THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 17 OF 2017

BETWEEN

WERE SAMWEL & 14 OTHERS.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY OF EDUCATION

SCIENCE AND TECHNOLOGY.....2ND RESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION.....3RD RESPONDENT

JUDGMENT

1. This is a Petition dated and filed in Court on 24th January 2017. The petitioners are student leaders of various public universities and have brought this petition on their own behalf and that of other students. The petition has been brought against **The Attorney General who is** the principle advisor to the government and the person authorised to represent the government in civil proceedings, **the Cabinet Secretary of Education Science and Technology** and the **Commission for University Education,** as the respondents.

2. The petition is a challenge to amendments introduced to the Universities Act and in particular Section 18 (1C), (1D), and (1E) which introduced changes to the manner of election of student leaders in the universities. Section 18 amended Section 41 of the University 2012, and of material to this petition, introduced Sub-sections (1A), (1B), (1C), (1D), (1E), (1F), (1G), (1H) and (1I) to Section 41 of the Act. The amendments have to do with student governance and leadership in the universities.

3. The provisions introduced what is now called Student Electoral college, which, the petitioners contend, are contrary to **Article 38** of the **Constitution** on Political Rights, and **Article 81 of the Constitution** on the principles of electoral system in the country which, they argue includes students electoral process.

4. The petitioners further contend that the amendments were done in violation of **Articles 10, 24** and **118(b)** of the **Constitution,** in that there was no public participation. For those reasons, the petitioners want the amendments annulled and, therefore, sought the following orders;

a) ***A declaration that section 18 1C, 1D and 1E of the Universities Act 2016 is unconstitutional***.

b) A declaration that the continued enforcement of section 18 1C, 1D and 1E of the Universities (Amendment) Act 2016 by the respondents against the petitioners violates the Bill of Rights (Political Rights under Article 38).

c) A permanent injunction barring the application or enforcement of section 18 1C, 1D and 1E of the Universities (Amendment) Act 2016.

d) Costs and interests of this petition.

Responses

5. The petition is opposed. The 1st and 2nd respondents filed a replying affidavit by **jacinta kapiyo,** Director of University Education, sworn on 30th March 2017, and filed in Court on 31st March 2017. **Ms Kapiyo** deposed that the amendments affect the students' Associations governance, electoral process and procedures by allowing an inclusive approach to student leadership. It was further deposed that one of the reasons that lead to the amendment was the constant students' riots during student elections and soon thereafter, and gave an example investigations undertaken by **Commission of Administration of Justice (CAJ)** which established external interference by external forces including politicians.

6. It was deposed that it also was necessary to limit the terms a student leader should be elected, and that the amendments introduced through Section 18, (1C), (1D), and (1E) were aimed at ensuring that students' leadership was aligned with national values and principles of governance as envisaged in **Article 10** of the **Constitution.**

7. Further deposition was that the amendments do not infringe the students' rights since they still have the right to vote and participate in elections as provided for in the **Constitution**. Any issues the petitioners had should have been raised when the public was asked to give views on the amendments before they were enacted by parliament. It is the 1st and 2nd respondents' position, that there was sufficient public participation before the enactment of the amendments. In this regard, it was deposed that the impugned amendments are lawful hence the petition discloses no cause of action.

8. The 3rd respondent filed a replying affidavit through **Prof. Walter O. Aywa** sworn on 18th April 2017. **Prof. Aywa** deposed that there was public participation and stakeholder's engagement before the enactment of the impugned provisions, that various institutions submitted letters including the Public Service Commission, Office of the Attorney General and Ministry of Education Science and Technology over the amendments.

9. According to **Prof Aywa,** an invitation was sent out asking stakeholders to attend workshops on 24th August 2015 and 22nd to 26th September 2015 with a view to discussing the proposed amendments, and the meetings took place. It was also deposed that the National Assembly invited submissions and Memoranda through an advertisement published in the News Paper on 25th February 2016. For that reason, he stated, the complaint that there was no public participation is unfounded.

10. **Prof. Away** deposed, therefore, that the amendments contained in section 18 (1C), (1D) and (1E), do not in any way infringe the petitioners' or other students' rights since the Students' Associations still have the right to elect their councils as it has been in the past, in that the Students in each campus, Schools or Faculty will conduct elections to elect their student council directly through universal suffrage.

