REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISSION

JUDICIAL REVIEW CASE NO. 2 OF 2018 AND JR 709 OF 2017

[CONSOLIDATED]

REPUBLIC.....APPLICANT

VERSES

MINISTRY OF HEALTH.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

EXPARTE

KENNEDY AMDANY LANGAT AND 14 OTHERS...APPLICANTS IN JR NO. 2 OF 2018

AMIT KWATRA AND 12 OTHERS.....APPLICANTS IN JR 709 OF 2018

JUDGMENT OF THE COURT

1. From the onset, the delay in delivering this judgment is highly regretted. Judgment was scheduled for delivery on 21st March 2018 but as a court, we were thrown into mourning our late brother Justice Joseph Louis Onguto who departed suddenly. Secondly, as soon as we had interred his remains, I had to report to the new station away from Nairobi and settle in, with a myriad of challenges, before securing an appropriate date to return to Nairobi to deliver this Judgment. The above situations raised anxiety from the parties who I cannot fault as they had no full knowledge of what the transfer and settling in a new court station entailed. I am therefore glad that this day is here for this long awaited judgment to be rendered. Again, my profound apologies to all the parties and their legal representatives while appreciating their patience.

2. The exparte applicants in the consolidated matters are various persons engaged in the Shisha business of either consumption, trading, manufacture or importation thereof and are therefore consumers or owners of bars and restaurants situate mainly in the City of Nairobi, Kenya.

3. The 1st Respondent is the Ministry of Health of the Republic of Kenya, whereas the 2nd Respondent is the Cabinet Secretary in charge of the 1st Respondent Ministry and all its operations in Kenya.

4. The 3rd Respondent is the Attorney General of the Republic of Kenya, an office established under Article 156 of the Constitution of Kenya and the Office of Attorney General Act, and is therefore enjoined in these proceedings by virtue of the mandate and functions of that office as the Principal Legal advisor to the National Government.

5. Vide a Notice of Motion dated 16th January 2018, the exparte applicants seek from this court the following judicial review orders and other orders:

*1. THAT orders of **CERTIORARI** do issue removing into this Honourable Court and quashing the decision of the Ministry of Health*

*contained in the i**mpugned Legal Notice Number 292 of 2017 dated 28th December 2017** issued by the Cabinet Secretary, Ministry of Health, purporting to otherwise ban the importation, manufacture, sale, offer for sale, use, advertisement, promotion, facilitation or encouragement of SHISHA smoking in Kenya;*

*2. THAT orders of **PROHIBITION** do issue to restrain the Cabinet Secretary from making further notices without complying with the relevant laws and rules regarding the importation, manufacture, sale, offer for sale, use, advertisement, promotion, facilitation or encouragement of SHISHA smoking in Kenya;*

3. THAT the Costs of this Application be provided for.

6. The judicial review application is predicated on the grounds set out on the face of the Notice of Motion namely: that it is just and equitable for the court to review the impugned notice for it does not comply with the law; that the legal notice was issued without proper involvement and consultation with the industry stakeholders; that the Cabinet Secretary acted unprocedural and *ultravires* as the regulations as gazetted were contrary to section 5(1) of the Statutory Instruments Act; that under section 36 of the Public Health Act Cap 242 Laws of Kenya, he did not act within his powers; that the legal notice failed to indicate the chemical composition of Shisha, its health hazards or any communicable diseases that may be contracted if any and that the legal notice had paralysed the operations of the applicants as they are in long-term leases for the Shisha premises.

7. The Notice of motion is further supported by the chamber summons for leave, statement of facts together with the verifying affidavit sworn by **Hussein TAHER** through their affidavits dated 19th January 2018. Hussein Taher deposed that he had complied with all the legal requirements under the law including paying taxes to the Kenya Revenue Authority and getting the requisite licences and complying with the law including Tobacco Control Regulations 2014; Food and Chemical Substances Act, by having his products tested. Further, that his products had been tested and approved by the United Kingdom Accreditation Service.

8. It was the exparte applicant's case that the Legal Notice Number 292 of 2017 banning the sale and importation of Shisha by the Ministry of Health was unconstitutional as it contravenes the fundamental rights in the Constitution this being Articles 10,19(2),20(2) (3) (f), 27,35 (3) 40(1) 47(1) (2), 165 (3) (b) and (d) (ii).

9. The deponent averred that the Cabinet Secretary in exercising his powers under section 36 (m) of the Public Health Act violated the law by failing to engage with stakeholders for consultations and that no cogent reasons for his decision to ban the use of Shisha in Kenya were given.

10. It was his case that the rules made by the Cabinet Secretary have not been substantiated by a conclusive medical expert's report showing the purported health effects or risks associated with Shisha use. That the WHO reports annexed are but advisory and inconclusive and meant for further research.

11. It was his case that the WHO reports have been heavily criticised by experts giving the example of Dr. Kioko wa Mang'eli who is an expert in Standards and Conformity Assessment, referring to the latter's report titled "***SCIENTIFIC CRITIQUE AND REBUTTAL OF THE WORLD HEALTH ORGARNISATION (WHO) REPORT TITLED"WARTERPIPE TOBACCO SMOKING: HEALTH EFFECTS, REASERCH NEEDS AND RECOMMENDED ACTIONS FOR REGULATORS, 2ND EDITION."***

12. The deponent further referred to **Dr chaouachi**, a Paris based expert and his research and his article titled ***" a critique of the World Health Organisation (WHO) TobReg's "advisory note" report entitled: " Water-pipe Tobacco Smoking: Health Effects, Research Needs and Recommended Actions by Regulators."***

13. The applicant pointed to the annexed reports of **NACADA** and **University of *Nairobi*** *Status of Shisha and Kuber use in Kenya-Policy Brief No. NAC /15/2014-NaCADA) and (traces of opiates in shisha collected in Nairobi Kenya''*) contending that there is no credible evidence of any qualitative tests having been carried out; that in any event, NACADA has not availed any results of the official reports of the Government Chemist which it relied on as a basis of its consequent determination that Shisha and its products are harmful; that therefore its hazardous effects are unsupported by medical reports; and that they are subject to bias and speculation.

10. It was the exparte applicant's case that there is no connection between the spread of communicable diseases and the use of Shisha or reasonable risks that communicable diseases can be spread through use of Shisha.

11. He averred that he had taken precautionary measures to mitigate health risks associated with shisha by ensuring each person has their own disposable mouth piece, smoke pipe; ensuring the equipment is thoroughly cleaned; ensuring Shisha is tested to eliminate hazardous substance and it complies with international standards of quality and the tobacco guidelines set by Tobacco Control Board and the Ministry of Health which requires pictorial health warnings.

