



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NUMBER 603 OF 2014**

**IN THE MATTER OF AN ALLEGED THREAT OF CONTRAVENTION OF ARTICLES 1(3),  
ARTICLE 3, ARTICLE 10, ARTICLE 174 (C), ARTICLE 179(1), ARTICLE 201(A), ARTICLE 202  
(1) (2), ARTICLE 209 (3) (5) OF THE CONSTITUTION OF KENYA**

**-AND-**

**IN THE MATTER OF ARTICLE 22(1) & (2) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED THREAT OF CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLE 28, 43 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE KIAMBU FINANCE ACT 2014**

**BETWEEN**

**ROBERT N. GAKURU & OTHERS.....PETITIONERS**

**VERSUS**

**COUNTY GOVERNMENT OF KIAMBU.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**(CONSOLIDATED WITH PETITION NOS. 60 OF 2015, 65 OF 2015, 160 OF 2015 & 601 OF 2014  
AND JUDICIAL REVIEW APPLICATION NOS. 6 OF 2015, 22 OF 2015 & 90 OF 2015)**

**JUDGEMENT**

**Introduction**

1. This judgement arises from consolidated petitions and judicial review applications. There matters were consolidated by consent of the parties on 7<sup>th</sup> April 2015 before **Honourable Mr. Justice Isaac Lenaola** and they concern *Petition Nos. 60 of 2015, 65 of 2015, 160 of 2015 & 601 of 2014* and *Judicial Review Application Nos. 6 of 2015, 22 of 2015 & 90 of 2015* with *Petition No. 603 of 2014* being the parent file.
2. In these consolidated causes the petitioners/applicants (hereinafter referred to as the Petitioners)

herein seek the following orders:

- a. **A declaration that the enactment and publication of the Kiambu County Finance Act, 2014 without consulting the residents of Kiambu County offends and violates article 1 (3) (4), article 3, article (10), article 174 (c), article 179 (1), article 201 (a), article 202 (1) (2), article 209 (3) (5) and article 22 (1) & (2) of the Constitution of Kenya and was therefore unconstitutional.**
- b. **An order of certiorari to remove in the high court and quash the Kiambu County Finance Act 2014 published vide Kiambu County Gazette Supplement No. 16 (Act No. 7) dated 25<sup>th</sup> November 2014.**
- c. **An order of prohibition prohibiting the Respondent from enacting any further Finance Act disregarding the findings of the court in previous court proceedings where the Respondent was a party and where the court has pronounced itself clearly.**
- d. **A declaration that the 1<sup>st</sup> Respondent has no legal authority to levy and/or demand from the Petitioner any Carbon-dioxide transportation fees whether at the rate of Kshs 900 per tonne or at all.**
- e. **A declaration that section 14 and section 4(a) of the Ninth Schedule to the Finance Bill is unconstitutional, invalid, null and void.**
- f. **An order of Certiorari quashing the directive of the 1<sup>st</sup> Respondent to the petitioner contained in the letter dated 12<sup>th</sup> January 2015.**
- g. **An injunction prohibiting the 1<sup>st</sup> respondent and its servants, agents, officers or employees from in any way interfering with the petitioner's operations within or through the 1<sup>st</sup> Respondent's jurisdiction.**
- h. **A declaration that the Respondents are enjoined to consult and harmonize national and county finance policies in line with the Constitution and the public Finance Management Act to ensure equity and fairness of taxation of persons/entities by the respective levels of Government.**
- i. **Any other orders, writs and directions the Honourable Court considers appropriate and just to grant for the purpose of the petitioner's constitutional rights.**
- j. **Costs of the petitions**

### **Petitioners' Case**

3. According to the Petitioners, there was no public participation in the enactment of the ***Kiambu County Finance Act, 2014*** (hereafter referred to as "the Act") and thus the Act is unconstitutional to the extent that they were not consulted. The Petitioners alleged that the 1<sup>st</sup> Respondent, Kiambu County Assembly (hereinafter referred to as "the County") failed to facilitate public participation and involvement as required by Article 196(1)(b) of the constitution of Kenya.
4. *It was further contended that the County violated the provisions of the **Statutory Instruments Act 2013**, in particular section 8 of the said Act. In the Petitioners' view, a sick joke was performed in the name of public participation which was publicized in the *Daily Nation* newspaper of Friday November 7<sup>th</sup> 2014 from which it was clear that the respondents did not provide at least 14 days between the notice and the purported public participation as espoused by section 8(4) of the **Statutory Instruments Act 2013**.*
5. To the petitioners, the County's engagements with the public were merely public relations exercises designed to give the impression of engagement with the public without any meaningful engagement. The Petitioners relied on consultative meeting attended by the Plant Manager and the Commercial assistant on 25<sup>th</sup> February 2014 at ACK Hall at Kimende and alleged that the meeting was for collection of the views for the 10 year Strategic Plan for the whole county, and that levies and taxes were not discussed.
6. They further alleged that the enactment was arbitrary and illegal as it was in total disregard to the process prescribed by the County Standing Orders No. 121 (3).
7. According to the Petitioners, *their constitutional rights to human dignity under Article 28, in particular the right to afford social amenities and be respected after death and economic and social rights under Article 43 in particular the right to accessible and adequate housing and to*

