REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 9 OF 2018

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 2(1), 3,(1),10(1),(2) a, b, c, 27& 73 OF THE CONSTITUTION AND IN THE MATTER OF ARTICLES 20(20), (20)(3) & a(b)4(a)&(b) ,

ARTICLES 21(1), 22(1), (2)& 23(1)& (3) a, b, c& e OF THE CONSTITUTION

IN THE MATTER OF PRINCIPLES OF PUBLIC FINANCE: OPENNESS, EQUALITY, FAIRNESS, PRUDENCE AND PUBLIC PARTICIPATION

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 196, 201, 203, 209(3) & 210(1), (2&(3) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND

IN THE MATTER OF THE FINANCE MANAGEMENT ACT, NO. 18 OF 2015

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

AND

IN THE MATTER OF MACHAKOS FINANCE ACT, 2015

AND

IN THE MATTER OF ARTICLES 165a, b, d, I & ii & 4 OF THE CONSTITUTION AS READ WITH SECTION 4 OF KENYA PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

SIMEON KIOKO KITHEKA ..... 1ST PETITIONER

ANTHONY KYENGO ..... 2ND PETITIONER

MUTUNGA KALELI ..... 3RD PETITIONER

DRICON TRANSPORTERS SACCO ..... 4TH PETITIONER

SYOKAS AND TRANSPORTERS SACCO ..... 5TH PETITIONER

SWAMIRANAYAN TRANSPORTERS SACCO ..... 6TH PETITIONER

KARROT TRANSPORTERS SACCO ..... 7TH PETITIONER

SANTRACCO TRANSPORTERS SACCO ..... 8TH PETITIONER

EMOTRA TRANSPORTERS SACCO ..... 9TH PETITIONER

HOTLINE TRANSPORTERS SACCO ..... 10TH PETITIONER

KIAMA TRANSPORTERS SACCO ..... 11TH PETITIONER

TRUCKERS TRANSPORTERS SACCO ..... 12TH PETITIONER

INTERCOUNTY TRANSPORTERS SACCO ..... 13TH PETITIONER

ATHI SAND TRANSPORTERS SACCO ..... 14TH PETITIONER

JUKAGI TRANSPORTERS SACCO ..... 15TH PETITIONER

BUMASUTRA TRANSPORTERS SACCO ..... 16TH PETITIONER

UTS TRANSPORTERS SACCO ..... 17TH PETITIONER

HITMAK TRANSPORTERS SACCO ..... 18TH PETITIONER

UNITRA TRANSPORTERS SACCO ..... 19TH PETITIONER

-VERSUS-

1. COUNTY GOVERNMENT OF MACHAKOS ..... 1ST RESPONDENT

2. COUNTY ASSEMBLYOF MACHAKOS ..... 2ND RESPONDENT

3. ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGEMENT

The Parties

1. The 1st, 2nd and 3rd Petitioners herein described themselves as officials of the Kenya National Chamber of Commerce and Industry (Machakos Branch), being Chairman, Vice Chairman and Treasurer respectively while the 4th – 19th Petitioners are described as SACCO's involved in the Harvesting and Transportation of sand operating within Machakos County (hereinafter referred to as "the County") whose membership is set out in the schedule annexed to the Petition.

2. The 1st Respondent is the government of the County of Machakos, established under the provisions of Article 176 of the Constitution of Kenya, 2010 (hereinafter referred to as "the County Government").

3. The 2nd Respondent is the County Assembly of the County of Machakos, established under the provisions of Article 176 of the Constitution of Kenya, 2010 (hereinafter referred to as "the County Assembly").

4. The 3rd Respondent, the Attorney General, is the principal legal adviser to the government of Kenya and is appointed in accordance to provisions of Article 156 of the Constitution of Kenya 2010.

The Petitioners' Case

5. According to the Petitioners, the 2nd Respondent enacted the ***Machakos Finance Act, 2017*** (hereinafter referred to as "the Act") whose effective date was provided as 14 days from the date of assent. The said Act, it was disclosed, provided for, *inter alia*, Sand Harvesting/ Transportation Cess (hereinafter referred to as "the Cess"). It was the Petitioners' case that the residents and stakeholders in the industry of Machakos County were totally left out of the process leading to the enactment of the Act and in particular the levying of exorbitant Sand Harvesting and Transporting fees as there was no public participation**,** a requirement embodied in the Constitution of Kenya, 2010 and the doctrines of reasonableness and legitimate expectation.

6. Accordingly, the 1st and 2nd Respondent were accused of having acted unconstitutionally by enacting the said Act without consulting the residents of Machakos and all stakeholders, including business entities yet the Petitioners have a right to be consulted and a right to participate in all national and county matters. As a result it was contended that the Act levies taxes that are not only unconstitutional but also detrimental to their socio-economic well-being as the same were both oppressive and draconian.

7. Based on Articles 1(4), 6(2), 174, 184 (1), 196(1), 232(1) and the Fourth Schedule Part 2(14) of the Constitution, the Petitioners averred that participation is important because practical experience on the ground shows that it establishes the necessary sense of ownership. To them, participation has greatly contributed to the sustainability of development initiatives, strengthened local capacity, given a voice to the poor and marginalized and linked development to the people's needs and is instrumental in guarding against abuse of office by public servants and political leaders. Further, it has also provided a control against excessive discretion being vested in civil servants in public procedures as well as checks and balances against unnecessary political interference in service delivery and disregard for professionalism and meritocracy in the public sector amongst others.

8. It was the Petitioners' case that the new rates set by the Machakos County Government are both oppressive and draconian and that the residents of the county were not consulted in the implementation thereof and during the formulation of the rates hence the said rates should be scrapped and any adjustments and or introduction of various levies must be done after consultation with all stakeholders as provided by the Constitution of Kenya, 2010.

9. The Petitioners therefore urged this Court to grant the following reliefs:

A. A declaration that the *Machakos Finance Act 2018* in its totality as enacted and assented is unconstitutional and against the provisions of Articles 196 and 201 of the Constitution of Kenya 2010.

B. A declaration that the Machakos County residents' right to participation in the process leading to the enactment of the *Machakos Finance Act 2018* and as guaranteed under Article 196 and 201 of the Constitution has been violated by the decision 1st and 2nd Respondents to unilaterally enact the said Act.

C. An order of prohibition stopping the operations and/or implementation of the said *Machakos Finance Act 2018*.

D. Any other order that may deem to be fit and just to ensure that Law and Order is maintained and that the Rule of Law is upheld.

E. Costs of the Petition.

10. In support of the petition, the petitioners filed sworn affidavits in which they deposed that the Petitioners' members, up until recently were paying levies, rates and other licensing fees as set out in the schedule of the ***Machakos County Finance Act* 2016** and **2017**. However, the Petitioners' members in the Sand Harvesting and Transport industry were astonished when in May, 2018 they sought to renew their licenses, and were met with demands for increased levies, rates and licensing fees by the Defendant/Respondent as set out in the schedule annexed to the supporting affidavit.