12. He contended that the chemical analysis carried out by Agri Quest completed on the 12thDecember 2017 showed no traces of opiates at all in the Shisha samples taken. That compared to other tobacco products shisha apparatus is designed to minimise health risks; that coal used in shisha smoking is less harmful in comparison to coconut coal in use globally made from recycled coconut husks.

13. He advanced the view that industry regulation as opposed to a blanket ban would be most appropriate, pointing to Switzerland where the world health organisation is based as an example.

14. He averred the respondents have failed to show shisha is a predisposing factor in the increased rate of communicable diseases, with no conclusive research being done to establish a causal link. He asserted the products are only available to adults and refuted the allegation that it is a gateway to other drugs.

15. He reiterated that the enactment of the Legal Notice No. 292 of 2017 did not comply with the procedure set out in the Statutory Instruments Act No. 23 of 2013 in particular, sections 5 and 11. That the Cabinet Secretary had not illustrated the persons he consulted and neither was it tabled in Parliament as is required.

16. That there was a further violation of the Fair Administrative Action Act as no notice was issued as required in section 4(3) (a) (b) and (g) and that this breach of the law had not only caused substantial losses but brought businesses to the brink of collapse and in turn loss of employment. He contended that the failure to consider and issue sufficient notice would have enabled them clear existing stock and avoid restocking which subjects them to irreparable loss and damages He prayed that the court invalidates the Legal Notice.

17. **AMIT KWATRA** through his affidavit dated 19th January 2018 responding to the affidavits of the respondents averred that Shisha business is licensed by both County and National Government. It was his case that the Cabinet Secretary breached the law by failing to indicate which diseases are transmitted and obtained through the use of Shisha as required under section 36 (m) of the Public Health Act.

18. He stated that Article 27 of the Constitution recognises that every person is entitled to equal benefit and protection before the law. That they were denied an opportunity to make representations before the rules were made, and that neither were they given notice and reasons as required under the Fair Administrative Action Act.

19. He contended that the Tobacco Control Act 2007 regulates the importation, manufacture and sale of tobacco in Kenya which includes Shisha. That section 2 of the Act defines ***tobacco product*** to mean a product composed in whole or in part, of tobacco leaves and an extract of tobacco leaves intended for use by smoking, inhalation, chewing, sniffing or sucking and include cigarettes. Analysing the annexed reports by the respondents he contended that those reports had been criticised by Dr Kioko wa Mangeli and Dr Kamal Chaouachi based in Paris.

20. It was his case that many countries after considering the WHO report carried out further research and opted for regulating rather than banning Shisha. Further that there was no evidence that Shisha products are laced with hard drugs. He averred that the WHO does not recommend banning of water pipe smoking but called for further investigations to be carried out

21. Mr Kwatra elaborated on the precautionary measures they had put in place to minimise the risk associated with shisha consumption. He refuted that public awareness campaigns have been carried out by the respondents in the form of brochures and termed them as mere allegations.

22. It was his case that public interest includes the law being followed to the letter and relied on **Petition No.143 of 2015 British American Tobacco Kenya Ltd (BAT) versus Cabinet secretary for Health and 2 others 2015 eKLR.**

23. He further deposed that the cost of complying with the rules are colossal, their businesses will suffer and collapse; they are discriminative to a section of tobacco users and they infringe on their constitutional rights under Article 47.

24. He asserted that Shisha smoking is an African invention with a cultural and sociological purpose pointing to the article by Dr Kamal on page 2 of his Commentary Journal of Negative Results in Biomedicine.

25. Responding to the affidavit of Dr Kioko he denied that Shisha causes non communicable diseases and or that it predisposes communicable diseases and maintained that the claim is unsubstantiated. He pointed out to the Global Tuberculosis Report urging that it does not state that Kenya is a high Tb burden because of shisha, noting that Tanzania is also high on the list.

26. It was the applicants' case that the statistics with regard to tuberculosis are just numbers and show no relation with Shisha consumption. Reiterating that TB is a world-wide nuisance. He averred that prioritization of health among the Kenyan people should not be selectively done. He denied all allegations deposing that no proof had been given to substantiate the allegations that Shisha use was harmful to public health.

The Respondents' case

27. All the Respondents opposed the exparte applicants' Notice of Motion through the affidavits filed by the respondents sworn by Dr **Jackson Kioko** (Director of Medical Services) and Dr Cleopa Mailu (Cabinet Secretary Ministry of Health (as he then was). In his replying affidavit dated 5th January 2018, Dr Jackson Kioko deposed that Shisha consumption affects all parts of the body, causes non-communicable diseases and predisposes many to communicable diseases. That non- communicable diseases are initiated and accelerated by use of Shisha. He gave the example of cancers, high blood pressure, stroke, heart attack, blockage of limb arteries, asthma, bronchitis, derangement of metabolism of fat and sugar in the body.

28. He averred that prevention is better than cure, as medicine is a multifaceted, intersectoral and multidisciplinary responsibility and should be prioritised using the Constitution and the Public Health Act Cap 242 and the Health Act of 2017.

29. Dr Jackson Kioko further deposed in contention that Shisha use is becoming socially acceptable and therefore moving to the confines of homes; its exposure for those who do not smoke through second hand smoke as well as burning charcoal causes serious health implications. That Shisha contains numerous carcinogens and toxicants that have been identified to cause cancer and must therefore be banned.

30. He elaborated that charcoal used to heat during consumption contributes to high levels of carbon monoxide and generation of carcinogen. That the apparatus used for shisha consumption is designed to influence and drive consumption.

31. It was his contention that Shisha affects both men and women reproductive systems causing infertility, impotence and low libido. To the pregnant women he asserted that the foetus also gets affected, with the outcome being that overall development of the embryo, and the child

is suppressed.

32. Dr Jackson Kioko further deposed that to the women who consume and work in places where Shisha is taken, they do not usually carry their pregnancies to term. That absorbed nicotine remains in the baby for a long time and continue to suppress ongoing development of the body mass and vital individual organs such as the brain, heart and lungs; that the frequent clinical manifestations if not aborted include low birthweight, sudden infant death syndrome, mental retardation and congenital heart diseases.

33. He further added that Shisha had led to social disintegration and a predisposition to numerous debilitating diseases to the human body such as increase in blood pressure, tooth decay cancer of the mouth, tongue, larynx, oesophagus and stomach. He therefore contended that the stoppage of Shisha would prevent and reduce the risk factors associated with such diseases.