- reasonable standards of sanitation have been violated.*
8. According to the Petitioners, since the Joint Committee of Finance, Planning, Trade and Cooperatives and that of Budget and Appropriation comprises of 24 members, there is no practical way to attain a quorum of a majority of the 24 members simultaneously in twelve sub counties in the county.
  9. The Petitioners further contended that the County Assembly of Kiambu in an arbitrary and illegal manner adapted rather than adopt fees as espoused by the provisions of section 120(1) of the **County Government Act** cap 65 Laws of Kenya. To the Petitioners, the County's executive Committee on Finance conspired with the Kiambu County Assembly to swindle the word "adapt" for "adopt" and engaged the public in discussing illegal issues (fees) if for whatever reason any lawful public participation was conducted and later the Kiambu County passed into law the illegal issues.
  10. In was their contention, the County fancifully and illegally enacted the Act without regard to the process prescribed by provisions of section 23 of the **County Government Act Cap 65 Laws of Kenya** which provides that a Bill shall be published by including the Bill as a supplement in the County Gazette and the Kenya Gazette. They further accused the County of oppressively, irregularly, irrationally and unlawfully enacting the **Kiambu County Finance Act 2014** without regard to the process prescribed by the provisions of section 25 of the **County Government Act** Cap 265 laws of Kenya, which provides that a legislation passed by the County Assembly and assented to by the governor shall be published in the *County Gazette* and *Kenya Gazette* within seven days after assent.
  11. They also alleged that the County Assembly disregarded in total section 55 of the **Interpretation and General Provisions Act** which provides that save as is otherwise expressly provided by a law, where an act, or thing may, or is required to be done by more than two persons, a majority of them may do it. They contended that the County's action of unlawfully persisting in demanding fees from Kiambu residents under the guise of **Kiambu Finance Act 2013** that was declared unconstitutional by this Honourable Court on 17<sup>th</sup> April 2014 but now christened **Kiambu Finance Act 2014** is baseless and lacks any element of truth. The Petitioners averred that the demand for fees by the County from the traders at Madaraka Market under the **Kiambu Finance Act 2014** is therefore unlawful.
  12. The Petitioners claimed that the enactment of the **Kiambu Finance Bill 2014** into law was unclear as the county office and the government printer did not have a copy. In their view, the County was acting without any legal authority as the **Finance Bill 2014**, had not been enacted. The same Bill however imposed a disguised tax on the Petitioners, and was unconstitutional and illegal as there is no national legislation authorizing such a tax. It was contended that the purported **Finance Bill 2014** failed to comply with the financial provisions of the section 132 of the **Public Finance Management Act**. To them, neither the public nor themselves were given a reasonable/meaningful opportunity to have a say on the **Finance Bill 2014** by both the county executive committee and the County Assembly contrary to Articles 10, 174, 196 and 201 (b) (i) of the Constitution as well as section 132 of the **Public Finance Management Act** and section 87 of the **County Government Act**.
  13. It was further contended that the purported fee does not relate to any demonstrated/established service provided by the County as the County incurs nil costs as the maintenance of the 1.2 km stretch of Moi Road falls within the statutory mandate of the Kenya Rural Roads Authority. They further alleged that the maintenance of the 1.2 Km stretch of Moi Road falls within the statutory mandate of the Kenya Rural Roads Authority and that the purported fee of Kshs 900 per tonne of lorry is exorbitant and disproportionate to the stretch of the road require for maintenance. To them, the fee is a disguised tax as there is no national legislation authorizing such a tax. Further, the impugned fees amount to double taxation as it pays mining royalties at the rate of 7cts per kilogram of Carbon Dioxide to the Ministry of Mining. They explained that the transportation fee of Kshs 900 per tonne for a 20 MT lorry for a road which measures only 1.4 km is too exorbitant as translates into Kshs 12,857.
  14. The Petitioners averred that the issue of a purported **Finance Bill 2014** was published in a special issue of Kiambu County Gazette Supplement of 24<sup>th</sup> October 2014 and was withdrawn in unclear circumstances. To the Petitioners, this is not the first time the County has attempted to levy a fee/charge without a just cause as in January 2014, the respondent visited the petitioner's Kagwe

mine to discuss similar levies under the *Kiambu County Council Finance Act of 2013*. However, the levies were extinguished when the Act was declared null and void for lack of public participation in petition No. 532 of 2013.

15. The Petitioners also took issue with the levying of business permits and parking fees by the County Government of Kiambu and contended that there is no legislation that allows the County Government to charge for business permits. To the Petitioners, parking services are non-existent and that where they exist, they are substandard. To the Petitioners, they are incurring huge financial losses and/or economic damages by paying fees for a non-existent service. It was asserted that section 4(5) as read with section 19 of the *Kiambu County Finance Act, 2014* is in conflict with the provisions of section 71 of the *Interpretation and General Provisions Act*.

### **1<sup>st</sup> Respondents' Case**

16. According to the Respondent, the *Kiambu County Finance Act, 2014* was enacted by the County Assembly of Kiambu and gazetted on 25<sup>th</sup> of November, 2014 in the Kiambu Gazette Supplement No. 16 (Act 7). The Act, according to the County was enacted pursuant to the provisions of Article 209(4) of the Constitution which provides that the national and county governments may impose charges for the services they provide. To the County, the Act was enacted in compliance with the provisions of Article 210(1) of the Constitution which provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation and as a general rule, its provisions came in force immediately after it was published in the Gazette. It was therefore contended that the notice dated 1<sup>st</sup> December, 2014 was a mere communication of the contents of the Act and did not extend the scope of the Act in any way, as it does not bear any authority of its own.
17. With respect to the allegation that the enactment of the *Kiambu Finance Bill 2014* into law was unclear as the county office and the government printer do not have a copy, the County's position was that it is inexcusable and inexplicable that the petitioner could not obtain a copy of the *Kiambu Finance Act 2014* yet all the other litigants challenging the Act have managed to obtain a copy. The County noted that in the supporting affidavit of **Jesse Mwit** dated 24<sup>th</sup> February 2015, he indicated that he did not bother to go to the Government Printer as the Partner told him that there was no copy there. The County relied Court of Appeal sitting in Malindi in **Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others [2013] eKLR**, while relying on section 68 of the *Interpretation and General Provisions Act* held that:

**“The Kenya Gazette is an official newspaper of the government in which official matters including official notices are published. The Gazette has evidentiary character...The production of a copy of the Gazette containing a written law or notice, or of copy of a written law or notice purporting to be printed by the Government Printer shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.”**

18. Reliance was similarly placed on section 85 of the *Evidence Act* which stipulates that:

**“The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.”**

19. In the County's view, Article 199(1) states that county legislation does not take effect until it is published in the gazette. According to the County, the enactment of the *Kiambu County Finance Act* is clear and incontrovertible as it was gazetted in the Kiambu Gazette Supplement No. 16 (Act 7). It contended that the petitioner did not make any substantial efforts to obtain the Act but only made lazy and half-hearted attempts and hastily filed the matter in Court to avoid complying with its statutory obligations to pay the dues it owes the County Government.
20. The County denied that there was a procedural impropriety in the enactment of the *Kiambu Finance Act* and relied on **Cabinet Secretary for Ministry of Interior and Co-Ordination of**

National Government & Another Ex-Parte Director of Immigration Service [2015] eKLR and Republic vs. Transition Authority & Another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 Others [2013] eKLR, and contended that the assertion that there was procedural impropriety in the enactment of *Kiambu Act* is false and baseless as the County government fully complied with the provisions of the Constitution, the *County Governments Act*, and the *Public Finance Management Act*. To the County, it made a pronouncement of revenue raising measures, submitted the *County Finance Bill* together with a policy statement to the county assembly, and fully complied with all the requirements of the provision and therefore averred that procedural impropriety does not arise as all the rules, canons, and procedures laid down in the constitution and the relevant of statutes were followed in the enactment process.

