



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.618 OF 2014

BETWEEN

THE LAW SOCIETY OF KENYA.....PETITIONER

AND

CABINET SECRETARY, MINISTRY OF LANDS HOUSING

AND URBAN DEVELOPMENT..... 1ST RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY.....2ND RESPONDENT

THE ATTORNEY GENERAL3RD RESPONDENT

AND

THE NAIROBI CITY COUNTY.....INTERESTED PARTY

JUDGMENT

Introduction

1. By Legal Notice No.74 published in the Kenya Gazette dated 6th June 2014, the then Cabinet Secretary for Lands, Housing and Urban Development, Hon Charity K. Ngilu, published the National Construction Authority Regulations, 2014 (hereinafter referred to as “the regulations”). The regulations were made in exercise of the powers conferred by **Section 42** of the **National Construction Authority Act, 2011** (hereinafter referred to as the “NCA”). **Regulation 25** of the regulations imposed a construction levy in the following terms:-

“There shall be payable to the authority by the owner of any works a construction levy of 0.5% of the value of the contract sum in respect of any construction works whose value exceeds five million shillings.”

2. The Law Society of Kenya, a body corporate established under the **Law Society of Kenya Act** was at all material times engaged in the intended construction of an Arbitration Centre along Mombasa Road in Nairobi at an estimated cost of Shs.1.2 billion and had retained a number of professionals and consultants for that purpose. In light of **Regulation 25**, the Law Society of Kenya claims that it is directly affected by its contents in the sense that it would be required to pay a sum of Kshs.6,000,000/= as construction levy,

which sum in its view, is astronomical and would require it to recover the said sum directly from its members thereby resulting in severe and adverse consequences on its finances.

3. The Law Society of Kenya has therefore filed the Petition on 16th December 2014 in effect challenging the constitutionality of **Section 31** of the **NCA** as read with **Regulation 25** aforesaid and has invoked its objectives set out in **Section 4** of the **Law Society of Kenya Act** which *inter alia* include assisting the Government and Courts in all matters affecting legislation and the administration and practice of law in Kenya. Its actions are also said to be founded on its duty to protect and assist the public in Kenya in all matters touching on, ancillary or incidental to the law.

4. The Petition is brought against the Cabinet Secretary for Lands Housing and Urban Development as the 1st Respondent, the National Construction Authority (hereinafter the Authority) and the Attorney General as the 2nd and 3rd Respondents, respectively. By an application filed on 19th February 2015 and argued on 20th February, 2015, the Nairobi City County was enjoined in the proceedings as an interested party.

5. Simultaneously with the filing of the Petition, the Petitioner filed an application under certificate of urgency seeking a conservatory order suspending the operation of **Regulation 25** pending the hearing of the Petition. The Application was argued before Odunga J. who issued a prohibitory order prohibiting the Respondents from obtaining and or collecting any payments whatsoever under **Regulation 25** from the Petitioner pending the hearing and determination of the Petition. The parties were thereafter directed to file necessary affidavits to buttress their respective positions and they also filed written submissions which were orally highlighted at the hearing.

The Petitioner's case

6. The Petition is supported by an affidavit sworn on 16th December 2014 and a further affidavit deponed by its then Secretary/Chief Executive Officer Mr. Apollo Mboya on 13th March 2015 and it is its case that it challenges **Regulation 25** on the basis that it is null and void for offending the provisions of **Articles 210, 201, 185(4) (a) 43(1) (b)** and of the **Constitution**. The Petitioner further argues that **Regulation 25** is illegal as it was made without conforming to the provisions of **Section 5** of the **Statutory Instruments Act**.

7. The Petitioner later framed and addressed the following issues for determination by this Court:

- a. Whether the imposition of the construction levy under **Regulation 25** by the 1st Respondent violates **Article 210** of the **Constitution**.
- b. Whether the imposition of the construction levy under **Regulation 25** by the 1st Respondent violates **Article 201** of the **Constitution**.
- c. Whether the 1st Respondent prejudiced every citizen's right to housing under **Article 43 (1) (b)** of the **Constitution** in imposing the construction levy without public participation and consultation as required by law.
- d. Whether **Regulation 25** is legal in light of the challenges under **Articles 43(1), (b), 185(4)(a) and (b), 201** of the **Constitution** and **Section 5** of the **Statutory Instruments Act**.

8. On the alleged violation of **Article 210** of the **Constitution**, the Petitioner submitted that the imposition of the construction levy by virtue of **Section 31** of the **NCA** together with **Regulation 25** was unlawful as it was a tax not envisaged under **Article 210** of the **Constitution**. It was argued further that the **Constitution** mandates that taxes imposed on the public are done only by way of specific legislation giving example the **Income Tax Act, Value Added Tax Act** and **Customs and Excise Tax Act** and the requirement that all taxes must be imposed by way of specific legislation by Parliament or County Governments is to ensure public participation and representation of the public through duly elected representatives.

9. The Petitioner thus faults the imposition of the construction levy through subsidiary legislation in the sense that **Section 31** of the **NCA** which the 1st Respondent invoked in enacting **Regulation 25** violates the provisions of **Article 94(1)** of the **Constitution** in which the legislative authority to make laws is vested in Parliament. It is the Petitioner's other submission in that regard that a notice in the *Kenya Gazette* does not amount to specific legislation contemplated under **Article 210** of the **Constitution**.