11. According to **Prof. Awa**, the impugned sections will ensure that there is student representation from all Schools, Faculties, Departments as well as Satellite campuses through a student council that derives power from the entire university. In that regard, **Prof. Aywa** deposed, the Electoral College does not infringe on the petitioners' and other students' rights to vote for their leaders.

Submissions

12. **Mr Ayieko**, learned counsel for the petitioners submitted that Section 18 (1C), (1D) and (1E) of the Universities (Amendment) Act, 2016 is unconstitutional in so far as the elections to leadership of university students is concerned. According to counsel, the amendment to section 41 of the Universities Act 2012 by Section 18 of the (Amendment) Act 2016 which introduced a new way of electing student leaders through an electoral college infringes on the political rights of students as provided for under **Article 38** of the **Constitution**.

13. Counsel submitted that Section 18(1I) requires that student elections comply with the electoral system in Kenya under Article 81 of the Constitution and rules governing election of student council. Counsel contended that **Article 81** of the **Constitution** is a general provision on the electoral system in the country, while **Article 81(a)** is about the freedom of citizens to exercise their political rights to vote under **Article 38** of the **Constitution. Article 81(a)** is therefore, about universal suffrage and **Article 38(2)** advocates for free election based on universal suffrage.

14. Counsel contended that section 41 of the Universities Act as amended by Section 18 of the Universities (Amendment) Act 2016, introduces an electoral college system which takes away the students' right to elect their leaders, and is therefore a violation of their constitutional rights. In counsel's view, the impugned amendments introduce electoral college which is against the principle of universal suffrage.

15. Counsel further contended that the students' Council should be elected based on the popular vote and full participation of all students as required by **Article 10** of the **Constitution.** Learned counsel went on to submit that students were not consulted before the amendments were effected, hence there was no public participation. He contended that for the legislature to limit rights, the limitation must meet the criteria set under **Article 24(1)** of the **Constitution.** In counsel's view, the limitation introduced by the impugned amendments does not meet the criteria set under **Article 24** of the **Constitution.**

16. It was learned counsel's further contention, that the amendments directly violate the students' right to participate in the election of their leaders contrary to both **Articles 38** and **81** of the **Constitution,** Learned counsel referred to the decision in ***Re The Matter of Interim Independent Electoral and Boundaries Commission*** **Application no. 2 of 2011** on the interpretation of the Constitution particularly paragraph 51 of the judgment for the proposition that a nation's Constitution should not be mechanically interpreted, and ***Re The Kadhi's Court; Right Rev. Dr Jesse Kamau & others v Attorney General & another*** **HCMCA, no. 890 of 2004** on the interpretation of the Bill of Rights.

17. Counsel further referred to the decision in the case of ***Muranga Bar Operators & another v Minister of State for Provincial Administration and Internal Security & others*** **petition no. 3 of 2011 [2011] eKLR** and ***Samuel G. Momanyi v Attorney General & another*** **petition no. 341 of 2011** for the submission that in determining the constitutionality of a statute, the Court should consider the object and purpose of the legislation.

18. On the necessity for public participation, counsel referred to the decision in ***Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others*** **[2013] eKLR** for the submission that public participation in governance and public affairs is necessary; and ***Doctors for Life International v Speaker of the National Assembly & others*** **CCT 12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 CC,** to the effect that the Constitution values public participation in the law making process. He also referred to the case of ***Robert N. Gakuru & others v The Governor of Kiambu County & 3 others*** **2014 eKL*R*** on the same principle, among others. He urged that the petition be allowed with costs.

19. **Miss Kamande,** learned counsel for 1st and 2nd respondents submitted, first; that there was public participation leading to the impugned amendments. Counsel submitted that there was sufficient public participation, that stakeholders were invited to submit views and memoranda as shown in the replying affidavit filed on behalf of the 1st and 2nd respondents, including an advertisement in the newspaper by the National Assembly inviting views and comments on the proposed amendments. In that regard, counsel submitted, the petitioners cannot successfully allege that there was no public participation.

