REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NOS. 291 & 314 OF 2016

IN THE MATTER OF JUDICIAL REVIEW APPLICATION

IN THE MATTER OF THE CONSTITUTION OF KENYA (2010)

IN THE MATTER OF REFORN ACT CHAPTER 23 OF THE LAWS OF KENYA

IN THE MATTER OF KENYA COFFEE BOARD

AND

IN THE MATTER OF NATIONAL TASK FORCE ON COFFEE SUB-SECTOR REFORMS APPOINTED BY HIS EXCELLENCY THE PRESIDENT UHURU KENYATTA

AND

IN THE MATTER OF AN APPLICATION BY NEW NATIONAL FARMERS ASSOCIATION TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

REPUBLIC……..…….…..... ….....….. APPLICANT

-VERSUS-

CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK & FISHERIES……....……1ST RESPONDENT

THE PRINCIPAL SECRETARY, THE STATE DEPARTMENT OF AGRICULTURE, FOOD

& FISHERIES

AUTHORITY…….....…….2ND RESPONDENT

CHAIRPERSON NATIONAL TASK FORCE ON COFFEE SUB-SECTOR…….....
….……3RD RESPONDENT

THE HON. ATTORNEY

GENERAL…….....……..4TH RESPONDENT

AND

KENYA PLANTERS CO-OPERATIVE UNION LIMITED……..….....
……..……..INTERESTED PARTY

EX PARTE:

COUNCIL OF COUNTY GOVERNORS.....1ST EX PARTE APPLICANT

HARRISON MUNYI (AS CHAIRMAN OF NEW NATIONAL FARMERS ASSOCIATION)..... …….2ND EXPARTE APPLICANT

JUDGEMENT

Introduction

1. This judgment, as the title indicates is the subject of two consolidated judicial review applications where the applicants herein, **Council of County Governors** and **Harrison Munyi** in his capacity as the chairman of **New National Farmers Association** (hereinafter referred to as "the Association") moved this Court seeking the following orders:

> **1) An order of Prohibition directed against the 1st and 2nd Respondents, prohibiting them and their agents, employees and servants from implementing *The Coffee (General) Regulations, 2016* published as Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June 2016**
>
> **2.) An order of Certiorari to remove and bring to this honourable Court for purpose of quashing and to quash *The Coffee (General) Regulations, 2016* published as Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June 2016.**
>
> **3) An order of Certiorari to quash the report of National Task Force on Coffee Sub-Sector Reforms contained in Kenya Gazette Notice supplement Notice No. 105, legislative supplement No. 49, legal notice No. 120 Gazetted on 27th April 2016.**
>
> **4) An order of Prohibition to prohibit the 1st, 2nd and 3rd Respondents implementing a report of National Task Force on Coffee Sub-Sector Reforms, contained in Kenya Gazette Supplement Notice No. 105, Legislative Supplement No. 49, Legal Notice No. 120. Gazetted on 27th April 2016 till the Applicant's application herein is heard and determined.**
>
> **5) Costs of the application.**

Applicants' Case

2. According to the Association, in order to resolve the problems bedevilling the coffee sector, a petition was presented to the President who pursuant thereto appointed a National Task Force on Coffee Sub-Sector Reform to look into the same and thereafter recommend to the President on how our problems could be comprehensively resolved.

3. The said Task Force began its work and collected the views of the members of the Association with regard to the long standing problems facing the sector for many years and which views the said members presented. Having done so, the task force proceeded to prepare and compiled a report which was to be forwarded to the President for his consideration. However the Association averred that before the report was forwarded to the President, it managed to obtain a copy of the same and upon going through it, it

found that most of the pressing issues raised by farmers and presented to the task during the public hearing were omitted in the report. The Association further noted that the report compiled by the National Task Force mostly favoured powerful personalities in coffee industry but not ordinary farmers. Having noted grievous anomalies in the report foresaid, the Association protested to the Task Force demanding that they go back to the drawing table and amend the report and include all the left out critical issues raised by farmers as presented to them during public hearing but these protests were ignored and it went ahead and presented a report to the President which was gazette being Notice No. 105, Legal Notice No. 120 and is due for implementation any time from now.

4. The Association's case was that if the report prepared by the National Task Force is implemented the way it is, its interest is likely to be prejudiced hence its plea that the Kenya Gazette Notice No. 105, Legal Notice No. 120 gazetted on 27th June 2016 be revoked as it was based on a defective report which does not cater the interest of farmer.

5. On the part of the Council of County Governors (hereinafter referred to as "the Council") it was contended that the 1st Respondent has through Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June, 2016 issued ***The Coffee (General) Regulations*** (hereinafter referred to as "the Regulations") without conducting meaningful and qualitative public participation or tabling the same in Parliament for subsequent approval as required under the ***Statutory Instruments Act***.

6. It was averred that the Constitution under Article 186 makes provisions for the respective functions and powers of national and county governments, which functions are listed exhaustively in the Fourth Schedule. To the Council, agriculture is a fully devolved function under the Fourth schedule of the Constitution and that under section 29 of part I of the fourth schedule to the Constitution, the National Government's role in Agriculture is strictly limited to Agricultural Policy while implementation of the agricultural policies and other agricultural functions are a preserve of the County Governments.

7. It was therefore averred that considering that agriculture is a shared function, the two levels off government have been engaging in intense negotiations to solve disputes as to the limits of each level's powers especially on licensing. However in hurriedly and unprocedurally issuing the impugned Regulations, the 1st Respondent has effectively shut out county governments from the Coffee sector by effectively granting it fully to AFFA in ignorance of the shared nature of the agriculture function and especially the fact that licensing, as an implementation act, is a preserve of counties under the Constitution. To the Council, the impugned Regulations provide for a very minimal role for counties with most of their functions in the coffee sector being handed exclusively to AFFA.

8. It was disclosed that previous intergovernmental technical negotiations had reached an agreement on the sharing of the agricultural licensing revenue collected by AFFA which was to take effect upon signing of a Memorandum of Understanding. The sharing of the licensing revenues between the two levels of government was to be based on the 75:25 ratios depending on the relative weight of the Constitutional function of each level of government. However, the regulations appear to wash away and obliterate these discussions and appear not to have been made in good faith.

9. I was contended that the negotiations concerned general regulation of the entire agricultural sector and at no time did the impugned Regulations come up for discussion in any form and it is unexplainable why the 1st Respondent was quick was to issue regulations in one crop sector and not the others. It was reiterated that the regulations wash away and obliterate the intergovernmental discussions held between the Council of Governors, representing County Governments, and the Ministry of Agriculture and AFFA over a period of two years, culminating with the direction of the Summit to Intergovernmental Relations Technical Committee (IGRTC) to midwife the process, a function that IGRTC is diligently carrying out. To the Council, the gazette notice appears to have been done in a hurry for political expediency

10. The Council averred that Article 10 of the Constitution enjoins the Respondents to ensure that the national principle of public participation is discharged when exercising their powers and performing their duties while Article 118(1)(b) of the Constitution enjoins Parliament to facilitate public participation and

involvement in the legislative and other business of Parliament and its committees.

11. It was averred that during the entirety of the formulation of the impugned Regulations by the 1st Respondent, farmers and other stakeholders in the coffee sector were not granted any opportunity to air their views in support or opposition to any or all of the Regulations. It was the Council's case that the 1st Respondent should have conducted meaningful and qualitative public participation before submitting the same to Parliament for ratification. Further, section 5 of the ***Statutory Instruments Act*** requires a regulation-making authority to, before issuing a statutory instrument, make appropriate consultations with persons who are likely to be affected by the proposed instrument. Specifically section 5(3)(a) of the said Act requires a regulation making authority to notify , either directly or by advertisement, bodies that, or organizations representative of persons who, are likely to be affected by the proposed instrument. In this case it was averred that the 1st Respondent did not issue such notifications nor did they discharge their duty to consult under the said provision.