10. Referring to **Section 31(2)** of the **NCA** which empowers the 1st Respondent to impose the construction levy, the Petitioner submitted that the requirement for specific legislation under **Article 210** of the **Constitution** was contrived and formulated to ensure that any imposition of a levy is subjected to the rigorous process and procedures of legislation that conforms to constitutional provisions such as public participation through Parliament as representatives of the people.

11. In respect of **Article 201** of the **Constitution** that provides for openness, accountability and public participation in financial matters, the Petitioner submitted that there was no consultation with the public or relevant stakeholders before the imposition of the construction levy and it alluded to the reported concerns raised by the Interested Party to the effect that the Interested Party was not consulted prior to the imposition of the levy as underscored by the provisions of **Article 185(4)(a)** and **(b)** and **Part 2** of the **Fourth Schedule** of the **Transitional and Consequential Provisions of the Constitution** which sets out the distribution of functions between the National and the County Governments. The Petitioner in that context referred to the case of **Robert N Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR** wherein Odunga J. reiterated and emphasized on the need to engage the public sufficiently in all matters of public finance before the enactment of any legislation seeking to impose taxes and levies upon the public.

12. In the same breadth, the Petitioner contends that the 1st and 2nd Respondents' decision in introducing **Regulation 25** was contrary to their obligation to make appropriate consultations in line with the provisions of **section 5** of the **Statutory Instruments Act** and faults the consultation that was undertaken by the 2nd Respondent on the ground that the said consultations were insufficient as the persons upon whom the construction levy was imposed, being the general public, were not represented and/or invited to attend the consultative meetings that it had called. The Petitioner also maintained that the people who are alleged to have attended the consultative meetings were all drawn from the construction industry and upon whom the construction levy is not imposed.

13. On the issue whether the 1st Respondent prejudiced every citizen's right to housing as contemplated under **Article 43 (1) (b)** of the **Constitution**, the Petitioner submitted that the construction levy will increase the cost of building and acquisition of affordable housing and making reference to the provisions of the **Fourth Schedule** on Transitional and Consequential provisions of the **Constitution**, the Petitioner indicated that the listed functions of the County Government include county roads, county harbors, street lighting and housing. It was therefore incumbent upon the Respondents to consult the County Governments which are bestowed upon the function of developing various policies in relation to infrastructure before enacting the impugned regulation.

14. On the final issue, the Petitioner took the position that from the foregoing arguments, the imposition of the construction levy was in contravention of constitutional provisions and that the consequence of such violations is that this Court should find that **Regulation 25** is unconstitutional in light of the provisions of **Article 3** of the **Constitution**. The Petitioner thus prays that the following declarations and orders should be granted;

"1) A declaration that Section 31 of the National Construction Authority Act violates Articles 209(4) and 210 (1) of the constitution and is therefore null and void.

2) A declaration that the 1st Respondent in exercise of her mandate under Section 31 of the National Construction Authority Act violated Article 201 of the Constitution in introducing the construction levy under Regulation 25 of the national Construction authority Regulations 2014.

- 3) *A declaration that the introduction of the construction levy without the consultation and involvement of County Governments goes contrary to the provisions of Article 185 4(a) and, (b) and Part 2 of the Fourth Schedule of the Transitional and Consequential provisions of the Constitution.*
- 4) *A declaration that the imposition of the construction levy without appropriate consultations with the persons most affected offends the provisions of Section 5 of the Statutory Instruments Act (No.23 of 2013).*
- 5) *A declaration that the introduction of the construction levy by the 1st and 2nd Respondent's without the involvement of the public and relevant persons prejudices every citizens right to housing under Article 43 (1)(b) of the Constitution.*
- 6) *An order prohibiting the 1st and 2nd Respondent's from imposing and or collecting the construction levy under Regulation 25 of the National Construction Authority Regulations 2014.*
- 7) *A declaration that Regulation 25 of the National Construction Authority Regulations 2014 violates the Constitution and is therefore null and void.*
- 8) *The Respondent to pay the Petition costs in any event.”*

The Interested Party's case

15. The Interested Party supported the Petition and filed a Replying Affidavit sworn by its County Secretary and Head of County Public Service, Gregory Mwakanongo. On its part, it also framed the following five issues for determination:

- a. What is the scope of the powers and functions of the Respondents?;
- b. Whether the Respondents have the power to impose a construction levy under **Regulation 25**;
- c. Legitimate expectation;
- d. Whether one can charge for services they don't provide.
- e. Whether such imposition of the construction levy by the 1st Respondent specifically was done in violation of **Article 201** of the **Constitution**.

16. Turning to the first issue, the Interested Party submitted that the principal object and purpose of the 2nd Respondent is set out in **Section 5(1)** of the **NCA** which is to oversee the construction industry and coordinate its development. The functions and powers of the 1st Respondent are then circumscribed by **Sections 5** and **6** of the **NCA** and the Interested Party submitted in that regard that the 2nd Respondent ought not to act outside the scope and limit of its powers and functions.

17. As to whether the 1st Respondent has power to impose the construction levy under **regulation 25**, the Interested Party cites **Articles 209** and **210** of the **Constitution** to make the point that tax or licensing fees may not be imposed, waived or varied except as provided by legislation. The Interested Party thus submitted that it is constitutionally mandated to provide essential services including housing and to this end, it had in place the **Nairobi City County Finance Act 2013** which is elaborate on matters relating to physical planning, lands and housing. The said **Act** also contains provisions relating to evaluation of building plans and permits, construction monitoring, valuation and the issuance of occupation certificates.