20. Counsel contended that the petitioners had an opportunity to air their views and or grievances during the law making process and referred to the case of ***Moses Munyendo & 908 others v The Attorney General and Minister for Agriculture*** **[2013] eKLR,** for the proposition that there is a presumption of public participation where the legislation has been enacted in accordance with National Assembly standing orders; ***Minister of Health and another v New Clicks South Africa (Ply) & others*** **2006 (2) SA 311 (CC)** for the proposition that what matters is that at the end of the day a reasonable opportunity is offered to members of the public and interested parties to know about the issues and have an adequate say; and ***Commission on the Implementation of the Constitution v Parliament of Kenya and another 2013 eKLR*** for the submission that a party should demonstrate to the court how the National Assembly had failed to achieve public participation.

21. Second, learned counsel submitted that the impugned amendments have not taken away the petitioners' or other students' right to elect their leaders. According to counsel, the Electoral College envisaged under Section 18 1C, 1D and 1E, enables all students to participate in electing three (3) representatives in each electoral college. In that case, counsel contended, students will elect their representatives to the council, while section 18 (1H) provides that rules will be promulgated for purposes of governing elections into the council. Counsel submitted, therefore, that the petitioners' rights have not been violated by the impugned amendments, hence the petition lacks merit.

22. Third, on the constitutionality of a statute, counsel referred to the **US Supreme Court** decision in ***US v Butler,*** **U.S. 1 [1936]** on the role of the Court in determining the constitutionality of a statute. Counsel further submitted that there is a presumption of legality of a statute, and referred to the case of ***Hambardda Dawakhana v Union of India Air*** **[1960] AIR 554** followed in ***Ndyanabo v Attorney General of Tanzania*** **[2001] EA 495,** where it was stated that there is a general presumption that every Act of Parliament is constitutional.

23. Counsel also referred to the decisions in ***Mount Kenya Bottlers Ltd & 3 others v Attorney General & others*** **[2012] eKLR,** ***Kenya Youth Parliament & 2 others v Attorney General & another*** **petition no. 101 of 2011** and ***Trusted Society of Human Rights v The Attorney General and others*** **petition no 229/2012** to urge that the court should be slow in entering parliament's arena by questioning its wisdom in legislating a given statute. Counsel prayed that the petition be dismissed.

24. **Mr Gitonga**, learned counsel for the 3rd respondent, on his part submitted, first; that the principle of universal suffrage presupposes one person one vote. In that regard, counsel submitted that Section 18 (1D) provides that students in one college shall elect three (3) representatives hence the college is elected through a universal suffrage and in his view, universal suffrage and equality of votes is not affected.

25. Counsel further submitted that the amendments did not offend **Article 81** of the **Constitution**. In counsel's view, the process introduced by the amendments provide for participation of both gender, as well as the diversity of the people of Kenya. This, counsel submitted, brings equality among Schools and Colleges and eventually inclusiveness in the Universities' Students' leadership.

26. Learned counsel further contended that the petitioners had not demonstrated how the impugned amendments took away their right to elect student leaders. Counsel submitted that the amendments are constitutional and relied on the decision in ***Olum and another v Attorney General of Uganda*** **[2002] 2 EA 508,** for the proposition that to determine the constitutionality of sections of a statute or Act of Parliament, the Court has to consider the purpose and effect of the impugned statute or section.

27. Second, counsel submitted that there was public participation, and that the petitioners as student leaders must have had access to the letters sent to leaders of their universities on the amendments. Counsel referred annexures in the 3rd respondent's replying affidavit to show that there was public participation.

28. Counsel went on to submit that the amendments went through a parliamentary process and the National Assembly conducted public participation as required. He referred to the decisions in ***Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others***

[2013] eKLR, ***Minister of Health v New Clicks South Africa (PTY) Ltd and Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others*** **petition no. 1174 of 2007** among others on the issue of public participation and prayed that the petition be dismissed.

Analysis and Determination

29. I have considered this petition, responses thereto and submissions by counsel for respective parties. I have also considered the authorities cited. The petition challenges the constitutionality of **Section 18(1C), (1D)** and **(1E)** of the **Universities (Amendment) Act 2016**, introducing amendments to **Section 41** of the Universities Act 2012. The impugned amendments are on student elections the universities and University Colleges.

30. Before dealing with the amendments, it is important first to consider the applicable principles in determining the constitutionality of statutes.

31. When the constitutionality of an enactment is challenged on the ground of violation of any of the Articles of the Constitution, the ascertainment of its true nature and character becomes necessary. That is, its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy.(***Bengal Immunity Company Ltd v The State of Bihar*** 1954 SCR 873.)