34. In his further affidavit sworn on the 1st February 2018 in response to the applicants' affidavits, Dr Jackson Kioko stated that the two affidavits sworn by **Hussein Taher** and **Amit Kwatra** offend the basic principles of judicial review as they introduce new facts and grounds not contained in the statement of facts and grounds filed at the leave stage.

35. He stated that the national government has not issued licenses for Shisha importation, sale manufacture, advertising and promotion. He deposed that it is not a standardised product and neither is it regulated nor has the Government permitted its use. That the Kenya Bureau of Standards shows the substance is unregulated and has no licensing regime.

36. He reiterated that Shisha consumption is known to be an avenue for other drug consumption such as heroin, opium and cannabis sativa and therefore a threat to public health. That the shared mode of consumption is a health hazard as it is shared among people of unknown health status; that the second hand smoke is a predisposing factor for the spread of airborne diseases such as tuberculosis and herpes. He emphasised that the public health concerns of shisha smoking are adverse.

37. He pointed out that the World Health Organisation is a United Nations organ responsible for setting global health standards; giving technical advice to Member States on global health matters and helping them come up with policies and legislation that safe guard global public health. This he contended is usually done after thorough research.

38. On the critique by Dr Kioko Mang'eli, Dr Jackson Kioko urged that the critique should be disregarded as the said Dr Kioko Mang'eli was not a medical doctor. Further he averred that the affidavit of Hussein Taher at paragraph 15 should be struck out together with the report as it offends the Oaths and Statutory Declaration Act, in that the annexed affidavit of Dr Kioko Mang'eli is not filed hence the said Dr Eng Kioko Mang'eli is a stranger to these proceedings.

39. It was the contention by Dr Jackson Kioko that Agriquest Industrial Labs licence was suspended for failure to meet regulatory requirements, therefore any reliance by the applicant to suggest that his consignment was free from opiates should be disregarded. It was the deponent's contention that the NACADA report is based on scientifically proven facts by Government institutions and hence it could not be described as mere reports.

40. Dr Jackson Kioko further deposed that matters public health are not based on cultural practices and beliefs but are based on scientific evidence based on proven facts; and that his reasonability test remains unchallenged.

41. **Dr Cleopa Mailu Cabinet Secretary**(the second respondent) filed his replying affidavit dated 19th January 2018. It was his case that the test to be applied in determining the validity of a regulation is to subject it within the four corners of the parent Act and by reference to specific provisions of the statute which confer the power of delegated legislation, its object and purposes which the applicants had not done.

42. He averred that the applicants had not demonstrated that they had licenses which allowed them to engage in the business of Shisha therefore they were not identifiable legitimate traders. He stated that Articles 42 and 43 of the Constitution guarantee the right to a clean environment and the highest attainable standard of health. To that effect, the deponent Dr Cleopa Mailu averred that Parliament enacted the Health Act No 21 of 2017 and that section 5(1) thereof stipulates that every person has the right to the highest attainable standard of health which shall include progressive access for provisions of promotive, preventive, curative, palliative and rehabilitative services.

43. Dr Mailu contended that under section 36 of the Public Health Act, whenever any part of Kenya is threatened by any formidable epidemic, endemic or infectious diseases, the Minister may make rules for the purposes provided for by the Act and that most importantly section 36(m) which specifically provides for any other purposes whether of the same kind or nature as the foregoing or not which has for its object the prevention, control or suppression of infectious diseases.

44. It was further deposed by Dr Mailu that section 13 of the Public Health Act places responsibility on every health authority to take all lawful means for preventing or dealing with any outbreak of infectious or communicable diseases, to safeguard and promote public health.

45. Dr Mailu further contended that the Ministry of Health had the responsibility through the statutes and the Constitution to protect the greater good of the public health; and that on the basis of this, the Cabinet Secretary imposed a ban on importation, manufacture, sale, offer for sale, advertisement, promotion or distribution of Shisha in Kenya vide Legal Notice No. 292 of 2017.

46. It was Dr Mailu's case that available statistics indicate that Shisha has chronic side effects on consumers and non-consumers and had been found to be the gateway to consumption of other hard drugs such as heroine, which he contended had been established from various Shisha vendors in Kenya. He added that the statistics further indicate that tuberculosis is a public health problem in Kenya; that the country is ranked 15th among the 22 of the high TB burden; and that the multi drug resistant TB had increased.

47. Dr Mailu emphasised that no smoking is safe for lungs as one puff of Shisha is equivalent to smoking one hundred (100) cigarettes which

was a dangerous predisposing factor for cardio pulmonary diseases.

48. Dr Mailu reiterated that he acted in accordance with the provisions of the Public Health Act, more specifically, in line with section 36(m) of the Public Health Act. He maintained that the element of prevention of infectious diseases require interruption of the disease at its weakest link; and that the shared apparatus of smoking Shisha is a predisposing factor for the spread of multi-drug resistant TB.

49. It was contented by Dr Mailu that the Ministry of Health had carried out an awareness campaign through posters and brochures on harmful effects of Shisha and that the Kenya Gazette was deemed to not only be sufficient but the official means of communication to bring it to the attention of those likely to get affected by it.

50. Dr Mailu refuted claims that the decision to ban shisha was based on bias, unreasonableness or bad faith but that to the contrary, the decision was informed by greater public interest of protecting the public from harmful health effects.

51. It was Dr Mailu's contention that the requirement of sections 5 and 11 of the Statutory Instruments Act applied to stake holders who engage in legitimate business and are licensed to manufacture, sell, import, and distribute Shisha which is not licensed in Kenya. Further, that the allegations on alleged losses to be suffered by the exparte applicants are unsubstantiated as neither of the applicants had demonstrated that they were licensed to undertake such trade in Kenya by any regulatory authority.

52. Dr Mailu further deposed that the economic interests of the Shisha traders and consumers in Kenya should not be allowed to control and override the greater public health agenda. In summing up he deposed that Article 21(2) of the Constitution demands that the state should come up with measures to achieve the rights guaranteed under Article 43 of the Constitution some being the highest standard of health and a clean environment.

53. The above depositions were reiterated in the arguments for and against the Notice of Motion through submissions filed and highlighted by the parties' respective advocates on record as summarised below.