18. The Interested Party added that its **Finance Act** was enacted by the Nairobi City County Assembly through effectual and extensive public participation in compliance with the constitutional and other statutory provisions that regulate revenue raising measures and expenditure. In essence, the Interested

Party argued that the imposition of the construction levy amounts to double taxation in contravention of **Articles 46 and 43(1)(b)** of the **Constitution** and referred to the case of **Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR** in support of its proposition on the importance of public participation.

19. On the issue of legitimate expectation, the Interested Party submitted that it has in the past and now been involved in collection of revenue relating to construction and the intended action by the 2nd Respondent would interfere with the legitimate expectation of the people of Nairobi City County that housing is controlled by it and in that regard cited **Administrative Law, Sir William Wade 10th Edition** and **Keroche Industries Limited v Kenya Revenue Authority & 5 Others [2007] eKLR** to advance their argument on the need to enforce the legitimate expectation that there is need by all and sundry, including the Respondents, to uphold the rule of law and good governance.

20. On whether one can charge for services they do not provide, the Interested Party argued that it is the constitutional mandate of every County Government under **paragraph 8 part 2** of the **Fourth Schedule** to the **Constitution** to oversee county planning and development which includes housing. Juxtaposing the position obtaining at the present time where contractors pay for approval of building plans and in return the County surveyors and planners oversee construction to ensure it is undertaken as approved, it is its case that the imposition of the construction levy as sought will jeopardize the construction industry as it contravenes **Articles 43(1)(a) and (b)** and **Article 46(1)(c)** of the **Constitution** together with **Section 6(1)(b)** of the **NCA**, as no service in construction is actually offered by the Respondents. The Interested Party in that context relied on the case of **Real Deals Limited & 3 others v Kenya National Highways Authority & Another [2015] eKLR** wherein the Court upheld the distinctive roles of the County and National Government on certain matters in order to avoid parallel authority that can only lead to confusion and overlapping of such roles.

21. On the final issue for determination, being whether the imposition of the construction levy by the 1st Respondent was done in violation of **Article 201** of the **Constitution**, the Interested Party maintained that neither it nor the public was ever consulted prior to the enactment of the regulation, contrary to the requirement stipulated in **Article 201** of the **Constitution**.

22. Citing the provisions of **Sections 114 and 115** of the **County Government Act** which require the Interested Party to ensure that public participation is realized in County planning processes, the Interested Party contends that it is placed in a predicament with its residents for failure to protect the residents from the imposition of the construction levy. The interested party faults the 2nd Respondent for holding a national contractors' conference across 9 regions in Kenya as deponed in the 2nd Respondent's replying affidavit which conference was held without a public notice neither was it meant for public participation. This is so because the target group for the said conference was contractors who were further meant to pay attendance and registration fee. As such, it has argued that the general public was unaware of the intention to pass the impugned legislation involving imposition of tax in which case the Respondents' duty to publicize the intended action was more onerous. The Interested Party referred the Court to its previous decision in **Nairobi Metropolitan Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others [2013] eKLR** on this subject.

23. In conclusion, the Interested Party contends that **Section 31** of the **NCA** and consequently, **Regulation 25** is unconstitutional and therefore illegal and the Court should declare so in light of the foregoing.

The 2nd Respondent's case

24. The 2nd Respondent opposes the Petition and relies on the replying affidavit sworn on 23rd February 2015 and further affidavit sworn on 14th January 2016 by Mr. Daniel Manduku, its Executive Director. It has distilled the following issues for determination;

a. Whether **Section 31** of the **NCA** as read with **Regulation 25** is in conflict with **Article 210 (1)** of

the **Constitution**.

b. Whether the regulations aforesaid were passed after complying with the requirement for public participation as envisaged under **Article 201** of the **Constitution**.

c. Whether the construction levy is imposed for services rendered by the Authority as required by **Article 209(4)** of the **Constitution**.

d. Whether the imposition of the levy has prejudiced every citizen's rights to housing under **Article 43(1)** of the **Constitution**.

e. Whether the Authority's mandate under the Act to collect construction levy is in conflict with that of the Interested Party.

25. The 2nd Respondent in that context maintains that the construction levy is provided for by legislation as it is envisaged by the provisions of **Section 31** of the **NCA**, which provides for the rate of assessment of the levy and allows the 1st Respondent limited discretion in the making of regulations in respect of the manner of payment of the levy, underscoring the importance of the levy in financing the Authority's activities. That **Section 42** of the **NCA** also empowers the 1st Respondent in consultation with the Board of the 2nd Respondent to make regulations for the better carrying out of the objects of the **NCA**. Further, since the **NCA** is part of legislation enacted pursuant to a rigorous parliamentary process involving scrutiny and public participation before the relevant parliamentary committee in line with the **Statutory Instruments Act**, the 1st and 2nd Respondents derived their legitimacy to proceed as they did in enacting the regulations (see **Republic v Kiambu County Government & 4 others ex parte Samuel Thinguri Waruatho & 2 others (being officials of the Kenya National Chamber of Commerce & Industry Kiambu County)** [2014] eKLR and **Cereal Growers Association & Another v County Government of Narok & 10 others** [2014] eKLR).

26. The 2nd Respondent further submitted that a Minister may introduce subsidiary legislation to operationalize an Act of Parliament (see **Halsbury's Laws of England 3rd Edition Volume 36**) and referring to **Article 209(2)** of the **Constitution**, it was the 2nd Respondent's submission that the National Assembly has authorized the National Government to impose the construction levy by virtue of **Section 31** of the **NCA** and in the premises there was no legal basis for the assertion that **Section 31** of the **NCA** is in conflict with **Article 94(1)** of the **Constitution**. The 2nd Respondent further relies on the decision of Majanja J. in **Bidco Oil Refineries Limited v the Attorney General & 3 Others** [2013] eKLR in that regard.

