



**Kenya Union of Saving & Credit Co-Operatives Limited (KUSCCO) v Sacco Societies
Regulatory Authority (SASRA) (Petition 319 of 2018) [2019] KEHC 10904 (KLR)
(Constitutional and Human Rights) (20 December 2019) (Judgment)**

*Kenya Union of Savings & Credit Co-operatives Limited (Kuscco)
v Sacco Societies Regulatory Authority (Sasra) [2019] eKLR*

Neutral citation: [2019] KEHC 10904 (KLR)

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

PETITION 319 OF 2018

WK KORIR, J

DECEMBER 20, 2019

BETWEEN

**KENYA UNOIN OF SAVING & CREDIT CO-OPERATIVES LIMITED
(KUSCCO) PETITIONER**

AND

**THE SACCO SOCIETIES REGULATORY AUTHORITY
(SASRA) RESPONDENT**

JUDGMENT

1. The Petitioner in this case, Kenya Union of Savings & Credit Cooperatives Limited (Sacco), is a union of savings and credit co-operative societies (Saccos) duly registered under the provisions of the [Co-operative Societies Act](#), Cap 490. It is thus a secondary co-operative society comprised of several primary co-operative societies.
2. The Respondent, the Sacco Societies Regulatory Authority (SASRA), is a state corporation established by Section 4 of the [Sacco Societies Act](#), 2008 (the Sacco Act). Its mandate includes to license Saccos to undertake deposit-taking business; to levy contributions, hold, manage and apply the general fund of SASRA in accordance with the Act; and perform such other functions as are conferred on it by the [Sacco Societies Act](#) or by any other written law.
3. The Petitioner seeks the quashing of The Sacco Societies Deposit Levy (ammendment) Order, 2018 (the Order) which the Respondent caused to be published as Legal Notice No. 51 in Kenya Gazette Supplement No. 12 of 22nd February, 2018. Through its letter dated 20th August, 2018 addressed to



the Saccos, the Respondent indicated that the statutory instrument had received the approval of the National Assembly on 10th April, 2018. The impugned Gazette Notice provides as follows:-

“The [Sacco Societies Act](#)

(No. 14 of 2018)

In Exercise of the powers conferred by section 15 of the [Sacco Societies Act](#), the Sacco Societies Regulatory Authority makes the following Order-

1. This Order may be cited as the Sacco Societies Deposit Levy (Amendment) Order, 2018.
2. The Sacco Societies Deposit Levy Order 2011, hereinafter referred to as “the principal Order”, is amended by deleting paragraph 2 (1) and substituting therefor the following new paragraph-
 - (1) Subject to a maximum levy of ten million shillings per annum, a deposit-taking Sacco Society shall pay an annual levy (hereinafter called the deposit levy payable) at the rate set out in the schedule based on the total deposits held by the society as indicated in the last audited financial statements of the society.
3. The principal Order is amended by deleting paragraph 4.
Schedule (p. 2(1))

| Rate of deposit levy payable in percentages | Period of imposition of deposit levy payable |
|---|--|
| 0.125% | From January, 2018 to December, 2018 |
| 0.15% | From January, 2019 to December, 2019 |
| 0.175% | From January, 2022. |

Dated the 7th February, 2018.

By order of the Board.”

4. The Petitioner’s case is that the actions of the Respondent in publishing the above Order were unreasonable, unfair, unlawful and unconstitutional, and that by publishing the Notice, the Respondent has committed a number of constitutional violations being: a violation of the national values and principles of governance provided under Articles 10, 73(1)(a) and 201(a) of [the Constitution](#); a violation of the right to equality and freedom from discrimination under Article 27 of [the Constitution](#); a violation of the right to property as set out in Article 40(1) and (2) of [the Constitution](#); a violation of the right to fair administrative action as protected under Article 47 of [the Constitution](#); and a violation of Articles 96, 109, 110, 111, 112, 113 and 118 (1) of [the Constitution](#).



5. The foundation of the petition is at paragraph 17 wherein the Petitioner contends that:-

“That the Sacco Societies Deposit Levy (Amendment) Order, 2018 was and is unreasonable, unfair, unlawful and unconstitutional for the following reasons:

- (a) It was published without exhaustive or adequate consultations with the petitioner, its member Saccos and their individual members.
- (b) Co-operatives function is devolved as per Schedule 4 rule 7(e) of *the Constitution*. It would have been procedural to pass the bill through the Senate as provided for under Articles 96, 109, 110, 111, 112 and 113 of *the Constitution* of Kenya
- (c) The levy is on total deposits of each Sacco and as such is punitive.
- (d) The deposits made to the respective Saccos are from net salaries and incomes already taxed by the Government, and therefore the levy exposes them to double taxation.
- (e) The number of regulated Saccos has grown from 98 in 2010 to the current number of 177 and therefore the rate of the levy should decrease and not increase.
- (f) The SACCO deposits also continue to grow and therefore the levy continue to grow and there can therefore not be any justification for an increment in the rate applied to the deposits as levy.
- (g) The SACCOS also contribute to the exchequer by way of payment of licence fees and taxes to the National Government. They also pay further levies to various County Governments and there is therefore no justification for the increment of the levy payable.
- (h) The SACCOS rely on mobilization of deposit for the smooth running and growth of SACCOS and have to pay bonuses and dividends to their members in accordance with section 46 of the *Co-operative Societies Act*. An increment on the levy on the total deposits would obviously adversely affect the bonuses and dividends payable to members and would therefore adversely affect their morale and willingness to make deposits.
- (i) It will make it hard for SACCOS to lend affordably due to the given requirements of liquidity and capital as directed by the respondent.
- (j) SACCOS are private entities registered and established for public good and the role of the Government should be merely to ensure that there is an environment that nurtures a dynamic and vibrant Co-operative movement.
- (k) The respondent, being a state corporation should give service to the public at reasonable costs, because its principal mandate is to regulate the framework of operations of SACCOS. It shouldn't therefore burden SACCOS with unreasonable financial obligations.
- (l) Section 16 (3) of the *SACCO Societies Act*, provides that there shall be made to the Authority out of moneys provided by Parliament for that purpose, grants towards the expenditure incurred by the board in the exercise of its powers or