21. On the allegation that the petitioners and the public nor itself were not given a reasonable/meaningful opportunity to have a say on the *Finance Bill 2014* by both the county executive committee and the County Assembly contrary to Articles 10, 174, 196 and 201 (b) (i) of the Constitution, section 132 of the *Public Finance Management Act* and Section 87 of the *County Government Act*, the County's position was that the Petitioners only cited the consultative meeting attended by the Plant Manager and the Commercial assistant on 25<sup>th</sup> February 2014 at ACK Hall at Kimende. However, the petitioners failed to attend the consultative meeting held by the Kiambu County Government in Lari Sub-county at ACK Kimende Church Hall on 20<sup>th</sup> May 2014. In its view, the meeting was not a public relations exercise as the petitioner claims as the sub-county officer informed the stakeholders of the purpose of the meeting, distributed copies of the draft, and took them through the figures proposed in the Bill. The petitioners were also accused of having failed to attend the forum convened by the County Assembly on 10<sup>th</sup> November 2014 at ACK Kimende in Lari Sub-County. In support of this position, the County relied on Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County Of Nairobi Government & 3 Others [2013] eKLR, where Lenaola, J held that:

**“A Bill was thereafter presented to the City County of Nairobi Budget and Appropriation Committee and according to the unchallenged deposition of Lilian Ndegwa, that Committee considered the public views in preparing the final budget estimates which were later on passed included in the Act that was passed by the County Assembly. Surely, after this lengthy enactment process, the Petitioners cannot now be heard to blame the 1s Respondent while all along they were made aware of the process , right from the time of the preparation of the 1<sup>st</sup> Respondent's budget estimates of revenue and expenditure up to the time the impugned Act was enacted. The Petitioners have in any event failed to demonstrate to this Court how the 1st and 2nd Respondents failed to achieve public participation taking into account all that the 1st Respondent did in the process of enacting the impugned Act. I should say in passing that public participation is not the same as saying that particular public views must prevail”.**

22. In the case, the learned Judge cited with approval the case of Minister of Health vs. New Clicks South Africa (PTY) Ltd (supra) where it was stated that:

**“It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations. Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose, It enables people who will be affected by the proposals to make representation to the lawmaker, so that those concerns can be taken into account in deciding whether changes need to be made to the draft”.**

23. According to the County, in enacting the *Kiambu Finance Act 2014*, the County Government intensely consulted with residents of Kiambu County and to achieve consensus and ensure most of the residents were consulted, the County Government appointed a Task Force that coordinated the collection and collation of views from residents of the County which consultations were done at the sub-county level. In support of the submissions, the County relied on Petition No. 22 of 2015,

**Kenya Association of Stock Brokers and Investment Banks vs. The Attorney General & Another**, in which Ngugi J cited with approval the case of **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others CCT (41/07) 2008 ZACC 10**, where it was observed that:

**“There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views...while the constitution at Article 10 enshrines the principle of public participation, it cannot be intended that this principle would negate the principle of indirect participation through duly elected representatives in whom the citizen has vested legislative power under Article 1 of the Constitution, In keeping with the principle of the harmonization and interpretation of the constitution as a whole, with no one provision destroying the other, it cannot be that lack of public participation in the enactment of legislation can, in and of itself lead to invalidation of legislation. The legislature has a constitutional duty to facilitate public legislation and must facilitate such participation. However, it would render legislative business redundant, which would run counter to the provisions of Article 1 of the Constitution, if lack of direct public participation by a particular sector would lead to invalidation of legislation”.**

24. It was averred that after the County Executive of Kiambu completed its extensive public participation process and presented the ***Kiambu County Finance Bill, 2014*** to the Kiambu County Assembly, it conducted another round of extensive public participation and the Assembly formed a Committee that coordinated the collection and collation of views from residents of the County and the participants were duly guided on how they should participate which information enabled them to participate in the enactment of the ***Kiambu Finance Act 2014*** in a meaningful way. To the County, the process of participation was engaging and meaningful. The County Government provided the necessary procedures to ensure that the engagement was not a tick-box exercise but that the engagement was value for money and invaluable for both the County Government and the residents of Kiambu.
25. On fees, the County contended that the amount levied is strictly a fee, an infrastructure maintenance fee in particular, and is in no way a tax, disguised or otherwise. It relied on ***Black’s Law Dictionary*** which defines tax as “any contribution imposed by government upon individuals, for the use and service of the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name”. A fee on the other hand is a voluntarily incurred governmental charge in exchange for a benefit conferred on the payer which fee should reasonably approximate the payer’s fair share of the costs incurred by the government in providing the benefit. A fee differs from a tax in that a tax is not voluntarily incurred, nor does a tax have to produce any identifiable benefit to the payer or reflect governmental costs.
26. The Council averred that the Kshs. 900 fee per tonne is strictly a fee as the petitioner gets the benefit of the maintenance of the roads it uses and is meant to cover the cost incurred by the Kiambu County Government in maintaining the roads the petitioner uses. While conceding that it was aware of Article 209(5) of the Constitution which requires counties to exercise their revenue raising powers in a rational manner not to jeopardize national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour, its position was that the ***Kiambu County Finance Act*** was developed in compliance with this provision.
27. On the allegation of double taxation, the County contended that the mining royalties and infrastructure maintenance fees are not similar levies to amount to double taxation since the royalties paid by the petitioner to the Kenya Forest Service and the Ministry of Mining do not preclude the county from levying fees. It was averred that the road maintenance is neither a disguised county tax nor is it levied for a similar purpose as the mining levy under section 12 of the ***Mining Act***. To the County, section 12 of the ***Mining Act*** stipulates that all minerals obtained in the course of prospecting or mining operations shall be liable to such royalties as may be prescribed and that the royalties are payable in relation to the activity of mining. On the other hand since the fees charged by the County are road maintenance fees, those are two distinct and

separate concepts and there is no remote degree of similarity for the fees to amount to a disguised tax. It was therefore asserted that there is no double payment of tax to the national government and county government.

