



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 79 OF 2014

- 1. MILLY GLASS WORKS LIMITED.....PETITIONER**
- 2. SHREEJI CHEMICALS LIMITED.....PETITIONER**
- 3. EASTERN CHEMICAL INDUSTRIES LIMITED.....PETITIONER**
- 4. ANAIDA INVESTMENT LTD.....PETITIONER**

VERSUS

- 1. THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT**
- 2. THE GOVERNOR MOMBASA COUNTY.....RESPONDENT**
- 3. THE EXECUTIVE COMMITTEE, MOMBASA COUNTY..RESPONDENT**

JUDGMENT

1. In their Petition dated 10th December, 2014 and filed on 17th December, 2014, the Petitioners sought five orders, namely -

(a) A declaration that paragraph 86 as contained in the MOMBASA COUNTY FINANCE ACT 2013 and contained in Mombasa County Gazette Supplement 269 (Act No. 2) issue of 27th December, 2013 is unconstitutional;

(b) An injunction restraining the 1st Respondent (the COUNTY GOVERNMENT OF MOMBASA) from effecting and/or implementing the operation of the Mombasa County Finance Bill 2014;

(c) An order directing the COUNTY GOVERNMENT OF MOMBASA to refund the Petitioners any monies paid to the County pursuant to the provisions of MOMBASA COUNTY FINANCE ACT 2014;

(d) Any other relief that this court deems fit and proper to grant.

2. The Petition was supported by the Affidavit of OSCAR NDAMBUKI sworn on 17th December, 2014, the annexures thereto, and the submissions of counsel for the Petitioners dated 14th May, 2015 and filed on 18th May, 2015.

THE PETITIONERS' CASE

3. The Petitioners case may be summarized into two propositions –

- (1) that the Mombasa Finance Bill 2014 is unconstitutional because it purportedly offends the mandatory provisions of Section 22, 23 and 24 of the County Governments Act because –
 - (a) a Bill cannot be implemented until it is passed as an Act and assented by the Governor;
 - (b) the Bill was not published in the Gazette as required under the County Governments Act;
 - (c) the Finance Bill 2014 contravened the provisions of Article 209 of the Constitution of Kenya by levying the taxes in the circumstances without being authorized by an Act of Parliament;
- (2) that the County of Mombasa Finance Act 2013 was unconstitutional for reasons that –
 - (a) there was no public participation of all concerned hence contrary to the provisions of Article 174 of the Constitution;
 - (b) the County Assembly of the County of Mombasa did not facilitate public participation and involvement in the legislation of the Finance Act 2013 contrary to the provisions of Article 196 of the Constitution of Kenya 2010;
 - (c) the Act contravened Article 209 of the Constitution of Kenya 2010 by levying the taxes on silica sand without being authorized by an Act of Parliament.

4. Counsel for the Petitioners reiterated these arguments in their submissions dated 14th May, 2015 and filed on 18th May, 2015 as already stated at the beginning of this Judgment. In addition on the question of public participation, counsel relied on the case of **Robert N. Gakuru & Others vs. Governor, County of Kiambu & Others** where the court found that in the circumstances revealed in that case, there was no public participation.

5. On the question of levying taxes on goods produced in one County and transported to or through one county to another, counsel for the Petitioners argued that it prejudices the mobility of goods. In this case, counsel argued, the Petitioners obtain silica sand from the Counties of Kwale and Kilifi which is then transported to the County of Mombasa. Counsel argued that the Bill prejudices the mobility of goods across the County of Mombasa contrary to the provisions of Article 209(5) of the Constitution of Kenya, 2010.

6. On the issue of refunds, counsel for the Petitioners urged the court to find that payments to the County of Mombasa were unconstitutional, and that by virtue thereof the County be ordered to refund the said payments to the Petitioners with interest and also grant the Petitioners costs of the Petition.