27. The 2nd Respondent furthermore has asked the Court to note the various legislations authorizing the National Government to levy taxes, charges or fees in the same manner as **Section 31** of the **NCA** and to make reference to **Section 6** of the **Value Added Tax Act** which empowers the Cabinet Secretary in charge of Finance to, by order published in the *Gazette*, amend the rate of tax by increasing or decreasing any of the rates of tax to an amount not exceeding twenty-five percent of the rate. That **Section 105** of the **Tourism Act** also allows the relevant Minister, by order, to require the payment by persons engaged in tourism activities and services of a tourism levy. **Section 22(2) (d)** of the **Kenya Roads Act** similarly empowers the Kenya National Highways Authority and the Kenya Rural Roads Authority, with the approval of the Minister responsible for roads, to determine, impose and levy rates, tolls, charges, dues or fees for any of its services or for the use by any person of its facilities.

28. Finally, the 2nd Respondent in addition, submitted that any Act of Parliament is presumed to be constitutional, the applicant bearing the burden of rebutting the constitutionality. In the same breadth, that the Petitioner bears the burden of rebutting the constitutionality of **Section 31** of the **NCA** which burden the Petitioner has failed to discharge. (see **Ndyanabo v Attorney General of Tanzania (2001) 2 EA 485**).

29. On the level of compliance with **Article 201** of the **Constitution** in passing the regulations, the 2nd Respondent outlined the opportunities which the public in general and the stakeholders in the construction industry in particular had when the regulations were being proposed and in that regard, it enumerated four instances where public participation was involved.

30. First, it maintained that the draft regulations were posted on its website where comments were sought from the public regarding its contents. Second, a stakeholders' workshop was held to deliberate on the draft regulations and the authority's strategic plan. The key processes leading up to this workshop involved advertisement in the *Daily Nation* newspaper, specific representation of the Petitioner by its Council member, Hon. Judith Sijeny, who also sits on the 2nd Respondent's Board, invitations to over 25 public and private institutions specifically to deliberate on the draft regulations and a specific invitation to the then Nairobi City Council to attend the stakeholder's conference.

31. Third, a National Contractors Conference was held between 31st January and 9th February 2013 in 9 regions within Kenya during which the draft regulations were handed out to the participants and discussed by those present. The 2nd Respondent in its replying affidavit in that context attached the list of invitees and attendees as well as the advertisement for that event pointing out that the Interested Party was represented by a Mr. Evans Mogire from the office of the Town Clerk of the then Nairobi City Council.

32. Fourth, that the regulations have fulfilled the requirements of **Sections 5 and 11** of the **Statutory Instruments Act** by passing through the necessary legislative process at the National Assembly which involved public participation at the committee level. Moreover, it contended that the Interested Party had raised concerns with the Clerk of the Senate when the draft regulations were before the Senate, which queries were duly responded to by the 2nd Respondent to the satisfaction of the Clerk of the Senate.

33. In rebutting the Interested Party's assertion that the involvement of the construction industry in the stakeholders workshop did not constitute public participation, the 2nd Respondent submitted that the criteria for public participation included a broad representation of the interests at stake and it would be too much to expect every member of the public to have their views heard on the regulations for them to be valid and it relied on **Moses Munyendo & 908 Others v Attorney General & Another [2013] eKLR** and **Coalition for Reforms and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR** in support of that proposition.

34. The 2nd Respondent furthermore submitted that the Petitioner's and Interested Party's argument that the 2nd Respondent was collecting the construction levy for services not rendered contrary to **Article 209(4)** of the **Constitution** lacked factual basis and reiterated that its mandate spelt out in **Sections 5 and 6** of the **NCA** include accreditation and registration of contractors and the regulation of their professional undertakings, accreditation and certification of skilled construction workers and construction site supervisors, development and publication of a code of conduct for the construction industry, promotion and assurance of quality in the construction industry and to advise and make recommendations to the Minister on matters affecting or connected with the construction industry. Consequently, that the construction levy is imposed for services rendered by the National Government through the 2nd Respondent for the public benefit and in the discharge of its obligations under **Part 1** of the **4th Schedule** of the **Constitution** which mandates and services the Petitioner and Interested Party had not contested at all. On the imposition of the construction levy being prejudicial to every citizen's right to housing under **Article 43(1)**, the 2nd Respondent submitted that the construction levy was intended to perfect the right to housing. Citing the leading economic indicators for the month of October 2015 published by the Kenya National Bureau of statistics, it was the 2nd Respondent's argument therefore that there was growth in the building and construction industry compared to the 6 months preceding the publication of the regulations and emphasized its role in the reduction of incidences of collapse of buildings owing to the vetting and inspections mounted by the 2nd Respondent. That granting the Petitioner's prayers would thus erode the gains made by the 2nd Respondent.

35. On the issue whether the 2nd Respondent had usurped the mandate of the Interested Party, the 2nd

Respondent maintained that the National Government has the mandate to regulate the construction industry under **part 1** of the **4th Schedule** of the **Constitution**. This schedule mandates the National Government to deal with matters relating to housing policy, consumer protection, the construction and operation of national trunk roads, standards for the construction and maintenance of other roads by Counties and national public works.