28. To the County, it does not require national legislation because the impugned amount is a fee and not a tax. It relied on Article 6(2) of the Constitution for the provision that the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation, hence in its view, this provision forms the foundation of Kenya's co-operative form of devolved government which combines a certain measure of autonomy on the part of each of the two levels of government. It contended that the arguments that a national legislation is needed for the charges to be levied are totally misleading as under Article 189(1) the two levels of government are distinct and have autonomy from each other in the sense that there is no subordination of one order of government to the other as they are co-ordinate to each other. It therefore submitted that the constitutional and statutory mandate of Kiambu County Government to levy infrastructure maintenance fees cannot be subjected to the mandate of the national government to levy mining royalties.

29. With respect to the allegation that the transportation fee of Kshs 900 per tonne for a 20 MT lorry for a road which measures only 1.4 km is too exorbitant as translates into Kshs 12,857, it was its case that this is a wrong calculation as the charges are for the 400 meter stretch of Moi Road from the intersection, the 200 meter Kimende-Kirenga Road, the further stretch of 800 meter Moi Road and 5 Km Kermit Forest Road which is a total of 6.4 Km, hence translates to a mere Kshs, 2812 per kilometre. According to it, the petitioner's assertion that in its experience, the rate per kilometre for a commercial lorry transporting goods from Mombasa to Nairobi over a stretch of 500 kilometres is Kshs. 300 per kilometre is not backed by any evidence. Similarly, the hypothetical scenario that it would pay Kshs 77, 143 per kilometre of the 6 counties between Kiambu County and Mombasa County were to charge a similar rate of Kshs 12,857 per kilometre is misguided and inflated. In any case the Nairobi-Mombasa Highway which the petitioner would use is a national trunk road under the mandate of the national government and the six counties would have no business levying fees over the highway. It was its view that it is not the mandate of the petitioner to determine the manner in which the fee is calculated as that is the mandate of the County Assembly. The County relied on the decision of **Majanja, J in Bidco oil Refineries Ltd vs. Attorney General and 3 Others (2013) eKLR** where he observed that:

**“It is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it imposed, calculated and enforced. The arguments made by the petitioner concern how the customs duty is calculated, that is an issue of the application of the Act, rather than its constitutionality”.**

30. Further reliance was placed on the decision by the same Judge in **Association of Gaming Operators-Kenya & 41 Others vs. Attorney General & 4 Others [2014] eKLR** where he cited with authority the case of **Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union vs. Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013[2014]eKLR**, where it was held that:

**“Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. Article 209 of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax.”**

31. To the County, it has similar powers to impose taxes authorized by an Act for parliament and charges for the services it provides under Article 209 and it is solely its obligation to define the scope of the charges and not the obligation of the petitioner. In this respect it relied on **Nairobi**

- Metropolitan Psv Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others [2013] eKLR** in which **Lenaola, J** held that the court cannot direct the 1<sup>st</sup> Respondent on how to exercise its duty of levying parking fees and that the Petitioners had not demonstrated how the levying of the parking fees was prejudicial to national economic policies, economic activities across the county, mobility of goods and services, capital and labour as demanded by Article 209 (5) of the Constitution.
32. Based on the foregoing, it was submitted that neither the Court nor the petitioner can direct the County on how to exercise its duty of levying and calculating infrastructure maintenance fees. It asserted that it had considered the impact of its fiscal and monetary policy on the wider national public finance policies and was not occasioning any undue burden on the petitioner. To it, in levying the fees, it was acting in compliance with Article 209(5) of the Constitution and section 120 of the **County Government Act**. Its position was that the fees charged by it are reasonable and proportionate to the huge profits generated by the Petitioners in their business and were a bargain considering that the Petitioners' monstrous and voluminous tankers cause most of the damage to roads within its areas of operation in Kiambu. The County therefore contended that the petitioners were getting value for their money in terms of well-maintained roads and other facilities necessary for their businesses and were not being deprived of the legitimate and equal benefit of the law since other stakeholders in the county were duly paying their fees, having contributed to the stakeholders forums and were satisfied with the fees under the Act. To therefore exempt the Petitioners from paying the same, it was its view, would be unfair as other heavy duty transporters were dutifully paying their taxes.
33. On the purported withdrawal Finance Bill 2014, the County contended that, that was an immaterial issue as the bill was not binding on anybody and that the process of enactment of the Act was ongoing hence The **Kiambu Finance Act 2014** was the final refined version of the Bill as enacted into law. It was further contended that section 16(1) of the **Kiambu Finance Act No. 7 of 2014** empowers the executive committee member to amend any of the schedules by order published in the Gazette hence there was no need to invalidate section 4 of the Ninth Schedule as the petitioners could always lobby for an amendment.
34. In the County's view, in developing the Draft Kiambu County Government Policy and conducting the public participation for the **Kiambu County Finance Act 2014**, it was learning from the mistakes that led to the nullification of the **Kiambu Finance Act 2013** by the court of law. According to it, the **Kiambu County Finance Act 2013** and the **Kiambu Finance Act 2014** are totally unrelated since the former was for the financial year 2013/2014 while the latter covered the financial year 2014/2015. As opposed to the **Kiambu Finance Act 2013** where public participation was contested, the development of the **Kiambu Finance Act 2014** was undertaken in an environment of intense public consultation and participation hence the process cannot be factually, legally and constitutionally faulted as it was duly guided by best practices in community engagement and dialogue. At any rate, the County government of Kiambu, having been in existence for only two years, was a young government still manoeuvring the ropes of legislation and governance. Its past mistakes could not therefore be used to choke its legislations at every twist and turn. Furthermore, the invalidation of the **Kiambu Finance Act 2013** was pending before the Court of Appeal.
35. Based on **Republic vs. County Government of Kajiado & 2 Others Ex-Parte Leah Wanjiru Mburu, Wellamondi vs. The Chairman, Electoral Commission of Kenya, (2002)1 KLR 286, Republic vs. Principal Magistrate's Court Murang'a & 4 Others Ex-Parte Milka Nyambura Wanderi & Another [2013] eKLR** and **Republic vs. Registrar of Trademarks Ex Parte Sony Holdings Limited [2012] eKLR**, it was submitted on behalf of the County that the matters before this Court lacked the proper grounds to sustain it since they were based upon facts that were unsubstantiated and should consequently be dismissed. It was further submitted that speed is the hallmark of judicial review especially in financial matters to avoid putting the other party at unnecessary ransom in relation to its duty to provide services to the public and reliance was placed on **Republic vs. Minister For Finance & Another Ex Parte Nyong'o & 2 Others, [2007] eKLR** where **Nyamu, J** (as he was then) stated;