THE RESPONDENT'S CASE

7. The Petition was opposed by the Respondent through **firstly**, the Replying Affidavit of Jimmy Waliaula the Respondent's Director of Legal Services sworn on 10th March, 2015 and filed on the same day, and **secondly**, the Respondent's counsel's written submissions dated 4th November, 2015 and filed on 5th November, 2015. In essence the Respondent denied all of the Petitioners' claims and contended that –

- (a) there was public participation;

(b) the County of Mombasa Finance Act 2014 was duly enacted and operationalized;

(c) the County of Mombasa (and other Counties) has/have the legal authority to impose charges in accordance with County legislation;

(d) payments by the Petitioners to the County of Mombasa are lawful;

(e) an order of refund of any payments made to the County would be highly prejudicial as the said payments have been applied to the cost of services to the residents of the County;

THE ISSUES, ANALYSIS

8. From the above arguments by counsel for the Petitioners and the Respondents, the following issues are discernible –

(1) Whether there was public participation in the enactment of the County of Mombasa Finance Act 2013 and 2014;

(2) Whether there was failure in the publication of the Mombasa County Finance Bill 2014 and when does a Bill become law;

(3) Whether the collection of taxes by the County of Mombasa is legal/constitutional;

(4) Whether such payments, if unconstitutional are refundable to the Petitioners;

(5) Whether an order of refund would be prejudicial to the welfare of the residents of the County of Mombasa.

9. I will consider each of these issues in turn.

OF WHETHER THERE WAS PUBLIC PARTICIPATION IN THE ENACTMENT OF THE COUNTY OF MOMBASA FINANCE ACT 2014

10. The objects of devolution of government are stated in Article 174 of the Constitution. One of the objects under Article 174(c) is to give powers of self-government to the people and enhance participation of the people in exercise of the powers of the State and in making decisions affecting them.

11. Article 196 of the Constitution sets out the principles by which legislation is enacted by a County Assembly.

“196(1) A County Assembly shall –

- a. **conduct its business in an open manner, and hold its sittings and those of its committees in public, and**
- b. **facilitate public participation and involvement in the legislative and other business of the assembly and its committees;**

2. **a County Assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so;**

3. **Parliament shall enact legislation providing for the powers, privileges and immunities of County Assemblies, their committees and members.”**

12. In addition, Article 201 of the Constitution sets out the principles which shall guide all aspects of public finance in the Republic –

- (a) there shall be openness and accountability including public participation in finance matters;
- (b) the public finance system shall promote an equitable society and in particular –
 - (i) the burden of taxation shall be shared fairly;
 - (ii) revenue raised nationally shall be shared equitably among national and county governments; and
 - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- (d) public money shall be used in a prudent and responsible way; and
- (e) financial management shall be responsible and fiscal reporting shall be clear.

13. For the purposes of achieving self-government of the people and enhancing participation of the people in the exercise of the powers of the State and in making decisions affecting them, Section 87 of the County Governments Act, 2012 sets out the principles upon which public participation shall be based –

- (a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;
- (b) reasonable access to the process of formulation and implementing policies, laws and regulations, including approval of development proposals, projects, and budgets, the granting of permits and the establishment of specific performance standards;
- (c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;
- (d) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth and disadvantaged communities;
- (e) reasonable balance in the roles and obligations of county governments and non-state actors in decision-making process to promote shared responsibility and partnership and to provide complimentary authority and oversight;
- (f) promotion of public-private partnerships, such as joint committee, technical teams and citizen commissions to encourage dialogue and concerted action on sustainable development; and
- (g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

14. Besides, public participation is mandatory under Section 115 of the County Governments Act. The Section provides –

“115(1) Public participation in the County planning processes shall be mandatory and be facilitated through –

- a. mechanisms provided for in Part VIII of this Act, and

b. **provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including –**

i. **clear strategic environmental assessments;**

ii. **clear environmental impact assessment reports;**

iii. **expected development outcomes; and**

iv. **development options and their cost implications.**

(2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.