11. It was however reiterated that the 1st and 2nd Respondent had failed, refused and/or neglected to inform the Petitioner/Applicant members of the increased levies, rates and licensing fees and that the 2nd Respondent did not involve the Public while coming up with the increased levies, rates and licensing fees for the Sand Harvesting and Transport industry which increased rates, levies and other licensing fees were irregular.

12. In a further affidavit, it was averred that the instant Petition was brought pursuant to the provisions of Article 22 of the Constitution of Kenya (2010) and that Public Participation ought not be a checklist to be ticked off by the Respondents but ought to be inclusive, wholesome and participatory.

13. The Petitioners deposed that owing to the literacy levels within Machakos County, a newspaper advertisement by the County Assembly (2nd Respondent) in the *Standard Newspaper* for only one day would not adequately inform the citizen of the County of the forums organized.

14. It was their case that the 1st Respondent's invitation for a consultative forum on 29th September, 2017 was on the budget making process and not on the ***Finance Bill 2017*** and that in fact, the forums did not kick off as scheduled due to political campaigns at the time. They asserted that the 1st Respondent had not availed any proof of the occurrence of the said forums.

15. The Petitioners noted that:

a) The dates when the invitations to the Public forums was made was deliberately obfuscated.

b) The invitation to the Machakos County, Kenya National Chamber of Commerce and Industry was dated on 26th September, 2017 and received on 27th September, 2017 for a forum to be held on 29th September, 2017 which was a grossly inadequate notice notwithstanding the failure to hold the forums.

16. It was averred that Machakos County is covered by the following radio and Television Station that broadcast in *Kamba* Language:-

Radio Stations **T.V Stations**

a) Musyi FM **a) Kyeni T.V**

b) Mbaitu FM **b) Mwamba T.V**

c) Athiani FM

d) County FM

e) A.T.G Radio

f) Syokimau FM

g) Mang'elete FM

17. However, the 2nd Respondent only placed an advertisement in one radio station asking the Public for their views and Submission of Memoranda on such a momentous piece of legislation such as the ***Machakos County Finance Bill 2017***. Owing to the large populace and individual preference, a huge population of the citizens within the County were not reached by the said advertisement which advertisement only ran for four days at 7:20am and 7:20pm.

18. It was further alleged that there wasn't any involvement of local administration, churches, mosques or any other more inclusive mode of reaching the Citizens as envisaged under the ***Machakos County Public Participation Act*** and that the Kenya National Chamber of Commerce, Machakos County Branch, was only informed of a forum to be held on 6th March, 2018 on the 5th March 2018 when it hurriedly prepared a Memorandum in which it clearly stated that the Notice issued was too short and that the Finance Bill had not been supplied.

19. It was further averred that the Bill that was availed by the 2nd Respondent doesn't contain the rates that are currently charged in the ***Finance Act 2018*** hence no Public Participation was ever conducted thereon the as the rates contained therein are substantially differed from the rates in the Bill.

20. The Petitioners therefore insisted that there wasn't adequate and reasonable Public Participation and the ***Finance Act, 2018*** fails a constitutional standard thus rendering it unconstitutional and illegal.

21. In their submissions the Petitioners reiterated the factual averments in the affidavits sworn in support of the petition and submitted that public participation is important and vital in any development agenda because, first it strengthens democracy and governance of and entity, secondly, it improves process quality as well as managing social, economic and political conflicts and majorly, it protects public interest by increasing transparency and accountability. In support of their case the Petitioners relied on the definition of "the public" in section 2 ***County Government Act*** No. 17 of 2012 and submitted that any state entity at national or county level cannot adopt, pass or sign into law any policy without conducting public participation and that every state officer derives his/her authority from the people of Kenya he/she represents since all sovereign power belongs to the people of Kenya and this power can only be exercised in accordance with Article 1 of the Constitution. Therefore according to the Petitioners, it is prudent that any entity with the intention of passing any law, must conduct stakeholder mapping to identify who are going to be directly and/or indirectly affected by that law. In stakeholder mapping, all categories of persons are brought on board by adopting the doctrine of inclusivity and that minority and marginalized groups must never be left out. If such is not done, such a law passed must be declared unconstitutional and void to the extent of its inconsistency.

22. The Petitioners based their case on the aforestated constitutional provisions as well as section 207 of the ***Public Finance Management Act***, which provides that County Governments are to establish structures, mechanisms and guidelines for citizen participation; sections 94, 95 100 and 101 of the ***County Government Act*** which provide that counties are to establish mechanisms to facilitate public communication and access to information with the widest public outreach using media and that county governments should create an institutional framework for civic education; the provisions of the ***Urban Areas Act***, which provide for the overarching theme being participation by the residents in the governance of urban areas and cities and the Second Schedule thereto which provides for the rights of, and participation by residents in affairs of their city or urban areas.

23. According to the Petitioners, the sovereign power of the people of Kenya is exercised at the National level and the county level thanks to the Constitution 2010.At the county level, the law imposes the duty of public participation to various organs and officers namely the Governor, the County Executive Committee, the Sub-County Administrator, the Ward Administrator, the Village Administrator and the County Assembly.

24. It was further submitted that section 87 of the ***County Government Act 2012*** establishes the principles of citizen participation in counties while section 88 of the ***County Government Act*** establishes the modalities and platforms for citizen participation.

25. As regards the issue of locus standi it was the Petitioners' case that they brought these proceedings application on their behalf and on behalf of the public affected by the said Act and relied on Article 22 of the Constitution and Rule 4 of the ***Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practices and Procedure Rules 2013***.

26. While the Petitioners did not dispute the fact that there was a newspaper advertisement inviting all persons to present their views, the Petitioners submitted that it was their case that the same did not meet the threshold of the public participation as per the ***Machakos County Public Participation Act 2014*** and section 88 and 89 ***County Government Act.*** In this respect the petitioners relied, firstly, on the preamble of the ***Machakos County Public Participation Act*** which states that it is:

> ***AN ACT of the Machakos County Assembly to give effect to Articles 1,10 (2) (a), 118, 119, 174, 232 (l) (d) and paragraph 14 of Part 2 of the Fourth Schedule of the Constitution to establish modalities and platform for public participation in the governance of the County and for connected purposes.***

27. Section 2 of the Act defines Public participation "public participation" as:

means an open, democratic and accountable process of engaging a representative sector of the public in formulating policies and developing laws that affect them.

28. Section 3 of the Act on the other hand provides the objects and purposes of the Act to give effect to Articles 1, 10(2), 118, 119, 174 & 232 of the Constitution while section 4 thereof provides the guiding principles for public participation in Machakos County Government to include:

(a) The communities, organizations and citizens affected by any policy decision of the government shall have the right to be consulted and shall be accorded an opportunity to participate in the process of formulating policy;

(b) Availing participants access to the information necessary to ensure meaningful participation; and

(c) Feedback to the public on how their input is included in the policy decision.

29. Further reference was made to section 5 of the said Act which provides for the public participation guidelines whose burden is on the County Secretary (a representative of the 1st Respondent and the clerk to the County Assembly (A representative of the 3rd Respondent).