the performance of its functions under the Act. It is therefore clear that the running costs of the management of the respondent are not catered for by the levy.

- (m) The rate used is discriminatory when compared to other levies by other statutory regulatory bodies or taxation tables.
- (n) The order will impose significant costs on the communities where the Saccos operate.
- (o) There was no regulatory impact statement prepared in line with Section 6, 7 and 9 of the *Statutory Instruments Act*.”

6. In its Petition dated 13th September, 2018, which was supported by the affidavit of its Managing Director Mr. George Ototo, the Petitioner seeks the following reliefs:-

- a) A declaration that the petitioner’s and its members right to equality and freedom from discrimination as protected under Article 27 of *the Constitution* was violated.
- b) A declaration that the petitioner’s and its members’ right to property under Article 40 of *the Constitution* was violated by the respondent.
- c) A declaration that the Petitioner’s and its members rights to fair administrative action as protected under Article 47 of *the Constitution* was violated by the respondent.
- d) A declaration that the Petitioner’s and its members’ rights as protected under Article 10, 73, 96, 109, 110, 111, 112, 113, 118 and 201 of *the Constitution* was violated by the respondent.
- e) A declaration that legal notice 51 of 22nd February, 2018 and the letter dated 20th August, 2018 referenced SASRA/F&P/1300/18 (403) were and are unconstitutional, null and void.
- f) General damages for violation of the petitioner’s and its members’ rights.

7. In response, the Respondent filed a replying affidavit sworn on 2nd November, 2018 by its Chief Executive Officer Mr. John Mwaka. The Respondent through the replying affidavit addressed each and every issue raised in the petition. A few highlights of the averments are only necessary at this stage of the judgement.

8. In its first line of attack on the petition, the Respondent contends that the proceedings herein have been commenced without the resolution of the Management Committee of the Petitioner as required by Section 28(3) of the *Co-operative Societies Act* which specifically provides that legal proceedings in the name of or against a co-operative society may only be instituted by a resolution of the management committee of the co-operative society. It is therefore the Respondent’s position that because of that deficiency, the proceedings should be struck out for being in direct contravention of Section 28(3) of the *Co-operative Societies Act* as read together with Section 12 of the same Act.

9. The Respondent’s second line of attack on the propriety of the petition is that the Petitioner has failed to particularize violations of *the Constitution* to the particularity required and has also not stated the manner in which *the Constitution* has been violated by the Order and the letter dated 20th August, 2018 communicating the approval of the Order by the National Assembly.

10. Regarding the merits of the petition, the Respondent dismissed the Petitioner’s assertion that there was no public participation or consultation. It is the Respondent’s averment that extensive, appropriate, effective, far-reaching and all-inclusive public consultations were indeed undertaken by itself and Parliament prior to the publication and operationalization of the Order. Further, that the Petitioner



was consulted at every stage of the process including at the stakeholder validation meeting held on 24th November, 2018. Additionally, that the Petitioner was directly consulted by the Parliamentary Committee on Delegated Legislation on the Order and was invited to, and attended, the Parliamentary Committee meeting on 10th April, 2018 to make representations.

11. According to the Respondent, the Order did not require the approval of the Senate, for among other reasons, that the same was enacted under the [Sacco Societies Act](#) which is strictly limited to the licensing, regulation and the supervision of the business of Sacco societies. Consequently, the activities of Sacco societies fall under the banking sector which is an exclusive function of the National Government. The Respondent also faults the Petitioner for not raising the issue with the National Assembly. Further, that the National Assembly and the Senate are in any case not parties to these proceedings.
12. In submissions dated 12th October, 2018, the Petitioner once again stressed that the Order was published without consulting the Petitioner, its member Saccos and the individual members of the Saccos. It also repeated its claim that the Respondent should have passed the Bill through the Senate as provided for under Article 96, 109, 100, 111, 112 and 113 of [the Constitution](#); that the levy is on total deposits of each Sacco and is therefore punitive; that the deposits made to the respective Saccos are from net salaries and incomes already taxed by the Government, and therefore the levy exposes the members to double taxation; and that the number of regulated Saccos has grown from 98 in 2010 to the current number of 177 and therefore the rate of the levy should decrease and not increase.
13. On the violation of the national values and principles of governance provided under Articles 10, 73 (1)(a) and Article 201 (a) of [the Constitution](#), counsel for the Petitioner relied on the case of Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR where Lenaola, J (as he then was) held that the present Constitution contemplates participatory democracy highlighted by accountability, transparency and public involvement as envisaged under Article 174(c) and that one of the objects of devolution was to give the power of self-governance to the people and the power to make their own decisions through public participation.
14. The Petitioner further relied on the decision in Association of Gaming Operators Kenya & 41 others v AG & 4 others [2014] eKLR where the Court explained the importance of public participation as a national valued and an expression of sovereignty of the people as articulated under Article 1 of [the Constitution](#).
15. The Petitioner indicated that under Schedule 4 rule 7 (e) of [the Constitution](#), matters dealing with trade development and the regulation of co-operative societies are devolved functions to be exercised at the county level. The Petitioner submitted that, in line with this, the impugned Order affected co-operative societies which are under the county governments, and the same was required to be considered by Senate under Articles 96, 109 and 113 of [the Constitution](#).
16. The Petitioner relied on the case of Republic v National Assembly, Speaker of National Assembly & 6 others Ex parte George Wang'ang'a [2018] eKLR where the Court laid out the procedure for determining whether a Bill concerns counties, and the procedure for passing such a Bill. Further reference was made to the Supreme Court's guidelines on determination on the issue of Bills affecting counties in the case of The Speaker of the Senate & another v The Hon Attorney General & others [2013] eKLR, where the Court held that where [the Constitution](#) decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. Further, that the Supreme Court held that if Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law to assert the authority and supremacy of [the Constitution](#).