The Exparte Applicants' Submissions

54. According to the 2nd Exparte Applicants the facts relied upon in their written and oral submissions are set out in the affidavits sworn by **Hussein Taher** and **Amit Singh Kwatra** both sworn on 19th January, 2018. In their view, two (2) issues are for determination namely:

> **i. Whether the procedure leading to the enactment of the Legal Notice breached the law for lack of Public Participation.**
>
> **ii. Whether the 2nd Respondent abused discretionary power under Section 36(m) of the Public Health Act and whether the CS acted in favour of the Public Interest/Health**

55. On issue No. 1, citing the Constitution, it was submitted by Ms ShellaSheikh counsel for the exparte applicants that Public participation is enshrined in the Constitution of Kenya, 2010 under Article 10 (2) (a). She relied on paragraphs 17 and 47 of earlier judgments delivered by Hon. Justice Lenaola (as he then was) in ***George Ndemo Sagini v Attorney General & 3 others [2017] eKLR*** and of Court of Appeal judgment in ***British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR*** respectively stating that the participation of the general public in public affairs including direct and indirect participation in the enactment of legislation is a constitutional imperative.

56. It was further submitted that public participation is a fundamental human right. Reliance was placed on the case of ***Doctors for Life International v Speaker of the National Assembly & Others [2006] ZACC* 11** cited at page 30 of the ***George Sagini (supra) case.*** It was therefore submitted that the 2nd Respondent's failure to provide materials and information of the basis for the Legal Notice violated the ex parte Applicant's right to fair administrative action under Article 47.

57. The applicants' counsel further cited the **Statutory Instruments Act No. 23 of 2013**, and submitted that there was no consultations and involvement of stakeholders in the Shisha industry and other persons likely to be affected by the implementation of the Legal Notice as required under Section 5 (1) (a) of the Act and that no evidence had been adduced by the Respondents of a Regulatory Impact (RI) statement in terms of Section 6 of the Act.

58. Further, it was submitted that none of the provisions of Sections **7, 8 and 11 of the Act requiring the** setting out of the particulars that RI Statements must contain and the responsibilities of the 2nd Respondent in this regard, notification of the RI Statement through the Kenya Gazette and the tabling of the Legal Notice before Parliament were complied with.

59. It was further submitted, citing the **Fair Administrative Action Act, 2015** that the 2nd Respondent violated the provisions of Section 4(3) (g) of the said Act in that no evidence (documentation, information and materials were supplied by the 2nd Respondents) and reasons given prior to issuing the Legal Notice thereby denying the ex parte Applicants the opportunity to make representations on the same.

60. On the second issue, it was submitted that no medical report was relied upon by the Respondents linking the use of Shisha and its apparatus to transmission of infectious and communicable diseases and that the Affidavit evidence relied on by the Respondents are scientifically inconclusive as they show no evidence of official findings of survey and laboratory tests. It was thus submitted that the 2nd Respondent while purporting to protect public interest violated the laid down laws and procedures requisite for enactment of legislation and regulations to control any industry.

61. In conclusion it was submitted on behalf of the exparte applicants that the 2nd Respondents' evidentiary materials are misleading and unsubstantiated for reasons that the WHO, MoH, UoN and NACADA reports are not conclusive scientific reports adding that the WHO report has not been ratified by Kenya and that there is no formal study associating Shisha use with Hepatitis and TB and that as such, the court should not enforce the actions of the 2nd Respondent who is in breach of the duty to act fairly and exercise statutory discretion reasonably. Reliance was placed on paragraphs 12 and 13 of a judgment delivered in ***Republic v Registrar of Companies Ex Parte Independent Electoral Board of Kenya National Chamber of Commerce & Industry (KNCCI) [2016] eKLR.*** The court was urged to allow the ex parte Applicants' application as prayed.

The Respondents' Submissions

62. The Respondents (Ministry of Health, the Cabinet Secretary Ministry of Health and the Honourable Attorney General) in their written submissions dated 1st February, 2018 and oral highlights by their counsel Mr Odhiambo placed reliance on affidavits dated 1/2/2018, 5/1/2018 and their earlier submissions dated 5/1/2018 in opposition to the application for stay.

63. In their submissions, the Respondents contended that there is a fairly well established criteria for issuance of judicial review orders that is, that Judicial Review orders will only be available in cases of illegality, impropriety of procedure and irrationality (the three I's).

64. It was therefore submitted in contention that the decision to ban importation, manufacture, sale offer for sale use, advertise, promotion of distribution of shisha in Kenya vide legal notice 292 of 2017 dated 28/12/2017 was done in accordance to the powers under Section 36 (m) of the Public Health Act and that the object of the rules in the Act were put in place so as to ensure reasonable measures are taken to safeguard the greater public health as evidenced in their replying affidavits and annextures and as such the decision was not made ultra vires which fact the Ex parte Applicants had, according to the Respondents, not proved.

65. It was further submitted that the supplementary Affidavits by the applicants contained grounds and facts not captured in their statutory statement of facts. Reliance was placed on the case of ***Khobesh Agencies Limited and others vs Minister for Foreign Affairs and international relations and others –Nairobi JR No. 262 of 2012 [2013] eKLR*** where it was held that it is a settled principle that in an application for judicial review, the applicant's case is limited to grounds set out in the statement of facts in line with Order 53 Rule 4(1) of the Civil Procedure Rules.

66. It was further submitted that the application does not meet the true test to be applied in determining the validity of a regulation by subjecting it to the parent Act and specific provisions of statute i.e. that the applicants had neither proved the invalidity of the rules nor had they explained the unreasonable or unnatural effects or the aftermath of the purported breach to warrant the granting of judicial review remedies. To this end the respondents relied on the cases of ***Maharashtara State Board of SecondaQ & Higher SecondaQ Education v Kurmarsheth & others 1985J LRC (Const)*** and ***Nature Foundation Limited v Minister for Information and Communication & another [2015]eKLR*** stating that the applicants had not demonstrated the invalidity of the rules as against the Public Health Act and the case of ***Republic vs Kenya Power and Lighting Company Limited & another [2013] eKLR*** where the court observed that ***"…it is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."***

67. Further submission on the part of the respondents was that none of the applicants had demonstrated that they were licensed to trade in Shisha under the Laws of Kenya hence the respondents were not entitled to the orders sought.