15. The County Governments Act 2012 derives from Article 196(3) of the Constitution already referred to above. Read together with the provisions of the Constitution, it becomes abundantly clear that public participation is a central pillar in both the legislative and policy functions of the government whether at the national or county level. Public participation in the process of planning, legislative enactment of laws, financial management and performance management is mandatory. This is in conformity with the doctrine that the Constitution of a nation

“... is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of the nation; the articulation of the values blending the people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion “per Mohamed Ag. JA in the Namibia case of SVACHESON 1991 (NMH) at 813”

16. **“Public participation”**, is a concept modelled and borrowed from the Constitution of South Africa, which in Article 72 thereof provides for public **“involvement”** (participation) in these terms –

“72(1) the National Council of Provinces must-

a. **facilitate public involvement in the legislative and other processes of the council and its committees; and**

b. **conduct its business in an open manner, and hold its sittings, and those of its committees in public, but reasonable measures may be taken –**

i. **to regulate public access, including access of the media, to the council and its committees; and**

ii. **to provide for the searching of any person and, where appropriate, the refusal of entry to, or removal of, any person;**

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justified to do so in an open and democratic society.”

17. In his erudite Ruling in the case of **ROBERT N. GAKURU & OTHERS VS. GOVERNOR, COUNTRY OF KIAMBU & 3 OTHERS [2014] eKLR** Odunga J dealt extensively on the questions of what constitutes public participation or in the context of Article 72(1) of the Constitution of South Africa, **“public involvement”**, and cited extensively the wide ranging majority decision delivered by Ngcobo J in the case of **DOCTORS FOR LIFE INTERNATIONAL VS. SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS (CCT12/05) [2006] ZACC11; 2006 (12) BCLR 1399 (IC):2006 (6) SA 416**

(CC), and said –

“The right to political participation is a fundamental right which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs, and a more specific right to vote and/or to be elected ... Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation. ... The right to political participation includes and is not limited to the right to vote in an election. That right which is specified in Article 25(a) of the ICCAR, represents an institutionalization of the right to take part in the conduct of public affairs, the broader right, which is provided for in Article 25(a) envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation through elected representatives but also forms of direct participation...”

18. Ngcobo J continued to consider what constitutes participation in terms of international law and said –

“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and the 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 international law right to participation reflects a shared nation’s sovereign authority is one that belongs to its citizens who “themselves” should participate in government – though their participation may vary in degree...”

19. This notion is expressed in Chapter one of the Constitution of Kenya 2010 and states that –

“We the people of Kenya ... exercising our sovereign and inalienable right to determine the forms of governance of our country and having participated fully in the making of this Constitution... the sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

- a. **Parliament and the legislative assemblies in the county governments;**
- (b) the national executive and the executive structures in the county governments; and**
- (c) the Judiciary and independent tribunals.**

The sovereign power of the people is exercised at—

- (a) the national level; and**
- (b) the county level.”**

20. Through these provisions the people of Kenya reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies created under Article 1(3) of the Constitution.

21. Chapter two (Article 4) which declares Kenya to be a Sovereign Republic also declares that the Republic of Kenya shall be a multi-party democratic state based on the national values and principles of governance, that is to say –

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- c. good governance, integrity, transparency and accountability; and
- (d) sustainable development.

22. Commitment to national values and principles of governance demonstrates that our constitutional democracy is not only representative but also participatory. Indeed as Ngcobo J said of the Constitution of South Africa in the said **Doctors for Life et al** (supra), and so can be said of the Constitution of Kenya 2010 –

“This is a defining feature of the democracy that is contemplated. It is apparent from both the Preamble and Article 2 and 10 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.”

23. Public participation is not, and should never be seen as a derogation from Parliamentary representation or representation at the County Assembly level, as Odunga J said in the **Robert N. Gakura case** (supra).

24. Indeed I would agree and entirely endorse the opinion of **Ngcobo J** in the **Doctors for Life case** (supra) that –

“...in the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the constitution of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken into account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore democracy includes as one of its basic and fundamental principles the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of participatory democracy...”