12. It was therefore averred that not only did the 1st Respondent fail to conduct any public participation, there is no evidence of the Regulations being submitted to Parliament for approval at which stage public participation is required by Article 118 of the Constitution. Even if Parliament somehow secretly approved the Regulations they clearly did not invite the public to air their views before the relevant committees or in any public forum anywhere in the country contrary to parliamentary practice.

13. The Council further relied on section 11(1) of the ***Statutory Instruments Act*** which requires every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament and averred that since publication of the impugned Regulations on 27th June, 2016 fourteen (14) days have thus far lapsed without the same being tabled in Parliament for scrutiny and approval. To the Council, section 11(4) of the ***Statutory Instruments Act*** provides that if a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void. It was therefore its position that in effect, for failure to submit the Regulations to Parliament for scrutiny and approval, the impugned Regulations ceased to have effect on 4th July, 2016.

14. It was the Council's case that the Constitution of Kenya requires cooperation and consultation in the performance of shared functions and constitutionally mandated powers between the two levels of government and that such consultation and co-operation is especially important in execution of roles in shared functions like agriculture.

15.It was therefore its case that the 1st Respondent as an arm of the National Government acted unconstitutionally and unprocedurally in unilaterally formulating and gazetting the impugned Regulations which Regulations never came up for discussion and consultation in the numerous meetings between the counties and the Respondents despite the negotiations being generally on the role of both levels of the agriculture sector. Whereas, the Respondents had the opportunity to table the draft Regulations for consultations they chose to ambush counties with lopsided and unconstitutional apportioned of functions. It was reiterated that counties, especially those reliant on coffee as a cash crop, were not consulted or involved in the decision-making process of formulating these particular Regulations even though they have a constitutional right to be consulted.

16. The Council relied on Article 6 (2) of the Constitution which provides that the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation while Article 189(2) of the Constitution provides that Governments at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers.

17. It was submitted on behalf of the Association that farmers had legitimate expectation that the task force would consider their views and having failed to do so the report emanating from the task force must

be and should be quashed for not abiding to the Law.

18. It was submitted that the intention of publishing the Regulations was for purposes of implementation by AFFA to the exclusion of the county governments.

19. According to the Council, while section 40(1) of ***Crops Act*** empowers the 1st Respondent to make regulations in the agricultural sector, it also requires that such regulations can only be made in consultation with county governments. However, the Council, the one body representing all counties, was not consulted in the making on the impugned Regulations. It was the Council' case that the obligation is on the 1st Respondent to prove that they indeed consulted counties as required by the said provision since it is not for counties to prove lack of consultation considering that the obligation to consult is placed on the 1st Respondent. In this case, it was submitted that the only evidence that the 1st Respondent has presented to show that there was consultation are mere statements in its alleged explanatory memorandum to the National Assembly and nothing else. The Council therefore submitted that the 1st Respondent has not proven at all that it consulted counties before publishing the Regulations.

20. The Council denied that the alleged meeting with the Council of Governors of 1st July, 2015 did take place and asserted that had it taken place, the Respondents would have had documentation to provide to the Court. To the Council, the procedure for the participation of the Council in consultative meetings is that first and foremost an invitation must be received indicating the matter to be discussed, the venue and the participants. After such invitation, the Council writes to CECs of all the counties inviting them to attend such a meeting. Further to this, the Council always prepares and forwards to the body inviting it to the consultative meetings a written official position on the matter. On the day of the consultative meeting, the attending members usually sign an attendance register which should be in the custody of the 1st Respondent in this matter. To the Council, the complete lack of documentation is evidence that no such meeting took place.

21. The Council's case was that the Respondents were relying on the alleged public hearings and consultations carried out by the National Taskforce on Coffee Sub-sector reforms appointed by the President. However, at no time did the Taskforce approach counties, through the ex-parte Applicant or otherwise, to consult them on the impugned Regulations. Again, no documentary evidence has been provided of the said public hearings and consultations carried out by the Taskforce.

22. While reiterating the contents of the verifying affidavit, the Council relied on the decision of **Lenaola, J** in **Nairobi Metropolitan Psv Saccos Union Limited &25; Others vs. County of Nairobi Government & 3 Others [2013] eKLR**, in which he expressed himself on public participation as follows;

> **"The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. "**

23. According to the Council, the 1st Respondent should have conducted meaningful and qualitative public participation before submitting the same to Parliament for ratification and it is immaterial that Parliament is also required to carry out public participation since the duty to conduct public participation is singular. Its view was that failure by the 1st Respondent to conduct public participation cannot be cured by Parliament conducting its own public participation.

24. It was submitted that section 5 of the ***Statutory Instruments Act*** requires a regulation-making authority to, before issuing a statutory instrument, make appropriate consultations with persons who are likely to be affected by the proposed instrument. Specifically section 5(3) (a) of the ***Statutory Instruments Act*** requires a regulation making authority to notify, either directly or by advertisement, bodies that, or organizations representative of persons who, are likely to be affected by the proposed instrument. In this case, the 1st Respondent did not issue such notifications nor did they discharge their duty to consult under the said section 5 of the said Act. No evidence of advertisement or other form of notification has been presented by the 1st Respondent to this Court.

25. According to the Council, public participation must be qualitative and meaningful and not just cosmetic and the threshold test for qualitative and meaningful public participation under the Constitution has already been defined by the Courts. In this respect the Council relied on ***Majanja, J's*** *decision in* **Commission for the Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others [2013] eKLR**, where he held that:

> **"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."***

26. It was the Council's case that the public was not given a reasonable opportunity to submit their views on the impugned Regulations yet actual, meaningful and qualitative public participation is the test as illusory participation does not pass muster. In this respect the Council relied on this Court's decision in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others [2014] eKLR** where it was held follows:

> **"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 behaves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively……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."**

27. The Council also relied on this Court's decision in **Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR** where it was held that:

> **"Here 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."**

28. It was submitted that by extension, consultation too must be qualitative and meaningful and not just cosmetic. In this case, the alleged public hearings and consultations did not take place at all for the test of qualitative and meaningful to be applied and reliance was placed on ***Doctor's for life International vs. The Speaker National Assembly and Others*** **(CCT12/05) [2006] ZACC 11)** as adopted in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others [2014] eKLR** where the Court observed

that:

> **"The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation…… ……The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process……."**

29. Further support was sought from **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)** *as adopted in* **Republic vs. County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR** where the Court stated that:

> **"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…"**

30. It was contended that in submitting the Regulations to both Houses of Parliament, the 1st Respondent should also have ensured that a copy of a regulatory impact statement and a compliance certificate was also presented therewith as required by section 7(5) of the ***Statutory Instruments Act***. In the Council's view, the absence of a regulatory impact statement is improper as the Regulations are likely to impose significant costs on many members of coffee farming community.

31. To the Council, Article 201(1) of the Constitution provides that there shall be openness and accountability, including public participation in financial matters.