**“Refocusing on the issue of delay in seeking earlier intervention by the applicants the court must point out again as it has done before, that speed is the hallmark of judicial review...indeed**

**decisions with financial implications must be challenged promptly failing which orders should not issue even where otherwise deserved.”**

36. The decision of **Musinga, J** (as he then was) in **Republic vs. City Council of Nairobi & Another Ex Parte Peter Odoyo And Stanley Kinyanjui Suing on Behalf of Outdoor Advertising Association of Kenya [2011] eKLR**, was also cited where the learned Judge observed that the increased charges were gazetted on 15<sup>th</sup> October 2010 and were effective as from 1<sup>st</sup> January 2011 yet the applicants had moved to court on 8<sup>th</sup> February 2011 and held that:

**“I agree with Mr. Orina that any challenge to the 1st respondent’s decision ought to have been brought promptly to avoid unnecessary disruption to the 1st respondent’s finances which will in turn adversely affect its service delivery to the City residents”.**

37. Similarly, the applicants in this case, it was contended, should have challenged the impugned Act promptly to avoid unnecessary disruption to the finances of the County which will in turn adversely affect its service delivery to the County residents.

38. With respect to the alleged violation of the provisions of section 8 of the ***Statutory Instruments Act 2013*** (which provides that the *preparation of a regulatory impact statement for a proposed statutory instrument shall be notified in the gazette and in a newspaper likely to be read by people particularly affected by the proposed legislation*); and subsection 4 thereof (which provides that the notice shall *allow at least fourteen days from publication of the notice for the making of comments*), it was contended it is inconceivable and incomprehensible why the applicants would invoke the provisions of a legislation that is irrelevant to these proceedings. According to the County, the ***Statutory Instruments Act*** does not affect statutes but solely affects statutory instruments since section 2 of the Statutory Instruments Act defines a statutory instrument as “*any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.*”

39. To the County, the legislation enacted by parliament or a county assembly is not a statutory instrument since the purpose and object of the Act is to guide regulation-making authorities to ensure that they do not act ultra-vires, unconstitutionally or arbitrarily hence the Kiambu County Finance Act 2014, being an Act, its provisions of the ***Statutory Instruments Act*** do not apply at all to its enactment. To the County, it is only subsidiary legislation and other orders made under the ***Kiambu Finance Act, 2014*** that would be subject to the requirements of the ***Statutory Instruments Act***.

40. On the allegations of failure to facilitate public participation and involvement as required by Article 196 (1) (b) of the constitution of Kenya and disregard to the process prescribed by the Kiambu County assembly standing orders no. 121(3), it was contended that standing order 121(3) mandates the sectoral committee to which the Bill is committed to facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its reports to the county assembly. To the County, it conducted comprehensive and extensive public participation exercises and tabled a report before the assembly. In support of its case, the County cited the **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR**, where five judge bench (Lenaola, Ngugi, Ong’udi, Chemitei and Onguto JJ) held:

**“There is certainly no doubt that the parties that participated and gave their representations during the legislative process of SLAA represent the various and diverse interests of Kenyans. They are also undoubtedly well versed with the contents and areas that SLAA touched on. While acknowledging that an opportunity could have been availed for greater public participation, it would be to expect too much to insist that every Kenyan’s view ought to have been considered prior to the passage of SLAA or any statute for that matter. In any event, the members of the National Assembly pursuant to Articles 1(2), 94(2), 95(1) and 97 of the Constitution also represent the people of Kenya. While such representation cannot be said to dispense with the need for public participation, we take the view that, taken together with the views expressed by the organisations**

set out above, there was reasonable public participation and SLAA cannot be held unconstitutional on account of lack of public participation. A fortiori, the Presidential assent cannot be faulted as the process leading to the same was in our view within the ambit of the law.”

41. To the County, it would have been too much to expect that the view of every resident of Kiambu County would have been considered. The views collected as evidenced in the Replying Affidavit, it averred, amounted to reasonable public participation by the county assembly hence the Act cannot be faulted as the enactment process was within the ambit of the law. It relied on the decision of Emukule, J in John Muraya Mwangi & 495 others & 6 Others vs. Minister for State for Provincial Administration & Internal Security & 4 Others Nakuru Petition No. 3 of 2011 [2014] eKLR, where the learned Judge held that:

“Similarly the court cannot say with certainty that there was comprehensive consultation in the passage of the new Regulations. It cannot also say that there was no consultation. The benefit of doubt will therefore go to the purpose of the legislation to regulate the manufacture and sale of alcoholic drinks, and to protect consumers, and especially the children.”

42. Similarly, it relied on Nairobi Metropolitan PSVs Saccos Union Ltd & 25 Others vs. County of Nairobi Government & 3 Others Civil Appeal No.42 of 2014 as cited in Petition 603 of 2014 Consolidated with Petition 65 of 2015, JR 6 of 2015, JR 22 of 2015 & JR 90 of 2015, where the court of appeal held;

“The Constitution and the relevant Statutes are silent on the period of the notice to be given to the public. Nevertheless, it has to be reasonable notice. Although we agree that notices issued may not have been sufficient considering the social conditions of the ordinary Kenyans who may not access the information through the websites and the print media, from the averments in the Affidavit of Lillian Ndegwa sworn on 16th October, 2013, in response to the Appellant’s Petition in the High Court, it is clear that “Representatives of Motorist Associations of Kenya Bus Operators, Double M Operators among other Stakeholders attended and gave their view.” As Kenya Bus Operators and Double M Operators are among the PSV operators, it means that the Appellants had notice of the public engagements but only a few attended. As the trial Judge correctly, observed, the words of Chaskalson, CJ, in South Africa case of MINISTER FOR HEALTH VS. NEW CLICKS South Africa (PTY) LTD, succinctly cover the situation in this case: “It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made.” What is necessary is that reasonable notice is given and the views of those who attend are taken into consideration. In this case, none of the above mentioned PSV Operator groups who attended the 1<sup>st</sup> Respondent’s consultative for the representative of the Motorist Association complained that the notice given to them was too short. Similarly, the other Appellants did not adduce any evidence that the notice given was insufficient. In the circumstances, it would not be right to annul the 1<sup>st</sup> Respondent’s Finance Act on mere Submissions of Counsel that the Appellants were not accorded a reasonable opportunity to air their views on it”.