30. The Petitioners therefore submitted that the ***Machakos County Public Participation Act*** has guidelines and procedures to be followed for public participation to be said to have been carried out effectively and in section 52(f) it provides for the public to be accorded reasonable time to input and comment on any proposals. The Act also establishes that there should be a feedback mechanism to the public which involves carrying out a monitoring and evaluation to inform the public of the results of the process and any additional input from the public for the same.

31. In this case it was submitted that the newspaper advert adduced by the 2nd Respondent was up allegedly in the dailies on 28th February, 2018 and forums scheduled for 6th March, 2018. The Petitioners posed the questions whether this was adequate notice as contemplated in section 5 of the ***Machakos County Public Participation Act 2014***, whose preamble seeks to give effect to sections 88 & 89 of the ***County Government Act 2012,*** more so considering the poverty index in Machakos County. Apart from that it was submitted that the draft bill availed by the 2nd Respondent for the alleged public participation was markedly different from the Act that was finally passed as the rates that were provided in the draft bill were as for the previous year. However, what was finally presented for enactment contained the impugned charges. Therefore in the Petitioners' contention, no public participation was carried on in respect of the ***Machakos Finance Act 2018.***

32. The Petitioners also took issue with the 1st Respondent's claim that the Petitioners herein were invited to a public participation forum vide a letter dated 26th September, 2017 and received on 27th September, 2017 for a forum to be held on 29th September, 2017 which in their view cannot be held in any parameter to be adequate notice for the forum since section 5(2(i) of the ***Machakos County Public Participation Act*** among the guidelines provides; … ***ensure that the public, affected groups, and stakeholders are informed of the results of the public participation process and how their input was used in the decision taken***.

33. The Petitioners refuted the allegation that by them coming to court, the judiciary will be interfering with the legislative process and the doctrine of separation of powers, since it is the duty of the court to interpret the law. This Court, it was submitted, has jurisdiction as provided under Article 165 of the constitution and to render any law that is void and inconsistent to the constitution void and that the ***Machakos Finance Act 2018*** is such one law that deprives of the supremacy of the constitution and sovereignty of the people.

34. The Court was therefore urged to render the Act unconstitutional and make a permanent order that the levies rates and other fees imposed by the Respondent pursuant to the ***Machakos County Finance Act 2015*** (sic) be suspended and to direct that the levies, rates and fees imposed by law before ***Machakos County Finance Act 2015*** (sic) be in force until the Respondents have the Act comply with the threshold of Public participation.

The 1st Respondent's Case

35. The 1st Respondent, the County Government of Machakos, opposed the petition.

36. According to the County, both the application and the petition are incompetent, fatally defective, devoid of merit and based on misapprehension of the relevant constitutional provisions, brought in bad faith and ought to be dismissed with costs forthwith. To the County the petitioner's sole intention is to frustrate the 1st respondent and cripple its financial activities by seeking to block its constitutional mandate and thus make sure county government doesn't meet its obligations of devolution which is against the law.

37. It was the County's case that under the ***County Governments Act*** no 17 of 2012 and the Constitution of Kenya, the County Government is mandated by the law to pass the relevant Finance Acts to enable it run its activities and thus by seeking to block the ***Finance Act*** the petitioners are therefore motivated by their own ulterior motive.

38. The County took issue with the fact that the affidavit in support of both the application and the petition were defective because it was sworn by a person who was not a party to these proceedings and prayed that the same be struck off after which it follows that the pleadings would also be struck off *mutatis mutandis*. It was further contended that the petitioners' prayers in the petition were amorphous and thus could not be granted by this Court because although they sought suspension of the increased rates, taxes and licensing fees, they had not specified which among the various items contained in the Finance Act are to be suspended.

39. The County further averred that the petitioners have not pointed to the Court what violations of the Constitution have been committed by the 1st respondent hence the Court is left guessing as to what the petitioners want as the pleadings are also not clear as to which prayers they

want, they are uncertain and should be struck out.

40. It was the County's case that the petitioners had deliberately lied to the Court in their supporting affidavit at paragraphs 3, 4 and 5 thereof that there was no public participation when the ***Machakos County Finance Act*** was passed. According to the County, it did advertise through the ***Daily Nation*** and ***Taifa Leo*** calling for public participation forums for the ***Finance Bill 2017*** and that was deemed as adequate notice. It was averred that the Kenya Chamber of Commerce Machakos County from whom the petitioners allege to be members were individually invited to attend the public participation forum for the ***Finance Act 2017*** vide a letter dated 26th September, 2017 and served on the same date which the organization acknowledged receipt and stamped indicating the dates, time and venue for each sub county and location.

41. It was therefore the County's case that it fully complied with the law with respect to public participation before the enactment of the ***Finance Act 2017*** and that if the petitioners and their unknown "other members" failed to attend the sessions to air their views then they can only blame themselves for taking casually such an important exercise.

42. The County averred that the 2nd Respondent, the county assembly, an organ of the 1st respondent and on behalf of the county government of Machakos caused the ***Machakos County Finance Bill*** to be published in the Kenya gazette in full compliance with the law for the willing members of the public including the petitioners to access the same. In various consultative public participation sessions, the citizens overwhelmingly supported the proposed rates and therefore the petitioners are merely playing with mind games with the 2nd respondent and they can at best be described as busy bodies.

43. It was deposed that the charges for sand transportation permit per month was agreed between the 1st respondent and the Machakos County Sand Transporters Sacco's who are the petitioners through a memorandum of understanding on 24th October, 2016 and executed by their representatives and that the said agreed charges in paragraph 7 of the M.O.U. are a replica of what is captured in item number 4 part b under title Sand Transportation Permit Per Month in the fourth schedule of the impugned ***Finance Act***. It was therefore averred that the petitioners were involved before the Act was enacted and thus the petition is full of lies and ought to be dismissed.

44. It was the County's view that the petitioners through the current petition are requesting the Court to direct the county government on how to conduct its affairs which is contrary to the law because both the courts and the 1st respondent have different roles to play which must at all times be respected unless there is violation of the law. However, in this case the petitioners have not demonstrated any law which was violated by the 2nd respondent at all.

45. The County maintained that it is mandated by the law to charge rates and taxes in order to run its affairs and meet the obligations of devolution and if the court grants the prayers sought in the petition, its activities would be crippled and risk the closure of the government for lack of funds because the source of the money would have been cut off.

46. To the County Government, under article 196(1) of the Constitution as well as sections 87, 91 and 115 of the ***County Governments Act*** No 17 of 2012 the law contemplates reasonable participation otherwise if the 1st respondent was to go to door, it would take unconscionable periods to pass such an Act thus making the essence of public participation an obstacle to devolution. In this case, it was its position that it had properly demonstrated that reasonable public participation was conducted and it would be contrary to public interest to allow the petitioners trash such a meaningful exercise by granting the prayers sought. In its view, the petitioners had not demonstrated that the increase in rates and taxes was made in bad faith or that they are unreasonable but to the contrary they are within the reasonable bracket and in any event it is not the business of the court to direct the 1st respondent how much to levy or tax.