25. But what does the phrase **“participation of the people”** mean? The English language verb **“participate”** comes from the ancient Latin **“participare”** which literally means, to **“partake”** or **“share”** or with somebody or something. The expression employed in Section 72(1) of the Constitution of South Africa is **“facilitate public involvement”** is a much broader concept which imposes a duty to ensure public **“partaking” “sharing”**, participation in the law-making process. The Constitution of Kenya lacks those key words - **“facilitate”** and **“involvement”**. To **“facilitate”** means **“to make easy or easier”** promote or **“help forward”**. Therefore the process of **“public involvement”** or in our case **“public participation”** describes the process by which the public is allowed or of allowing the public to participate/to share 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 a matter)... the active involvement of members of a community or organization in decisions which affect them.”

26. Thus according to their plain and ordinary meaning, the words “public involvement”(per Section 72(1)(a) of the Constitution of South Africa) or “public participation” of the people on Article 10(2)(a) of the Constitution of Kenya) refer to the process by which the public **“partakes”** or **“shares”** in something. Facilitation of public involvement (per the South African provision), is equivalent to the mandatory injunction in Section 115 of the County Governments Act, 2012 that –

“Each County Assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.:

27. Yet, and notwithstanding the wide discretion given to both Parliament at the National level and County Assembly at the County level, the courts can, and in appropriate cases, will determine whether there has been the degree of **effective citizen participation** which is required by the national values and principles under Article 10 of the Constitution. The democratic government that is contemplated in the Constitution is both a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.

28. Again as recognized by the court in **Doctors for Life etc** (supra) what is required by Article 10(2) (a), and Section 115(1) and (2) of the County Governments Act, will no doubt vary from case to case. In all cases however, the County Assembly must act reasonably in carrying out its duty to develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county. I would therefore agree and endorse what Sachs J said in his minority Judgment in **NEW CLICKS** case –

“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.”

29. **“Reasonableness”** is an objective standard which is sensitive to the facts and circumstances of a particular case. In dealing with the issue of reasonableness the South African Court has explained that **“context is all important”**. Whether a County Assembly (legislature) has acted reasonably in discharging its duty to facilitate **effective** citizen participation or involvement, well depend on a number of factors –

(a) the nature and importance of the legislation and

(b) the intensity of its impact on the public are all especially relevant;

30. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for citizen participation.

31. In evaluating the reasonableness of Parliament’s and a County Government’s conduct the court will consider what Parliament or Parliamentary Committee and County Government considered to be appropriate public participation in light of the legislative content importance and urgency. In particular the court will consider what steps the legislature has taken to afford the public a reasonable opportunity to participate effectively in the law-making process. Perhaps the most important measure to be taken is to ensure that people have the ability to take advantage of the opportunity provided. To do so, there must be **“a continuum that ranges from providing information and building awareness to participation in**

decision-making.”

32. This is consistent with the international law right to political participation under International Covenant on Civil and Political Rights (ICCPR) which both creates a right and a duty to facilitate such participation in the conduct of public affairs.

33. In this regard, therefore, it is necessary to examine what measures were put into place to facilitate the public participation or involvement before the enactment of the County of Mombasa Finance Act 2014. From the Replying Affidavit of the Respondent’s Director of Legal Services, it is clear that public fora were held in the four sub-counties which constitute the County of Mombasa. Information regarding the conduct of public hearings of the proposed Finance Bill were made via a County Government Vehicle fitted with loud speakers and was driven around the four sub-county areas announcing the discussion of the Finance Bill and making the public to participate in the fora on various dates.

34. In addition, the same announcement were published in the Star Newspaper, and similar announcement were placed in various Notice Boards in every County including upto Ward levels to enable the public to fully participate in those fora.

35. The announcements were followed by a public meeting on 14th October, 2014 where the public were granted an opportunity to discuss the Finance Bill and raise objections and/or give their suggestions on the Finance Bill 2014 before enactment thereof at Tononoka Hall. A list of attendees was attached to the Replying Affidavit.

