



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**PETITION NO 3 OF 2016.**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 2(1), 3(1), 10 (1), (2), (a), (b) & (c), 27 & 73 OF THE CONSTITUTION AND IN THE MATTER OF ARTICLE 20 (1), (2), (3) (a) & (b), (4) (a) & (b), ARTICLE 21 (1), 22 (1), (2) & 23 (1) & (3) (a), (b), (c), (d) & € OF THE CONSTITUTION**

**AND**

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

**AND**

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

**AND**

**IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT, NO. 18 OF 2012**

**AND**

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

**AND**

**IN THE MATTER OF: THE MACHAKOS FINANCE ACT 2015**

**AND**

**IN THE MATTER OF: IN THE MATTER OF ARTICLE 165 a, b, d i & ii & (4) OF THE CONSTITUTION AS READ WITH SECTION 20 AND 21 OF THE CONSTITUTION OF KENYA [PROTECTION OF FUNDAMENTAL RIGHTS AND FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**SIMEON KIOKO KITHEKA.....1<sup>ST</sup> PETITIONER**

ANTHONY KYENGO.....2<sup>ND</sup> PETITIONER

MUTUNGA KALELI.....3<sup>RD</sup> PETITIONER

**-VERSUS-**

THE COUNTY GOVERNMENT OF MACHAKOS.....1<sup>ST</sup> RESPONDENT

H. E. ALFRED MUTUA, GOVERNOR,

THE COUNTY GOVERNMENT OF MACHAKOS.....2<sup>ND</sup> RESPONDENT

THE COUNTY ASSEMBLY OF MACHAKOS.....3<sup>RD</sup> RESPONDENT

ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

## **RULING**

### **Introduction**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners are officials of the Kenya National Chamber of Commerce and Industry (Machakos Branch), being the Chairman, Vice Chairman and Treasurer respectively. The first Respondent is the Government of the County of Machakos, and the second Respondent is the Governor and Chief Executive Officer of the said Government. The third Respondent is the County Assembly of Machakos, while the fourth Respondent is the Attorney General of the Republic of Kenya.

The Petitioners filed a Petition dated 18<sup>th</sup> February 2016 in which they state that on 4<sup>th</sup> December 2015 the 2<sup>nd</sup> Respondent assented to the Machakos Finance Act 2015, and that the residents of Machakos County were left out of the process leading to the enactment of the Act. Further, that the new rates provided by the Act are oppressive to the poor and /or ordinary traders and residents of the County, and detrimental to their socio economic well-being. The Petitioners sought a declaration that the said Act is unconstitutional, that the Machakos residents' right to participation in the process leading to the enactment of the Act had been violated, and an order of prohibition stopping the operations and/or implementation of the said Act.

### **The Petitioners' Application**

The Petitioners contemporaneously filed an application in a Notice of Motion dated 18<sup>th</sup> February 2016, which is supported by an affidavit sworn on the same date and a supplementary affidavit sworn on 8<sup>th</sup> March 2016 by Simon Kitheka, the Chairman of the Kenya National Chamber Of Commerce and Industry, Machakos County. The Petitioners in the said application are seeking orders for the suspension of the increased levies rates, taxes and other licensing fees levied by the Respondents by themselves, their servants, employees and/or agents pending the hearing of this application and the entire suit. The main ground for the application is that there was no public participation by the Respondents in coming up with the increased levies.

The Petitioners explained that they were until December 2015, paying levies, rates and other licensing fees as set out in a schedule of Single Business Permits for the Financial Year 2014/2015 which they annexed, and that in 2016 when they sought to renew their licenses, they were met with demands for increased levies, rates and licensing fees by the Respondent. Further, that the Respondent had failed, refused and/or neglected to inform the Petitioners of the increased levies, rates and licensing fees, and did not involve the public while coming up with the increased levies, rates and licensing fees for the

2015/2016 Financial Year.

The Petitioners allege that the increments are unconscionable and gave various examples of the increased rates levied on their members, which they contend are illegal and should be stopped. They stated that they received invitations to participate in formulating the Machakos County Finance Act 2015, and members gave their proposals which were in a schedule they annexed, but that they later came to learn that the Respondents later collected signatures from persons and claimed that they participated in the consultative meetings.