47. The County Government lamented that whereas it has a duty to protect the resources of the County of Machakos from exploitation for the economic benefit of all citizens, the petitioners want to frustrate this obligation by asking the court to set the amounts to be levied which request has no basis in any known law of the land.

48. In its submissions, the County Government contended that it fulfilled the constitutional obligation under Article 196(1) of ensuring that public participation incorporated in the legislative business of the assembly

49. It was submitted that the ***County Governments Act No. 17 of 2012*** under sections 87, 91 and 115 all call for public participation in county affairs and which the 1st respondent insisted it had complied with. The County Government referred to section 91 of the ***County Governments Act*** and averred that it did also comply with these provisions by an advert calling members of the public to give their input in the ***Finance Bill*** for Machakos County in both the *Daily Nation* and *Taifa Leo* newspapers which adverts contained schedule of the Sub County, location, venue and time when the public input session would be hosted and the petitioners under the umbrella of Kenya National Chamber of Commerce Machakos County were invited through a letter dated 26th September, 2017 and served upon them on the same date inviting them to the public participation forum which letter gave the venue and time.

50. It was further submitted that the County Government, through its legislative organ the County Assembly, the 2nd respondent herein, caused to be published in the *Kenya Gazette* the ***Machakos County Finance Bill 2017*** vide a letter dated 22nd November, 2017 for public scrutiny which Bill was published on 19th January, 2018 in the Kenya Gazette Supplement number 13**.** Apart from that the said County Assembly caused to be advertised through a local Kamba station namely *Maitu Fm* calling for public participation on 1st March, 2018. It was disclosed that the 1st respondent also had attendance sheet recorded for the members of public who attended the exercise and gave their views as per the further affidavit as well as for those members of the public who attended the public hearing. It was therefore the County's position that the petition is misguided because both the 1st and 2nd respondents have availed evidence showing that member of the public were invited and were allowed to give their views and it is for the Assembly to sieve and to assimilate the views as well as disregard what they think is not viable for whatever reason. The petitioners seem to be making blanket accusations against the 1st respondent.

51. The Court was therefore urged to find there was sufficient public participation in the process leading to the enactment of the ***Machakos County Finance Act 2018*** which should continue being operationalised. To the County Government, the County Assemblies and the county ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies and that in this case, the County Government in conjunction with the County Assembly called out the constituents to participate in the process of the enactment of the ***Finance Act*** by making adverts in the *Daily Nation* and *Taifa Leo* as well as the popular vernacular radio broadcasting station called *Mbaitu Fm*. This information included the location date and time when the public participation forum will take place and the petitioners under their umbrella were personally invited. It was accordingly submitted that the petitioners' allegation that public participation was not conducted is absurd and not genuine at all.

52. As to what constitutes public participation, the County Government relied on **Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another [2016]** and submitted that what is required is reasonable public participation and in this case the 1st respondent in conjunction with the 2nd respondent has adduced enough evidence to prove that the Bill leading to the enactment of the ***Finance Act*** was widely advertised. The petitioner were invited vide a letter addressed to them directly under their umbrella group. The public were duly invited and give adequate time to give their views. Therefore, the Court was urged to find that members of the public were given adequate time to contribute towards the enactment of the impugned Act. The County based its submissions on **Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another (supra)** at page 14 paragraph 52 and submitted that the 1st respondent had proved there was adequate public participation before the passing of the ***Finance Act***. The petitioner himself signed the attendance sheet for Machakos Sub County. He attended and gave his views. He is therefore misleading the court.

53. The County Government therefore maintained that the petitioners failed miserably to prove that the 1st respondent violated the constitution or any other law with respect to public participation when passing the ***Machakos County Finance Act 2018***. On the other hand, the 1st respondent has overwhelmingly proved that public participation was invited, facilitated and conducted. However it is not practical to hear every citizen of Machakos County in order to achieve public participation which is the impression created by the petitioners that every citizen of Machakos must be heard. Based on the same decision it was submitted that the petition had no merit and the County Government, the 1st Respondent herein, prayed that the same be dismissed with costs.

The 2nd Respondent's Case

54. The 2nd Respondent herein, the County Assembly of Machakos, similarly opposed the petition.

55. According to the Assembly:

> (1) The deponent of the Supporting Affidavit has not stated whether the authority he states he has is from the Kenya National Chamber of Commerce and Industry, which is not a party herein and also whether the other two Petitioners have authorized him to swear and bring the Application on its behalf and also from the unspecified members;
>
> (2) The deponent of the Supporting Affidavit is also not a party to these proceedings hence incompetent to swear the same. The same should be struck off *in limine.*
>
> (3) The reliefs sought are omnibus and cannot be granted by this Honourable Court as they seek a suspension of the increases levies rates, taxes and other licencing fees levied by the Respondents without specifying what exactly is to be suspended and who are the beneficiaries of the reliefs sought herein. It is noteworthy that the Act the subject of these proceedings contains different and various items.
>
> (4) The Petitioner's pleadings do not disclose adequate particulars in support of their alleged cause of action/ claim relating to the alleged violations of the Constitution to enable this Honourable Court grant the reliefs sought herein.
>
> (5) The Petition and the Application thereof seek to impede the functions of Constitutional office holders and as such, it is frivolous, vexatious and an abuse of the judicious process. One cannot stop a person or an organ of state or any other constitutional body from carrying out their constitutional mandate.
>
> (6) That the Petitioners' pleadings offend the ***Doctrine of Separation of powers*** as the same invite this Honourable Court to direct County Assemblies which are Legislative branches of government , on their procedures and how they ought to run their affairs.

56. Based on legal advice, the County Assembly believed to be true that the Petition must fail on the above grounds. Apart from that it was its case that the Petition was an abuse of the court process for the following grounds:

> (1) **THAT** it is utterly incorrect for the Petitioner to state at Paragraphs 3, 4 and 5 of his Supporting Affidavit that the enactment of the ***Machakos County Finance Act 2018*** was done without informing and involving the public. On the 28th February, 2018, as the Clerk of the County Assembly of Machakos caused an advertisement to be placed in a leading Newspaper with wide national circulation, to wit; The Standard Newspaper and in the said advertisement, all stakeholders were invited to several forums to present their views orally or by submission of written memoranda.
>
> (2) **THAT** also, on the 1st March, 2018, the Clerk of the County Assembly of Machakos caused an announcement to be placed in a leading local Radio Station to wit; *Mbaitu FM* and in the said announcement, all stakeholders were invited to several forums to present their views orally or by submission of written memoranda.

(3) **THAT** prior to the foregoing, the ***Machakos County Finance Bill*** {Machakos County Bill No.4} was published in the Kenya Gazette Supplement No. 13 of 19th January, 2018 as a Bill for the County Assembly of Machakos. The Bill was published as received from the Executive Committee Member for Finance with no amendments.

(4) **THAT** pursuant to Standing Order No. 118 and 119 of the ***Machakos County Assembly Standing Orders***, the Bill was read for the first time on the 14th February, 2018 and stood committed to the sectoral committee on Finance and Revenue Collection.