32. There is also a general but rebuttable presumption of constitutionality of a statute. The presumption is that courts should presume the statute or statutory provision to be constitutional unless the contrary is established, and that it is the duty of the person who alleges that a statute or statutory provision is unconstitutional to prove such unconstitutionality.

33. In the case of ***Hambardda Wakhana v Union of India Air*** **(supra)** the Supreme Court of India stated;

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

34. This principle was followed in the case of ***Ndyanabo v Attorney General of Tanzania [*****2001] EA 495** where the **Court of Appeal** of **Tanzania** stated that ***there is a general presumption that every Act of Parliament is constitutional and the burden of proving the contrary rests upon any person who alleges otherwise***.

35. For the Court to determine constitutionality of a statute, it has to look at the statute ***vis a vis*** the constitutional provision alleged to be offended and make a determination thereof, considering the purpose and effect of the implementation of the impugned statute. If the purpose does not infringe the right the Court must then consider whether its implementation does. this was re stated in the case of ***Olum and another v Attorney General of Uganda*** **[2002] 2 EA 508,** the constitutional Court of Uganda stated;

> ***"To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of its implementation. If either its purpose or effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional."***

36. The above principle had earlier been stated by the US **Supreme Court** in the case of ***U.S v Butler*** **297**

U.S 1 [1936] thus;

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the Article of the Constitution which is invoked besides the statute which is challenged and to decide whether the latter square with the former. All the court does or can do is to announce its considered judgement upon the question. The only powers it has, if such it may be called, is the power of judgement."***

37. Turning to the subject matter of this petition, it is necessary to set out the impugned provisions and juxtapose them against the constitutional provisions alleged to be violated and determine whether or not they are unconstitutional. In that regard, **Section 41** as amended provides as follows;

> (1) ***Every university shall have a students' association comprising of all students of the university.***
>
> ***(1A) A students' association shall be governed by a students' council comprising of—***
>
> ***(a) a Chairperson;***
>
> ***(b) a Vice Chairperson who shall be of opposite gender with the Chairperson;***
>
> ***(c) a Treasurer;***
>
> ***(d) a Secretary-General who shall be the secretary to the Council; and***
>
> ***(e) three other members to represent special interests of students.***
>
> ***(1B) Every students' council shall be elected in accordance with this Act and its membership shall—***
>
> ***(a) reflect national diversity; and***
>
> ***(b) have not more than two-thirds of its members being of the same gender.***
>
> ***(1C) For purposes of conducting the election of the members of the student council referred to in subsection (1A), the students' association shall constitute itself into electoral colleges based on either academic departments, schools or faculties, as may be appropriate.***
>
> ***(1D) The students of each electoral college constituted under subsection (1C) shall elect three representatives—***
>
> ***(a) from amongst persons who are not candidates under subsection (1A); and***
>
> ***(b) of whom not more than two-thirds shall be of the same gender.***
>
> ***(1E) The representatives of each electoral college shall elect the members of the student council within thirty days of the election under subsection (1D).***
>
> ***(1F) A member of the student council shall hold office for a term of one year and may be eligible for re-election for one final term.***
>
> ***(1G) A person who has held office as a member of the student council of a University for two terms is disqualified from election as a member of the student council of any other University or constituent college in Kenya.***

(1H) Every students' association shall, in consultation with the University, formulate and enact rules to govern the conduct of elections including regulation of campaigns, election financing, offences and penalties.

(1I) An election conducted pursuant to this section shall comply with the general principles of the Kenyan electoral system under Article 81 of the Constitution and the rules governing the election of members of the student council.

(2) The functions of a Students' Council shall be to—

(a) oversee and plan, in consultation with the Senate, students' activities for the promotion of academic, spiritual, moral, harmonious communal life and social well-being of all students;

(b) draw to the attention of the appropriate authority, where necessary, special needs for particular students;

(c) offer suggestions to the Senate or its equivalent on matters affecting the well-being of students; and

(d) undertake such other functions as provided in its governance instrument as approved by the Council.