68. It was submitted that the court should not be used to sanction an illegality as this will offend the key principle of law which is legality, stating that a legitimate expectation can only be properly grounded on the law. The case of ***Pevans East Africa & others vs Betting and Licensing Board and 3 others Petition No. 353 of 2017*** which discusses the question of legitimate expectation was relied on. In the case, citing **H.W.R. Wade & c.f. Forsyth [86] at pages 449-550** it was stated that it was not enough that an expectation should exist but that it must be legitimate and that the pre-conditions for an expectation to be termed as legitimate listed, it was thus stated that ***"an expectation whose fulfilment requires that a decision maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many decisions, and express in several, that the expectation must be within the powers of the decision maker before any protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting unlawful practice."***

69. The respondents contended that they acted in line with the provision of Section 36 (m) of the Public Health Act and added in submission at paragraph 9 that the ban being for the greater good of the public should not be invalidated and on this the Respondents relied on the decision of justice Majanja in ***Richard Dickson Ogendo and 2 others vs Attorney General & 5 others [2014]*** where it was stated ***"…..Although the Statutory Instruments Act was not applicable, it is reflective of the kind of public participation contemplated in future. What is clear from the Act is that it does not provide a consequence for lack of public participation because ultimately the legislature, as the representatives of the people will decide whether the statutory instruments is accepted or rejected in accordance with Section 11 of the Act. Should the rules be invalidated because one aspect of public participation has not been achieved? I think not. The court is obliged to look at the entire process of law making, assessing both the quantitative and qualitative aspects of public participation and determine whether legislation should be invalidated on that account….the Statutory Instruments Act does not require that subsidiary legislation be annulled on that account as it requires the instruments that have not been tabled before Parliament….."***

70. It was submitted that in so deciding**,** Justice Majanja adopted the position taken by Emukule J (as he then was)**,** in ***John Muraya Mwangi & 495 others v Minister for State for Provincial Administration & Internal Security & 4 others- Nakuru HC Petition No. 3 of 2011 [2014] eKLR*** where he stated that**,** ***"similarly the court cannot say with certainty that there was comprehensive consultation in the passage of the new regulations. It cannot also say that there was no consultation. The benefit of the doubt will therefore go to the purpose of the legislation to regulate the manufacture and sale of alcoholic drinks, and to protect consumers, and especially the children. In this case I decline to invalidate the rules on account of lack of public participation on the ground that I am required to give effect to other values of equal importance like good governance and the need to the human rights of others particularly those who are at risk of loss of life and property through road carnage arising from drunk driving."***

71. The Respondents thus submitted in conclusion that the decision to ban use of Shisha was reasonable, legal, rational and well informed by public health interests in that examining the statistics in Kenya on the prevalence of Tuberculosis, there was need to take all reasonable measures to curb its spread and as such the orders of Certiorari and Prohibition should not issue.

72. It was contended in submission that Prohibition should not be used to curtail statutory powers. Adding further in submission that the application does not satisfy the threshold for the grant of the orders under Section 8 and 9 of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules and should thus be dismissed with costs**.**

DETERMINATION

73. I have considered the arguments and counter arguments by the parties' pleadings, affidavits, documentary evidence and written as well as oral submissions in court and the constitutional, case law and statutory provisions cited by the parties' advocates on record. In my humble view, the main issues that flow for determination are:

i. Whether the Cabinet Secretary for Health acted ultravires his powers in issuing the impugned Shisha ban Gazette Legal Notice ?

ii. Whether Shisha business is licensed to be undertaken in Kenya?

iii. Whether any new issues were introduced in the affidavits of the exparte applicants?

iv. Whether the exparte applicants are entitled to the prayers sought; and

v. What orders should the court make?

74. This case raised mixed feelings with views being advanced for and against the use of Shisha in the Kenyan Society. The question that immediately arises therefore is what the scope and purpose judicial review is. The Court of Appeal in the case of ***MUNICIPAL COUNCIL OF MOMBASA V REPUBLIC AND ANOTHER 2002 eKLR 223 CIVIL APPEAL NO 185 0F 2001*** the court of appeal stated:

"That is the effect of this Court's decision in the KENYA NATIONAL EXAMINATION COUNCIL case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.''

75. The above holding captures the essence and the scope of judicial review. In judicial review, the court is not concerned with the merits of the decision but the decision making process. Therefore, in my humble view, if the court were to consider the arguments raised by both parties with regard to the harmful or potential harmful effects or there being no harmful effects of Shisha use, then the court would no doubt be stepping outside the bounds of judicial review. In other words, in judicial review, the Court is not concerned with whether the decision to ban Shisha use or manufacture or sale or offering for sale of Shisha was right or wrong but whether the decision making process was followed to the letter in issuing the ban.

76. It is worth noting that the 1st set of applicants in JR 2 of 2018 never filed their substantive notice of motion after leave to apply was granted. They were required to do so within the stipulated timeframe in accordance with the conditions for leave of court and having failed to do so means that the court is no longer seized of their application and the leave granted accordingly terminates. The Court had nonetheless the duty to state their case which was initially consolidated with the second applicant's case.

77. Having established the scope of judicial review, I will now deal with the issues that the court is seized of in determining the 2nd exparte applicants' motion.

78. **On the first issue of whether the Cabinet Secretary acted *ultravires* his powers, t**he applicants averred that the Cabinet Secretary's decision was not only unprocedural, but that he violated sections 5 and 6 of the Statutory Instruments Act and further that he did not comply with the founding section 36 of the Public Health Act as the Legal Notice did not state the disease that the ban was protecting the public from.

79. The respondents on the other hand countered that argument and contended that the decision of the Cabinet Secretary was within the law made under section 36(m) of the Public Health Act in the unbiased interests of safeguarding public health.

80. Section 36 of the public health provides as follows:

"Rules for prevention of disease

Whenever any part of Kenya appears to be threatened by any formidable epidemic, endemic or infectious disease, the Minister may make rules for all or any of the following purposes, namely—

(a) the speedy interment of the dead; (b) house to house visitation;

(c) the provision of medical aid and accommodation, the promotion of cleansing, ventilation and disinfection and guarding against the spread of disease;

(d) preventing any person from leaving any infected area without undergoing all or any of the following, namely, medical examination, disinfection, inoculation, vaccination or revaccination and passing a specified period in an observation camp or station;

(e) the formation of hospitals and observation camps or stations, and placing therein persons who are suffering from or have been in contact with persons suffering from infectious disease;

(f) the destruction or disinfection of buildings, furniture, goods or other articles, which have been used by persons suffering from infectious disease, or which are likely to spread the infection;

(g) the removal of persons who are suffering from an infectious disease and persons who have been in contact with such persons;

(h) the removal of corpses;

(i) the destruction of rats, the means and precautions to be taken on shore or on board vessels for preventing them passing from vessels to the shore or from the shore to vessels, and the better prevention of the danger of spreading infection by rats;

(j) the regulation of hospitals used for the reception of persons suffering from an infectious disease and of observation camps and stations;

(k) the removal and disinfection of articles which have been exposed to infection;

(l) prohibiting any person living in any building or using any building for any other purposes whatsoever, if in the opinion of the medical officer of health any such use is liable to cause the spread of any infectious disease; and any rule made under this paragraph may give the health officer or a medical officer of health power to prescribe the conditions on which such a building may be used;

(m) any other purpose, whether of the same kind or nature as the foregoing or not, having for its object the prevention, control or suppression of infectious diseases,

and may by order declare all or any of the rules so made to be in force within any area specified in the order, and such area shall be deemed an infected area, and to apply to anyvessels,whether on inland waters or on arms or parts of the sea within the territorial jurisdiction of Kenya.