43. The County also relied on Samuel Thinguri Waruatho & 2 others vs. Kiambu County Government & 2 Others [2015] eKLR where this Court held:

“However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. Therefore the mere fact that particular views have not

**been incorporated in the enactment does not justify the court in invalidating the enactment in question”.**

44. On the allegations that the joint committees of Finance, Trade and cooperatives and that of the budget and appropriation could not have attained a quorum of a majority of the 24 members of the county assembly simultaneously in 12 sub counties in the county, it was submitted that there is no requirement that the threshold of the public participation conducted by a county assembly must be conducted by a majority. According to the County, standing order 121 (3) mandates the sectoral committee to which the Bill is committed to facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its reports to the county assembly. It does not contain any provisions as to quorum. In its view, public participation forums convened by the county assembly should not be confused with sittings of the assembly which have a provision as to quorum and there is no requirement for quorum for a public participation exercise.
45. On the allegations that the *Kiambu Finance Act* was riddled with massive irregularities and illegalities as the amendments made to the finance bill by the committee of the whole house were not incorporated or acted upon in the Act, it was submitted that the *Kiambu County Finance Act, 2014* incorporated all the amendments made to the Finance Bill by the Committee of the whole House and that the sections of the *Hansard* presented by the Petitioners are unexplainably incomplete and raise major questions as to their authenticity. The County relied on the decision of **Makau, J** in **Meru Bar, Wines & Spirits Owners Self Help Group vs. County Government of Meru [2014] eKLR**, where the learned Judge held that:

**“On the issue as regarding the County Assembly legislation stage the petitioner has not proved to the required standard that the process was faulty and flawed, in absence of evidence to the contrary the court would take that the process of enactment was in accordance with County Assembly standing orders which provides for public participation as it has not been demonstrated that the process was devoid of public participation”.**

46. Reliance was also sought from **Consumer Federation of Kenya (COFEK) vs. Public Service Commission and Another, Petition No. 263 OF 2013** for the holding that:

**“[13] .... The Petitioner has latched on to the phrase “participation of the people” in a selective and selfish manner. I have said that there is no express requirement that “participation of the people” should be read to mean that “the people” must be present during interviews but taken in its widest context that their in-put is recognized.”**

47. According to the County, it collected views from the public using meetings and other mediums. These views were put into consideration during the legislative process that saw the enactment of *Kiambu Finance Act 2014*. It therefore submitted that the legislative process that saw the enactment of the *Kiambu County Finance Act, 2014* complied with the provisions of Article 196 of the Constitution and section 87 of the *County Government Act* no. 17 of 2012. Members of the Public were given access to information concerning the enactment of the *Kiambu County Finance Act* and they were also given the opportunity to participate in the process. In its view, these proceedings are an afterthought after the Petitioners failed to exercise their duty as civilised citizens to participate in the legislative process of the Act.
48. With respect to sections 23 and 25 of the *County Governments Act*, it was submitted that the Kiambu County Finance Bill, 2014 was published and included as a supplement in both the Kiambu County *Gazette* and the Kenya *Gazette* to kick off its enactment process hence the Petitioners were misguided in their contention that the *Kiambu County Finance Act, 2014* was not duly gazetted within seven days of its assent as it was duly gazetted on **25<sup>th</sup> November, 2014** having been assented to on **19<sup>th</sup> November, 2014**. On section 55 of the *Interpretation And General Provisions Act* which provides that save as is otherwise expressly provided by a law, where an act, or thing may, or is required to be done by more than two persons, a majority of them may do it, it was submitted that there is no requirement that more than two members of the Joint Committee must be present in every venue to collect the views of the public and it relied on the

Malindi Court of Appeal decision in **Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others [2013] eKLR**, where **Githinji, Makhandia & Sichale JJA**, relied on section 68 of the ***Interpretation and General Provisions Act*** and held that the Kenya Gazette is an official newspaper of the government in which official matters including official notices are published hence has evidentiary character. It was submitted that the Kiambu County Government fully complied with the provisions of the IGPA as both the Executive and assembly formed taskforces to collect and collate views from the public and supported its submissions by citing section 120(1) of the ***County Governments Act, 2012*** which provides as follows:

***A county government or any agency delivering services in the county shall adopt and implement a tariffs and pricing policy for the provision of public services.***

49. On the allegation the County's Executive Committee on Finance conspired with the Kiambu County Assembly to swindle the word "adapt" for "adopt" and engaged the public in discussing illegal issues (fees), the County submitted that the Petitioners did not provide any evidence to prove such collusion and in any case the County Assembly does not need the Executive to interpret legal provisions. To it, section 120(1) of the ***County Governments Act, 2012*** merely enjoins counties to formulate and adhere to tariff and pricing policy for the various services that they provide to their residents. Based on Black's Law Dictionary 2<sup>nd</sup> Edition, it submitted that the Petitioners did not provide evidence to show how the County Executive and Assembly allegedly colluded to illegally adjust or modify the process of enactment and/or substantive matters relating to the imposition of fees and charges under the ***Kiambu County Finance Act, 2014***. Further, the 1<sup>st</sup> Respondent did not change anything procedural or substantive in relation to the ***Kiambu County Finance Act, 2014*** to meet any specific ends or to make it work for a particular purpose. Accordingly, the Petitioners were misguided in their argument that pursuant to section 120(1) of the ***County Governments Act, 2012*** the Counties are only allowed to adopt taxes and other fees already provided for under national legislation. To the contrary, Article 185(2) provides that A County Assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. Trade development especially trade licensing is an exclusive province of county governments under Part II of the Fourth Schedule and Counties are not required to wait for the national government to legislate on trade licensing before adopting those charges. As such, Counties are only required to adopt tariff and pricing policies to explain how they arrived at the amounts of the specific charges/taxes/levies and the services to be provided to justify the same. In its view, the Petitioners confused adopting a tariff policy and waiting for national legislation authoring counties levy charges on areas under the counties' exclusive mandate- a clear contradiction of the devolution of power under Article 6(2) and 189 of the Constitution.
50. It was submitted by the Respondent that public participation is a democratic principle that facilitates and seeks the involvement of people who are interested or are potentially affected by a decision in the decision making process. It is a constitutional and statutory requirement.
51. According to the Respondent, whereas *the petitioners who are residents of Kiambu County allege that they were and/or have not been consulted before enacting the ***Kiambu County Finance Act, 2014*** (hereinafter referred to as "the Act") as provided for in the Constitution of Kenya, the annexed documentary evidence on record proves that the Kiambu County Government conducted intensive and extensive public participation exercises in the process of enacting the Act and that consultations with members of the public were conducted in every sub-county on specific dates.*
52. *In the Respondent's view, the allegations by the petitioners that they were not consulted raise eyebrows as well as pertinent legal questions with respect to the number of persons that should be consulted for public participation to be said to have taken place and the threshold/standard of public participation in law or the constitution. In this respect the Respondent relied on **Nairobi Metropolitan Psv Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others [2013] eKLR**, in which the Court observed that:*