36. The 2nd Respondent in that regard anchored its submission on **Article 186(3)** of the **Constitution** which provides that a function not assigned to a County by the Constitution or national legislation is a function or power of the National Government and in the absence of an express provision regarding the function of regulation of the construction industry being assigned to the County Governments, the function remained with the National Government. The 2nd Respondent thus distinguished its role with that of the Interested Party, the latter's role being limited to approving the plans for construction, collection of taxes fees and charges for the provision of specific services in relation to the putting up of structures that conform to the County's Master plan, the distinct roles of the 2nd Respondent and the Interested Party thus in no way interfering with each other.

The 1st and 3rd Respondents' case

37. On their part, the 1st and 3rd Respondents filed written submissions on 15th March 2016 in opposition to the Petition. The submissions were made under the following four broad themes:-

- a. Public participation;
- b. The constitutionality of **Section 31** the **NCA** together with the regulations thereof specifically;
- c. Whether the imposition and collection of the construction levy contravenes the Constitution generally; and
- d. Whether the Petitioner is entitled to the remedies sought.

38. The 1st and 3rd Respondent in that contexts fault the Petitioner's inaction in not having challenged the NCA and the regulations for the over 4 years that the legislation has been in place and they further challenge the evidentiary value of newspaper cuttings in which sentiments by the Governor of Nairobi on lack of public participation prior to the enactment of the regulations were captured. The 1st and 3rd Respondents therefore support the 2nd Respondent's position that there was public participation prior to that action and that indeed the Petitioner and the Interested Party were represented in the various stake holder sessions held by the 2nd Respondent. They further contend that the Petition is founded on pursuits prompted by the demand made to the Petition to pay Shs.6 million as construction levy and they further quote the case of **Commission for the Implementation of the Constitution v Parliament of Kenya & 2 others [2013] eKLR** where the Court declined to declare an Act as unconstitutional for want of public participation, the Petitioner having failed to demonstrate how the National Assembly had failed to achieve the threshold required for public participation.

39. On the constitutionality of the NCA together with the regulations thereof, the 1st and 3rd Respondents submitted that the said provisions are within the provisions of **Article 209(1)** and **(2)** of the **Constitution** and argue that the constitutionality or otherwise of the Act as a whole is not in question and that 1st Respondent was therefore within her mandate in issuing the regulations to guide the manner of collection of the construction levy, the same having been provided for under **Section 31** of the **NCA**.

40. The 1st and 3rd Respondents further argued that the imposition and collection of the construction levy did not contravene the **Constitution** as the imposition of tax by statute cannot of itself amount to deprivation of property contrary to **Article 40** of the **Constitution** (See **Pharmaceutical Manufacturing (K) Co. Ltd & 3 Others v Commissioner General of the Kenya Revenue Authority & 2 Others [2014] eKLR**). Moreover, the 1st and 3rd Respondents fault the Petitioner for seeking to amend the NCA,

a matter that is the preserve of the Executive and Legislature as was the decision of Majanja J. in **Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 Others [2014] eKLR**.

41. In concluding their submissions, the 1st and 3rd Respondents stated that the Petitioner has not demonstrated any violation of the Constitution by the enactment of the NCA and the formulation of the regulations thereunder. These Respondents further ask the Court to restrain itself and not be in a rush to declare the Act and the regulations as being unconstitutional in the absence of legitimate reasons and credible evidence in that regard.

Determination

42. From the extensive submissions highlighted above and with each party framing its own issues, I find it appropriate to narrow the issues for determination as follows:-

- a. Whether the provisions of **Section 31** of the **National Construction Authority Act** and **regulation 25** thereof contravene the provisions of **Article 210** of the **Constitution**;
- b. Whether the imposition of the construction levy violated the provisions of **Article 201** of the **Constitution**; on public participation.
- c. Whether the imposition of the construction levy impedes every citizen's right to housing as set out in **Article 43(1)(b)** of the **Constitution**.
- d. Whether the Petitioner is entitled to the remedies sought.

Preliminary Issues

43. The Petition was clearly triggered by the Petitioner's imminent payment of Kshs.6 Million as construction levy for its intended construction of an Arbitration Centre at a total cost of Kshs.1.2 Billion. Indeed, it is the 1st and 3rd Respondents' argument that the Petition is actuated by the selfish interests of the Petitioner in that regard. In the course of the hearing, I took note that the said issue mutated into a number of constitutional issues in which the imposition of the construction levy was challenged on several constitutional fronts, the matter later cascading to one of public interest including the role of County Governments in the construction industry. This fact is bolstered by the Interested Party's subsequent enjoinder in the proceedings.

44. As an aggrieved party however and which was subject to the imposed construction levy, the Petitioner had a right to individually seek recourse in Court as it did whether or not it acted in the public interest. In addition, the NCA having been in place for about 2½ years and the regulations in place for about 6 months prior to the filing of the Petition as pointed out by the Respondents, there is no legal basis to prevent the Petitioner from challenging the constitutionality of the said statute or its regulations. In my view, the 6 months within which the Petitioner brought its Petition from the publication of the regulations is reasonable time and I know no law that limits constitutional litigation save that for practical reasons, any challenge to statute must be made soon after its enactment.

45. Having dispensed with what I considered necessary preliminary issues raised by the Parties, I shall now proceed to address the issues for determination as framed above.

Whether the provisions of Section 31 of the NCA and Regulation 25 thereof contravene the provisions of Article 210 of the Constitution

46. **Article 210** of the **Constitution** deals with imposition of tax and **Article** specifically **210(1)** of the **Constitution** provides that;

“No tax or licensing fee may be imposed, waived or varied except as provided by legislation.”