32. It was further submitted that section 11(1) of the ***Statutory Instruments Act*** requires every Cabinet Secretary responsible for a regulation-making authority to within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament. Parliament of Kenya, it was contended, is constituted of both the National Assembly and the Senate. According to the Council, section 11(4) of the ***Statutory Instruments Act*** provides that if a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

33. It was submitted that whereas the Respondents have pleaded that the Regulations were presented to

the Clerk of the National Assembly in time, the letter dated 8th July, 2016 and annexed to the Respondents' Replying Affidavit purporting to prove that the Regulations were sent to the Clerk of the National Assembly is a forgery created after the Respondents learnt of this Suit as the letter contains an ordinary stamp indicating just "Clerk's Office" without stating the body which such a clerk works for. Nonetheless, the 1st Respondent should have submitted the Regulations to the Senate in line with its constitutional role to participate in the passage of legislation that affects counties since the Regulations are subsidiary legislation that affect counties and as such must be considered by the Senate too and not just the National Assembly. Reliance was placed on Article 96 of the Constitution which provides the legislative role of the Senate to be as follows:

> ***(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.***

34. To the Council, the fact that the National Assembly cannot solely consider legislation concerning counties is provided at Article 109(3) of the Constitution which states thus;

> ***(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.***

35. Legislation concerning counties is expounded at Article 110(1)(a) of the Constitution to include;

> ***(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule.***

36. The Council's contention was that Regulations are subsidiary legislation that must be considered by the Senate too if they happen to touch of counties e.g. devolved functions like agriculture. To this end reference was made to the ***Crops Act*** itself at section 40(1) which recognizes that any regulations made thereunder affect counties and as such requires that the 1st Respondent must consult them before making the same. At Section 4 of the ***Crops Act***, guiding principles are stated to guide both the national government and counties in the management of agricultural land. Section 6 of the ***Crops Act*** provides for the role of the national and county governments in the development of crops.

37. It was therefore submitted that from the above provisions, it is clear from that the ***Crops Act*** affects county exercise of its agriculture functions under the Fourth Schedule and it is immaterial that the ***Crops Act*** was only passed by the National Assembly because at the time of assent, 14th January 2013 the Senate was not yet constituted as elections under the new Constitution had not yet taken place. Accordingly, the National Assembly was acting in place of the Senate pursuant to Section 11 of the Sixth Schedule of the Constitution which provides as follows:

> ***The Senate***
>
> ***(1) Until the first Senate has been elected under this Constitution—***
>
> ***(a) the functions of the Senate shall be exercised by the National Assembly; and***
>
> ***(b) any function or power that is required to be performed or exercised by both Houses, acting jointly or one after the other, shall be performed or exercised by the National Assembly.***
>
> ***(2) Any function or power of the Senate shall, if performed or exercised by the National Assembly before the date contemplated in subsection (1), be deemed to have been duly performed or exercised by the Senate.***

38. It was therefore submitted that the ***Crops Act*** is to be deemed to have been passed by the Senate too and the Council referred to the decision of the Supreme Court in **Speaker of the Senate & another vs. Attorney-General & 4 Others [2013] eKLR** where it was stated that:

"[144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)]."

"[32] Is it a "matter concerning county government"? The answer is in the affirmative, as may be perceived from this Court's Ruling in Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. No. 2 of 2011 [para.40]: "We consider that the expression 'any matters touching on county government' should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government."

39. To the Council, in effect, for failure to submit the Regulations to the Senate for scrutiny and approval, the impugned Regulations already ceased to have effect as 7 days for submission have since lapsed.

40. From the foregoing, the applicants prayed that the Application be allowed with costs.

1st and 2nd Respondents' Case

41. The application was opposed by the 1st and 2nd Respondents.

42. According to them, section 40(1) of the ***Crops Act, 2013*** empowers the 1st Respondent to make Regulations including the ***Coffee (General) Regulations*** (hereinafter 'the impugned Regulations') that are the subject of this proceedings which were gazetted on 1st July 2016 vide Kenya Gazette Supplement No. 105 of 2016 for the sole purpose of being placed before the National Assembly for discussion and not implementation as alleged by the applicant.

43. Consequently, it was averred, and as required of the 1st Respondent by the provisions of section 11(1) and 11(2) of the ***Statutory Instruments Act***, the impugned Regulations were forwarded to the Clerk of the National Assembly for tabling before Parliament together with an explanatory memorandum.

44. According to the said Respondents, contrary to the allegations of the Council, the Council was at all material times consulted during the drafting of the impugned Regulations hence the impugned Regulations were not hurriedly and unprocedurally issued as the same are still subject to review and scrutiny as required by the ***Statutory Instruments Act***.

45. It was therefore the said Respondents' case that the application before the court lacks merit in so far as the applicant seeks to challenge the substance of the impugned Regulations as that is tantamount to challenging their merits which is beyond the scope of a judicial review court.

46. According to them, it is a matter of general notoriety that the President appointed a National Taskforce on Coffee Sub-sector Reforms vide Gazette Notice No. 1332 of 4th March 2016 whose mandate included to examine the existing policy, institutional, legislative and administrative structures and systems in the coffee industry and to recommend comprehensive reforms. It was revealed that the members of the National Taskforce on Coffee Sub-sector reforms carried out public hearings and consultations in all coffee growing Counties in the country while carrying out its work. It was therefore averred that appropriate consultations were carried out with all relevant stakeholders in the coffee sub-sector including with the Council herein. The *ex parte* applicant and other stakeholders were represented in various consultative meetings including those held on 30th May 2015, 2nd June 2015, 17th June 2015 and on 1st July 2015 in which they gave their views.

47. To the Respondents, an allegation of forgery is a serious allegation which requires strict proof by way of viva voce evidence and not by affidavit evidence as in the present proceedings. In the circumstances, the allegation that the authenticity of the stamp is suspect has not been substantiated as the applicant has

not proved the same.

48. In their view, the impugned Regulations herein fall under the ambit of an ordinary Bill as provided for by article 110 of the Constitution and may thus be considered by any House before being referred to the other House for review or concurrence, hence there was no requirement that the impugned Regulations be submitted to both Houses simultaneously.

49. The Respondents took the view that the requirement for a regulatory impact statement is not mandatory and may be unnecessary in certain instances as provided for in section 9 of the Statutory Instruments Act. Further, the impugned Regulations herein do not impose significant costs to members of the coffee farming community and as such the requirement for a regulatory impact statement is not mandatory. For instance, the impugned Regulations have eliminated the 4% ad valorem levy previously imposed in the Coffee General Regulations of 2002 as amended in 2012. The impugned regulations have also eliminated the requirement of a bank guarantee of USD 1,000,000 for a marketing agent licence thus opening the field for more players and removing cartels in the coffee industry.

50. It was therefore the Respondents' case that the application herein lacks merit as it is based on a misapprehension of facts surrounding the publication of the impugned Regulations and should therefore be dismissed with costs to the Respondents.

51. It was submitted on behalf of the Respondents that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

52. Based on section 11 of the ***Statutory Instruments Act*** it was submitted that the 1st Respondent submitted the said Regulations to the Clerk of the National Assembly for tabling before Parliament as required, together with an explanatory memorandum and they were received by the Clerk of the National Assembly on 11th July 2016. Since the said Regulations were gazette on 1st July 2016 vide Kenya Gazette Supplement No. 105 of 2016, it was the Respondents' submission that the forwarding of the Regulations was done within 7 days as stipulated in the Act taking into account that 7th July 2016 was gazetted as a public holiday to mark Idd-Ul-Fitr. In this respect the Respondents relied on **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary. Joseph Kimiri – Treasurer) & 8 Others vs. Cabinet Secretary for Transport and Infrastructure & 5 Others [2014] eKLR** where the court stated that:

> **"Whether or not the relevant Cabinet Secretary did transmit the Regulations was, in my view, peculiarly within the knowledge of the said Cabinet Secretary and therefore it behoved him to place before the Court material supporting the fact that he had fulfilled the legal obligation placed on him. Without such evidence, it would be unreasonable to expect the applicants to prove the negative that the Cabinet Secretary did not so comply apart from making an allegation to that effect…Without evidence that the Regulations were laid before Parliament, it is my view and I so hold that the same became void and are therefore a nullity"**

53. It was the Respondents' submission that in this particular case there is evidence that the impugned Regulations were actually laid before Parliament and they therefore cannot be quashed on the basis that section 11 of the ***Statutory Instruments Act*** was not complied with.