17. On the alleged violation of Articles 96, 109, 110, 111, 112, 113 and 118(1) of *the Constitution*, counsel for the Petitioner submitted that since the Bill was not considered by the Senate, it was unlawful, unconstitutional, null and void. In support of this assertion, counsel relied on the decision in *Republic v National Assembly, Speaker of National Assembly & 6 others Exparte George Wang'ang'a* [2018] eKLR.
18. On the averment of the violation to the right to property under Article 40 (1) & (2), it is the Petitioner's position that the levy affects this right by subjecting the net salaries and incomes of members of Saccos to double taxation as they are already taxed by the Government. Additionally, the Petitioner claimed that the increment is punitive as it is based on total deposits. Further, that the members of the Saccos who make deposits were not given an opportunity to be heard, and therefore the levy was tantamount to arbitrarily taking away their property.
19. The Petitioner also asserted that the Respondent violated its right to fair administrative action under Article 47 of *the Constitution*. The Petitioner referred to Section 4(3) of the Fair Administrative Act, 2015 as requiring that if an administrative action is likely to affect the rights and fundamental freedoms of any person, the administrator shall give the person affected prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; notice of a right to a review or internal appeal against an administrative decision, where applicable; and information, materials and evidence to be relied upon in making the decision or taking the administrative action. Further reference was made to Section 5 of the same Act which lists the actions that an administrator should take in the case where a proposed administrative action is likely to adversely affect the legal rights or interests of a group of persons or the general public. The Petitioner averred that the Respondent did not consider all the submitted views and omitted to consider all the relevant and material facts.
20. The Petitioner also contended that the Respondent failed to meet the requirements of Section 6 of the *Statutory Instruments Act*, 2013 which states that where there is a proposed statutory instrument, a regulatory impact statement must also be prepared and gazetted.
21. On the violation of the right to equality and freedom from discrimination under Article 27 of *the Constitution*, it is the Petitioner's contention that the method of calculation of the levy in the impugned Order is erratic and does not follow scientific method of a stable, linear or mathematical model as compared with taxation tables used by other authorities such as the Retirement Benefits Authority. The Petitioner therefore urged the court to allow the petition.
22. The Respondent filed submissions dated 31st January, 2019 in which it proposed various issues for the determination of the court. As to whether the principle of public participation as enunciated in Article 10 of *the Constitution* was violated, the Respondent submitted that it has provided evidence through its replying affidavit marked as annexures JM-16 to JM-21 as well as JM-36 to prove that it engaged stakeholders and sought their views on the proposed levy, and that the Petitioner's members were represented in those engagements.
23. It is the position of the Respondent that sufficient public participation took place, and reference was made to a number of cases to support the assertion. Counsel stated that the Petitioner facilitated public participation hence complied with one of the conditions of the principle of public participation. On this, reference was made to the South African Constitutional Court case of *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05) [2006] ZACC11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) where it was held that "facilitation of public involvement in the legislative process...means taking steps to ensure that the public participate in the legislative process."