81. From the foregoing provision, clearly, the Cabinet Secretary has wide ranging powers under section 36 of the Public Health Act to undertake measures to ensure the safety of public health in the Republic. The Section does not make it mandatory for the Cabinet Secretary to name the particular or specific infectious disease when making the rules, whenever such a particular scenario arises. Therefore, the contention by the applicants that the infectious disease should have been named in the notice has no basis in the law. The applicants' assertion is therefore baseless and is hereby overruled.

82. **The next question under issue number one is whether the provisions of the Statutory Instruments Act, Act** No. **23 of 2013** were complied with by the Cabinet Secretary and what would be the effect of such a finding on the Regulations. Section 11 of the said Act provides:

" (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 Parliament.[emphasis added].

(2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).

(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 Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void."[emphasis added].

83. In this case, there was a statutory obligation on the part of the Cabinet Secretary responsible for Health to, within seven (7) ***sitting days after the publication of the Regulations,*** ensure that a copy of the Regulations were transmitted to the responsible Clerk for tabling before Parliament and the Clerk was enjoined to register or cause to be registered the Regulations for tabling or laying thereunder. Whether or not the relevant Cabinet Secretary did transmit the Regulations was, in my view, peculiarly within the knowledge of the said Cabinet Secretary and therefore it behoved him to place before the Court material supporting the fact that he had fulfilled the legal obligation placed on him. No evidence was placed before this court to demonstrate that the Cabinet Secretary did comply with the requirement of placing before the Clerk the Regulations for tabling before the relevant House of Parliament.

84. Section 11(4) of the Statutory Instruments Act clearly provides for the consequences for the failure to lay the instrument before the House within the stipulated period and the consequences are that ***"the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void."***

85. Therefore, in my view section 11(4) does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are likewise provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory.

86. There is however a difficulty in understanding the said provision. Whereas subsection (1) of section 11 of the Act provides that the Cabinet Secretary is enjoined within seven (7) sitting days after the publication of a statutory instrument, to ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament, there is no express period within which the Clerk is to table the Instrument before the House of Parliament. However, subsection (4) thereof provides that ***"if a copy of a statutory instrument that is required to be laid before 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."***

87. One of the rules of statutory interpretation is the rule of ***harmonisation*** which is to the effect that all provisions concerning an issue should be considered together to give effect to the purpose of the instrument. This principle was considered in the case of **Foundation For Human Rights Initiatives Vs. Attorney General HCCP No. 20 of 2006 [2008] 1 EA 120, Olum & Another vs. Attorney General (1) [2002] 2 EA 508 and Kigula And Others vs. Attorney-General [2005] 1 EA 132.**

88. Applying the rule of harmonisation, it is clear that since there is no other timeline stipulated under section 11 of the Statutory Instruments Act, save for the 7 days provided in subsection (1), the phrase ***"in accordance with this section.....after the last day"*** must necessarily refer to the same period of 7 days. It follows that if the Regulations were not laid before Parliament within seven (7) sitting days after the publication, the same would on the 8th day have become void, ***albeit the voidance of the Regulations would not nullify the acts which were done thereunder before the said 8th day.***

89. Subsection (1) of Sections 4 and 5 of the Statutory Instruments Act on the other hand provides as follows:

> ***"4. Object of the Act***
>
> ***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;***
>
> ***……..……..……..…..***
>
> ***5. Consultation before making statutory instruments:***
>
> ***(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—***
>
> > ***(a) have a direct, or a substantial indirect effect on business; or***
> >
> > ***(b) restrict competition;***
> >
> > ***the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.***
>
> ***(2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—***
>
> > ***(a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and***
> >
> > ***(b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.***
>
> ***(3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—***

(a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

(b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

90. Whereas section 36 of the Public Health Act empowers the Cabinet Secretary to make rules when it comes to the outbreak or control of infectious diseases, the Statutory Instruments Act on the other hand regulates the manner in which the Cabinet Secretary ought to exercise his powers when making the rules or Gazetting the regulations.

91. From the pleadings filed in court on behalf of the Respondents and the submissions in opposition to the exparte applicants' notice of motion, the respondents have not disputed the assertion by the applicants that the respondent did not follow the procedural requirements under Sections 4 and 5 of the Statutory Instrument Act. The cited sections of the law require in mandatory terms that consultations be undertaken with those who will be affected by the regulations proposed to be formulated, and their input taken into account. This requirement echo the principle and spirit of public participation espoused in the Constitution at Article 10 on the National Values and Principles of Governance. The Article stipulates that:

10. (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.

92. The above Article 10 of the Constitution contemplates Public Participation in the management of public affairs.

93. Section 11 of the Statutory Instruments Act further requires that the regulations must be submitted to Parliament for approval before they can be published for implementation. The Cabinet Secretary published the Regulations for immediate implementation. Nonetheless, between 11th December, 2017 and 11th February, 2018 Parliament was on recess and was not sitting. Therefore that period was excluded from computation of time so that the 7 days period would have started running from the 11th February, 2018. To that extent, the ground that the Legal Notice was not submitted to Parliament for consideration and approval was prematurely taken as the legal Notice was issued when Parliament was in recess. Accordingly, the Regulations did not become void or cease to have any effect as the proceedings herein were taken immediately after the Legal Notice was published. Nonetheless, this court observes that the Cabinet Secretary in his response to the application herein did not indicate that he had any intention of placing the said Regulations as gazetted, before Parliament for approval before implementation, even after Parliament resumed its business after the recess.

94. On this limb therefore the applicants have proved their case, that on the whole, the Cabinet Secretary, when issuing the legal notice banning the use, manufacture, sale, offer for sale of Shisha did not comply with the procedural requirements under the Statutory Instruments Act.