54. As to the adequacy of public participation, it was averred that there was adequate public participation with all stakeholders involved including the applicant herein in the making of the impugned Regulations which are yet to come into force and reliance was placed on **Moses Munyendo & 908 Others versus Attorney General & Another, Petition No. 16 of 2013** where the court stated as follows:

> **"[21] As concerns the pre-parliamentary or consultative stage, the Permanent Secretary has given evidence on how different stakeholders were consulted. Some of the organisations consulted include the following; Kenya National Federation of Cooperatives, National Cotton**

Growers Association, Meru Central Diary Co-operative Union Limited, Cereal Growers Association and the Horticultural Farmers and Exporters Association. <u>The organisations consulted are, in my view, broadly representative of agricultural interests in the country.</u> This evidence is not controverted by the petitioners. Furthermore, <u>I do not think it is necessary that every person or professional be invited to every forum in order to satisfy the terms of Article 10.</u> Thus the contention by the first petitioner that "I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law" is not necessarily decisive of the lack of public participation…" (Emphasis added)

55. It was the Respondents' submission that similarly in this case the organizations consulted were broadly representative of coffee interests in the country and the impugned Regulations should not be quashed on the basis that there was no meaningful public participation. To this end the Respondents relied on **<u>British American Tobacco Kenya Limited versus Cabinet Secretary, Ministry of Health & 4 Others [2016] eKLR</u>** where the court stated as follows at paragraph 90:

"As the cases cited above illustrate, the Regulations cannot properly be impugned on the basis that the petitioner's views were not taken into considerations: the position is that there is no requirement that the views held by any particular group or individual on a matter before the legislature or regulation – making body must prevail."

56. It was the Respondents' submission that the impugned Regulations were still subject to further public participation upon being submitted to Parliament a fact which the applicant agrees with and referred to the **British American Tobacco case** at paragraph 92 that:

"While there is an obligation on Parliament under Article 118 cited elsewhere in this judgment to facilitate public participation, there is no requirement that legislation will be invalidated simply because there was a perception that a certain level of public participation was not achieved."

57. It was the Respondents' submission that in the present case there was adequate consultation in the formulation of the impugned regulations. The applicant and other stakeholders participated in various meetings of stakeholders and submitted their views.

58. It was therefore submitted that from the foregoing, and based on the facts, the law and the judicial authorities cited above, this court do find that the applicant has not made out a case for the grant of judicial review remedies as sought and dismiss the application with costs to the Respondents.

<u>Interested Party's Case.</u>

59. The application was also opposed by the interested party, **Kenya Planters Co-Operative Union Limited** (hereinafter referred to as "KPCU").

60. According to the interested party, it is a major player in the said industry with a confirmed membership of close to 700,000 farmers as such, the interested party is simultaneously regulated both by counties and by the National Government through the 1st and 2nd Respondents herein.

61. After narrating what in its view was the background to this dispute from 2001 to date, it was averred that as a result of this devolution of agriculture, parliament sought to pass and enact laws that would aid in this process: namely the *Crops Act*, the ***Agriculture and Food Authority Act*** and the ***Statutory Instruments Act***: all of 2013. However, the ***Statutory Instruments Act***, No. 23 of 2013 came into force before the ***Crops Act*** and the ***Agriculture and Food Authority Acts***: Nos. 16 and 13 of 2013, respectively.

62. It was averred that as a result of the above position, and more specifically due to the express wording of section 21(1) of the ***Statutory Instruments Act, 2013***, the ***Coffee (General) Rules, 2002***, which had been regulating the coffee sector until then, stood repealed as at the 25th of January, 2013 when the

Statutory Instruments Act came into force.

63. It was averred that pursuant to section 21 (1) and (2) of the ***Statutory Instruments Act, 2013***, the then Minister responsible for matters relating to agriculture could have saved the ***Coffee (General) Rules, 2002***, by following the process laid out therein: at least until the coming into force of the ***Crops Act***, No. 16 of 2013, which the then Minister did not deem necessary to do and was thereby not done. It was averred that the ***Crops Act***, No. 16 of 2013, came into force as law on the 1st of August, 2014 vide Legal Notice No. 110 of 2014: a full 19 months after the ***Statutory Instruments Act***, No. 23 of 2013. To KPCU, sections 42 and 43 of the ***Crops Act*** contain saving provisions to try and carry over the previous regulations until such time as new regulations would be made and operationalized.

64. In its view, because the ***Statutory Instruments Act 2013*** came into force before the ***Crops Act, 2013***, all regulations older than 10 years that pertain to any legislation stood repealed as at the 25th of January, 2013: unless saved by the clear process laid down in section 21 of the ***Statutory Instruments Act, 2013***. As such the Coffee Sub sector has had no regulations in force since the 25th of January, 2013 when the ***Coffee (General) Rules, 2002***, were repealed as a result of operation of the law and that this is a fact well known especially to the 2nd Respondent, who has continued to engage with the interested party herein as its regulator and is evident from the correspondences and memoranda, including minutes of a joint meeting held between the 2nd Respondent and the Interested Party, submitted to the 2nd Respondent by the interested party herein: enumerating this legal position.

65. It was contended that further to the above, the 2nd Respondent herein, as the regulator, is well aware that the Speaker of the National Assembly issued guidance to all about the process to be used in saving regulations in his communications from the Chair dated the 26th of March, 2014 and the 3rd of July, 2014. Further, the 2nd Respondent's preceding sector regulator, the Coffee Board of Kenya, was indeed the body charged with the regulation of the coffee sector and admitted that indeed the ***Agriculture, Fisheries and Food Authority Act*** was given a commencement date of the 17th of January, 2014 vide legal notice number 4 of 2014 by the Cabinet Secretary responsible for matters relating to Agriculture.

66. Based on the foregoing the KPCU believed that the 2nd Respondent and its preceding sectoral body, the Coffee Board of Kenya, failed to save the Coffee (General) Rules 2002 by invoking the process laid down in Section 21 of the Statutory Instruments Act, No. 23 of 2013. To buttress this position, and further to the above, the institution, out of an abundance of caution, sought two legal opinions as to the legality of the continued use of the Coffee (General) Rules 2002 to regulate the coffee industry and shared the same with the 2nd Respondent herein. The legal opinions unequivocally state that the regulations were deemed repealed by operation of section 21 of the Statutory Instruments Act, No. 23 of 2013: a fact well known to the Respondents herein: particularly the 2nd Respondent.

67. It was averred that in perpetuation of the fallacious legal position the 2nd Respondent found itself in, the 2nd Respondent in its capacity as a regulator wrote to the Interested Party herein and alleged therein that the Interested Party herein would face legal action for illegal trading in coffee: a letter which the Interested Party responded to setting the record straight and which to date, despite being received by the 2nd Respondent herein, has gone un-responded to.

68. To the KPCU, it is therefore strange that from the 25th of January, 2013 to the date the impugned regulations herein were gazetted and published; the 2nd Respondent herein has continued to licence coffee marketers and traders and give access to the Coffee Exchanges based on repealed regulations.

69. KPCU therefore was of the view that the 2nd Respondent herein, and its preceding body, the Coffee Board of Kenya, failed in their statutory and legal duties to effectively regulate the sector and it is by these actions and other complaints from other industry stakeholders that led to the formation of the Presidential Task Force to look into the Coffee sub-sector and rectify the ills therein in order for the sector to return to its former glory. In the KPCU's view, the President of the Republic of Kenya, in his

role as president and with great concern as to the happenings of the coffee sub-sector within the Republic of Kenya, commissioned a task force to look into reforming the coffee sub-sector: which task force was duly gazetted and came into being on the 4th of March, 2016. In exercise of its mandate, the National Task Force on reforms of the coffee sub sector duly handed in its report to the President on the 4th of May, 2016, thereby completely discharging its mandate.