38. The import of Section 41 (1B), (1C),(1D),(1E),(1F) as amended, ***(impugned Section 18),*** is that the students' association will convert itself into an electoral college in terms of Departments, Schools or Colleges where by students in each of these electoral colleges (departments, schools and colleges) will elect three representatives who should not be candidates, and the election should abide by gender parity that not more than two thirds should be of one gender, the term of office is one year with eligibility for re-election for one final term. A student can only be elected into office for only two terms. There is a requirement in **section 41(1H)** that every students' associations should in consultation with the university formulate rules to govern the conduct of elections.

39. These representatives from electoral colleges will then elect the council within thirty days. Section 41 (1B) provides that elections of the council should be conducted in accordance with the Act, take into account the diversity of the people of Kenya and special interests. This will ensure that student leadership in universities reflects the face of Kenya as required by the constitution.

40. Prior to the impugned amendments, Section 41 of the Universities Act did not have a provision on the manner of conducting student elections in universities. The petitioners did not put before court evidence on how student leaders' elections are conducted and how colleges, schools or campuses are represented and similarly how issues of gender and special interests as well as national diversity were taken care of in the previous electoral system.

41. The introduction of Electoral College, the petitioners argue, will deprive students the right to elect their leaders directly through universal suffrage guaranteed under **Articles 38** and **81** of the constitution.

42. **Article 38(1)** of the **Constitution** grants citizens the right to make political choices, and Sub- Article 2 states that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the constitution or office in a political party. **Article 81** on the other hand emphasizes on the freedom to exercise political rights, gender parity and fair representation including equality of the vote.

43. The impugned amendments have introduced a system through which students in each department, campus, college or faculty will first elect three of their own representatives through universal suffrage. These representatives will then represent the school, department, campus, college or faculty in electing the council. The amendments also bar finalist candidates from offering themselves for election. For the

first time the provisions make it plain that the election of representatives either at the electoral college or council level, shall take into account gender parity so that one gender shall not have more than two-thirds of the members, take care of special interests and limit the term of office to two terms of one year each.

44. Furthermore, the elected representatives should reflect the diversity of the people of Kenya. In other words, the electoral reforms are aimed at achieving fair and inclusive representation in colleges, schools or faculties of each university, and place term limits in elective positions. This would in my view, protect minority interests so that even colleges that have fewer students will feel fully represented, give equal say to campuses or schools and ensure that as many students as possible have an equal chance to aspire for leadership in the Universities rather than leave those positions to the same people for as long as they are in those institutions.

45. The petitioners have also contended that the impugned amendments violate Article **24(1)** of the **Constitution** by limiting political rights. Rights have inherent value and must at all times be promoted, respected and above all protected in an open and democratic society. However a proper reading of Article 24 is that limitation of rights is permissible where necessary and justified. In this case the right to vote by universal suffrage may appear to be limited but students will still elect their college, school, faculty or campus representatives through universal suffrage where students' associations in those colleges, schools and faculties will constitute themselves into electoral colleges for purposes of electing representatives who will in turn elect the council.

46. As it is, the vote by universal suffrage will not be completely limited. If there is any limitation introduced by the amendments, it is justified as it is meant to achieve fair and equitable representation as well as orderly elections in universities. I do not therefore agree with the petitioners that the amendments violate Articles 38 and 81 of the **Constitution** in the strict sense. They only modify the manner of election and introduce gender parity and national consciousness in the student leadership in the institutions of higher learning. The limitation, if any, in my view, is reasonable in the circumstances. It should not be lost that the amendments will have positive effect on representation

47. The next issue raised in this petition is whether the amendments are unconstitutional for lack of public participation. The petitioners contended that the amendments were effected without any or sufficient public participation as required by **Articles 10** and **118** of the Constitution. The respondents on their par argued that there was public participation.

48. Public participation is one of the values and principles of governance in our constitution. **Article 10** of the **Constitution** ***binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution, (b) enacts, applies or interprets any law or (c) makes or implements public policies.*** Under **Article 10(2)** of the **Constitution,** People have a right to participate in the process of enacting laws that govern them and, therefore, public participation in the legislative process is a constitutional dictate.

49. **Article 118** of the **Constitution** further requires Parliament and its committees to conduct business in an open manner, facilitate public participation and involvement in its legislative and other business including that of its committees.

