unwanted consequences of human activities are not unusual.***
>
> ***"129. Additionally, where, in matters of public health, it proves impossible to determine with certainty the existence or extent of***

the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted as was alleged by the applicants in this case, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective."

132. The government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle. The use of a curfew order to restrict the contact between persons as advised by the Ministry of Health is a legitimate action. I am aware, although I cannot place my finger on the particular Gazette Notice, that the 2nd Respondent has ameliorated the effects of the curfew by changing the working hours in order to make it possible for the workers to comply with the curfew.

133. Although the Curfew Order meets the constitutional and statutory parameters, the Petitioner and the interested parties made a strong case for the retooling and remodelling of the instrument so that it can achieve its objectives with reduced impacts on the rights and fundamental freedoms of Kenyans. It is observed that the curfew was imposed for a public health purpose. The curfew is not meant to fight crime or disorder. I do not understand why the issuance of permits under the Curfew Order is solely reserved to police officers. Why shouldn't a person in need of emergency care seek authority from a medical officer, the village elder, Nyumba Kumi, the local administrator or even the Member of the County Assembly? In order for the Curfew Order to achieve its objectives and to be embraced by the public it should not be seen as a tool of force but something that aims to protect the health of the people.

134. I think the main problem with the Curfew Order is the manner in which it has been implemented. The interested parties have correctly concentrated their firepower on that deficiency. It is, however, observed that unconstitutional and illegal acts that occur in the implementation of a legal instrument does not render that instrument unconstitutional. The problems that arise from the implementation must be addressed separately."

117. I find that there is a legitimate basis for publishing the Rules, which are not aimed at disadvantaging any person but are aimed at protecting everyone equally from the threat of COVID-19. Such law should embrace the provisions of ***Article 43 of the Constitution*** and ensure every person has the right to the highest attainable standard of health, which should include the right to health care services, and especially the older members of the society, poor and vulnerable.

118. It is noted that several other countries have indeed introduced laws requiring all person to wear masks while in public places. Those include Jamaica, Rwanda, DR. Congo and various states in USA among others. The obligation to protect and promote rights is not limited to the government but also include private individuals between themselves. This calls for every person to ensure that they do not expose other persons to the ravages of COVID-19 by taking measures including wearing of face masks while in Public places.

119. ***Article 24(1) of the Constitution*** provides: -

"24. Limitation of rights and fundamental freedoms

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a) the nature of the right or fundamental freedom;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

120. In the instant Petition the right which has been restricted is the right of movement outside stated geographical areas and unnecessary physical interactions, which restrictions was informed by the serious threat posed to the health and lives of Kenyans by the spread of COVID – 19, protection of the old and vulnerable in society and prevention of potential resultant deaths. The 2nd Respondent in his affidavit has deponed that its decision has been reached based on expert determination that COVID – 19 spreads primarily via respiratory droplets, thus little biobs of liquid as someone cough, sneezes, or talks and that virus contained in these droplets can infect other people via the eyes, nose, or mouth; either when they land directly on somebody's face or when they are transferred there by people touching their face with contaminated hands.

121. It is further confirmed that the virus may also be transferred via surfaces contaminated by respiratory droplets or other secretions from an infected person which virus could remain infective on materials such as metal, glass or plastic for a number of days. It is therefore not irrational to limit the number of persons being transported in private and public vehicles and also to require a lone driver in a vehicle to wear a mask to limit instances of transmission of virus with any subsequent person who come in contact with the subject vehicles. I therefore find that restriction is proportionate and reasonable in an open and democratic society noting that the freedoms under the constitution are enjoyed only to the extent that they do not pose a risk to others.

122. In ***LSK vs. Inspector General of Police and Others; Nairobi Petition No. 120 of 2020,*** the Hon. Mr. Justice W. Korir held as follows:

"127. It has already been established that the Curfew Order is backed by law. The Curfew Order applies to each and every person in the Republic of Kenya except those who offer essential services. There is no dispute that the measures imposed are aimed at the containment of a novel infectious disease with no known cure or vaccine. Evidence from other countries show that some of those who have been infected by the disease have died as a result of the infection. The WHO has declared the disease a pandemic. The disease is therefore a threat to life which is a fundamental right protected by Article 26(1) of the Constitution.