70. It was the view of Kenya Planters Co-operative Union, an institution that represents the interests of close to 700,000 farmers, as a large player in the coffee sub-sector, also gave in its views to the National Task force which views were duly considered. To it, the National Task Force Report is a collection of all views from all players in the coffee sub-sector and thus recommends what needs to happen in order for the sub sector to return to its former glory all across the board.

71. The KPCU's position was that the ex parte applicant is bringing these proceedings to stall the impending implementation of the reforms proposed by the national task force and duly accepted by the President of the Republic of Kenya and all concerned government agencies. It believed that the process and the task force was open to all and sundry to participate in: which afforded the Ex-Parte Applicant herein an opportunity to participate in the process initiated by the President and to give its views to the task force, but instead, the ex-parte applicant and/or its members participated in fully and continue to participate even in the implementation of the task force report as one of its representatives is part of the implementation committee set up vide gazette notice no. 7745 of 30th September, 2016.

72. According to KPCU, it is as a result of the uncertainty created by this vacuum in the law and also due to numerous complaints from the players in the coffee sub-sector that led the President of the Republic of Kenya to establish the Presidential task force that looked into the coffee sector and duly published its report. One of the issues addressed in the report was the lack of regulations and the vacuum noted in the law: a fact that led to the drafting, gazetting and publishing of the impugned regulations herein.

73. While acknowledging that the Council's members are responsible for fully implementing any agricultural policy as framed by the Respondents herein: a responsibility granted unto them by the Constitution itself; it was averred that it is, however, not right for the Ex-Parte Applicant to come to court to challenge regulations of which it has had an input and in which process it has participated in and continues to participate in all through. While appreciating that behind the scenes efforts are being made to resolve the issues plaguing the coffee sector between the national and county governments, the Court was urged take judicial notice of the progress made in 4 years to operationalize a coherent regulatory system: which progress is still quite a way away and may not even be in place before the next general elections on August 8, 2017.

74. According to the KPCU, it was unfair, unjust, inhumane and unconstitutional for the interested party herein as well as other regulated entities to be held at ransom while the County Governments and the National Government lethargically move towards the creation of a coherent regulatory framework not just for the coffee sector but for all other sectors of the agriculture economy; thereby putting the livelihoods of about 8 Million Kenyans in the coffee sector alone under peril and strife. This uncertainty has led to the Interested Party herein not being able to fully conduct its business affairs and as such has impeded the Interested Party's rights to own, use and enjoy property under Article 40 of the Constitution.

75. According to it, while blame for this current state of affairs should fall squarely on the feet of the 2nd Respondent herein; and its preceding body, the Coffee Board of Kenya, it is encouraging to see that they have finally realised the legal conundrum in existence and put forward regulations to effectively run the coffee sector for an interim period as recommended by the Presidential Task Force in its report. The regulations impugned herein, although by no means perfect, will serve as a stop gap measure and bring much needed clarity and sanity to the coffee sector while the national and county governments complete their duly undertaken and commenced process.

76. KPCU took the view that given the fact that the Country is now gearing towards the election cycle, any efforts made up to this point by the ex-parte applicant and the Respondents herein will have to await the electoral cycle to be concluded: hence the need for interim regulations to enable the sector to run and

players in the industry, be they farmers, marketers, millers, etc, to carry on business uninterrupted pending the completion of the process under way between the ex-parte applicant and the respondents herein. It averred that the greater good and business certainty will be served by letting the impugned regulations stand and continue through the parliamentary process: on completion of the process under way between the ex-parte applicant and the respondents herein, the regulations and indeed the entire framework regulating agriculture in general and coffee in particular may need to be amended or re-enacted afresh: hence the need for the impugned regulations to stay in force until such time as this process is completed as there is no fall back legal regulatory framework currently in place.

77. Its belief was therefore that in the interests of justice, certainty, the rule of law and the greater good, the instant application should fail and I urge the Honourable court to dismiss the same and restore the impugned regulations to bring certainty, clarity and formality to the coffee sector and to safeguard the livelihoods of close to 8 Million Kenyans in the process.

78. According to KPCU, it is not in dispute that the National Task Force Report was presented to the President sometimes in June, 2016: it is, however, not true that the report was gazetted vide gazette notice No. 120 as alleged: as that gazette notice refers to the regulations which were gazetted and are the subject of Misc. Application No.291 of 2016. As a result, the ex-parte applicant is not clear in his mind about what he wants; and as such is not worthy of moving the court for the orders he wishes for as he has not been clear, precise and is seeking to set aside the outcome of a process he and his organization voluntarily and fully participated in.

79. To the KPCU, it is evident from the pleadings herein that the Ex-Parte Applicant participated in the proceedings before the National Task Force fully: even going as far as submitting memoranda for the consideration of the task force. Looking at the supporting affidavit filed in support of these proceedings by the ex-parte applicant, he acknowledges that he participated in the procedures and processes to do with the National Task Force on Coffee Sector reforms: the same way that the interested party herein similarly participated in. Further, he even acknowledges that he got an advance copy of the proposed report to be presented for his comments and/or critique. The Ex-parte applicant acknowledges that he indeed protested to the National task Force to once again look at the issues it raised as he felt, in his opinion, that the report that was to be presented "***ostensibly omitted the pressing issues raised by farmers and presented to the task…***".

80. It was therefore KPCU's position that it cannot therefore be said that the National Task Force acted capriciously, irrationally, illegally or un-procedurally as the ex-parte applicant was afforded every opportunity to present its position to the National Task Force: which he did: and was afforded every opportunity to participate in the process of the National Task Force: which, by his own admission, he did fully. In its view, what the ex-parte applicant is seeking to challenge herein is the result of a process that he fully participated in: wherein he had no complaints as to the process: but is instead questioning the merit of that process: a challenge that lies squarely outside the province of judicial review proceedings. Further, other than challenging the result because he does not agree with it and/or it does not serve his interests, the ex-parte applicant herein has not shown any legal, procedural or rational reason why the outcome of the Report by the National Task Force on Coffee Reforms should not remain as is.

81. It was therefore contended that the Court should dismiss this instant application with costs as it discloses no proper cause of action under judicial review proceedings. To it, considering the nature of these two applications, the law and legal process requires certainty and clarity: a situation that would be best achieved by leaving the impugned regulations intact for the time being while allowing the Council of County Governors, its members therein and the 1st and 2nd Respondents herein, to thereafter come up with a harmonized system that works for the entire agricultural sector as they have been working on.

82. KPCU therefore took the position that it is in the interests of justice, good order and the rule of law that these consolidated applications be refused and the orders sought therein be declined.

Determinations

83. I have considered the application, the various affidavits filed in support of and in opposition to the application as well as the submissions filed.

84. The substratum on this application revolves around the constitutional principles of devolution and sharing of power on one hand and public participation on the other. Article 10(1) of the Constitution provides that:

> ***The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them—***
>
> ***(a) applies or interprets this Constitution;***
>
> ***(b) enacts, applies or interprets any law; or***
>
> ***(c) makes or implements public policy decisions.***

85. Sub-article (2) (a) and (c) provides that "The national values and principles of governance include—(*a*) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (*c*) good governance, integrity, transparency and accountability. Article 10 of the Constitution expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. These values and principles of governance are the foundation of our Republic since Article 4(2) of the Constitution provides that:-

> ***The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.***

86. In my view, Article 10 of the Constitution is one of the Articles that make a paradigm shift between the retired Constitution and the Constitution of Kenya 2010 - a value-oriented Constitution as opposed to a structural one. Its interpretation and application must not therefore be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in Article 10 of the Constitution. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organization of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010:**

> **"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions."**

87. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Sup. Ct. Advisory Opinion Appl. No. 2 of 2012 at para 54**:

> **"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and**

with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

88. This Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. It is in this respect that Article 20(3) (a) provides that in applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Apart from that Article 259 of the Constitution decrees that the Constitution is to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law; and contributes to good governance.