24. Responding to the Petitioner’s contention that its views were never taken into account, counsel for the Petitioner cited the Court of Appeal decision in the case of *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR for the proposition that what mattered is the fact that the public was given an opportunity to have a say in the enactment of the Order. In the cited case the Court of Appeal held that:-
- “Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted.”
25. Counsel for the Respondent also cited the case of *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR to drive home the point that what really matters is whether an opportunity to present views was given to the public.
26. On the Petitioner’s claim that *the Constitution* was violated because of failure to involve the Senate, the Respondent submitted that the Petitioner has misunderstood the law and facts, and that the Senate was in fact not required to participate in the publication of the impugned Order. The Respondent relied on Articles 96, 109 (4) and Article 110 (1) (a) to demonstrate that the Senate participates in the publication of Bills, and that the impugned Order was in fact a statutory instrument as defined under Section 2 of the *Statutory Instruments Act*, and therefore outside the ambit of the Senate. On that ground the Respondent urged the court to find that there was no violation of Articles 96, 109, 110, 111, 112, 113 and 118(1) of *the Constitution*.
27. The Respondent also argued that in accordance with Part 2 of the Fourth Schedule of *the Constitution*, the Respondent does not fall under the definition of a co-operative society as defined in Section 2 of the *Co-operative Societies Act*. It is the Respondent’s case that it does not regulate co-operative societies and is only mandated to licence and regulate the deposit-taking aspect of Sacco societies. According to the Respondent, whereas the co-operative society function has been devolved, the regulation of the deposit-taking business, which is a financial aspect that requires prudential regulation has not been devolved as claimed by the Petitioner.
28. The Respondent relied on the case of *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR as providing the “pith and substance” test for determining whether a Bill touches on county functions. It is the position of the Respondent that applying the said test will show that *the Constitution* sought to devolve trade development and regulation of co-operative societies; that trade development and regulation is a function of the Commissioner for Co-operative Development (the Commissioner) by dint of the *Co-operative Societies Act*; that the licensing and regulation of the deposit-taking business of Saccos as defined by the Sacco Act does not fall under the purview of the Commissioner but is a mandate of the Respondent; that by dint of the principle of pith and substance test the Sacco Act makes provision for regulation of deposit-taking business of Saccos which regulation deals with Saccos as players in the financial sector; that pursuant to Part 1 of the Fourth Schedule to *the Constitution* the regulation of the financial sector is a function of the National Government; and that the consumer protection function, which includes protection of members of Saccos, is a preserve of the National Government as per Part 1 of the Fourth Schedule of *the Constitution*.
29. On the Petitioner’s contention that the Order was made in breach of sections 6, 8 and 13 of the *Statutory Instruments Act* which states that any proposed statutory instrument which is likely to impose a significant cost on the community or a part of the community, should be preceded by a regulatory impact statement about the instrument, the Respondent submitted that the applicable



- provision is Section 9 which provides that a regulatory impact statement is not necessary for an amendment of a statutory instrument that does not fundamentally affect the legislation's application or operation. The Respondent submitted that the Order falls within the exception.
30. Turning to the Petitioner's assertion that the Order violates the right to property of the members of the Saccos, the Respondent retorted that the Petitioner has failed to provide evidence to prove that the increase in the levy on deposits violated the right to property. Reliance was placed on the statement in the case of *Anarita Karimi Njeru v The Republic* (1976-1980) I KLR 1272 that "if a person is seeking redress from the High Court on a matter which involves a reference to Constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."
 31. On the Petitioner's claim that the Order is discriminatory, the Respondent's answer is that the Petitioner has failed to show how the levy amounts to double taxation; and that there was nothing erratic or unpredictable about the calculation used for the levy as the specific percentages, to be implemented progressively, have been shown. The Respondent referred to the case of *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR as stating that discrimination arises "where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim." According to the Respondent, the Petitioner could have only succeeded on this head by showing that the treatment accorded to its members was different from that given to other Saccos.
 32. As to the allegation that the Respondent violated the Petitioner's right to fair administrative action under Article 47 of *the Constitution*, the Respondent submitted that it has proven that there were extensive and wide consultations before the publication and operationalization of the impugned Order and as such there was no breach of Article 47(2) of *the Constitution*. Further, that the Petitioner has omitted to show how the Respondent failed to follow the due process of the law.
 33. The Respondent finally contended that the petition is defective and should be summarily dismissed on the basis of the failure to comply with Section 28(3) of the *Co-operative Societies Act* which states that the committee as the governing body of the society "shall institute and defend suits and other legal proceedings brought in the name of or against the co-operative society." It is the case of the Respondent that this petition should have been instituted through a resolution of the Petitioner's Management Committee and failure to do so makes the petition a proper candidate for striking out.
 34. The Respondent relied on the case of *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] eKLR where it was held that it "is not a "procedural technicality" to require that a company authorises any proceedings brought in its name." Reliance was also placed on the decision in *Bugerere Coffee Growers Ltd v Sebaduka & others* [1970] EA 147 as cited in the said *East African Portland Cement Ltd* (supra) for the principle that "when companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings in the case." The Respondent therefore urged that since there was no resolution of the management organ authorizing the institution of the suit the petition should be deemed defective.
 35. Still stressing that the petition is defective, the Respondent referred to the decisions in *Anarita Karimi* (supra) and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and submitted that the Petitioner had failed the requirement that particulars of any allegation of an infringement of constitutional rights must be proven. Relying on the case of *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1) SA 505(CC), where the Constitutional Court of South Africa stated that a constitutional challenge should be explicit and all



interested parties should have an opportunity to make their representations, the Respondent asserted that the Petitioner has made claims against Parliament and the Committee on Delegated Legislation without joining them to the proceedings so as to afford them an opportunity to respond to the allegations against them.

36. The Respondent concluded by asserting that the Petitioner has failed to prove the allegations of the violations of *the Constitution*, and that the petition is an afterthought, ill-conceived and is only meant to harass and embarrass the Respondent. The court was urged to dismiss the petition.
37. I have carefully considered the substance of the petition, the response thereto and the submissions of the parties and in my view the issues for determination are (a) whether the petition is fatally defective; (b) whether the impugned Order is unconstitutional; and (c) what are the appropriate remedies, if any?
38. I will start with the Petitioner's claim that the Order is constitutionally defective both procedurally and substantively. The petition is predominantly anchored on lack of or inadequate public participation in enactment of the Order. Article 118 (b) of *the Constitution*, commands Parliament to facilitate "public participation and involvement in the legislative and other business of Parliament and its committees."
39. In the case of Robert N. Gakuru & others v Governor of Kiambu County & 3 others [2014] eKLR Odunga, J relied on the decision in the South African case of Doctors for Life International (supra), where the Court reflected on what is meant by 'facilitation of public participation', and held that:-

"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement." To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process."