According to the Petitioners, the Budget Statement delivered on 25/6/2015 and the notice of invitation to members of the Public which they annexed, were both mere formalities by the Respondents and do not amount to public participation. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not availed any memoranda that was presented to them pursuant to the invitation to present memoranda, and that the newspaper advertisements and attendance schedules provided by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are not proof of public participation for the following reasons:-

- a) There are no minutes of the meetings that were held and the resolutions therein.
- b) The only attendance schedules are from Mavoko Sub-County and no other Sub-County within the entire Machakos County.
- c) The attendance schedules from Mavoko Sub-County illegible and unclear to determine the participants of the alleged public participation.
- d) Only the names and details of the members of the County Assembly are legible and clear.

The Petitioners reiterated that their membership has been diligent in engaging the 1<sup>st</sup> and 2<sup>nd</sup> Respondents during previous forums, however, for the Finance Bill 2015/2016, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have failed, refused and/or neglected to involve the Petitioners. The Petitioners also clarified that they are not averse to adjustment of rates, levies and other licensing fees by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, but asked that the same be done following the Constitutional principle of public participation.

The said application by the Petitioners was heard *inter partes* on 23<sup>rd</sup> February 2016 when this Court granted temporary orders suspending the increased levies, rates, taxes and other licencing fees by the Respondents under the Machakos County Finance Act of 2015.

### **The Response**

The 1<sup>st</sup> Respondent's initial response was in a replying affidavit sworn on 29<sup>th</sup> February 2016 by James M. Kathili, the Chief Legal Officer of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent subsequently also filed a Notice of Motion dated 14<sup>th</sup> March 2016 seeking a discharge or setting aside of the orders made on 23<sup>rd</sup> February 2016 pending the hearing and determination of the suit, on the main grounds that the Petitioners had not demonstrated a *prima facie* case, and that the new fees and levies have already been implemented and their suspension would prejudice the Respondent who would suffer substantial loss of revenue. The said application was supported by an affidavit sworn on 14<sup>th</sup> March 2016 by Jacob Mwenda Malelu, the Advocate on record for the 1<sup>st</sup> Respondent.

The Petitioners responded to the 1<sup>st</sup> Respondent's application by filing a Notice of Preliminary Objection dated 17<sup>th</sup> March 2016 seeking the striking out of the said application on the ground that it was a gross abuse of the process of this Court and is bad in law as it is not premised on any relevant provision of law.

The affidavits filed by the 1<sup>st</sup> Respondent depone to the same facts. It is averred therein that the Machakos Finance Act was passed on 30<sup>th</sup> September, 2015 after due process of law was followed and

commenced on 12<sup>th</sup> December, 2015, and that the assertion by the Petitioners that they were never informed of these changes shows negligence on their part as the law is a public document which is listed by the 3<sup>rd</sup> Respondent on its website. Further, that the assertion by the Petitioners, that they were paying levies, rates and other licencing fees as set out in their annexed Exhibit marked SK-1 is false and misleading as the attached Exhibit is only proposals that were advanced during public participation and not the final Schedule of payment as passed by the County Government of Machakos.

It was stated that the 1<sup>st</sup> Respondent acting pursuant to the powers bestowed upon it by Article 186(1) of the Constitution as read with Section 7(b) of the 4<sup>th</sup> Schedule part 2 of the Constitution to regulate trade through issuance of trade licences , enacted the Machakos County Finance Act, 2015 to regulate and govern the taxes, duties, levies and charges. Further, that the County Executive Committee Member for Finance and Revenue Administration, Elizabeth M. Nzyoka presented a budget statement on 25<sup>th</sup> June, 2015 to kick start the process of revenue raising through the Machakos Finance Act, 2015. The said budget statement was annexed as an exhibit.

It was further stated that the County Assembly invited representations and recommendations from members of the public by way of notice in accordance with Article 221 (5) of the Constitution, and a copy of the said notice was annexed. According to the 1<sup>st</sup> Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in collaboration with the 3<sup>rd</sup> Respondent conducted hearings of the public views in Mavoko, Kathiani, Matungulu, Kangundo, Yatta, Masinga, Mwala and Machakos as indicated in the said notice.