89. In my view the value system in which our Constitution is structured is steeped in our history and this value system was a reaction to the historical deficiencies that rendered the system of governance under the retired Constitution inadequate to meet the expectations of the people of the Republic of Kenya. As was held by a majority in the Court of Appeal decision of **Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR**, quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles. That purposive approach was explained by the Supreme Court **In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012,** where it was held that a purposive approach would take into account the agonized history attending Kenya's constitutional reform.

90. In **Murungaru vs. Kenya Anti-Corruption Commission & Another Nairobi HCMCA No. 54 of 2006 [2006] 2 KLR 733,** it was held that our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution. The same view is expressed **In Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR at paragraph 26,** where the Supreme Court opined that:-

"…But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

91. The Supreme Court expressed this same position in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where it stated thus:-

"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on – "RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." And the principle is fleshed out in Article 10 of the Constitution, which specifies the

"national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, reconfigures the interplays between the States majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "Legal Culture and Transformative Constitutionalism," South African Journal of Human Rights, Vol. 14 (1998), 146 thus wrote [at p.147]: "At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent." The scholar states the object of this South African choice: "By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law." The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".

92. It is therefore my view that the constitutional provisions of Article 10 dealing with the national values and principles of governance are partly steeped in historical context. That the principle of devolution entrenched in our Constitution has a historical genesis was appreciated by the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where **Mutunga, CJ** expressed himself as follows:

"The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state..."

93. The learned President of the Supreme Court continued:

"Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents the *raison d'être* of the Senate as "to protect" devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the

Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities…..National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya's social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act.*"

94. It is therefore my view that the twin principles of sharing and devolution of power and public participation are an integral part of the foundation of our Republic. It is therefore my view that the said values and principles cannot be treated as lofty aspirations. To paraphrase the decision in **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition No. 229 of 2012,** Kenyans were very clear in their intentions when they entrenched Article 10 in the Constitution. In our view, they were singularly desirous of cleaning up our politics and governance structures by insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article 10 be enforced in the spirit in which they included it in the Constitution. The people of Kenya did not intend that these provisions be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the said provisions should have substantive bite and that they will be enforced and implemented. They desired these values and principles be put into practice. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must defer to Article 10 of the Constitution.

95. It is particularly important to note that Article 10(2) employs the word "include" which in my view means that the principles identified under the said Article are not exclusive. However, the fact that the Constitution expressly identifies some of them is a pointer to the importance the Constitution and the people of Kenya attach to the specified values and principles of governance enumerated therein. It is therefore my view that in order to justify their exclusion in matters falling under Article 10, assuming it is possible to do so in the first place, the burden is indeed heavy on the person desiring to do so considering that Article 10 is one of the provisions protected under Article 255 of the Constitution whose amendment can only be achieved by way of a referendum.

96. I however appreciate that the manner in which public participation is to be conducted must take into consideration the context in which the action is being undertaken. Dealing with this issue, it was held by the South African Constitutional Court in **Doctors for Life International vs. The Speaker of the National Assembly & Others(CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416(CC)** that:-

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

my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation."

97. My 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."

98. 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.

99. As was appreciated by **Sachs, J**. in the South African case of the **Minister of Health vs. New Clicks South Africa (Pty) Ltd [2005] ZACC:**

> **"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 issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."** [Emphasis supplied]

100. A similar position was adopted in **Doctors for Life International vs. The speaker of the National Assembly and Others** (supra) cited with the approval in **Robert N. Gakuru & Others vs. Governor, Kiambu County [2014] eKLR** that:-

> **"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".**

101. 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 vs. County of Nairobi Government & 3 Others Petition No. 486 of 2013**, public participation is not the same as saying that public views must prevail. The same Judge in **British American Tobacco Kenya Limited versus Cabinet Secretary, Ministry of Health & 4 Others [2016] eKLR** expressed himself at paragraph 90 as hereunder:

> **"As the cases cited above illustrate, the Regulations cannot properly be impugned on the basis that the petitioner's views were not taken into considerations: the position is that there is no requirement that the views held by any particular group or individual on a matter before the legislature or regulation – making body must prevail."**

102. The essence of public participation was captured in the case of **Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others CCT 86/08 [2010] ZACC 5**, in the following terms:-

> **"…engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision."**

103. I therefore hold that public participation must apply to all legislative enactments and policy decisions though the degree and form of such participation will depend on the peculiar circumstances of the case. However, 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."

104. As was held in ***Gakuru*** (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."

105. The case presented by **New National Farmers Association** was that though its views were collected by the Task Force, the report prepared by the Task Force and which was presented to the President and which was eventually gazetted omitted the Association's views. Instead what was contained in the said report were the views of the powerful personalities in coffee industry as opposed to ordinary farmers.

106. It is important to determine the impact of the views received from the public on the eventual determination. Having noted grievous anomalies in the foresaid report, the Association protested to the Task Force demanding that they go back to the drawing table and amend the report and include all the left out critical issues raised by farmers as presented to them during public hearing but these protests were ignored and it went ahead and presented a report to the President which was gazetted being Notice No. 105, Legal Notice No. 120 and is due for implementation any time from now.

107. It is therefore clear that the Association was accorded an opportunity of presenting its views. The Association however laments that its views were never taken into consideration in compiling the final report. In **Minister of Health vs. New Clicks South Africa (PTY) Ltd** (supra) the Court was clear that what is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations. It enables people who will be affected by the proposals to make representation to the lawmaker, so that those concerns can be taken into account in deciding whether changes need to be made to the draft. In other words public participation is not just a formality and the views gathered in the process ought not to be considered as irrelevant. Whereas the authority is not bound by them, serious considerations must be given to them and must not just be disregarded as being inconsequential. In other words the authority ought not to make a decision and then conduct public participation simply for the purposes of meeting the constitutional mandate.

108. In this case no attempts have been made by the Respondents to show what material was collected from the Association, what was considered and what was disregarded leave alone the grounds upon which they were disregarded. I am therefore unable based on the evidence placed before me to find that the views given by the Association were in fact considered. The Court cannot simply assume that they were in fact considered. Whereas it is not for the Court to determine for the authority the views that should have carried the day, the authority ought to place before the Court material upon which the Court may find that it indeed considered the views presented to it.

109. With respect to the Council of County Governors' case, it was contended that previous

intergovernmental technical negotiations had reached an agreement on the sharing of the agricultural licensing revenue collected by AFFA to be based on the 75:25 ratios depending on the relative weight of the constitutional function of each level of government which was to take effect upon signing of a Memorandum of Understanding. However, the regulations appear to wash away and obliterate these discussions and appear not to have been made in good faith since at no time did the impugned Regulations come up for discussion in any form.

110. It is not in doubt that agriculture is a fully devolved function under the Fourth schedule of the Constitution and that under section 29 of part I of the fourth schedule to the Constitution, the National Government's role in Agriculture is strictly limited to Agricultural Policy while implementation of the agricultural policies and other agricultural functions are a preserve of the County Governments. Article 6(2) of the Constitution provides as follows:

> ***The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.***

111. Therefore since both the national and county governments have some roles in matters relating to agriculture they ought to adhere to the provisions of Article 189(1)(a) which provides that:

> ***Government at either level shall—***
>
> ***(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level.***

112. In other words in formulating legislation and policies relating to agriculture, the national government is enjoined to consult the county governments in the spirit of upholding the principle of devolution. This position is strengthened by the fact that whereas section 40(1) of ***Crops Act*** empowers the 1st Respondent to make regulations in the agricultural sector, it also requires that such regulations can only be made in consultation with county governments. However, the Council, the one body representing all counties, was not consulted in the making on the impugned Regulations.In this case, there is no evidence at all that the county governments were consulted before the impugned regulations were promulgated.