128. it is the 1st, 2nd, 3rd and 5th respondents' positon that the imposition of the curfew is aimed at reducing the spread of the disease. The Petitioner and the interested parties did not point out any other alternative course that would achieve the same objective with lesser restrictions on rights and fundamental freedoms."

123. In the ***President of the Republic of Malawi ex parte Steven Mponda (Malawi Zomba District Registry Judicial Review No. 13 of 2020)*** the High Court stated as follows:

3.22 The Court having reviewed the state of disaster declaration noted that it was prescribed by law, that is, the DRPA. Furthermore, this Court does not find it unreasonable that where the world has declared a pandemic and cases continue to rise, a school shall consider closure so as to safeguard the lives of the students it caters for. Furthermore, this Court on examining the city of Zomba wishes to point out that apart from Chancellor College, Zomba has the highest number of institutions hosting large numbers of people, all within 10 to 20 km form Chancellor College like the two army barracks, police training school, Zomba Central Hospital, Zomba Maximum Prison, Zomba Mental Hospital, Zomba Market, Secondary schools like Mulenguzi, St. Mary's, Masongola, Police and Zomba Catholic to name a few as well as numerous primary schools. The potential risk of spread if not considered would be catastrophic. Thirdly, the Court noted that the declaration was recognized by international human rights standards as neighbouring countries like Zambia, Mozambique and Tanzania ha similarly done the same. Lastly, the limitation was necessary in a democratic and open society which was balancing the right to life versus the right to education.

3.23 Interestingly, the Applicants argued that the 1st Respondent should not have ordered closure of schools and colleges but rather only the borders to keep out the virus. At this point, the Applicants need to be reminded of the scientific evidence which is now general knowledge of how the virus spreads including issues of incubation period. Furthermore, Malawi like so many other African countries has porous borders as such their argument is absurd. This is evident by the fact that Article 12 of the International Covenant of Economic, Social and Cultural Rights on health which is not a constitutional right in Malawi but applies to Malawi as a State and has been expounded by the Committee on Economic, Social and Cultural Rights in General Comment No. 4 . The Committee estate that the right also includes the right to prevention, treatment and control of diseases."

124. I have considered the parties rival submissions and authorities relied upon, and from the various international authorities; I have no doubt in stating that the restrictions imposed through the Restriction of movement Rules are reasonable, proportionate and Constitutional and are reflective of the steps taken world over in the fight against COVID – 19. COVID – 19, now a pandemic covering the whole world with the resultant deaths in Kenya and other several countries (including Italy, Spain, USA, South Africa, China and World Over) speak to magnitude of the danger which Kenya is facing and this is therefore an issue of grave public interest and for which should be taken seriously.

125. I find that in view of the seriousness of COVID-19 disease and in light of the principles laid down by the Supreme Court in the Case of ***Gatirau Peter Munya case*** *(Supra)* and ***Jennifer Shangalla case*** *(Supra),* the public interest lies in saving lives of Kenyans and protecting their wellbeing against COVID – 19, and in effect, the priority level attributable to the relevant government cause in doing so should take precedents over the unsubstantiated allegations by the Petitioner.

126. The Respondent in support of their submission rely on the case of ***National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Coordination of National Government & 3 others [2017] eKLR*** where while declining to issue an order setting aside a curfew order, the Court held as follows:

"60. Undoubtedly, the Petitioner and the voters of the three (3) Counties have rights in an open and democratic society based on human dignity, equality and freedom. However, their rights as private citizens cannot outweigh the public rights bearing in mind the factors that ought to be taken into account under Article 25 of the Constitution of Kenya The case of Jacqueline Okuta & another vs. Attorney general & 2 Others [2017] eKLR… set out this issue clearly when the court stated as follows:-

"Government may not do some things, and must do others, even through the authorities are persuaded that it is in the society's interests (and perhaps even the individual's own interest) to do otherwise. Individual human rights cannot be sacrificed even for the good of a greater number, even for the general good of all. But if all human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances for limited times and purposes, to the extent strictly necessary."

64. In determining if such restrictions, can be lifted, the court has to consider prevailing public interest vis a vis private interests. The 4th Respondent set out the tests of adopting the principle of proportionality as the legitimacy tests, the suitability tests, necessity tests and balancing of interest."