(5) **THAT** it is noteworthy that the invitation to the public participation for a and call for memoranda were sent by email and by hand to the Petitioner's organization, Kenya National Chamber of Commerce and Industry (Machakos Branch) on the 5th March, 2018. Suffice to say, the 1st Petitioner herein actually attended the public participation forum at Machakos Municipal Hall and actually the attendance sheet.

(6) **THAT** between the 6th to 9th March, 2018 the 2nd Respondent's Sectoral Committee on Finance and Revenue Collection with the assistance of other members of the Assembly whose membership is provided for in Article 177(1)(a)(b)(c) and (d) of the Constitution facilitated and or conducted public participation of the ***Machakos County Bill , 2017*** in all the 40 Wards of Machakos County pursuant to Standing Order 120(3) whereby views of members of the Public were collected for consideration.

(7) **THAT** in the premises, the 3rd Respondent in compliance with the provisions of Articles 10(2) and 196 (1) (b) did facilitate and there was some reasonable level of public participation and involvement of all stakeholders in the legislative process that led to the enactment of the Act, the subject herein.

(8) **THAT** further, the Finance and Revenue Collection Committee of the 2nd Respondent as established under Standing Order 190(5)(a) of the Standing Orders prepared and tabled the Finance Bill, 2015 which was tabled before the County Assembly for deliberation and adoption having been satisfied that the 2nd Respondent had conducted comprehensive public participation in each of the 40 Wards of the Machakos County.

(9) **THAT** again, it is utterly dishonest of the Petitioner to allege that the new charges are irregular and illegal as enumerated at Paragraph 6 of the said affidavit as the views collected from the public participation sessions endorsed the said charges. It is clear that these proceedings have been brought in bad faith as the Petitioner's organization presented its recommendations on the 6th March, 2018.

(10) **THAT** there is no plea nor evidence that the taxes, charges and or levies contained in the said Act by the 1st Respondent are prejudicial to either national economic policies, economic activities across the country or the national mobility of goods, services, capital or labour as envisaged under Article 209(5) of the Constitution. Again, there is no evidence as to why the rates of levies under the said Act were either unfair or unreasonable in the circumstances of the County of Machakos. The Court is not entitled to interfere with the tariffs and pricing of services simply on the ground that the court would have decided otherwise since it ought not to substitute its opinion for that of the County Government.

(11) **THAT** contrary to the averments at Paragraphs 4 and 6 of the Supporting Affidavit, the Constitution mandates the 1st Respondent to impose any charges or taxes in order to run its affairs and or render services to its citizenry and the said mandate is discretionary. As such, this Honourable Court cannot impede a Constitutional body from performing its functions. The 2nd Respondent avers that the raise of the charges and taxes as contained in the said Act was reasonable and necessary in order to continue offering services to the people.

(12) **THAT** the Petitioner admits at Paragraph 3 of the Supporting Affidavit that they allegedly learned of the new charges on 4th May, 2018. If the same is true, and which is denied, the Petitioner has not explained why it took them over a month to bring these proceedings. In any event and without prejudice to the foregoing, the Bill was duly assented to on the 10th May, 2018 and it is fully operational.

57. It was the County Assembly's position that from the foregoing and in further response thereof, it is clear that:

i) The Application as presented had no proof of infringement of any of the Petitioner's rights to public participation under Article 196(1)(a)(b)of the Constitution, 2010. Further, Sections 87, 91 and 115 of the ***County Government's Act***, No. 17 of 2012 only required facilitation of reasonable public participation which the Appellant had complied with.

ii) There was sufficient notice and adequate public participation before the enactment of the ***Finance Act*** herein the effect of a stay order would gravely prejudice the development of the County, which is the core purpose of Devolution and as such, the balance of convenience favours the 2nd Respondent.

iii) There had been extensive involvement of the residents of Machakos County and further that there was representation of the Respondents by their Members of County Assembly (MCAs) at the proceedings leading to enactment of the Finance Act, 2018, the subject of the Petition and further that the said legislation was Gazetted.

iv) That without prejudice to the foregoing, and applying the ***ratio decidendi*** of ***Giella –Vs- Cassman Brown Ltd {1973} EA*** where this Honourable Court found that an injunction and in this case stay, will not normally be granted unless the applicant will otherwise suffer irreparable loss if the injunctive orders are not granted and further also failed to considerer the ***ratio decidendi*** in the celebrated ***Mrao Case*** where the an injunction will not be granted if what is in dispute is the amount to be paid or any sum that is ascertainable.

And consequently, that this would not justify the grant of an interlocutory injunction order pending hearing and determination of the main Petition.

v) By staying the implementation of the ***Machakos County Finance Act 2018*** will be tantamount to issuing an omnibus order restraining the 1st Respondent from collecting fees, charges and or levies in quarrying and sand harvesting activities from the Petitioners and other unspecified members will in effect paralyze the operations of the entire County.

vi) The powers to determine the amount to be paid in terms of fees, charges and or levies are discretionary on the part of the Respondents and unless there is proof that the discretion thereof was exercised capriciously, the Honourable Court has no ground to grant a stay of implementation, and in this case, there is no proof that the Respondents increased the amount capriciously.

58. It was deposed that the possibility of the paralysation of the operations of the entire Machakos County is highly probable given that the County relies on the taxes, charges and other fees paid for sustainability of its budget in order to realize the full effect and objectives of Devolution. The application is *malafides*, brought with dirty hands and driven by selfish personal interests in wrongful competition with great public interest of the people of Machakos County. It was averred that the stoppage of payment of taxes, charges and other fees by the Petitioner and its unspecified members will spell doom to the 1st Respondent as it will renege on its obligations to the whole of its citizenry as the economic status and development of the County will be gravely prejudiced.

59. It was submitted on behalf of the Assembly, while reiterating the contents of its replying affidavit that Petitioners have not proved any infringement of any of the Petitioner's rights to public participation under Article 196(1)(a)(b)of the Constitution, 2010. Further, sections 87, 91 and 115 of the ***County Government's Act***, No. 17 of 2012 only required facilitation of reasonable public participation which the Appellant had complied with.

60. In this case it was submitted that there was sufficient notice and adequate public participation before the enactment of the ***Finance Act*** herein as there had been extensive involvement of the residents of Machakos County and further that there was representation of the Respondents by their Members of County Assembly (MCAs) at the proceedings leading to enactment of the ***Finance Act, 2018***, the subject of the Petition and further that the said legislation was Gazetted.

61. In support of its submissions the County Assembly relied on **Articles 201** and **196 (1)** of the Constitution of Kenya, 2010 and submitted that sections 87, 91 and 115 of the ***County Government's Act***, No. 17 of 2012 only required facilitation of reasonable public participation which the 2nd Respondent had complied with.