113. The 1st Respondent's action was therefore contrary to section 5 of the ***Statutory Instruments Act*** which requires a regulation-making authority to, before issuing a statutory instrument, make appropriate consultations with persons who are likely to be affected by the proposed instrument, in this case the county governments represented by the Council of County Governments. Specifically section 5(3)(a) of the said Act requires a regulation making authority to notify , either directly or by advertisement, bodies that, or organizations representative of persons who, are likely to be affected by the proposed instrument.

114. Section 11 of the ***Statutory Instruments Act,*** Act No. 23 of 2013 provides as follows:

> ***(1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.***
>
> ***(2) (2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).***
>
> ***(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.***
>
> ***(4) If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately***

after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void."

115. According to the Council since publication of the impugned Regulations on 27th June, 2016 fourteen (14) days have thus far lapsed without the same being tabled in Parliament for scrutiny and approval. To the Council, section 11(4) of the ***Statutory Instruments Act*** provides that if a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void. In this case, since agriculture is a devolved function, it is my view that the regulations ought to have been placed before the Senate and not merely before the National Assembly since a reading of the relevant provisions of the Constitution places the subject regulations squarely within the purview of those instruments that touch on the Counties. The said provisions are Articles 96(2), 109(3) and 110(1)(a). Article 96 of the Constitution which provides the legislative role of the Senate to be as follows:

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

116. I agree that pursuant to Article 109(3) of the Constitution the National Assembly cannot solely consider legislation concerning counties. That Article states thus:

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

117. Legislation concerning counties pursuant to Article 110(1)(a) of the Constitution to include:

(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule.

118. It therefore follows that the instant regulations are subsidiary legislation that must be considered by the Senate too since they happen to touch of counties as they deal with agriculture which is a devolved function. My view is buttressed by section 40(1) of the ***Crops Act,*** No. 16 of 2013 which provides that:

The Cabinet Secretary may, in consultation with the Authority and the county governments, make regulations for the better carrying into effect of the provisions of this Act, or for prescribing anything which is to be prescribed under this Act.

119. Whereas I appreciate that the above section empowers the Cabinet Secretary to make regulations, in carrying out the said mandate, he must comply with the law and the law expressly requires him to consult with the county government. What then amounts to consultation? In the English case of **Agricultural, Horticultural & Forest Industry Training Board -vs- Aylesbury Mushrooms Ltd [1972] 1 All ER 280; [1972] 1 WLR 190**, a Minister had a statutory power to make training orders for the mushroom industry, but only provided he first engaged in consultations with organizations representative of the industry. Since he had not consulted with the mushroom growers, his training scheme was declared invalid. It was held at page 284 that:

"The essence of consultation is the communication of a genuine invitation, extended with a receptive Minister of Town and County Planning. If the invitation is once received, it matters not that it is not accepted and no advice proffered. Were it otherwise, organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation."

120. On the same issue, **Pichard, J** in **Maqoma vs. Sebe & Another, 1987 (1) SA**, observed *inter-alia* that:

"It seems that 'consultation' in its normal sense without reference to the context in which it is used, donates a deliberate getting together of more than one person or party…in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word 'consultation' in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."

121. Similarly in ***Republic vs. North and East Devon Health Authority, EXP Coughlan 34*** the Court of Appeal determined that:

"To be proper, consultation must be undertaken at a time when proposals are still at a formative stage, it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be consciously taken into account when the ultimate decision is taken."

122. Accordingly it is my view that there was no consultation with the county governments before the regulations were promulgated without out the same cannot acquire the force of law.

123. My view is supported by the decision of the Supreme Court in **Speaker of the Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** that:

"The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase 'concerning counties' is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments. For instance, it may be argued that although security and policing are national functions, how security and policing services are provided affects how county governments discharge their agricultural functions. As such, a bill on security and policing would be a bill concerning counties….With a good Speaker, the Senate should be able to find something that affects the functions of the counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by both Houses… Many offices established by the Constitution are shared by the two levels of government, as is clear from the Fourth Schedule…We have taken note too that the Senate (which brings together county interests at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county level – such as finance, budget and planning, public service, land ownership and management, elections, administration of justice –dovetail into each other and operate in unity."

124. It is my view that the impugned Regulations ought to have been tabled before the Senate together with a copy of a regulatory impact statement and a compliance certificate as required by section 7(5) of the ***Statutory Instruments Act***. In this case the only contention is that the regulations were placed before the National Assembly. This, even if true, however cannot do considering the nature of the regulations in question. This view is well captured by **De Smith, Woolf and Jowell** in ***Judicial Review of Administrative Action*** at paragraph 5 – 073 at page 274, when dealing with section 4(1) of the ***Statutory Instruments Act*** of 1946 of England on constitutes 'laying before Parliament' thus:-

> ***"Where any statutory instrument is required to be laid before Parliament after being made a copy must be laid before both houses [House of Lords and House of Commons]."***

125. Therefore, in my view section 11(4) does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory. I therefore agree the failure to submit the Regulations to Parliament (Senate and National Assembly) for scrutiny and approval would be fatal to the same where the regulations are required to be laid before both houses. As was appreciated ***Judicial Review of Administrative Action*** **5th Edition, Sweet and Maxwell, 1995** was cited where it is stated:

> "**If however, the instrument is required to be laid before Parliament, it is arguable that the instrument acquires legal validity only when it is so laid. It is true that the laying requirements have generally been regarded as directory by both the courts and learned commentators, but the wording of the 1946 Act is strong ("a copy of the instrument shall be so laid before the instrument comes into operation') and there is a dictum to the effect that these words are to be read in their literal *sense."***

126. The interested party however argued that since the ***Coffee (General) Rules 2002*** stood revoked by virtue of section 21 of the ***Statutory Instruments Act, No. 23 of 2013***, the 2nd Respondent herein, and its preceding body, the Coffee Board of Kenya, failed in their statutory and legal duties to effectively regulate the sector and it is by these actions and other complaints from other industry stakeholders that led to the formation of the Presidential Task Force to look into the Coffee sub-sector.

127. It took the view that given the fact that the Country is now gearing towards the election cycle, any efforts made up to this point by the ex-parte applicant and the Respondents herein will have to await the electoral cycle to be concluded: hence the need for interim regulations to enable the sector to run and players in the industry, be they farmers, marketers, millers, etc, to carry on business uninterrupted pending the completion of the process under way between the ex-parte applicant and the respondents herein. It averred that the greater good and business certainty will be served by letting the impugned regulations stand and continue through the parliamentary process: on completion of the process under way between the ex-parte applicant and the respondents herein, the regulations and indeed the entire framework regulating agriculture in general and coffee in particular may need to be amended or re-enacted afresh: hence the need for the impugned regulations to stay in force until such time as this process is completed as there is no fall back legal regulatory framework currently in place.

128. Its belief was therefore that in the interests of justice, certainty, the rule of law and the greater good, the instant application should fail and I urge the Honourable court to dismiss the same and restore the impugned regulations to bring certainty, clarity and formality to the coffee sector and to safeguard the livelihoods of close to 8 Million Kenyans in the process.

129. The Court was therefore urged to leave the impugned regulations intact for the time being while allowing the Council of County Governors, its members therein and the 1st and 2nd Respondents herein, to thereafter come up with a harmonized system that works for the entire agricultural sector as they have been working on.