40. The Court in the Doctors for Life International case proceeded to provide the contours of the principle of public participation by holding that:-

"What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided."

41. In the case before this court, there is sufficient evidence to show that the National Assembly through the Parliamentary Committee of Delegated Legislation fulfilled its constitutional mandate by involving the relevant stakeholders. This is proven by the letter dated 6th April, 2018 received by Respondent from the Petitioner, and addressed to the Petitioner's member Sacco societies asking for comments to be provided to the Petitioner for presentation to the Parliamentary Committee on Delegated Legislation on 10th April, 2018. This proves that the Petitioner was privy to and participated in the



public forum. There is also the averment by Mr. John Mwaka, which averment was not rebutted by the Petitioner, that on 10th April, 2018 while appearing before the Parliamentary Committee to present the Respondent's views on the Order, he saw and met the representatives of the Petitioner including one Ms. Mercy Njeru and Mr George Ototo who were also appearing before the same Committee to make presentations on the impugned Order.

42. In the recent judgment by the Court of Appeal in *Law Society of Kenya v Attorney General & 2 other* [2019] eKLR, it was held that:

“It must follow due process which includes consultation with stakeholders. *The Constitution* establishes that mechanism to enable the Legislature make laws that are reasonable, having sought and obtained the views of the people. That is the essence of an accountable limited Government and the shift from the supremacy of Parliament to the Sovereignty of the people birthed by the 2010 Constitution.”

43. That public participation cannot be meaningful if adequate time is not provided to those to be affected by the legislature was captured in the Robert N. Gakuru case which relied on the case of *Glenister v President of the Republic of South Africa & others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) where it was held that:-

“For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made.”

44. In its replying affidavit, the Respondent avers that it undertook a three-pronged consultation process with various stakeholders which took place from March 2016 to November 2016. In all the three phases, which included two stakeholder meetings, the Petitioner received invitations, was adequately represented, and was given an opportunity to submit its feedback on the proposed Order. This has been proven by copies of the letters of invitation dated 7th, 9th and 11th March, 2016; copies of the policy briefs discussed at the forums and the programs dated 14th March, 2016 for the Nairobi meeting; the attendance list signed by the three officials from the Petitioner's office for the meeting of 14th March, 2016; letters dated 15th November, 2016 inviting stakeholders for a meeting held on 24th November, 2016 to discuss proposals and comments; and the attendance list signed by participants during the meeting held on 24th November, 2016.

45. Although it is important that the public body must take the views submitted by the public seriously and even incorporate them where necessary, it is not a must that the views of every person should be married into the proposed legislation or project. Doing so will result in distorted outcomes which may not achieve the purpose for which the law or project was conceived. In *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR, the Court of Appeal held that:-

“43. It is now settled, that what matters in determining whether the constitutional threshold of public participation has been met is that at the end of the day a reasonable opportunity is offered to the members of the public and/or all interested parties to know about the issue/project and to have an adequate say on the same. See this Court's decision in *Nairobi Metropolitan Psv Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others* [2014] eKLR.”



46. In light of the stated law and the material before the court, I concur with the Respondent that there was sufficient public participation and that the Petitioner was invited to and took part in every stage of the process. I therefore find that the Order complied with the principle of public participation as required by *the Constitution*.
47. Another reason why the Petitioner contends that the Order is defective is that it was passed in violation of Articles 96, 109, 110, 111, 112, 113 and 118(1) of *the Constitution*. The Petitioner avers that under Schedule 4 Rule 7(e) of Constitution, trade development and the regulation of co-operative societies are within the ambit of the functions and powers of county governments as it is a devolved function. As such the Petitioner contends that any bill or regulation concerning a devolved function must be considered by the Senate as provided under Article 96, 109 and 113 of *the Constitution*. It is therefore the Petitioner's case that the Order needed the approval of the Senate as it touches on the functions of the counties.
48. The Respondent did not contest the jurisdiction of Senate but contended that the application of the "substance and pith test" will show that *the Constitution* sought to devolve trade development and regulation of co-operative societies which is a function of the Commissioner for Co-operative Development and not the licensing and regulation of the deposit-taking business of Saccos which falls under the jurisdiction of the Respondent.
49. The Respondent also posited that the National Assembly had the jurisdiction to pass the impugned Order as the same is not a Bill as defined by Article 110 of *the Constitution* but an Order as defined under the *Statutory Instruments Act*.
50. Part 2 (7) (e) of the Fourth Schedule of *the Constitution* provides that trade development and regulation including co-operative societies is among the functions and powers of county governments. Article 96(2) of *the Constitution* requires the Senate to participate "in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113."
51. Article 109 of *the Constitution* provides, inter alia:-
- "(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.
 - (4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 to 123 and the Standing Orders of the Houses."
52. Article 110(1) defines a Bill concerning county government as:-
- "(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;
 - (b) a Bill relating to the election of members of a county assembly or a county executive; and
 - (c) a Bill referred to in Chapter Twelve affecting the finances of county governments."