62. The County Assembly also relied on **Nairobi Metropolitan Psv Saccos Union Limited & 25 Others—Vs- County Government Of Nairobi & 3 Others [2013] eKLR, *in which*** Lenaola, J at Paragraph 66 found as follows:

> **"I must also state that this Court cannot direct the 1st Respondent on how to exercise its duty of levying parking fees. The 1st Respondent has the option of legislating on the calculation of parking fees and in its wisdom it has done that having taken into consideration public views , its policies as well as the revenue it ought to raise. The Petitioners have failed to demonstrate how the levying of parking fees in the manner proposed by the 1st and 2nd Respondent has prejudiced national economic policies, economic activities across the County, mobility of goods, services, capital and labour. In my view, it is not enough for the Petitioners to state that they will shy away from entering the city because of the high parking fees levied by the 1st Respondent. They have a duty to demonstrate how that will affect national economic policies and they have failed to do so".**

63. It also relied on **The Institute Of Social Accountability & Anor–Vs- The National Assembly & 3 Others [2015] eKLR**, where the Court found that there was sufficient public participation and at Paragraph 146 it held as follows:

> **"we are also cognizant of our obligation under Article 2 of the Constitution to declare any law that is inconsistent with the Constitution null and void. However, the Court is empowered to deal with the consequences of such invalidity bearing in mind its duty to interpret and apply the Constitution in a manner inter alia, promotes good governance. Article 258 of the Constitution does not limit the Court's jurisdiction to fashion an appropriate remedy to deal with the invalidity of the law. It is accepted that the court may suspend the declaration of invalidity in order to deal with the consequences of such invalidity."**

64. It was the County Assembly's case that even if this court was to find that there was breach of any provisions of the law by the 2nd Respondent, which is denied, the same would not warrant a draconian relief od declaration the ***Finance Act, 2015*** unconstitutional and or null and void and reliance was placed on **Diani Business Welfare Association And Others–Vs- The County Government Of Kwale [2015]eKLR** where the Court at Paragraphs 45, 46 and 51 found and held;

> **"it does not matter how public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation…..it is an indictment against the Petitioners that they would chose to ignore an important civic and constitutional duty to shape the financial and budgetary policy, the implementation of which would affect them in terms of revenue measures and the utilization of that revenue…For all these reasons, I am satisfied that there was public participation, and the Petitioners ignored to present their views during public participation stage of the budget proposals. They were granted opportunity and they failed to take advantage thereof;"**

65. It was further contended that the Petitioners herein chose to ignore the said advertisements for public participation on the enactment of the Act, the subject hereof and as such, cannot be granted the reliefs sought herein.

66. The County Assembly therefore submitted that this Court cannot interfere with another arm of government's function unless a clear cut case is brought on which provisions of the law are being infringed or threatened to be infringed by a body carrying out its mandate within the confines of the Constitution. To it, Article 165(6) of the Constitution is not applicable herein. It therefore urged the Court to adopt that position fully and dismiss the Petitioners' submissions that there was no public participation.

67. As regards separation of powers, reliance was placed on M**umo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR, Simon Wachira Kagiri vs County Assembly of Nyeri& 2 Others (2013)eKLR** and it was concluded that the Petitioner had not met the thresholds for grant of the orders herein and it was prayed that the Court proceeds to dismiss the Petitioner's Petition with costs to 2nd Respondent.

Determination

68. I have considered the petition the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

69. In my ruling delivered in this matter on 9th July, 2018, I considered the issue of separation of powers *in extenso* and expressed myself as hereunder:

> **"It is accordingly clear that the mere fact that the legislative assembly enacts an Act that is not the end of the matter. I am satisfied that I can grant the orders sought in the petition, where appropriate, or appropriate orders in accordance with Article 23(3). It is therefore my view and I hold that this Court cannot where there is an allegation of violation of the Constitution down its tools without investigating the same."**

70. This Court cannot therefore, in the circumstances of this case decline to interrogate the issues raised by the Petitioners herein which touch on the application of the constitutional provisions.

71. However since the matter before me is a petition seeking a declaration that the ***Machakos Finance Act, 2017*** or part of it is unconstitutional or did not adhere to the constitutional provisions in the process of its passage, the general rule or principle guiding such matters was restated by the Supreme Court of India in **Hambardda Wakhana vs. Union of India Air [1960] AIR 554** as follows:

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

72. Therefore the presumption of constitutionality of statutes is not in doubt. This position was affirmed by the Court of Appeal of Tanzania in the celebrated case of **Ndyanabo vs. Attorney General [2001] EA 495** which was a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. In the former, the Court held that:

> **"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative"**

73. This was clearly appreciated in **Ndyanabo vs. Attorney General [2001] 2 EA 485** where it was held *inter alia* that in interpreting the Constitution, the Court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction.

74. Though under Article 1 of the Constitution sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals; the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution otherwise Article 2 of the Constitution allows for the recall of any law, including customary law that is inconsistent with the Constitution, or any act or omission in contravention of the Constitution for the purposes of being voided and or invalidated.

75. This position is supported by **Coleman vs. Mitnick, etc. No. 19,955. 137 Ind. App. 125 (1964) 202 N.E.2d 577** where it was state that:

> **"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."**

76. Similarly in **Carr, Auditor v. State ex rel. Coetlosquet, 127 Ind. 204, 215**, as approvingly quoted in **Frost v. Corporate Commission of Oklahoma - 278 U.S. 515 (1929)**, the Supreme Court of the State of Indiana (USA) held that:

> **"An act which violates the Constitution has no power and can, of course, neither build up or tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality."**

77. That an unconstitutional statute is to be considered as though it had never been enacted by the legislature is also the view of the United

States Supreme Court, which in **Chicago, Indianapolis, & Louisville Railway Company, Plff. In Error, v. Haynes l. Hackett. No. 889**, said:

> **"That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."**

78. In **Norton v. Shelby County**, **Justice Field** said:

> **"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been."**

79. I associate myself with this Court's decision in **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004** where it was held that:

> **"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."**

80. In my view this holding is even more appropriate in cases where the Court is called upon to uphold the provisions of the Constitution.

81. What are the issues raised by the petitioners in this petition? It is contended that the process of enactment of the Act was itself unconstitutional since it was not in accordance with various constitutional and statutory provisions which require that there be public participation in the enactment of legislation. That there is such a requirement is clearly not in doubt and the Courts have nullified legislation which do not comply with such constitutional edicts.

82. It may be argued that where the action taken is in consonance with the Constitution in its formal aspects then the mere fact that there was no public participation ought not to nullify such otherwise legal action. However, I agree with the manner in which **Ngcobo, J** dealt with the issue in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2),** (supra) when he stated:

> **"The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected."**

83. It is similarly our view that this Court not only has the power but the obligation to determine whether a particular legislation was in fact and in substance enacted in accordance with the Constitution and not to just satisfy itself as to the formalities or the motions of doing so.

84. I must say that public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by ***Black's Law Dictionary*** 9th Edn. at page 358 as "*the act of asking the advice or opinion of someone*", "participation" on the other hand is defined at page 1229 thereof as "*the act of taking part in something, such as partnership…*" Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public. This position was appreciated in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** as hereunder:

> **"If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."**

85. This view is reinforced by the decision in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC),** where **Ngcobo, J** held *inter alia* as follows:

"Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other…What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process…To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected…Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values [and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to… public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."