50. I have perused the responses filed by the respondents and in particular the replying affidavit sworn by **Prof. Aywa** which contains letters sent out to stakeholders in August 2015 inviting stakeholders to workshops. The stake holders included; Association of Professional Societies of East Africa, Commission of Higher Education, Federation of Kenya Employers, Kenya private Sector Alliance, Kenya Universities and Colleges Central Placement Service (KUCCPS), Higher Education Loans Board (HELB), Vice Chancellors of Public and Private Universities and Principals of University Colleges. The petitioners as student leaders have representations in the university leadership.

51. This being a parliamentary process, the National Assembly published an advertisement in the Daily Nation of 25th February 2016 calling for submissions of memoranda on the Universities (Amendment) Bill, 2015 in compliance with Article 118 of the Constitution. It is clear from the documents that the

public was informed of the impending Bill to introduce amendments and were invited to submit views and memoranda on the proposed amendment. There is therefore uncontroverted evidence that there was public participation during that legislative process.

52. In the South African case of ***Minister of Health and Another v New Clicks South Africa (PTY) Ltd and others*** (supra), the Court stated with regard to Public Participation-

> ***"The forms of facilitating an appropriate degree of public 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."***

53. In the case of ***Moses Munyendo & 908 others v The Attorney General and Minister for Agriculture[2013]eKLR***, the Court stated-

> ***"The National Assembly and Public institutions have a broad measure of discretion in how they achieve the object of Public Participation. How it is affected will vary from case to case but it must be clear that a reasonable level of participation has been offered to the Public."***

54. Emphasizing on the importance of public participation in the law-making process, the Court stated in the case of ***Doctors for Life International v Speaker of the National Assembly and others (supra)*** that-

> ***"it is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values Public Participation in the law making process the duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating Public participation in legislative and other processes is to ensure that the public participates in the law making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of the state that the constitution contemplates that the public will participate in the law making process….. The nature and degree of Public Participation that is reasonable in a given case will depend on a number of factors. These include, the nature and importance of the legislation, and the intensity of its impact on the public. The more discrete and identifiable the potentially affected sections of the population and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say..."***

55. Regarding the standard to be applied in determining whether or not there was public participation, the Constitutional Court of South Africa stated in ***Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others*** [20016] ZAACC22

> "***The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances,***[1] ***as the power to determine how participation in the legislative process will be facilitated rests upon Parliament.***
>
> ***The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public. "***

56. The petitioners have argued that they form the section of the public that is potentially affected by the impugned amendments and that they should have been contacted for purposes of Public Participation before the amendments to the statute were effected. The amendments took place in the National

Assembly because it was a legislative process. It was the National Assembly's duty to ensure that there was Public Participation in accordance with **Article 118** of the **Constitution** and had the responsibility to determine how public participation was to be facilitated and achieved.

57. In complying with the **Constitution** and the Law with regard to Public Participation, the National Assembly called for memoranda through an advertisement published in the News Papers. Members of the Public who include the petitioners were made aware of the impending legislative process and had an opportunity to participate by submitting their views to the National Assembly. It was not necessary, in my view, that the petitioners be invited individually.to participate in that legislative exercise.

58. Complying with the requirement to Public Participation does not mean every affected person, group of persons or segment of the society be contacted and heard individually. It would simply be impossible to hear everybody who claims to be affected by a given legislation. However, it suffices if the public including those to be affected were made aware of the impending legislative process and accorded an opportunity to participate. Failure to participate despite the opportunity given, cannot invalidate the amendments for lack of Public Participation.

59. I agree with the court in ***Robert N Gakuru & Others v The Governor Kiambu County & 3 Others (supra)***, that Public Participation ought to be real and not illusory and ought not to be treated as a mere formality for purposes of fulfilment of the constitutional dictates. There must be evidence that the public was accorded an opportunity to participate taking into account the circumstances of each case.

60. Applying the principles underlined in the above decisions to the circumstances of this petition, I see no fault on the part of the respondents considering that indeed Public Participation was conducted for purposes of the impugned legislation. The public including the petitioners were accorded reasonable opportunity by the National Assembly, and before then, through stakeholders' engagement forums.

61. In the end the conclusion I come to is that I am not persuaded that this petition has merit. Consequently the petition dated 24th January 2017 is declined and is hereby dismissed. I make no order as to costs.

Dated Signed and Delivered at Nairobi this 22nd Day of September 2017

E C MWITA

JUDGE