95. **On the second issue of whether Shisha business is licensed to be manufactured, sold or consumed in Kenya, t**he applicants introduced themselves as people who have traded in the Shisha business and are licenced to do so by the Kenya Government and County Governments. That they pay taxes to the Kenya Revenue Authority. On the other hand the respondents in particular Dr Jackson Kioko disputed this contending that the Kenya Bureau of Standards produced a schedule showing that the Shisha substance is not on its list of items licensed and therefore unregulated.

96. I must point out that I have thoroughly perused the affidavit of Dr Jackson Kioko together with the affidavit sworn by the then Cabinet Secretary Dr Cleopa Mailu , to get the annexure HT5 that allegedly contains the list from the Kenya Bureau of Standards that classifies Shisha as unregulated but i have found none. Nothing on the record points to this assertion by the 2nd deponent for the respondent. In essence, therefore the affidavit by Dr Jackson Kioko was bare with nothing to prove the contention that Kenya Bureau of Standards has a schedule showing that Shisha is not licensed or that Shisha is unregulated in Kenya.

97. Furthermore, the annextures by the applicants show that Shisha is recognized as tobacco and therefore there is nothing to show that there was a requirement that Shisha be licensed separately. Furthermore, annexture HT4 to the affidavit of Mr Taher is a trade licence from Nairobi City County which was not disputed by the Respondents. Accordingly, I find that there is no evidence to show that Shisha business as conducted by the applicants was unlicensed in Kenya.

98. **On the third issue of whether new issues were introduced in the affidavit of the exparte applicants, t**he 2nd respondent through the affidavit of **Dr Jackson Kioko** raised the objection that the affidavits sworn by **Hussein Taher** and **Amit Kwatra** as offending the basic principles of judicial review as they introduce a totally new set of facts and grounds not contained in their statutory statement of facts filed at the leave stage and should therefore be struck out.

99. I have carefully considered this argument but having gone through and stated the scope of judicial review and as the affidavit is largely on the issue of facts setting out the issues relating to the debate on whether or not Shisha use is harmful to public health, the Court is not bound to consider those merit issues raised in the said affidavits at all. The impugned affidavits heavily rely on facts which are not the province of judicial review. On the other hand, i must mention that the affidavit of Dr Kioko Mang'eli is indeed irregularly attached to the affidavit of Taher as it ought to have been filed by the maker thereof and not attached as an annexure. The importance of a verifying affidavit or further affidavit was stated by the Court of Appeal in the case of **Commissioner General, Kenya Revenue Authority through Republic v Silvano Onema Owaki t/a Marenga Filling Station [2001] eKLR that:**

> ***"We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:***
>
> ***"The application for leave "By a statement" - The facts relied on should be stated in the affidavit (see R. v. Wandsworth JJ., ex p. Read [1942] 1 K. B. 281)."The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit."***

100. From the foregoing it therefore follows that an affidavit is where all the facts in the case should be, not in an annexture in the form of another affidavit, especially where the annexed affidavit has not been used as an affidavit in any other proceeding.

101. **On the last issue of whether the exparte applicants are entitled to the prayers sought and therefore what orders should this court make,** as was stated in ***Halsbury's Laws of England*4th Edn. Vol. 1(1) para 12 page 270:**

> ***"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.***
>
> ***Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders." [emphasis added].***

102. It therefore follows that the power to grant orders in judicial review are discretionary in nature. This is so because judicial review orders are not merit orders. A party who wishes to obtain merit orders must file proceedings in a court exercising civil or criminal jurisdiction which a judicial review court is not. What that means is that even where the applicant has established that their case is merited, the court has the discretion to issue or not to issue the orders sought. That discretion must however be exercised judiciously and having regard to all circumstances of the case.

103. In this case, the Respondents argued that under Articles 42 and 43 of the Constitution, every person has the right to a clean and healthy environment and to the highest attainable standards when it comes to health. They contended that this is buttressed by section 5 of the Health Act 2017.

104. Perusal of the annexures attached to the respondent's affidavits raise a fundamental issue at the core of the society at large. The issue is about public health vis-à-vis economic and social benefits of Shisha consumption. The Constitution of Kenya together with the Health Act, 2017 place a fundamental duty on the state to ensure that the health and well-being of the people of Kenya is maintained at the highest attainable standards, which duty is owed to the present and future generations.

105. Ultimately, the court must, in determining issues that relate to the fundamental rights of its citizens and of any other person, touching on matters of public health, take into account the above constitutional provisions while acknowledging the fact that there is no such a thing in our laws as the right to die or to inflict personal harm.

106. In the instant case, what clearly emerges is that the Cabinet Secretary flouted the procedural requirements for issuance of such legal notices. He did not consult the public on the same. He also did not demonstrate that he ever intended to place the Gazetted Regulations before Parliament for approval before implementation.

107. The exparte applicants also complained that they were never accorded any right to be heard before the ban was imposed, contrary to the provisions of the Fair Administrative Action Act and the Constitution.

108. Article 47 of the Constitution provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In ***Onyango Oloo vs. Attorney General [1986-1989] EA*** 456 the Court of Appeal expressed itself as follows:

> ***"The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."***

109. Fair administrative action is a right guaranteed under the Constitution therefore the question is whether such right can be limited and therefore whether publication and implementation of the Legal Notice without public participation; without seeking Parliamentary approval; and without according the applicants a hearing was a limitation envisaged in Article 24 of the Constitution.

110. Article 24 of the Constitution provides inter alia that:

> ***" (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.***
>
> ***(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—***
>
> ***(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;***
>
> ***(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and***
>
> ***(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.***
>
> ***(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.***

111. The law is that, once it is shown that there is a limitation on a fundamental right or freedom, the burden of proving that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests on the State or the authority limiting the fundamental right or freedom. As was held in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127, *the principles of***

constitutional interpretation are that firstly, the onus is on the petitioners to show a prima facie case of violation of their constitutional rights. Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Secondly, both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality. Thirdly, the constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.

112. Nonetheless, the determination of what is justifiable in a democratic society is not an easy one. This is so because as to what is reasonably justifiable in a democratic society is an elusive concept – one that cannot be precisely defined by the Courts. There is no legal yardstick save that the quality or reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right. The illusive concept of what was reasonably ***'justifiable in a democratic society'*** could not be precisely defined by Courts, but regard had to be given to a 'proper' respect for the rights and dignity of mankind. The proper test was an objective one and, taking into account the interests of everyone in a democratic society. See ***Nation Media Group Limited vs. Attorney General [2007] 1 EA 261.***

113. The Supreme Court of Uganda in **Obbo and Another vs. Attorney General [2004] 1 EA 265** observed that:

> ***"It is not correct that the test of what acceptable and demonstrably justifiable for the purposes of limitation imposed.....in a free and democratic society must be a subjective one. The test must conform to what is universally accepted to be a democratic society since there can be no varying classes of democratic societies."***

114. It is the duty of the state to ensure that whatever measures it takes towards the protection of Kenyans public health, the provisions of Article 24 of the Constitution is adhered to. Such considerations include the nature and extent of the limitation and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

115. Further, the relevant provision shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

116. The right to public participation in decision making processes and the right to be given notice before any action is taken against the applicants traders and users of Shisha is imperative.