It is common ground that the construction levy is an imposed tax as contemplated under the Constitution in the above terms. I understood the Petitioner's argument in that regard as two fold. The first argument is that the NCA in so far as it contains **Section 31** aforesaid is not specific legislation within the meaning of **Article 210** of the **Constitution** and secondly, that **Regulation 25**, being subsidiary legislation introduced by way of a legal notice in the *Kenya Gazette* does not also amount to specific legislation.

47. The Respondents on the other hand are adamant that the NCA is a valid piece of legislation having been made pursuant to the provisions of **Article 94(1)** of the **Constitution**. The Interested Party on its part reiterates that the construction levy falls within its mandate and that it had enacted the Nairobi County **Finance Act 2013** to provide for such matters and that allowing the construction levy to be imposed would amount to double taxation of city residents. The 2nd Respondent in rebuttal, asserts that the construction levy is any other tax that the National Government may impose by virtue of **Article 209(2)** of the **Constitution**, the County Government's exclusive power to impose tax being limited to property rates and entertainment tax only.

48. On the face of it, and bearing in mind the comparable legislation referred to by the Petitioner being the **Value Added Tax Act**, the **Income Tax Act** and the **Customs and Excise Tax**, it is the Petitioner's insinuation that Parliament was expected to pass a legislation presumably known as *the Construction Levy Act* and that only such legislation, that in the Petitioner's view, would amount to specific legislation. However, the 2nd Respondent correctly pointed out other legislations that imposed taxes such as the **Tourism Act**, the **Kenya Roads Act** and the **Energy Act** which are not named after a levy or tax but contain provisions that authorize imposition of tax. Moreover, the above pieces of legislation contain provisions that expressly allow the Minister to levy taxes under certain parameters.

In addition, I note for instance that **Section 78** of the **Energy Act** provides thus:

"The Minister may impose a levy of up to five percent on all electricity consumed in the country, the proceeds of which shall go into the Rural Electrification Programme Fund, set up under [section 79](#)".

This is a different position from that in **Section 6** of the **Value Added Tax** pointed out by the Petitioner which authorizes the Minister to amend the tax rate to be imposed under that Act but lays out a specific procedure requiring such amendment to be laid before the National Assembly for approval. I also note that **Section 2(l)(ii)** of the **Customs and Excise Act** empowers the Minister to levy such other additional duty payable in respect of all goods entered for home use from an export processing zone, by notice in the *Gazette*.

49. In that context, **Section 31** of the NCA which deals with the imposition of the construction levy provides that;

- 1. The Minister may, by notice in the gazette, impose a levy to be known as the construction levy on construction work carried out by persons registered under (the NCA).***
- 2. The levy shall be in an amount not exceeding an equivalent of 0.5% of the value of any contract whose value exceeds five million shillings.***
- 3. The minister may make regulations prescribing the manner of payment of the levy.***
(Empasis added)

A perusal of the above provision reveals that it is worded in a similar manner as **Section 78** of the **Energy Act** and as pointed out in **Halsbury's Laws of England, 3rd Edition Volume 36**, it is common practice that Parliament delegates authority to make subsidiary legislation to a person or body in furtherance of the objectives of an Act of Parliament in which such powers are delegated. It is therefore apparent from the foregoing that the Petitioner's argument that **Section 31** of the NCA and **Regulation 25** thereof do not amount to specific legislation as contemplated under **Article 210** of the Constitution is unsustainable and I am therefore unable to find that **Section 31** of the NCA and **Regulation 25** thereof are inconsistent with

Article 210 of the Constitution.

50. Having said so, the Interested Party took the imposition of the construction levy as an affront to its powers under the Constitution and other legislation. This begs the question; on whom is the mandate to impose the construction levy vested noting that the respective powers of the National and County Governments are set out in the Constitution?

51. Article 186(1) of the **Constitution** provides that the functions and powers of the National and County Governments, respectively, are set out in the **Fourth Schedule** to the Constitution. **Part 1** of the **Fourth Schedule** lists the functions of the National Government relevant to this Petition to include “housing policy” and “capacity building and technical assistance to the Counties.” **Article 186(3)** of the **Constitution** is then specific that a function or power not assigned by the Constitution or national legislation to a County is a function or power of the National Government while a function or power conferred on one or more than one level of Government is a function or power within the concurrent jurisdiction of each of those levels of government (**Article 186(2)** of the **Constitution**). For greater certainty, it is noted that Parliament may legislate for the Republic on any matter.

52. On the other hand, **Part 2** of **schedule 4** of the **Constitution** lists the powers and functions of County Governments relevant to this Petition as to include “County planning and development.” This includes statistics, land survey and mapping, boundaries, fencing and housing. **Article 185(2)** of the **Constitution** then empowers the County Assembly to make laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the **Fourth Schedule**. The Interested Party in that regard referred to its **Finance Act 2013** enacted pursuant to the **Fourth Schedule** of the **Constitution** which Act encompassed several income generating levies by the County to finance its activities including charging property rates, building plans etc. **Article 209(3)** of the **Constitution** then expressly allows a County to impose property rates and entertainment taxes while **Article 209(4)** of the **Constitution** allows each level of Government to impose charges for the services they provide.