The 1<sup>st</sup> Respondent refuted the allegation that there was no public participation, and stated that the same has been admitted by the Petitioners in paragraph 8 of their Application. Further, that if there were any business organizations which failed to participate after having been given the opportunity to do so, it is their fault and they should blame themselves, and that it is the responsibility of every person to participate in law making whenever an opportunity is availed. Copies of the newspaper advertisements and attendance schedules for public participation as well as two letters dated 11<sup>th</sup> August, 2015 addressed to the Cabinet Secretary, National Treasury and the Secretary Commission on Revenue Allocation respectively were annexed.

The 1<sup>st</sup> Respondent also denied that the County Assembly of Machakos County has not approved the Machakos County Finance Act, 2015 as alleged by the Petitioners, and stated that Schedules, unlike Regulations are passed together with the Act and therefore the passage of the Act means the passage of the schedules to the Act. According to the 1<sup>st</sup> Respondent, the charges stipulated in the Machakos County Finance Act, 2015 and those stipulated in the Machakos County Finance Act, 2014 are mostly the same with minor changes, and that the Petitioners has not shown a case for grant of suspension of the levies which effectively is an injunction, which in law cannot be granted against Machakos County Government as stipulated in Section 16 of the Government Proceedings Act.

It was also contended by the 1<sup>st</sup> Respondent that the Petitioners have not demonstrated to this court that they have a *prima facie* case with probability of success or that they would suffer irreparable injury that cannot be compensated by damages. Further, the balance of convenience tilts the scales in favour of the Respondents who would suffer a great prejudice because of the high revenue it may lose, and the great inconvenience it may incur considering its anticipated revenue generation and budget implementation were the suspension to be granted. It was stated that the Respondents are capable of compensating the Petitioners in the event that this Court finds in favour of the Petitioners.

The 3<sup>rd</sup> Respondent on its part opposed the application in a replying affidavit sworn on 15<sup>th</sup> March 2016 By Hon. Bernard Muteti Mungata, Speaker of the County Assembly of Machakos who stated that the orders sought in the Notice of Motion herein are final and if granted, there will be nothing to adjudicate upon by the Court. Further, that the reliefs sought are omnibus and cannot be granted by this Court as they seek a suspension of the increases levies rates, taxes and other licencing fees levied by the Respondents without specifying what exactly is to be suspended.

It was contended that the deponent of the Supporting Affidavit has not stated whether the authority he states he has is from the Kenya National Chamber of Commerce and Industry, which is not a party herein, and also whether the other two Petitioners have authorized him to swear and bring the Application on its behalf and also from the unspecified members. Further, that the Petitioner's pleadings do not disclose adequate particulars in support of their alleged cause of action relating to the alleged violations of the Constitution to enable this Court grant the reliefs sought herein.

The 3<sup>rd</sup> Respondent also claimed that the Petitioners' pleadings offend the doctrine of separation of powers as the same invite this Court to direct County Assemblies which are legislative branches of government on their procedures and how they ought to run their affairs, and seek to impede the functions of Constitutional office holders

According to the 3<sup>rd</sup> Respondent, it is not correct for the Petitioners to state that the enactment of the Machakos County Finance Act 2015 was done without informing and involving the public. It was further stated that on the 16<sup>th</sup> September, 2015 the Clerk of the County Assembly of Machakos, caused an advertisement to be placed in the *Standard* newspaper and in the said advertisement, all stakeholders were invited to several forums to present their views and written memoranda. Copies of the excerpt from the said newspaper containing the advertisement and the correspondence relating to the same were annexed by the 3<sup>rd</sup> Respondent.

Further, that in the premises, the 3<sup>rd</sup> Respondent in compliance with the provisions of Articles 10(2) and 196(1)(b) did facilitate and there was some reasonable level of public participation and involvement of all stakeholders in the legislative process that led to the enactment of the Act. It was also contended that the Finance and Revenue Collection Committee of the 3<sup>rd</sup> Respondent as established its Standing Orders prepared and tabled the Finance Bill, 2015 which was tabled before the County Assembly for deliberation and adoption. The Report of the said Committee was annexed as well as copies of the Report of combined views and the list and photographs of Participants of the said Committee.

The 3<sup>rd</sup> Respondent also decried lack of evidence that the taxes, charges and or levies contained in the said Act are prejudicial to national economic policies or activities or that they were either unfair or unreasonable in the circumstances of the County of Machakos. The 3<sup>rd</sup> Respondent averred that the raise of the charges and taxes as contained in the said Act was reasonable and necessary in order to continue offering services to the people. Further, that the paralysation of the operations of the entire Machakos County is highly probable given that the County relies on the taxes, charges and other fees paid for sustainability of its budget in order to realize the full effect and objectives of devolution.