86. This issue calls into question what amounts to public participation facilitation. As was held by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra):

"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. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."

87. In our case, the definition of "public participation" is to be found in section 2 of the ***Machakos County Public Participation Act,*** an Act whose Preamble states that it is:

AN ACT of the Machakos County Assembly to give effect to Articles 1,10 (2) (a), 118, 119, 174, 232 (l) (d) and paragraph 14 of Part 2 of the Fourth Schedule of the Constitution to establish modalities and platform for public participation in the governance of the County and for connected purposes.

88. Section 2 of the said Act defines "public participation" as:

means an open, democratic and accountable process of engaging a representative sector of the public in formulating policies and developing laws that affect them.

89. Therefore public participation must be inculcate the principles of openness, democracy, accountability and representation.

90. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations.

91. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by **Lenaola, J** in **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013**, public participation is not the same as saying that public views must prevail.

92. As this Court held in **Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another [2016]** at page 12 paragraph

48:

"48. This issue calls into question what amounts to public participation facilitation. As was held by Ngcobo, J in Doctors for Life International vs. Speaker of the National Assembly and Others (supra):

"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. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."

93. Further the court stated:

"50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case".

94. The court further observed that:

"51. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by Lenaola, J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013, public participation is not the same as saying that public views must prevail"

"52. The Respondent has however adduced evidence showing that not only was the Bill leading to the said Act widely advertised but that the applicants themselves participated by giving their views thereon. Whereas the views of the applicants may not have been swallowed hook, line and sinker, that does not necessarily mean that there was no public participation. However the caution expressed by Sachs, J in Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:

"The passages from the Doctors for Life majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect…Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication…There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information

that should be discovered for the first time from the newspapers, or from informal chit-chat."

53. This position was adopted by Majanja J's decision in Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others (supra) when he expressed himself as follows:

"The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

54. What the Courts are saying was that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed.

95. At page 17 paragraph 58 it was stated that:

58. As Ngcobo, J rightly appreciated:

"Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings.

96. Similar views were expressed in **Diani Business Welfare Association And Others vs. The County Government of Kwale [2015]eKLR** where the Court held that:

"it does not matter how public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation…..it is an indictment against the Petitioners that they would chose to ignore an important civic and constitutional duty to shape the financial and budgetary policy, the implementation of which would affect them in terms of revenue measures and the utilization of that revenue…"

97. In this case it was contended that that the charges for sand transportation permit per month was agreed between the 1st respondent and the Machakos County Sand Transporters Sacco's who are the petitioners through a memorandum of understanding on 24th October, 2016 and executed by their representatives and that the said agreed charges in paragraph 7 of the M.O.U. are a replica of what is captured in item number 4 part b under title Sand Transportation Permit Per Month in the fourth schedule of the impugned ***Finance Act***. I have however perused the said memorandum of understanding and it is clear that the Fourth Schedule is not a replica of the same. Whereas the memorandum was clear that sand harvesting permits would be issued strictly on a monthly basis and that charges per trip would not be allowed except on special conditions, the Schedule introduced charges per trip. Again the charges in the Schedule did not reflect the contents of the Memorandum.

98. I have also considered the *Taifa Leo* Advertisement. Whereas the same invited the public to various public fora and invited participation therein, the details of the document which the public was required to contribute on was not disclosed. At a minimum the Respondents should have informed the public where the document in question could be obtained and the costs, if any, for doing so. No such information which was crucial to meaningful public participation was disclosed. I therefore do not find the said advertisement useful for the purposes of obtaining information from the members of the public. That also goes for the advert in the *Daily Nation* which was also crafted in similar terms. My view is strengthened by the provisions of section 87 of the ***County Government Act 2012*** which establish the principles of citizen participation in counties by providing for:

a) Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

b) Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;

c) Protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;

d) Legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, Including women, the youth, and disadvantaged communities;

e) Reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;

f) Promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and

g) Recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

99. In fact section 52(f) of the ***Machakos County Public Participation Act*** provides for the public to be accorded reasonable time to input and comment on any proposals.

100. According to **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, the measures that are required to be taken to facilitate public participation in the law-making process include provision of notice of and information about the legislation under consideration and the opportunities for participation that are available.

101. As regards the letter addressed to the Kenya National Chamber of Commerce & Industry, Machakos County, the same was dated 26th September, 2017 and it was inviting the membership of the petitioners herein to attend the foras at various venues all of which were to take place on 29th September, 2017 from 11.00 am to 2.00pm. Again there is no indication in the said letter where the said Finance Bill was to be obtained from. The Petitioners aver that the letter was received on 27th September, 2017. Section 87 of the ***County Government Act 2012*** mandates that the public be given timely access to information, data, documents, and other information relevant or related to policy formulation and implementation. In **Robert N. Gakuru & Ors vs. The Governor Kiambu County & Ors [2014] eKLR** this Court cited with approval the decision in **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC)**, where it was held *inter alia* that 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. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case."**

102. In determining the reasonableness of the conduct of public participation process, as held hereinabove, the nature and importance of the legislation and the intensity of its impact on the public are especially relevant. In my view a Bill that has financial ramifications on the members of public is a very crucial Bill and ought not to be treated lightly. Sufficient time must therefore be afforded to the public to air their views thereon. In this case the Respondents have not disclosed the dates when the adverts appeared in the *Daily Nation* and the *Taifa Leo*. The copies exhibited themselves do not show when in fact the said adverts appeared in the media. To inform the public to air their views on a bill whose contents are not disclosed without informing them how and where to access the Bill and proceeding to limit the period for transmission of the views to two days in respect of a Bill so crucial to the public ordinarily cannot in my view amount to reasonable opportunity to the public to participate in the process of enactment of the Bill in question. Apart from the period the Respondents seems to have only relied on the media to disseminate the information. However this Court in the ***Gakuru Case*** (supra) opined that:

> **"Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation."**

103. That was the position adopted in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** where it was held that:

> **"Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens….[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few……It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process…In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as**

being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."

104. In Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) the Court discussed what public participation may entail and expressed itself as follows:

"This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."

105. As this Court held in ***Gakuru Case*** (supra):

"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that."

106. This position has been underpinned in legislation vide section 88 of the ***County Government Act*** which provides that the modalities and platforms for citizen participation include:

(a) Information communication technology based platforms;

(b) Town hall meetings;

(c) Budget preparation and validation fora;

(d) Notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;

(e) Development project sites;

(f) Avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or

(g) Establishment of citizen fora at county and decentralized units.

107. However even if the period is short but it is shown that the petitioner did in fact participate in the enactment of the Bill, the Court would be reluctant to nullify the enactment in the absence of any evidence that a member of the public was as a result of the short notice locked out from presenting his views. In this case the Petitioners' case is that the 1st and 2nd Respondent had failed, refused and/or neglected to inform the Petitioner/Applicant members of the increased levies, rates and licensing fees and that the 2nd Respondent did not involve the Public while coming up with the increased levies, rates and licensing fees for the Sand Harvesting and Transport industry which increased rates, levies and other licensing fees were irregular. It is thus clear that the Petitioners' case is with respect to the levies imposed on Sand Harvesting and Transport industry as opposed to the Act generally.