53. It is in this legislative context that I examine the NCA and whether the mandate of the authority established under the NCA is in conflict with that of the Interested Party. The scope of powers and functions of the authority are set out in **Sections 5** and **6** of the **NCA** respectively and the object for which the authority is established is to oversee the construction industry and coordinate its development. Construction in its common sense not being an exclusive mandate of the County Government under **Schedule 4** of the **Fourth Schedule** can only be undertaken by the National Government by virtue of **Article 186(3)** of the **Constitution** as exemplified by the NCA which grants such mandate to the 2nd Respondent.

54. The words ‘housing policy’ and ‘housing’ as used in the **Fourth Schedule** in respect of National and County Government functions respectively are capable of varied interpretation and application. **Black’s Law Dictionary 9th Edition** defines a house as a home, dwelling or residence while ‘policy’ is defined as the general principles by which a government is guided in its management of public affairs. The mandate of the National Government involves the accreditation, regulation and promotion of quality assurance and technical capacity assistance in the construction industry at large while the County Government is involved in housing to the extent of planning and development within a County only.

55. The arguments by both the 2nd Respondent and the Interested Party as to their roles are therefore valid to the extent that the decision in **Real Deals Limited & 3 Others (supra)** appreciates the distinctive roles of the different levels of government. I do not think that this is the same as parallel or overlapping jurisdiction and I note further that there was no dispute by the Petitioner or the Interested Party on one hand and the 2nd Respondent on the other as to their respective mandates.

56. As I understand it therefore, each level of Government is entitled to charge for services rendered and during the budgetary allocation process by Parliament, the 2nd Respondent as part of the National Government is expected to raise its finances through avenues such as the construction levy which

Parliament factors in while deciding on the budgetary allocation to the Authority. Similarly, the Interested Party expects to finance its operations from levies and taxes relating to housing etc. The Interested Party therefore, relying on its antecedents, invoked the doctrine of legitimate expectation in justifying its continued revenue collection and regulation of the construction activities within the County. The common denominator in all these situations remains the citizen being taxed, a situation that the Interested Party referred to as double taxation.

57. From the Petition however, it appears that the Interested Party is largely concerned with its power to levy taxes over what is a matter referred by Statute to the 2nd Respondent. The Interested Party is however unconvincing as to its pursuit of any constitutional rights in this regard and the Court will for the moment refuse to be drawn in that endeavour. I am also not satisfied that the Interested Party's position meets constitutional expectation and that position, introduced into a Petition by the Petitioner seeking relief for its own difficulties, cannot be the basis for addressing a matter clearly left to the National Government's mandate by the Constitution.

58. For avoidance of doubt, "construction" is not limited to housing as I will show later. Neither is it limited to panning or survey so that without a specific provision in the Fourth Schedule addressing the industry of constructing buildings for dwelling, industrial and other purposes, then **Article 186(3)** of the **Constitution** ought to be invoked and thus the function is conferred on the National Government.

59. My findings on this issue must therefore be that **Section 31** of the **NCA** is constitutional so is **Regulation 25** thereof. I so find.

Whether the imposition of the construction levy violated the provisions of Article 201 of the Constitution on public participation.

60. The principles of public finance are enshrined in **Article 201** of the **Constitution** partly provides that;

The following principles shall guide all aspects of public finance in the Republic –

a. there shall be openness and accountability, including public participation in financial matters;

This constitutional provision espouses the principle of public participation and in that regard, the Petitioner and Interested Party have argued that there was inadequate public participation prior to the formulation of the impugned **Section 31** and the aforesaid regulation. This argument was made on two fronts – the constitutional requirement under **Article 201** of the **Constitution** and the statutory requirement under **section 5(2)(3)** of the **Statutory Instruments Act**.

61. The Petitioner and the Interested Party in that context even went to the extent of suggesting that they were not involved in the formulation of the regulations but as for the Petitioner, it is undisputed that it is one of the organizations obliged to nominate a representative to the Board of the authority by virtue of **part 1** of the **first schedule** to the **NCA**. Ms. Judith Sijeny, a member of the Petitioner's Council, was therefore duly nominated, independently, by the Petitioner, to serve on the 2nd Respondent's Board of Directors. Does this nomination by the Petitioner of one of its Council members to the 2nd Respondent's Board amount to the Petitioner's participation in the affairs of the NCA and therefore in the formulation of the impugned regulation?

62. My answer to that question would be in the affirmative. The Petitioner is the Law Society of Kenya made up of practicing lawyers with the presumption that they understand the law including on the imposition of relevant taxes. There was therefore a reason why not less that Ms. Judith Sijeny, then Council member of the Society (and now a nominated Senator) was sent to represent the Society in the Board of the NCA. The regulations were formulated during her tenure and there is reasonable expectation that she participated as such in her capacity as a lawyer and nominee of the Society. There is no evidence before me that she faulted the regulation or its enactment at all. She and her society were also expected to be aware of any financial implication of the levy on the intended construction of the

Petitioner's Arbitration Centre and to plead otherwise would be an admission of laxity on their part. Moreover, both the Petitioner and the Interested Party were among other organizations specifically invited by the 2nd Respondent to participate in the review of the draft regulations and that is why a perusal of the 2nd Respondent's replying affidavit by Daniel Manduku dated 23rd February 2013 indicates that invitations dated 31st October 2012 to participate in a stakeholders' workshop was made to several organizations including the Petitioner and the 2nd Respondent. The Conference was held as publicized in the daily newspapers of 7th November 2012 and the attendance list annexed to the 2nd Respondent's affidavit aforementioned indicated that apart from the Petitioner's nominee, one other person from the Petitioner society signed the attendance list of 7th November 2012.