53. That an enactment that fails to comply with Articles 110 to 113 and 122 to 123 is unconstitutional was established in the case of Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR where the Court held that:-

“ 138. We have analysed the CDF Act and concluded that the CDF and the manner it is administered and projects implemented impacts functions allocated to the county under the Fourth Schedule to *the Constitution*. In terms of Article 96(2) and 110 of *the Constitution*, the CDF (Amendment) Bill as legislation affecting the functions and powers of the county governments qualifies as, ‘a Bill concerning county government’ within the meaning of Article 110(1) and ought to have passed by the Senate. The purpose of the CDF (Amendment) Act was to amend a law that as we have found violates the division of functions between the national and county governments. Thus, an amendment to the Act would have necessitated the input of the Senate. The purpose of involving the Senate is to ensure that counties, as far as possible, get to effectively participate in the legislative business at the national level in matters substantially affecting interests of county governments. This calls for the court to look beyond the substance or purpose of the statute expressed in the text. The court must unbundle the specific provisions of the proposed legislation to see if and to what extent they satisfy the criteria set out under Article 110(1) of *the Constitution*. An amendment to the Act affecting the manner in which money is allocated to the CDF is the core part of the Act. As the availability of money affects the financing and implementation of projects that fall within the competence of the county government, the provision cannot be severed without undermining the entire Act. The CDF (Amendment) Bill is not an insubstantial amendment. We therefore find and declare that the CDF (Amendment) Bill unconstitutional for want of involvement by the Senate and we so declare.”

54. The Respondent submitted that although the Order was in respect of trade development and regulation of co-operative societies, the application of the “pith and substance rule” demonstrates that *the Constitution* sought to devolve trade development and regulation of co-operative societies; that trade development and regulation is a function of the Commissioner by dint of the *Co-operative Societies Act*; that the licensing and regulation of the deposit-taking business of Saccos as defined by the Sacco Act does not fall under the purview of the Commissioner but is a mandate of the Respondent; that by dint of the principle of pith and substance test the Sacco Act makes the provision for regulation of deposit-taking business of Saccos which regulation deals with Saccos as players in the financial sector; that pursuant to Part 1 of the Fourth Schedule to *the Constitution* the regulation of the financial sector is a function of the national government; and that consumer protection function, which includes protection of members of Saccos, is a preserve of the national government as per Part 1 of the Fourth Schedule of *the Constitution*.

55. In the case of Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others [2017] eKLR, Mativo, J expounded the “pith and substance test” as follows:-

“

“ 44. In order to determine whether authority to enact a particular piece of legislation vests only in Parliament or concurrently in Parliament and the



Senate, it is necessary to determine whether the legislation in question is 'legislation with regard to a matter concerning county government that falls within a functional area listed in Schedule 4 part two.; Where the legislation clearly falls within the functions in the said schedule, there is no difficulty determining whether it is a matter concerning the county governments. Difficulties only arise where the legislation falls outside any of the matters covered in the fourth schedule and the court is invited to determine whether it is a matter for the National Assembly or County governments. Even then, in such situations, courts have come up with a test...

47. Pith and substance is a legal doctrine in constitutional interpretation used to determine under which head of power a given piece of legislation falls. The doctrine is primarily used when a law is challenged on the basis that one level of government has encroached upon the exclusive jurisdiction of another level of government. Doctrine of Pith and Substance says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks at the substance of the matter.
48. Thus, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be *intra vires* even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable: whether in the guise of making a law on a matter within its competence, the legislature is, in truth, making a law on a subject beyond its competence. However, where that is not the position, the fact of encroachment does not affect the *vires* of the law even as regards the area of encroachment.
49. The analysis must answer two questions: what is the pith and substance or essential character of the law" does it relate to an enumerated head of power in *the Constitution*" The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law; What is the true meaning or dominant feature of the impugned legislation" This is resolved by looking at the purpose and the legal effect of the regulation or law. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was legislating within its jurisdiction, or venturing into an area under county government jurisdiction. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law. The effects can also reveal whether a law is colourable (does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction)"

[Footnotes omitted]

56. The "pith and substance test" is only applicable where a statute cannot be placed either in the functions of the National Government or the county governments without first determining what the law is all about. As observed by Mativo, J where the legislation clearly falls within Part 2 of the Fourth Schedule, there is no difficulty determining that the same is about the functions and powers of county governments.