36. The national values and principles require participation of the people in the enactment of the law. Those values are possible under Article 10, are expanded and reiterated by Article 174 of the Constitution that sets out objects of devolution, and such objects are to be achieved through facilitation of public participation and involvement in the legislative and other business of the assembly and its committees. Besides a county assembly is prohibited by Article 196(2) from excluding the public, or any media, from any sitting unless in exceptional circumstances the Speaker has determined that there are justifiable reasons doing so.

37. The Petitioners herein are all major players and captains of industry in Kenya and in particular in the County of Mombasa. As well managed corporate entities they are expected to have in their Management Boards, a Committee or Committees on corporate communication whose functions would include keeping abreast in particular, with legislative proposals which would affect not only their investment, but their operations generally. Such committee or department would not have missed the publication of the County of Mombasa Finance Bill 2014. It would also not have missed the publication in the Star Newspaper that the public meeting which was scheduled for 9th October, 2014 had been postponed to 14th October, 2014 and the time and location duly indicated.

38. It seems to me also and it behooves entities such as the Petitioners through their Communication Departments or Committees of the Board to take note of communication or announcements by County Governments of all proposed legislation. In my humble view, the duty imposed upon every citizen under Article 3 of the Constitution to respect, uphold and defend the Constitution, includes the duty and obligation to be involved and participate in any legislative activity both at the national and county level. Such involvement and participation enhances both elective and participatory democracy.

39. In the instant case, with the announcement and publication of the Finance Bill, and meetings at the sub-county levels of the county, it cannot be said that the Petitioners were unaware of the proposed Finance Bill 2014 of the County of Mombasa. I would reiterate the words of Sach J in the **Clicks** case –

“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 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.”

40. With the publication of the Finance Bill on the Respondents website, and with the publication of the Finance Bill at the sub-county and ward levels of the county, the advertisement in the newspaper, and the final public meeting held on 14th October, 2014, I am satisfied that the Petitioners were granted reasonable opportunity to both air their views publicly and to write memoranda to the County Executive Committee responsible for matters of finance. It would not therefore lie in their mouth(s) to say that they were not afforded reasonable opportunity to air and give their views on the Finance Bill 2014. I would therefore agree with the submission by counsel for the Respondents the Petition on this aspect is an afterthought. The Petition therefore fails on that aspect alone.

41. I will now deal briefly with the aspects of taxation and mobility of goods from county to county, and recovery or refund of payments made to the County of Mombasa.

42. The issue on the question of taxation is whether the County of Mombasa or for that matter any other county has the constitutional mandate to levy any tax or cess by whatever name called to the goods, be they raw materials or finished goods emanating from one county to another, whether such goods are for sale or raw materials for the manufacture of goods in one county or merely transiting to a third county or for that matter to a foreign country or export.

43. Taxation or the raising of revenue between the national and county governments is governed by Article 209 which provides as follows –

“209(1) Only the national government may impose—

- (a) income tax;**
- (b) value-added tax;**
- (c) customs duties and other duties on import and export goods; and**
- (d) excise tax.**

(2) An Act of Parliament may authorize the national government to impose any other tax or duty, except a tax specified in clause (3)(a) or (b).

(3) A county may impose—

- (a) property rates;**
- (b) entertainment taxes; and**
- (c) any other tax that it is authorized to impose by an Act of Parliament.**

(4) The national and county governments may impose charges for the services they provide.

(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.”

44. The question is whether the taxes, levies, fees and charges set out in Item 86 of the second column of the First Schedule to the Mombasa County Finance Act, 2013 is prejudicial to the national economic policies, economic activities across the boundaries or the national mobility of goods and services, capital or labour, and therefore inconsistent with the Constitution and consequently void to the extent of the inconsistency.