63. A subsequent National Contractors Conference was also held across 9 regions in the Country on several dates between 31st January, 2013 and 9th February 2013. By a public notice in the newspaper, the conference was emphasized to be limited to contractors and a payment of Kshs.8,500/= as registration fee was required. The expectation upon publicisation of the Conference would be that the Petitioner had the opportunity even at that point to challenge the intended amendments. It did not do so.

64. From the foregoing, I find it very difficult to relate to the Petitioner's grievance that there was no public participation in as far as it was concerned.

65. I also note further to the above that **Section 5(1)** of the **Statutory Instruments Act** obliges a regulation-making authority to make appropriate consultations with persons who are likely to be affected by the proposed instrument and to ensure that such persons have an adequate opportunity to comment on its proposed content. The 2nd Respondent in that regard and through its replying affidavit has annexed evidence to indicate that the regulations were forwarded to the 1st Respondent who in turn forwarded the published the draft regulations together with the explanatory memorandum to the National Assembly for eventual consideration by the relevant committee before debate in the August House. The regulations were also forwarded to the Standing Committee on Roads and Transportation of the Senate during which time the Interested Party corresponded with the Chairman of the said Senate Committee and the Clerk of the Senate raising its concerns on the regulations in that correspondence. It cannot therefore be true that the Interested Party was never consulted prior to the enactment of the regulations.

66. In that context, following the Constitutional Court of South Africa case of **Minister of Health v New Clicks South Africa (PTY) Ltd & Others (2006) (2) SA 311**, it is my understanding that where a legislative authority publishes draft regulations and seeks the comments of affected parties as the Senate did in this case, then the affected party can hardly deny knowledge thereof. Further, it is not always the case that such a party must be granted an oral hearing for its participation to be real. Presentation of memoranda and correspondence such as the one between the Clerk to the Senate and the Interested Party was, in my view, sufficient participation – See **Association of Gaming Operators- v AG and 4 Others [2014] e KLR** per Majanja J.

67. Without saying more on the issue of public participation, I am of the same position as in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others [2013] eKLR** to the effect that it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and in the present case, there was a sufficient level of participation as I have shown above and that finding answers the only issue to be determined in the context of **Article 201** of the **Constitution**.

Whether the imposition of the construction levy impedes every citizen's right to housing set out in Article 43(1)(b) of the Constitution.

68. The right to housing is set out in **Article 43(1)(b)** of the **Constitution**. This provision states that every person has the right to accessible and adequate housing, and to reasonable standards of sanitation. The Petitioner's argument in that context is that the imposition of the construction levy infringes on its right to housing on account of increased housing costs. That may be so but apart from the general assertion no evidence was adduced to support such an allegation. The 2nd Respondent on its part made reference to

some economic statistics which indicated an increase in construction activities despite the imposition of the levy.

69. That obvious limitation notwithstanding in my view, the underlying issue in the Interested Party's case would seem to be based on the financial impact both in terms of income to the levels of Government and the economic capability of the citizens to pay tax. In that regard, it would be prudent to consider a finding that makes scientific correlation between the impact of the construction levy and housing to assist me in addressing this issue adequately. As was held in **Pharmaceutical Manufacturing (K) Co. Ltd & 3 Others (supra)**, I agree with the principle, albeit with modification, *mutatis mutandis*, that imposition of tax by statute does not in itself amount to a violation of **Article 43(1)(b)** of the **Constitution**. The right to housing is also not limited to construction of houses but extends to access thereof. Neither the Petitioner nor the Interested Party demonstrated how their respective rights to housing were violated to warrant the Court's intervention. The Petitioner's proposed arbitration centre for instance was not aimed at providing housing but more of an economic activity to the Petitioner and its membership.

70. In a nutshell, this issue was raised to spice up the Petition and to gather sympathy and had nothing to do with imposition of construction levy in the context of the real intent of the Petitioner; construction of its controversial Arbitration Centre.

Whether the Petitioner is entitled to the remedies sought

71. In a nutshell, the Petitioner has failed to demonstrate that it warrants the orders seeking to declare the provisions of **Section 31** of the **NCA** and **Regulation 25** thereof as unconstitutional. As rightly pointed in the Tanzanian case of **Ndyanabo v AG (supra)**, a statute is presumed constitutional and the burden of rebutting the constitutionality of the impugned **Section 31** of the **NCA** and **Regulation 25** lay with the Petitioner which burden it has failed to discharge.

72. Declaring a statutory provision as unconstitutional, in my view, is a mandate that should be exercised sparingly and only in the most obvious of cases because the Constitution places the law making responsibility on Parliament and in line with the well known and now settled doctrine of separation of powers, Courts should respect the doctrine as much as practicable.

73. Having failed to meet the requisite threshold, the Petitioner is therefore not entitled to any remedies sought. The support of the Petition by the Interested Party did not also yield much because the Interested Party merely, by litigational genius tried to create its own case out of a simple matter of a tax imposed for the construction of the Petitioner's arbitration centre which had nothing to do with it. It must always be remembered that an Interested Party's case should not be different from the case between an applicant/petitioner and a respondent otherwise mutational cases will only lead to convoluted and confused cases which would do nothing more than impede the administration of justice.

Disposition

74. On the whole, therefore I am not convinced that the Petition makes a case for the invalidation of the impugned statute, in its entirety or any specific provision on grounds of unconstitutionality. In the end, I hold that the Petition is unmerited and is hereby dismissed. Let each Party bear its own costs.

75. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 22ND DAY OF MARCH, 2017

E. CHACHA MWITA

JUDGE