57. The Respondent claimed that it only supervises the business-taking aspect of Saccos hence placing its role under Rule 10 of Part 1 of the Fourth Schedule which places “monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations” under the National Government. That argument is without merit. *The Constitution* is clear that the trade development and regulation of co-operative societies falls under the jurisdiction of the county governments. It would be a subversion of *the Constitution* to try and split that function and give part of it to the National Government. I therefore find no merit in the Respondent’s submission on this particular point and I reject it in its entirety.
58. Another heretic gospel propagated by the Respondent against the letter and the spirit of *the Constitution* is that the Order is not a Bill and therefore *the Constitution* does not envisage the involvement of the Senate in the enactment of statutory instruments. The *Statutory Instruments Act, 2013* at Section 2 defines a “statutory instrument” to mean:
- “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.”
59. The Statutory Instruments House of Commons Information Office Factsheet (<https://www.parliament.uk> 14/12/2019) explains the purpose of statutory instruments as follows:-
- “Statutory Instruments (SIs) are a form of legislation which allow the provisions of an Act of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act. They are also referred to as secondary, delegated or subordinate legislation.”
60. A statutory instrument is therefore a legislation. Therefore, the suggestion by the Respondent that the work of the Senate ends at the approval of Bills concerning county governments and does not extend to the approval of statutory instruments gives *the Constitution* a restricted and narrow interpretation. Such an interpretation will result in the ouster of the Senate’s constitutional role in the enactment of legislation. As such, I reject the Respondent’s submission that the Senate had no role to play in the enactment of the impugned Order.
61. The question is whether the impugned Order did not receive the approval of the Senate. Nobody knows. The only offices that could have answered this question are the National Assembly, the Senate and the Attorney General. None of them was made a party to the petition. The Respondent had no role in ensuring that the Senate was involved in the approval of the impugned Order. The Petitioner’s claim that the Senate was not involved in the promulgation of the impugned Order therefore remains unanswered because the entities that could have answered the question were not made parties to the petition. No finding can be made on the issue in the absence of the necessary parties. To do so would violate the right to a fair hearing which is guaranteed by *the Constitution*.
62. On the alleged violation to the right to property protected by Article 40 of *the Constitution*, the Petitioner contended that the increment of the levy directly affects the right to property of its members as they are exposed to double taxation. In reply, the Respondent submitted that the Petitioner failed to demonstrate how there has been a violation of the right to property.
63. The Respondent submitted that Parliament in its wisdom legislated under Section 15 of the Sacco Act that a levy will not be charged on any other aspect other than the deposits held by deposit-taking Sacco societies and therefore the imposition of the levy is not the Respondent’s decision but a legislative



imperative defined in law. It is therefore the Respondent's position that a challenge on the impugned levy in the manner crafted by the Petitioner can only stand by way of a challenge to the relevant statutory provision being Section 15 of the Sacco Act and not a remote conjectural grievance on an Order made pursuant to the said statutory provision.

64. The Respondent further contended that in any event, the Petitioner has not demonstrated how the charging of the levy as required by law is indeed punitive. The Respondent also submitted that the allegation of double taxation is factually inaccurate and legally misinformed as double taxation is the imposition of tax twice on the same income and the imposition of the impugned levy does not amount to taxation.
65. I agree with the Respondent's submission. The imposition of the levy was done by Parliament through Section 15 of the Sacco Act. The Petitioner has not challenged the said provision and the court cannot make a pronouncement on the issue of alleged double taxation since the imposition of the levy is based on a valid legal provision. The Respondent is also correct that the levy is not a tax. It is not remitted to the tax collector. The Petitioner's argument of double taxation is therefore without any basis and the same is rejected. That puts to rest the Petitioner's claim that the impugned Order violates the right of the members of Sacco societies to own property.
66. On the right to equality and freedom from discrimination under Article 27, the Petitioner contended that the method of calculation of the levy is "erratic, uncertain and unpredictable" as compared to other taxation tables such as the one used by the Retirement Benefits Authority. The Petitioner's case is that the *Retirement Benefits Act* uses a graduated scale in accordance with the contributions recovered by each retirement benefit scheme whereas the impugned Order uses a rate which is similar for all Sacco societies with no regard to the size of the Sacco.
67. In reply to the argument, the Respondent contended that the calculation used is not erratic, uncertain and unpredictable as there are specific percentages which the levy will implement progressively. The Respondent further submitted that the claim by the Petitioner fails as it does not show that the Respondent is treating its members differently from the way other Sacco societies are treated. The Respondent also submitted that all statutory regulatory bodies have the unfettered and statutory discretion to impose levies on the businesses they regulate and prescribe the rates applicable. Examples given are the Insurance Regulatory Authority which charges a percentage on the value of the underwritten premium and the Retirement Benefits Authority which charges a levy on the pension fund.
68. In *James Nyasora Nyarangi & 3 others v Attorney General* [2008] eKLR, the law on discrimination was explained as follows:-

"The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The U.S case of *GRIGGS v DUKE POWER COMPANY* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants."



69. It was not enough for the Petitioner to allege the violation of the right to equality and freedom from discrimination. It needed to show by way of evidence that other persons were receiving different treatment from that given to it. Indeed the examples given of the Retirement Benefits Authority and the Insurance Regulatory Authority will show that each one of them charges a levy according to what it collects. It is the same format that is applied to the Sacco societies which take deposits. I therefore find that there has been no violation of the right to equality and freedom from discrimination as protected by Article 27 of *the Constitution*.
70. On the alleged failure to comply with Article 47 of *the Constitution*, the Petitioner claimed that the Respondent did not take all views and material facts into consideration when submitting the impugned Order for gazettment. Its case was that its views were not taken into action. The Petitioner also contended that the Respondent did not adhere to process as laid out in sections 6 and 8 (1) of the *Statutory Instruments Act*, 2013 on the preparation of a regulatory impact statement.
71. In response, the Respondent submitted that the cited provisions of the *Statutory Instruments Act* do not apply to the impugned Order as it falls within the exception provided under Section 9 of the Act. The Respondent further asserted that the Petitioner failed to show that the principle of fair administrative action was not adhered to. According to the Respondent there were wide consultations before the publication of the impugned Order which confirms that there was no violation of Article 47(2) of *the Constitution*.
72. Section 4 (3) of the *Fair Administrative Action Act* states that where an administrative action is likely to have an adverse effect on the rights and fundamental freedoms of any person, that person should be given:-
- a) Prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b) An opportunity to be heard and to make representations in that regard;
 - c) Notice of a right to review or internal appeal against an administrative decision, where applicable;
 - d) A statement of reasons pursuant to section 6.
73. Section 5 of the same Act states that where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, the administrator shall among other things:-
- (a) Issue a public notice of the proposed administrative action inviting public views in that regard;
 - (b) Consider all views submitted in relation to the matter before taking the administrative action;
 - (c) Consider all relevant and material facts.
74. It has already been established in this judgement that the Respondent took extensive measures to ensure that stakeholders were involved in the process of the enactment of the impugned Order. The Petitioner was fully involved in the process. It received invitations from the moment the impugned Order was conceived and participated all the way until the validation stage. I have already discussed the evidence in support of this finding and I need not reiterate it at this point.