127. I find that it is not in public interest to allow the prayers sought in this Petition because if the Petition is allowed and Rules suspended and/or quashed, what will be witnessed or ensure is rapid spread and exposure of Kenyans to COVID – 19. What should continue to happen is to continue to take preventive measures to counter the spread of COVID – 19, including government supporting the vulnerable groups. I find that suspending the Rules will harm the majority of Kenyans and that would not be proportionate to any mischief, if at all, to which the Petitioner alleges it proposes to cure. I further find that the Petitioner has not placed material facts before this court, of any identifiable person whose rights have been violated or evidence of violation of any provisions of the Constitution.

128. In ***St. Patrick Hill School Ltd vs National Hospital Insurance Fund [2019] eKLR*** the court held as follows:

> ***"59. …success in a constitutional petition is evidence-based. Where no evidence is adduced, the journey comes to a stuttering halt. Mere allegations will not bear any fruits. The Petitioner's petition is made up of a litany of allegations, which are not backed by any iota of evidence."***

129. From the contents of the petition I find that the same is based on general averments. It is alleged in the petition that the rules negatively impact the lives of those in the transport business ***"without measures to provide food ratios to the individual and families affected by measures".*** I note hereunder inspite of that assertion the Petitioner does not in the Petition expound and provide supporting materials in respect of such assertion. I find from the reading of the Rules it is confirmed that transportation business has not been stopped or banned. The government has only put measures to regulate the geographical limits of operations as well as sought to mitigate the potential spread of COVID-19, by requiring social distancing between passengers in public transport vehicles.

130. The Petitioner aver that ***"many Kenyans were stranded as they could not travel back to their domiciles"*** but failed to put forward evidence in support and particulars of such Kenyans who have been affected and as such, I find that the Petitioner has not adduced evidence in support and nothing as such turns on this ground.

131. Under paragraph 61 of the Petition it is contended that the ***"Rules have been abused in so far as burial is concerned"***. Citing the case of **"James Oyugi"** as an example. A look at the paragraph 61, it is clear the Petitioner does not explain how the Rules **"have been abused"** or how the case of the said James Oyugi relate, to the Rules, to erate the Respondents respond to the allegation. I find the Petitioner has failed to give particulars as to how these Rules have been abused as far as burial is concerned.

132. In the case of ***Jared Bichanga v Inspector General of Police & Attorney General [2016] eKLR***, the court declined to analyse the Petitioner's claim as relates to torture as no evidence was led in support of the same. The Honourable Court should equally reject the Petitioner's invitation to be granted orders without leading any evidence. In the said case the judge opined as follows:

> ***"26) In the above regard, the Respondents have argued that the Petitioner has failed to lead any medical evidence or otherwise to substantiate the claim of torture and degrading treatment. In that regard, I cannot fault the Respondents' argument because, apart from the Petitioner's word, there is absolutely no evidence led in support of this allegation. In my view, it is not enough to merely state he suffered such serious violations without any evidence at all….Without any evidence on the alleged torture and in human and degrading treatment, I am unable to say more on the subject."***

133. I find at any event an allegations of abuse of Rules by individuals does not render the Rules unconstitutional as it is the actions of those who misuse the law, if at all, that is unlawful. This proposition was upheld by the court in the decision of ***CKW v. Attorney General & another (2014) eKLR*** where the Petitioner sought to challenge provisions of the Sexual Offences Act. The Court held noted as follows:

> ***"The discriminatory application of a law, if it is established, is wrong. But such a conduct by the person who exercises it does not render the law itself to be discriminatory."***

134. The same position was recently reiterated by Justice Korir in ***Law Society of Kenya v Hillary Mutyambai Inspector General national Police Service & 4 others; Kenya national Commission on Human Rights & 3 Others (Interested Parties) (2020) eKLR*** (hereinafter "LSK Petition 1") as follows:

> ***"134. I think the main problem with the Curfew Order is the manner in which it has been implemented. The interested parties have correctly concentrated their firepower on that deficiency. It is, however, observed that unconstitutional and illegal acts that occur in the implementation of a legal instrument does not render that instrument unconstitutional. The problems that arise from the implementation must be addressed separately."***

135. On requirement of the lone driver to wear masks the Petitioner urge that is irrational, effectively inviting the court to make policy and merit review of the rules. I find the Petitioner's in seeking such a policy and merit review has not placed before this Court any scientific evidence to this effect. I find no evidence has been availed in inviting this court to substitute the Petitioner's merit view for those of the 2nd Respondent.