### **The Issues and Determination**

The Court directed that the applications by the Petitioner and 1<sup>st</sup> Respondent and the Notice of Preliminary Objection by the Petitioners be heard and determined together, and the applications were canvassed by way of written submissions filed by the parties and oral submissions made in Court during *inter partes* hearings. The Petitioners' learned counsel, Mulu & Company Advocates, filed submissions dated 8<sup>th</sup> March 2016 while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' learned counsel, B.M Musau & Co Advocates, filed submissions dated 17<sup>th</sup> March 2016 in addition to making oral submissions in Court. Ms. Kamende, the learned counsel for the 3<sup>rd</sup> Respondent relied on oral submissions she made in Court.

I have read and carefully considered the pleadings and submissions made herein. A number of preliminary issues have been raised by the Respondents which this Court will first address. The first is whether this Court is the forum to deal with the Petitioners' claim on account of the doctrine of separation of powers, and it was urged that the Court should show deference to the legislative and executive arms of government. My view on this issue is that it is indeed the correct position that Courts should not ordinarily interfere with the exercise of the legislative authority of a constitutional body in line with the doctrine of separation of powers, and ought to exercise judicial restraint in matters which deal with legislative authority of County Governments.

However, I must also state that under Article 2(4) of the Constitution, any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. In addition, under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

Therefore, whereas the legislative authority vests in Parliament and the County legislative assemblies, and executive authority in the Presidency and Governors of Counties, where a question arises as to whether an enactment or act is inconsistent with the Constitution or is passed in contravention of the Constitution, as is the case in the instant applications and Petition, the High Court is the institution constitutionally empowered to determine such an issue, subject to appellate jurisdiction given to the Court of Appeal and the Supreme Court.

The second preliminary issue that has been raised is about the Petitioners standing to bring this suit, and particularly if they are doing so in a representative capacity. The answer to this issue is in Article 22 of the Constitution which grants any person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 22 (2) has greatly expands the standing to bring constitutional claims as follows:

**“(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**

**(a) a person acting on behalf of another person who cannot act in their own name;**

**(b) a person acting as a member of, or in the interest of, a group or class of persons;**

**(c) a person acting in the public interest; or**

**(d) an association acting in the interest of one or more of its members.”**

These provisions are also emphasized in Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

The import of these provisions is that under the Constitution a person acting on behalf of the grievant may file a claim. Likewise, a person acting on behalf of or a member of a group or class of persons may also file a claim. So too may a person acting in the public interest. The Petitioners as members and officials of the Kenya National Chamber of Commerce and Industry (Machakos Branch) fall in any of these categories of litigants and are therefore properly before this Court.

The substantive issue that remains for determination in the applications before the Court is whether the Petitioners have shown a *prima facie* case with a likelihood of success so as to be granted the conservatory orders they seek in terms of suspension of the increased levies rates, taxes and other licensing fees levied by the Respondents under the Machakos Finance Act 2015.

This Court is granted powers to issue conservatory orders in constitutional petitions under Article 23 (3) (c) of the Constitution, and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. The applicable principles for the grant of a conservatory were aptly summarised by Onguto J. in **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others** [2015] eKLR as follows:

**25. “Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of Centre for Rights Education and Awareness and 7 Others –v- The Attorney General [HCCP No. 16 of 2011]:**

***“[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”.***

**26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of Muslims for Human Rights [MUHURI] & Others –v- Attorney General & Others CP No. 7 of 2011, who whilst agreeing with Musinga J’s statement in Centre for Rights Education and Awareness [CREAW] and 7 Others –v- The Attorney General (Supra) stated as follows:-**

**“I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success” (emphasis).**

**28. Recently the same pertinent observations were made by Ngugi J and Muriithi J sitting separately in Jimaldin Adan Ahmed & 10 Others –v- Ali Ibrahim Roba and 2 Others [2015] eKLR and Micro Small Enterprises Association of Kenya (Mombasa Branch) –v- Mombasa County Government [2014] eKLR respectively.**