108. The Respondents have however attached a list of the participants in the public forum and one such person is indicated as **Simon Kitheka** from Chambers of Commerce. The 1st Petitioner herein is **Simeon Kioko Kitheka** and he describes himself as the Chairman of the Kenya National Chamber of Commerce and Industry (Machakos Branch). He has not denied that he is the person whose name appears in the list. It is therefore clear that not only was the Bill leading to the said Act advertised but that the applicants themselves participated by giving their views thereon. In fact the Petitioners expressly admitted that there was a newspaper advertisement inviting all persons to present their views. Their only issue was that the same did not meet the threshold of the public participation as per the ***Machakos County Public Participation Act 2014*** and section 88 and 89 ***County Government Act.*** While I agree that ordinarily, the material placed before me in this Petition by the Respondents would have fallen short of the threshold required for public participation to be deemed to have been properly

undertaken, in the absence of any evidence to the effect that any person was thereby locked from being afforded an opportunity to present his or her views, the Petitioners, who were themselves afforded that opportunity cannot succeed in this petition.

109. The Petitioners contended that the 1st Respondent's invitation for a consultative forum on 29th September, 2017 was on the budget making process and not on the ***Finance Bill 2017***. It is however clear from the newspaper adverts as well as the letter addressed to the Petitioners' organisation that the forum was in respect of the Finance Bill year 2017-2018.

110. It was incumbent upon the Petitioners to satisfy the Court that not only was the notice given too short, but that as a result thereof they were unable to adequately prepare and meaningfully participate in the process of the enactment of the Bill. Whereas I am satisfied that the notice in question was no doubt short, there is no satisfactory material placed before me to convince me that as a result, the Petitioners were deprived of an opportunity to participate in the process.

111. Whereas the views of the Petitioners may not have been swallowed hook, line and sinker by the Respondents, that does not necessarily mean that there was no public participation. As was appreciated by **Sachs, J** in **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)**:

> **"…being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect…Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication…There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat."**

112. This position was adopted by **Majanja J's** decision in **Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others** (supra) when he expressed himself as follows:

> **"The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**

113. What the Courts are saying was that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed. In other words public participation ought not to be taken as a mere formality for the purposes of meeting the constitutional dictate. This position is appreciated in section 4 of the ***Machakos County Public Participation Act 2014*** which provides the guiding principles for public participation in Machakos County Government to include:

> ***(a) The communities, organizations and citizens affected by any policy decision of the government shall have the right to be consulted and shall be accorded an opportunity to participate in the process of formulating policy;***
>
> ***(b) Availing participants access to the information necessary to ensure meaningful participation; and***
>
> ***(c) Feedback to the public on how their input is included in the policy decision.***

114. The issue of who and to what extent the issue of public participation ought to be determined was dealt with in **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others** (supra) as follows:

> **"Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the**

leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

The standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government's fulfilment of positive obligations to realise social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that "reasonable measures may be taken" to regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if 'it is reasonable and justifiable to do so in an open and democratic society.' Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. "In dealing with the issue of reasonableness," this Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. 'In dealing with the issue of reasonableness,' this Court has explained, 'context is all important.' Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. 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. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making." This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity beginning with the broader duty to take steps to ensure that people have the capacity to participate…"

115. This was the view expressed by **Lenaola, J** (as he then was) in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others –vs- County Government of Nairobi & 3 Others [2013] eKLR.**

116. It must however be made clear that not all persons must be heard. In **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

117. As **Ngcobo, J** rightly appreciated:

"Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings.

118. In this case, there was an opportunity for public participation and I do not have evidence that any member of the public, through the shortness of the notice was deprived of an opportunity to participate in the law making process.

119. The Petitioners have however contended that the draft bill availed by the 2nd Respondent for the alleged public participation was markedly different from the Act that was finally passed as the rates that were provided in the draft bill were as for the previous year. However, what was finally presented for enactment contained the impugned charges. Therefore in the Petitioners' contention, no public

participation was carried on in respect of the ***Machakos Finance Act 2018*.** I have looked at the Bill and it is clear that the Act did not exactly reflect what was contained in the Bill. For example whereas in the Bill the sand permit per 7 tonne Lorry per trip was indicated as Kshs 1,300 uniformly, the Act stated that sand permit per 7 tonne lorry per trip was Kshs 5000.00. It is not clear at what stage the amount in the Bill that was the subject of public participation was altered in terms of the amount payable in respect of the sand permit per 7 tonne Lorry per trip. It is my view that the onus is on the law making authority to show that there was public participation in the process and that the end product reflects that process. Where there is a break in the process and the end product is a monster that is completely strange to what was presented to the public as seems to be the case here, in the absence of any reasonable justification, the Court must find that the product is not result of the public participation and must proceed to declare it to be so. In my view, for any amendments to be introduced on the floor of the Assembly subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input. This position is supported by the views expressed in ***Merafong Case*** (supra) to the effect that:

> **"Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve…I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid."**

120. Therefore by introducing totally new and substantial amendments to the Act which were not in the Bill, the Assembly not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution. Its action amounted to a violation of Articles 10 and 196 of the Constitution.

121. It is therefore my view that the substitution of the sum of Kshs 1,300.00 as indicated in the Bill with that of Kshs 5,000.0o in respect of the sand permit per 7 tonne Lorry per trip was improper and unlawful.

122. As regards precision in the pleadings, it is my view that where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed, where the Court can glean from the pleadings the substance of what is complained, to dismiss the petition on the ground of lack of precision would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.

Order

123. In the result, ***Machakos County Finance Act* 2018** by introducing the sum of Kshs 5,000.00 in place of Kshs 1,300.00 in respect of the sand permit per 7 tonne Lorry per trip at the tail end of the proceedings without an indication as the how the proposed amount in the Bill was altered, the Respondents reneged on the requirement of public participation and rendered the constitutional edict a mirage.

124. It is therefore my holding that to the extent that the Act substituted what was presented to the public with a completely different figure, the ***Machakos County Finance Act* 2018** fell foul of Article of Article 2(4) of the Constitution and is inconsistent with the Constitution hence void to the extent of the inconsistency. In other words the insertion of the figure of Kshs 5,000.00 instead of Kshs 1,300.o0 in respect of sand permit per 7 tonne Lorry per trip is contrary to the Constitution and is hereby quashed.

125. If the petitioners have paid any sum over and above the said sum of Kshs 1,300.00 in respect of the sand permit per 7 tonne Lorry per trip, they are entitled to a refund of the same.

126. As none of the parties was fully successful, each party will bear own costs of these proceedings.

127. Orders accordingly.

Dated at Nairobi this 6th day of August, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Inima for Mr Mburu for the Petitioners

Mr Muumbi for the 1st Respondent

Mr Nthiwa for Ms Kamende for the 2nd Respondent

CA Geoffrey