45. The critical test in my view is whether the fees charged by the County of Mombasa under Item 86

aforesaid constitute revenue-raising measures which are prejudicial to the national economic policies, economic activities across county boundaries, or the national mobility of goods, services, capital or labour.

46. Item 86 establishes off-loading fees (to be charged at revenue barriers and outside markets and these fees relate to –

- (i) quarry products as enumerated
- (ii) agricultural products
- (iii) - mangrove products, flower seedlings
- scrap materials
- hides and skins

47. Article 206(4) (supra) empowers the national and county governments to impose charges for the services they provide. Although the items for which the off-loading fees are used for different activities (quarry and mangrove products, mainly for building purposes), others such as scrap metal materials are for sale and further processing, and agricultural products are mainly for consumptions, the critical question is whether the fees charged are for services rendered. What are “**services**”? There is no all-embracing definition of the expression “**services**”. It all depends upon the nature of the activity. In a tenancy arrangement, “services” may include the provision of heating or lighting, the supply of hot water and any other privilege, or facility connected with the occupancy of a dwelling. Everyone of these is a service. If there is a lift in a building, the provision thereof is a service. The lift has to be worked on, and maintained. There is the cleaning of common parts, removal of refuse, pest control, all these are services. Another example is the services rendered by a hotel-keeper. On arrival a guest is received and escorted to the room he is to occupy, and his luggage is taken to that room. Thereafter meals are brought to him be it in the dining room or in the private room he is to occupy. His shoes may be cleaned and his clothing sent to and received from a laundry, mail addressed to him and received and delivered, calls and taxis are obtained as needed. These are some of the services rendered but all these are properly described as **services**. The provision of meals is a service; the provision of a bed and other furnishings is the rendering of a service. That is the situation with regard to a private citizen.

48. But what is **rendering services** mean in relation to the national or county government?

49. The national government provides security both internal and external. It maintains a Defence Force and a Police Service but these are financed by the main taxes, corporate, income taxes. It also builds and maintains roads and highways, customs and border points, issues travel documents such as passports – all these are services.

50. What services does a county government render in relation to the fees charged under Item 86 of the Mombasa County Finance Act? The goods or items listed in Item 86 are essentially destined to the major wholesale and retail markets of a county. It is the duty of the county to ensure that services essential to the access, maintenance and provision of water, collection and disposal of refuse generated by the supply and sale of such of the items listed in Item 86 are rendered and maintained on a sustainable basis. In **REVESBY CREDIT UNION CO-OPERATIVE LIMITED VS. COMMISSIONER OF TAXATION [1964-65], 112, C.L.R. 564, MC Tiernan J** said at 528

“I consider that “rendering of services” could consist of the doing of an act for the benefit of another, which is more than the mere making of a contract and which goes beyond the performance of an obligation undertaking in the course of an ordinary commercial contract.”

51. Looked at from the holistic obligation and duty of either the national or county government, the levying of fees at off-loading at carrier points is to ensure collection of revenue adequate enough to

sustain the provision of services on a continuous basis.

52. For those reasons, I find and hold that Item 86 of the County of Mombasa Finance Act 2013 is not unconstitutional.

53. Having come to the above conclusion on the question of the constitutionality of the said Item 86, I find no ground for considering the question of refund of any payments made by the Petitioners to the Respondents. The Finance Bill 2014 having been enacted into Finance Act, 2014, the orders of injunction sought against its enactment are now superfluous.

54. In summary, I find and hold that there was both facilitation and public participation in the enactment of the County of Mombasa Finance Act 2013 and 2014, that Item 86 of the First Schedule to Finance Act 2013 is neither unconstitutional nor inconsistent with the Constitution, that there is consequently no basis for orders of injunction or refund of any payments made by the Petitioners to the Respondent.

55. The Petition is therefore dismissed with a direction that this being public interest litigation, each party shall bear its own costs.

56. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 28th day of April, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

No Appearance for Petitioners

Mrs. Kiti for 1st and 2nd Respondents

Mr. S. Kaunda Court Assistant