**29. Once the applicant has established to the court’s satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights: see Patrick Musimba –v- The National Land Commission & 4 Others HCCP 613 of 2014 (No. 1) [2015] eKLR and also Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR.**

**29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice. In these respects the case of Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others CP No. 7 of 2014, is relevant, especially paragraphs [59] [60] and [61] thereof.**

**30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.**

**31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others CP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.”**

The submissions on behalf of the Petitioners in this respect were that they had established a *prima facie* case that the Machakos Finance Act 2015 was enacted in contravention of the legal provisions on public participation, and in particular that the budget statement relied on by the Respondents is not a mode of

public participation, that the invitation for memoranda was on the budget estimates for the year 2015 and not on the Act, and that memoranda that emanated from the alleged public fora that were organised were not availed. Lastly, that a newspaper advertisement cannot suffice as public participation as levels of illiteracy and poverty in Machakos County are high and more needed to have been done.

Reliance was placed on the provisions of Articles 2(4), 10, 174, 196 (1)(b) and 201 of the Constitution, as well as sections 87, 88, and 115 of the County Government Act and section 175 of the Public Finance Management Act on the legal requirements of public participation. The Petitioners also relied on Article 19 of the International Covenant on Civil and Political Rights and Article 25 of the African Charter on Human and Peoples Rights in their submissions on this point. The Petitioners' counsel also pointed out that the Machakos County Public Participation Act of 2014 sets out in great detail how public participation in the County is to be carried out by the Respondents.

Various judicial decisions were cited by the Petitioners in support of their arguments on the content and scope of the right to public participation including **Doctors for Life International vs Speaker of the National Assembly and Others, (2006) ZACC 11**, and heavy reliance was placed in this regard on the decision by Odunga J. in **Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others (2014) e KLR**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on their part urged that the Respondents were not heard in the grant of the temporary orders of suspension, and that the Petitioners have not met the threshold for the grant of injunctions as laid down in **Giella vs Cassman Brown (1973) E.A. 358**, and the grant of conservatory orders as laid down in various cases including **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR**, and **Martin Nyaga Wambora vs Speaker of the County Assembly of Embu & 3 Others (2014) e KLR**.

According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Petitioners have not demonstrated a *prima facie* case since the 1<sup>st</sup> Respondent carried out its constitutional mandate in enacting legislation on new levies, which were based on market evaluation, and that the Petitioners have already paid the increased fees. It was also submitted that the Respondents provided evidence to show that the citizens were given notice and opportunity to participate in the legislation of the Machakos County Finance Act 2015. Reliance was placed on the decision in **Trade Union Congress of Kenya vs National Hospital Insurance Fund 2015 e(KLR)** for these submissions.

Lastly, it was submitted for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Petitioners have not demonstrated that they will be prejudiced, as the County Government will be able to repay them if the Court finds in their favour, and that their Petitioner will not be rendered nugatory since the Petitioners will be compensated, or alternatively the fees they will pay will be reduced by the amounts due from them. It was further submitted that the public interest dictates that the conservatory orders sought are not granted as the 1<sup>st</sup> Respondent requires the fees to implement its 2015/2016 budget to offer services to the citizenry.

The 3<sup>rd</sup> Respondent supported and reiterated the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions on there having been adequate notice and opportunity given to facilitate the Petitioners participation in the enactment of the impugned legislation and the prejudice likely to be suffered by the Respondents. It was further argued while making reference to Article 196(1) (b) of the Constitution and the Machakos County Public Participation Act that it is not the role of the Court to determine or enumerate the extent of public participation, and reference was made to the decision in **Nairobi Metropolitan PSV Saccos Union Ltd vs County of Nairobi Government & 3 Others (2013) eKLR** in this regard.

It was also urged that the Petitioners had adequate opportunity to challenge the Machakos County Finance Act 2015 under section 88 and 89 of the County Government Act and are guilty of laches. According to the 3<sup>rd</sup> Respondent, the Petitioners also needed to demonstrate that the enactment of the Act is contrary to the economic status of the County of Machakos, as held in **Diani Business Welfare Association and Others vs County Government of Kwale (2015) e KLR**. Lastly, that should the Court find that there was a lapse in the enactment of the Machakos County Finance Act of 2015, it should be mindful of the

circumstances of the case ad should not annul the entire Act

It is noteworthy from the arguments made that it is not disputed by the parties that the Constitution and other applicable laws place a high premium on public participation in legislation being enacted and implemented by the Machakos County Government, particularly as demonstrated by Articles 2(4), 10, 174, 196 (1)(b) and 201 of the Constitution, as well as sections 87, 88, and 115 of the County Government Act and section 175 of the Public Finance Management Act.