130. If I understood the interested party's case correctly, it does not contend that the said Regulations were promulgated in accordance with the law. Its case is that in the public interests the said regulations ought to be allowed to stand until properly promulgated regulations are made. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution while under Article 1(3)(c) sovereign power under the Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664** it was held with respect to Uganda that judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of

Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate mysef with the decision in **Konway vs. Limmer [1968] 1 All ER 874** which held that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

131. I am therefore of the firm view that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore, the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination and fashioning appropriate relief. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms. These twin principles are aimed at placing the parties before the Court on equal footing so that the Court can see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

132. A good place to begin our analysis would be the decision in **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR** where the Court of Appeal set out the principles of public interest as hereunder:-

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

133. I appreciate the position adopted by Author **Francis Bennion** in ***Statutory Interpretation*** 3rd Edition at page 606**,** that:-

> **"it is the basic principle of legal policy that law should serve the public interest. The court… should therefore strive to avoid adopting a construction which is in any way adverse to the public interest."**

134. Having said that, it is, however, trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya [2014] eKLR** thus:-

> **"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."**

135. Thus, I agree with the decision in **Republic vs. Public Procurement Administrative Review**

Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR where the court opined as follows:-

> **"We only emphasize that nothing would serve public interest better than adhering to the law on procurement and its objectives, as well as keeping delay in public procurement at the bare minimum. We have considered the instant application and the importance of the subject project to future generations."**

136. I agree with the decision in **Resley vs. The City Council of Nairobi [2006] 2 EA 311** where the Court held that:-

> **"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed (sic)…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed.."**

137. I am not an adherent to the radical judicial expression of deontology: ***Fiat justitia ruat cælum*** ("*Let justice be done though the heavens fall*"). However a proper constitutional understanding – especially of Articles 1 and 159 of the Constitution as well as the interpretive theory in Article 259 of the Constitution obliges the Court in cases such as this to balance the public interest and the private interest in determining whether to grant orders and in fashioning appropriate remedies. However, balancing between the public interest and the rights of successful litigants before the Court is a fact-intensive inquiry. It must be based on facts and permissible inferences of the likely consequences of granting the orders. It is not enough for a party to warn the Court that administrative chaos will ensue, that the heavens will shatter, and that the sky will fall down if the orders sought are granted. A party seeking to rely on this doctrine of public interest to inoculate its otherwise unlawful actions against Judicial Review orders bears a heavy burden to demonstrate that it will burden under the yoke of impossibility if the merited orders are granted. As aforesaid, in balancing the competing aspects, the nature of the right which was breached and its importance in the constitutional scheme of rights must be considered.

138. In this case however, it is clear that even if the 1st Respondent wanted to promulgate the rules, he would be unable to do so since the Parliament is not sitting and may not sit till well after the next general elections. I agree that to immediately nullify the regulations when the 1st Respondent is by circumstances beyond his control handicapped in expediting the process would militate against public interest.

139. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6**:

> **"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to**

ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

140. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. First the court issue a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations.

141. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court.

142. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The "check in" hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights.

143. Finally structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation. By requiring the responsible government officials to formulate a plan designed to operationalise the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent "queue jumping" in access to Economic and Social Rights. See ***Structural interdicts | Law Teacher*** **http://www.lawteacher.net/human-rights/essays/structural-interdicts.**

144. Another remedy is the suspension of invalidity of legislation. Such orders are generally granted where the matters in question are complex or where a declaration of invalidity would disrupt law enforcement processes. The Constitutional Court of South Africa in **Minister for Transport & Another vs. Anele Mvumvu & Others [2-12] ZACC 20,** expressed itself as follows:

> **"Section 172(1) of the Constitution empowers this Court to make a just and equitable order, following a declaration that legislation is invalid for being inconsistent with the Constitution. In the context of this section, a just and equitable remedy includes an order suspending the declaration of invalidity for a period determined by the court. The operation of the invalidity order is suspended so as to allow Parliament to cure the defect. But sometimes it occurs, as is the position here, that Parliament is unable to correct the defect before the period of suspension lapses….When Parliament fails to cure the defect during the suspension period, it becomes necessary to request the Court to extend the period of suspension in order to prevent the coming into operation of the order of invalidity. However, the request must be made and the decision to extend must come before the suspension expires as an expired one cannot be extended, nor can it be revived"**

145. Similarly, **Sachs, J** in **Doctors for Life Case (supra)** dealing with the suspension of invalidity held:

> **"On the facts of this case I accordingly agree with the orders of invalidation made by Ngcobo J, subject to the terms of suspension he provides for. In doing so I do not find it necessary to come to a final conclusion on the question of whether any failure to comply with the constitutional duty to involve the public in the legislative process, must automatically and invariably invalidate all legislation that emerges from that process. It might well be that once it has been established that the legislative conduct was unreasonable in relation to public involvement, all the fruit of that process must be discarded as fatally tainted. Categorical reasoning might be unavoidable. Yet the present matter does not, in my view, require us to make a final determination on that score.....New jurisprudential ground is being tilled. Both the principle of separation (and intertwining) of powers in our Constitution, and the notions underlying participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case in future. The touchstone, I believe, must be the extent to which constitutional values and objectives are implicated. I fear that the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process. Hence my caution at this stage. In law as in mechanics, it is never appropriate to use a steam-roller to crack a nut."**

146. In this case to immediately declare the Regulations invalid would have the effect of exposing Kenyans who rely on the coffee industry such as farmers, marketers, millers, etc, to a state of uncertainty.

147. Therefore there may be occasions where despite breaches and infractions of the law, the principle of proportionality ought to be adopted so as to give the relevant authorities a chance to remedy the defects rather than to adopt a course by which the public is thereby imperilled. As was recognised by **Ojwang, J** (as he then was) in Nairobi Misc. Civil Case (Judicial Review) No. 109 of 2004 – **Republic vs. The Minister for Transport & Communications & Others ex parte Gabriel Limion Kaurai & Another:**

> **"the Court, in coming to its decision, must strike a balance between the two scenarios described above – the public yearning for an effective, humane and civilised passenger transport sector, and the juridical imperatives of compliance with the law as it has been enacted. Such an attempt to find a balance will show that there are no cut and dried borderlines between the social purpose, on the one side, and the sacrosanct law, on the other. Social purposes are more dynamic, sometimes feeding into the domain of legal norms, and their earning acceptance and sanctification by the jurist; but sometimes not getting quite there, and so remaining pre-legal, even though they still represent part of normal human venture and endeavours towards improved quality of life."**

Order

148. Having considered the applications the subject of this judgement I make the following orders:

> **1. A declaration that *The Coffee (General) Regulations, 2016* published as Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June 2016 are unlawful.**
>
> **2. An order compelling the 1st Respondent to ensure that lawful regulations are promulgated within 30 days of the first sitting of the next Parliament.**
>
> **3. In default of compliance, an order of Prohibition shall be issued directed against the 1st and 2nd Respondents, prohibiting them and their agents, employees and servants from implementing *The Coffee (General) Regulations, 2016* published as Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June 2016.**
>
> **4. In further default, an order of Certiorari shall issue removing into this Court for purpose of quashing and quashing *The Coffee (General) Regulations, 2016* published as Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June 2016.**
>
> **5. Additionally, and in default an order of Certiorari shall issue to quash the report of National Task Force on Coffee Sub-Sector Reforms contained in Kenya Gazette Notice supplement Notice No. 105, legislative supplement No. 49, legal notice No. 120 Gazetted on 27th April 2016.**
>
> **6. Similarly, in default an order of Prohibition to prohibit the 1st, 2nd and 3rd Respondents implementing a report of National Task Force on Coffee Sub-Sector Reforms, contained in Kenya Gazette Supplement Notice No. 105, Legislative Supplement No. 49, Legal Notice No. 120. Gazetted on 27th April 2016.**
>
> **7. As this was a public interest litigation, there will be no order as to costs.**

149. Those shall be the orders of this Court.

Dated at Nairobi this 28th day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Peter Wanyama for the 1st Applicant

Mr Mutahi for the 2nd Applicant

Miss Daido for Miss Maina for the Respondent

Mr Ngatia for the interested party

CA Mwangi