117. On the other hand, it is upon the State to ensure that it puts into place measures which would ensure that harm or potential harm or death of its citizens are mitigated while at the same time ensuring that the freedom of citizens does not become a torturous process, which ought to be dreaded and avoided by all means and at all costs.

118. In this case, I have indeed found that the Cabinet Secretary flouted the procedural requirements for issuing the legal Notice. However, I have not delved into the merits of how Shisha smoking is useful or harmful to health. This is so because judicial review looks at the process and not the merits of the decision.

119. This finding in itself does not mean that the ban had no legitimate aim of balancing the health policy against pressing social economic needs of the applicants who are users and or traders in Shisha. What it means is that the state is under a duty to, if it believes that the Shisha smoking is harmful to public health, and if it has to successfully phase out this Shisha trade or consumption, the state must educate the public on the dangers and health risks of Shisha use.

120. In my humble view, public education and sensitization on the dangers and risks of Shisha use and therefore the ban policy would have significant advantages and would in my humble view, cause only relatively minor discomfort to the applicants owing to the fact that it is common knowledge that generally, Tobacco smoking is harmful to health not only of the smoker but also of others hence it cannot be a social or cultural developmental right accruing to the applicants herein. This is the reason why there are warnings for tobacco smokers as to its harmful effect to health and therefore whoever smokes tobacco takes the risk of the harm that smoking the product carries with it.

121. This court is also aware that tobacco or Shisha addicts may not necessarily entirely be free to choose whether to continue smoking or not. They are people who need help.

122. It therefore follows that liberty can be restricted to protect citizens from harmful or potentially harmful or addictive effects of Shisha smoking. No country should be forgiven for presiding over a dying population.

123. Further, it is my humble view that an economy that preys on a citizen's life and limb violates the very rights of those citizens to live and live healthy lives.

124. For that reason, I concur with the holding by Emukule J. as he then was in ***John Muraya Mwangi & 495 others v Minister for State for Provincial Administration & Internal Security & 4 others- Nakuru Petition No. 3 of 2011 [2014] eKLR*** where the learned Judge stated that***, "similarly the court cannot say with certainty that there was comprehensive consultation in the passage of the new regulations. It cannot also say that there was no consultation. The benefit of the doubt will therefore go to the purpose of the legislation to regulate the manufacture and sale of alcoholic drinks, and to protect consumers, and especially the children. In this case I decline to invalidate the rules on account of lack of public participation on the ground that I am required to give effect to other values of equal importance like good governance and the need to the human rights of others particularly those who are at risk of loss of life and property through road carnage arising from drunk driving."***

125. I reiterate that the Respondents have, in my humble view, identified the potential negative effect of the use of Shisha. They have demonstrated that the ban policy on the use of Shisha would cause only relatively minor disadvantage or discomfort to the applicants. The risks or potential risks identified herein cannot be said to be purely hypothetical. On the material placed before the court, although not

resolving the scientific uncertainty of the benefits and or harm caused by Shisha smoking, there is reasonable doubt raised as to the safety of the Shisha substance to public health and therefore justification for its withdrawal from the market altogether.

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.

127. In essence, the precautionary principle asserts that the burden of proof for potentially harmful actions by industry or governments rests on the assurance of safety and that when there are threats of serious damage, scientific uncertainty must be resolved in favour of prevention.

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. See the Gowan Case C-77/09 and Solvay Pharmaceuticals v Council CT-392/02.

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.

130. Albeit the applicants alleged bias and discrimination, this court was unable to find any evidence of bias or discrimination by the respondents. There was no material to suggest that the ban was geared towards benefiting the applicant's competitors in similar business enterprises to the detriment of the applicants.

131. In my humble view, any losses to the applicants if any can be quantified and be adequately compensated by an award of damages.

132. It is therefore out of public interest that I exercise judicial discretion and decline to issue the orders that the applicants have sought despite the irregularity identified in issuing the ban by the Cabinet Secretary. This is so because no country and no court of law can afford to gamble with the present and future lives and livelihoods of this country in the name of fear of loss of social and economic gains. Commercial enterprises go under and can be revived. Lives lost can never be revived.

133. There is no dispute that many Shisha lounges will suffer economic harm as a result of the ban and so they may no longer be viable, but it does not follow that this is the purpose of the Regulation issued by the Cabinet Secretary.

134. In my humble view, the protection of the public and their safety necessarily has economic impact on the operation of the exparte applicants' businesses, yes. However, that impact is incidental to, rather than determinative of, the purpose of the impugned regulations.

135. This case in my humble view is one of those exceptional ones where public interest outweighs social and economic individual benefit.

136. In addition, I am satisfied that it would cause more public inconvenience to lift the ban imposed by the Cabinet Secretary for Health than to decline the prayers sought. There is sufficient material before this court as presented by the respondents that Shisha consumption is most likely to cause more harm to public health of the country and that the alleged harm or potential harm outweighs the economic and social gain to the traders, employees and consumers of the Shisha substance.

137. Health being a fundamental right and funded by the state through the tax payers' money, it would be inimical to lift the ban and then turn to the taxpayer to fund the consequences of engaging in leisurely activities whose alleged positive attributes have not been demonstrated to the satisfaction of this court.

138. For the above reasons, I hold and find that the Shisha ban imposed by the Cabinet Secretary, Ministry of Health vide Legal Notice No. 292 of 28th December, 2017, however irregular, shall remain in force and the respondents are hereby directed to follow the procedural requirements to the letter in regularizing the ban. The process should be undertaken within Nine months from the date of this judgment. Any party is at liberty to apply. Accordingly, the application is declined.

139. Since these proceedings have raised serious issues of public discourse and importance, and as there has been no substantive merit review, each party shall bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 26th day of July 2018.

R.E. ABURILI

JUDGE

In the presence of:

Ms ShellaSheikh Advocate for the exparte applicants

Mr Odhiambo and Mr Adow Litigation Counsels for the Respondents

Court Assistant: Dominic