136. In support of the Respondent's position that Petitioner's merit views cannot be substituted for those of the 2nd Respondent relies on a decision of Court of Appeal in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR:***

> ***"(61). We further reiterate that whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provision on leadership and integrity under Chapter 6 of the Constitution warrants the heightened scrutiny of the legality of appointments thereto, that is neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature's decision for its own choice. To do so would undermine the principle of separation of powers. It would also strain judicial competence and authority. Similarly, although the courts are expositors of that the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the functions is vested elsewhere under our constitutional design."***

137. I find from the aforesaid that this court cannot sit on appeal on the question of the merits or otherwise of an opinion by health experts in steps needed to contain the COVID – 19 disease. It is of concern to note even the court may not substitute its own judgment for that of experts in the relevant fields provided the policy decision informed by the expert advice is relevant to the subject matter in issue. For example, the Petitioner cannot invite this Honourable Court to determine that it is not necessary to wear face masks in public places. The

Petitioner also challenges the requirement to cremate or inter bodies of those who die of COVID – 19 within 48 hours, again, on the basis of its own preference and which is not based on expert averments. This is interesting considering the petitioner's pleadings under paragraph 55 of its petition cites the following statement (in extract) for WHO:-

> "***The WHO on its guidance note on infection Prevention and control for the sole management of a dead body in the context of COVID 19 has stated:***
>
> > ***"Based on current evidence the COVID-19 virus is transmitted between people through droplets, families and close contact, with possible spread through faeces. It is not airborne. As this is a new virus whose source and disease progression are not yet entirely clear, more precautions may be used until further information becomes available."***

138. From the aforesaid I decline the petitioners' invite to review policy and expert decisions on their merits since the Petitioner has not provided any scientific evidence or any evidence to justify the invite and basis for their invite on unsupported personal preference. Further I find that if orders sought by the Petitioner, are granted, they would have the effect of allowing the unprecedented spread of COVID-19 rendering the health professionals' job impossible to carryout.

139. In ***Simon Mwangi Kamau & another v Council of legal education & another [2019] eKLR,*** this Honourable Court was called upon to pronounce itself on the Council of Legal Education (Kenya School of Law Regulations) 2009 which the Petitioner argued denied him an opportunity to resist for an examination. While declining to issue the orders ought, this Court stated as follows:

> ***"19. Having carefully considered impugned Regulation and the petitioners petition, I find that the petitioners have not been discriminated against nor have they been able to demonstrate in their petition how their rights have been infringed by the Respondent. The Respondent has acted faithfully in executing their statutory duty and their duty in upholding the law and ensuring due compliance with the law and Regulations governing the examination. The council of Legal Education is mandated to supervise and control legal education in Kenya and is expected in doing so, to apply the Regulations to all candidates who take their studies at School of Law as required and should not act contrary to the provisions conferred upon it by law.***
>
> ***20. I find, that it is important in dealing with petitions of this nature for court to avoid making decision or interpretation of statutory provision, rule or by-law which would bring about the result of rendering the system unworkable in practice or create a situation that will go against clear provisions of the law governing the subject matter in issue. The law and Regulations in question and are designed at maintaining ensuring the assuring high professional standards and competence. I find the impugned regulation to have good intentions and purposes of ensuring professionalism and the same is reasonable and valid.*** **It is logically related to legitimate public expectations and concerns to maintain high professional standards and ensuring competency in the legal profession."**

140. I find that other jurisdictions faced with the COVID – 19 pandemic have equally appreciated the importance of deference. In ***Friends of Danny Devito, Kathy & Others Versus Tom Wolf, Governor, And Rachel Levine, Secretary of PA Department of Health, No. 68 Mm 2020*** the Supreme Court of Pennsylvania Middle District was called upon to determine a challenge to the executive order by the State Governor compelling the closure of the physical operations of all non-life sustaining business to reduce the spread of Covid-19. The Petitioners contended that the Governor lacks any statutory authority to issue the Executive order and further claimed that it violated their constitutional rights under the financial hardship and threatened the jobs of hundreds of thousands of citizens. While dismissing the Petition the Court appreciated (in extract) as follows:

> ***"…More fundamentally, Petitioners' argument ignores the nature of this virus and the manner in which it is transmitted. The virus spreads primarily through person-to-person contact, has an incubation period of up to fourteen days, one in four carriers of the virus are asymptomatic, and the virus can live on surfaces for up to four days. Thus, any location (including Petitioners' businesses) where two or more people can congregate is within the disaster area.***
>
> ***Against this backdrop, Petitioners suggest that the public interest would best be served by keeping businesses open to maintain the free flow of business. Although they cite to none, we are certain that there are some economists and social scientists who support that policy position. But the policy choice in this emergency was for the Governor and the Secretary to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power. The choice made by the Respondents was tailored to the nature of the emergency and utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19. See Respondents' Answer at 3.***
>
> ***Finally, Petitioners contend that their businesses should be permitted to remain open because of the burden placed on them. We recognize the serious and significant economic impact of the closure of Petitioners' businesses. However, the question is whether it is unduly oppressive, thus negating the utilization of the police power. Faced with protecting the health and lives of 12.8 million Pennsylvania citizens, we find that the impact of the closure of these business caused by the exercise of police power is not unduly oppressive. The protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power."***

141. From the above I find the appropriate action that commands itself in this petition is to decline to accede to the reliefs being sought as by allowing the reliefs, this will expose Kenyans to unnecessary health risks and in worst case scenarios death. The measures and steps undertaken under Public Health (Prevention, Control and Suppression of COVID – 19) should be supported for the good of all Kenyan people.

142. I find as a general principle public interest should be able to trump any individual or personal interest of the Petitioner whether in private law or in public constitutional law and that there is a public law duty of the court not to interfere with the constitutional functions of

public bodies traceable to the Constitutional doctrine of separation of powers. In the case of ***East African Cables v. Public Procurement Complaints, Review and Appeals Board & Anor. (2007) eKLR:*** It was stated:

143. ***"We think that in a case like this one we must consider the likely effect of the orders south by the applicant. We should take into account the special nature of the setup of the 2nd respondent. It is common ground that it is the sole supplier of electricity in the country and that it has the duty to satisfy its ever surging number of consumers of that vital commodity. While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not reached, nevertheless, the Court has a reciprocal duty to ensure that it does not hamstring such bodies like the 2nd respondent form performing their lawful duty or duties as bestowed upon them by the relevant law.***

> ***We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."***

144. Similarly in ***British American Tobacco Ltd vs. Cabinet Secretary for Ministry of Health 7 5 Others (2017)*** where the Court of Appeal referred to the Indian case of ***Maharashtra State Board vs. Kurmarsheth & others [1985] CLR 1083,*** where it was stated as follows:-

> ***"so long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations…."***

145. Further in ***Lucy Njuguna & another vs. Town Clerk Municipal Council & Mombasa & 2 Others (2011) eKLR***, the learned Judge stated *"The far-reaching effects of judicial orders dictate that these orders are to rest on a solid foundation of law and/or evidence, neither of which has been shown in the petitioners' case.* ***The petitioners have not addressed the question of proportionality between their claims to certain rights, and the claims of the public interest; and they have adduced no evidence demonstrating any violation of their guaranteed rights, apart from raising analogies based on an unrelated study entitled Documenting Human Rights violations of Sex Workers in Kenya (2008)."***

146. Having considered the pleadings, rival submission and the relevant law and authorities I proceed to make the following orders:

> ***a) The 2nd Interested Party's Notice of Preliminary Objection dated 17th April 2020 is meritorious.***
>
> ***i) The orders sought by the petitioner, if granted will be contrary to Articles 94, 95, and 109 of the Constitution and threaten to bring Constitutional process by the National Assembly and its committee to a complete halt and undermine the National Assembly's, ability to discharge its constitutional mandate.***
>
> ***ii) The Petition in view of Articles 94, 95 and 109 of the Constitution is premature.***
>
> ***b) The Petition is dismissed.***
>
> ***c) On costs, the award of costs is at the discretion of the Court. In exercising of the discretion to award costs the court is required to take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms. This petition was filed by the Petitioner in public interest, this is therefore a public interest matter for which the petition was intended to benefit the public but not the Petitioner. The Petition is not vexatious nor is it an abuse of the court process. I accordingly direct each party to bear its own costs.***

Dated, Signed and Delivered at Nairobi on this **25th** day of **June, 2020.**

.....

J. A. MAKAU

JUDGE