75. In the case of *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR it was held at paragraph 49 that:-

“The views of the public do not have to prevail in the process of public participation. What is important is that in deciding on the enactment of a legislation the various opinions of the public have been taken into consideration with all other relevant factors.”

76. In light of the finding that there was sufficient public participation, it goes without saying that there was no violation of the provisions of the *Fair Administrative Action Act* or Article 47 of *the Constitution*. In any case the Respondent did not have to incorporate the suggestions of each and every stakeholder. It was only sufficient that the opinions were discussed and considered.

77. Section 6 of the *Statutory Instruments Act* states as follows:-

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

78. Section 9, however, provides circumstances where regulatory impact statements may be unnecessary. Two of those exceptions are where an amendment of a statutory instrument does not fundamentally affect the legislation’s application or operation and where an amendment of a fee, charge or tax is consistent with announced government policy.

79. Applying the stated law to the impugned Order, it is my finding that the impugned Order fell within the cited exceptions and a regulatory impact statement was not necessary in the circumstances of the case. It is therefore my conclusion that the Respondent did not violate the right to fair administration action or the requirement for a regulatory impact statement.

80. I have considered the issues raised by the Petitioner and my conclusion is that the petition is bereft of merit and should be dismissed at this stage. However, there is the question of locus standi raised by the Respondent. The Petitioner claimed to have locus standi pursuant to Article 22 (2) (b) and (d) of *the Constitution*. The Respondent contended that the petition is defective on the basis of Section 28 (3) of the *Co-operative Societies Act* which requires any suit by the Petitioner to be instituted through a resolution of the Petitioner’s Management Committee. The Respondent submitted that since there is no resolution of the Committee authorizing the institution of the suit, the petition should be deemed defective and dismissed.

81. Section 28(1) of the *Co-operative Societies Act* provides that every co-operative society shall have a Committee. Sub-section 3 states that:-

“The Committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the co-operative society, direct the affairs of the co-operative society with powers to-

- (a) enter into contracts;
- (b) institute and defend suits and other legal proceedings brought in the name of or against the co-operative society; and
- (c) do all other things necessary to achieve the objects of the co-operative society in accordance with its by-laws.”



82. It is true that the locus standi defence has lost its stature in matters brought in the public interest and those challenging violation of constitutional rights and fundamental freedoms-see John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR; Manase Guyo & 260 others v Kenya Forest Services [2016] eKLR; Kiluwa Limited & another v Commissioner of Lands & 3 others [2015] eKLR; and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. The question is whether all the laws requiring that permission be obtained before a suit is commenced have been rendered otiose by Article 22 of *the Constitution*. The Petitioner thinks so but the Respondent thinks otherwise.
83. In the case of East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR, Mumbi Ngugi, J was faced with the question as to whether the institution of a suit in the name of a company without the authority of the company was a procedural technicality that could be overlooked by reference to Article 159(2)(d) of *the Constitution*. She held that:-
- “It is not a “procedural technicality” to require that a company authorises any proceedings brought in its name.”
84. The learned Judge went ahead and explained why it was necessary for a company to authorize proceedings:-
- “The requirements of the Companies’ Act and the petitioner’s Memorandum and Articles of Association with regard to the execution of documents and filing of depositions authorising institution of suits are, I believe intended to protect the petitioner’s assets, to ensure among other things, that the petitioner is not embroiled in lawsuits instigated by individuals within the company without the sanctions of the body authorised to involve the company in litigation.”
85. I am in agreement with the position of the learned Judge. A chief executive officer of a co-operative society cannot take the society to the battlefield of litigation without the authority of the Committee. It is the members of the Committee who are answerable to the members of the society and it is only them who can decide what is good for the society. Litigation is not cheap and before a suit is lodged, the decision-making organ of the society must have its input in the decision. The Petitioner did not exhibit the authority of the Committee authorizing the commencement of the petition. For that reason, I agree with the Respondent that this is a matter fit for striking out.
86. In conclusion, I hold and find that the petition is defective. Further, that having considered the substance of the petition, I have also found it to be without merit. In the circumstances the petition is dismissed. The Petitioner should not be punished with costs in respect of a litigation it did not commence. As such, each party is directed to meet own costs of the proceedings.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019

W. KORIR,

JUDGE OF THE HIGH COURT