It is also not in dispute that the 3<sup>rd</sup> Respondent did cause an advertisement to be placed in *The Standard* newspaper of Wednesday September 16 2015 which it annexed to its replying affidavit as exhibit “BMM-a”, wherein made an invitation for persons to present their views and written memoranda on the Machakos County Finance Bill for the financial year 2015/2016 at various sub-county venues. The 3<sup>rd</sup> Respondent also provided evidence of the combined views from the said fora.

The facts that are in dispute are to what the efforts by the Respondents at public participation were, and whether the same met the threshold set by the law as regards public participation. While the said facts cannot be decided at this stage, this Court is of the view that in order to decide the issue whether Petitioners have shown an arguable case with a likelihood of success, an examination of what public participation entails is necessary.

I will in this respect extensively quote the decision by Odunga J. in **Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others (2014) e KLR** wherein the learned Judge while relying on the South African Constitutional Court’s decision 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)**,explored in great detail what is required for effective public participation as follows:

75. “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. Dealing with the issue I wish to reiterate what was held in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra)to the effect 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. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in**

New Clicks, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.”

76. In my view to huddle a few people in a 5 star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation. As was held in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra):

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

Arising from this holding which I wholly adopt, I note that the Petitioners have raised an arguable point that the evidence of facilitation of, and involvement of the public in the enactment of the Machakos Finance Act of 2015 so far provided by the Respondents of an invitation in an advertisement in the *Standard* newspaper to various fora to discuss the Act, is limited in scope, in light of the requirements set out above for effective public participation. I also find that the Petitioners being persons who are likely to

be directly affected by the said legislation as they are persons engaged in various businesses in Machakos County, have not raised a frivolous claim and are credible litigants in their quest to be involved in the decision making about the revenue raising initiatives proposed by Machakos Finance Act of 2015.

I am also of the view that given the cross-cutting emphasis on public participation in the values and principles that underpin the provisions set out in the Constitution, and that guide the implementation of devolution in the County Government Act, the correct application of the said value and principle is as much a public interest issue as is the economic development activities and gains sought by the Respondents.

The petition herein in my view would therefore be rendered nugatory for the Petitioners at two fronts if the conservatory orders sought are not granted. In the first instance at the legal front, if this Petition succeeds, the Petitioners would have been affected by a legislation without having had the opportunity benefit and to exercise their right of direct participation as enshrined in the Constitution.

At the more practical front, the balance of convenience tilts in favour of the Petitioners in terms of the prejudice they are likely to suffer if the Petition herein succeeds as opposed to the Respondents, in terms of payment of the increased fees, and the ability to recover the same in the event this petition is successful, as they are individually in a comparatively weaker position, both economically and politically.

I therefore allow the Petitioners' Notice of Motion dated 18<sup>th</sup> February 2016 and find no merit in the 1<sup>st</sup> Respondent's Notice of Motion dated 14<sup>th</sup> March 2016 for the foregoing reasons. I am also of the view that the Petitioner's Preliminary Objection did not raise nor urge any pure point of law outside what was already argued in their Notice of Motion and the same is dismissed.

I accordingly order as follows:

1. The levies, rates, and other fees imposed by the Respondents pursuant to the Machakos County Finance Act of 2015 be and are hereby suspended pending the hearing and determination of the Petition filed herein and with respect to all persons affected by the said Act.
2. For the avoidance of doubt the levies, rates and fees imposed by law and in force immediately before the enactment of the Machakos Finance Act 2015 shall continue to apply and shall continue to be paid by all affected persons pending the hearing and determination of the Petition filed herein.
3. There shall be no order as to costs as the applications herein involve a public interest issue.

Orders accordingly.

**Dated and Signed at Machakos this 22<sup>nd</sup> day of April 2016**

**P. NYAMWEYA**

**JUDGE**

**Delivered at Machakos this 26<sup>th</sup> day of April 2016**

**E. MURIITHI**

**JUDGE**