***"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to***

know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

53. *The Respondent also relied on **Robert N. Gakuru & Others vs. The Governor Kiambu County & 3 Others Petition No. 532 of 2013.***

54. To the Respondent, there are at least two levels of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law making process. The second is the duty to take measures to ensure that people have the ability to take advantages of the opportunities provided. In its view, it *followed the findings of the esteemed Honourable judges to the letter as it appointed a taskforce to coordinate collection and collation of views from the residents of the county. It made use of as many fora as possible including churches, dispensary grounds, and town halls meetings as per the annexed evidence. It also published an advertisement in a daily newspaper of national wide circulation to ensure every stakeholder knew about the forums. The public advertisement was carried in the Daily Nation Newspaper dated 30th April, 2014 notifying the public that the assembly would hold twelve (12) public participation forums to consult on the Kiambu County Government 2014/2015 Finance Bill and in this respect relied on the holding in **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) Sa 347 (Cc); 2011 (7) BCLR 651 (Cc) (17 March 2011)** as adopted in **North Rift Motor Bike Taxi Association (NRMBTA) vs. Uasin Gishu County Government [2014] eKLR** that:*

**“For the opportunity afforded to the public to participate in legislative process to comply, the invitations must give those wishing to participate sufficient time to prepare.”**

55. It was submitted that the Respondent’s invitations for public participation gave those wishing to participate sufficient time to prepare as the advertisement was published *as early as April (30<sup>th</sup> April 2014) for meetings that were to be held in late May (19<sup>th</sup> May 2014-26<sup>th</sup> May 2014) and that most stakeholders in the county sent their views for inclusion (Per the copies of the attached written memoranda). To the Respondent, its obligation is only to avail the right to public participation and thereafter, it is the obligation of the Petitioners to utilise the said right and participate. Since the public was duly notified and invited to forums, the Respondent contended that the petitioners were guilty of laches and delay as they came to court when all the consultative requirements had been undertaken and exhausted and the Act has been enacted into law.*

56. *According to the Respondent, the evidence on record proves that the invitations given by the County Assembly to the public to attend and be involved in the process were actually honoured by a considerable number of the members of the public though it is expected that some members of the public including the Applicants herein did not wish to be involved in the public participation process at that time for reasons best known to them. In support of this position, the Respondent relied on the decision of **Majanja, J in Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others [2013] eKLR.***

57. *It was the Respondent’s case that the petitioners herein neither demonstrated the standard to apply in assessing the level of public participation nor have demonstrated that the public participation exercises undertaken by the Respondent were not satisfactory. To the contrary the Respondent asserted that its efforts in facilitating public participation amounted to reasonable opportunity. In its view, the legislative process that saw the enactment of the Act followed the letter and spirit of the above provisions of the law and the Constitution since members of the Public were given access to information concerning the enactment of the Act and they were also given the opportunity to participate in the process as provided for by Articles 10, 174, 196 & 201 of the Constitution and Sections 87, 91 & 115 of the **County Government Act.***

58. In this respect the Respondent averred that in its response, it brought to the attention of the court, that several meetings were held at the sub-county level which saw members of the public whose names were exhibited, attend in good numbers to air their views and raise any concerns regarding the Act. According to the Respondent, it was self-evident that the public participation activities conducted by it met the requisite threshold under the law and the constitution and accused the Petitioners of failing to exercise their constitutional duty as citizens to participate in the enactment of the Act. It was the Respondent’s position that since the Petitioners willingly relinquished their

constitutional right to public participation, their application should not succeed as it is an abuse of the justice system and to allow the same would amount to rewarding the delay and inaction of the respondents.

59. According to the Respondent, ***Kiambu Finance Act, 2013*** and the ***Kiambu Finance Act, 2014*** are totally unrelated since the former was for the financial year 2013/2014 while the latter covers the financial year 2014/2015. This Court was however urged not to consider the merits or demerits of the decision in Petition 532 of 2014 as it is the subject of an appeal at the Court of Appeal and is pending determination. It was the Respondent's case that Article 164 (3) of the Constitution establishes the Supremacy of the Court of Appeal over the High Court by bestowing powers to hear appeals from the High Court. In support of this position, the Respondent relied on **Abdul Kassim Hassanali Gulam Hussein Khala vs. Southern Credit Banking Co-Orporation Ltd [2006] eKLR**, and **John Muthini Kamia vs. Giro Commercial Bank & Another [2007] eKLR** for the proposition that *sub judice* applies during the pendency of an appeal.
60. The Respondent disclosed that it was developing ***The Draft Kiambu County Public Participation Policy, 2014*** whose yardsticks and planks guided the development of the ***Kiambu County Finance Act, 2014***. The Respondent further disclosed that the segment on citizen awareness and access (section 5.1) specifically provides that sufficient notice of meetings should always be issued by the County Government to enable the communities and other stakeholders adequately prepare to attend and participate effectively in consultations and to submit their views and recommendations from an informed position. It was therefore the Respondent's position that the ***Kiambu Finance Act, 2014*** is valid and constitutional as all the principles of public participation in the constitution, statutes and policies were duly followed and that the process of enactment and the provisions of the ***Kiambu Finance Act, 2014*** are distinct and independent from those of the impugned ***Kiambu Finance Act, 2013***.
61. On the allegation of violation of the Petitioners' rights, the Respondent submitted that whereas it is trite law that a breach of any of the rights and freedoms must be specifically pleaded, the petition does not set out the particulars of breach of Articles 28 & 43 of The Constitution. In support of this submission, the Respondent relied on **Mumo Matemu vs. Trusted Society Of Human Rights Alliance & 5 Others [2013] eKLR** as adopted in **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR** where it was held that:

**“The jurisdiction of the court under Article 22 and 23 of the Constitution is one for enforcement of fundamental rights and freedoms guaranteed under the Bill of Rights. Each right under the Constitution is specifically defined and has specific contents. It therefore follows that a party who invokes these provisions must set out clearly the sections or provisions he claims have been infringed or violated and show how these sections are infringed in relation to him. The principle has been established in a long line of cases dating from Anarita K. Njeru v R [No. 1] (Supra).....I also agree with the respondent that the petitioners' complaints are of a general nature and relate to dissatisfaction in the manner the ESP has been implemented. If this is the case, then, unless there are specific provisions of the Bill of Rights that have been infringed, I consider that the petition is lacking in merit.”**

62. In the Respondent's view, the petition lacks precision as it has not specified how their rights under the Bill of Rights were violated and how the Petitioners stand to be affected. The allegations, it contended are vague, general and without substance. In the Respondent's view, claiming that the rights to human dignity, access to social amenities and social and economic rights will be violated by the implementation of the Act is paradoxical. To the contrary, the rights will be violated if the Act is suspended since the County Government of Kiambu will be handicapped and will not be in a position to provide essential public services such as water and sanitation services as mandated by Article 43 to the petitioners and other residents of Kiambu County.
63. The Respondent averred that the County Government is empowered by the Constitution, the ***County Government Act*** and the ***Public Finance Management Act*** to impose permit fees, licence fees, rents and charges to finance its operations. It was expounded that Article 209 (3) and (5) of the Constitution provide that a County may impose property rates, entertainment rates and any other tax authorised by an Act of Parliament. To that end, the Respondent enacts the Finance Act

*in every financial year to provide the legal and statutory basis of levying fees for the services it provides. The Respondent disclosed that it is expected to collect over Kshs. 3 Billion principally levies and user charges which collection supplements the annual equitable share received from the National Treasury hence the **Kiambu County Finance Act, 2014** will significantly enable the County Government to execute the functions set out in the Fourth Schedule.*

64. *The Respondent therefore contended that invalidating the Act will hamstring the provision of essential government services to the people and handicap the county from executing its constitutional and statutory functions hence the Court was called upon to exercise judicial restraint as the petitioners seek to countermand the constitutional, legislative and regulatory powers of the County Government. In support of this position the Respondent cited the case of **Mombasa High Court Petition No. 669 of 2009 Bishop Joseph Kimani & Others vs. Attorney General & Others** as adopted in **Kizito Mark Ngaywa vs. Provincial Administration & Another [2011] eKLR** where Ibrahim, J (as he then was) then pronounced that:*

**“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that “there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.” It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first.”**

65. *The Respondent also cited the decision of Majanja, J in **Susan Wambui Kaguru & Others vs. Attorney General Another**, where the learned Judge took the following viewpoint:*

**“I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very laws that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so.”**

66. *It was contended that the petitioners did not provide any strong and cogent reasons for this Honourable Court to make an interim declaration as they fail to demonstrate how the process of enacting the Act violated the Constitution and relied on **Petition No. 16 of 2011, Nairobi – Centre For Rights Education and Awareness (CREAW) & 7 Others** where Musinga, J (as he then was) stated that:*

**“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account 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.”**

67. In the Respondent's view, there is no real danger that the petitioners will suffer prejudice because there is no real or apparent violation or threatened violation of the Constitution as the process of enacting the Act fully complied with the law and the constitution and cited Hambarda Wakhan vs. Union India Air (1960) Air 554, as adopted in John Kinyua Munyaka & 11 Others vs. County Government of Kiambu & 3 others [2014] eKLR it where it was held as follows:

“.....in examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the needs of the people and the law it enacts is 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 constitutionality of an enactment...”

68. Putting into consideration the above decisions, the Respondent submitted that there are no reasons to warrant the stay of the Act as it is in public interest that the **Kiambu County Finance Act, 2014** is sustained. According to the Respondent, the enactment of the **Kiambu County Finance Act 2014** was undertaken in an environment of intense public consultation and participation; the process cannot be factually, legally and constitutionally faulted, and it was duly guided by the best practices in community engagement and dialogue. To the Respondent, there is no merit in the Petition filed herein and the Court was urged to hold that:

- a. There was sufficient public participation in the process leading to the enactment of the **Kiambu County Finance Act**.
- b. The public participation activities undertaken by the Kiambu County Government reached the requisite threshold of public participation in law and the constitution.
- c. The Kiambu County Government did not violate the constitutional rights of the applicants and other citizens of Kiambu County.
- d. The **Kiambu County Finance Act** is Constitutional and should continue being operationalised, implemented and executed.

69. Consequently it was sought that this Petition be dismissed with costs.

### **Determinations**

70. I have considered the issues raised in these consolidated causes and in my view the following issues fall for consideration and determination:

1. **Whether Kiambu Finance Act, 2014 is a statutory instrument under the Statutory Instruments Act, 2013.**
2. **Whether Kiambu Finance Act, 2014 is similar to Kiambu Finance Act, 2013 and whether the judgement in Petition 532 of 2013 declaring Kiambu Finance Act, 2013 unconstitutional has a bearing on the constitutionality of Kiambu Finance Act, 2014.**
3. **Whether there was public participation in the process leading to the enactment of Kiambu Finance Act, 2014.**
4. **Whether the Kiambu Finance Act, 2014 contravenes sections 23, 25 and 120(1) of the County Government Act, 2012.**
5. **Whether the Kiambu Finance Act, 2014 contravened section 55 of the Interpretation and General Provisions Act.**
6. **Whether the Kiambu Finance Act, 2014 contravenes section 71 of the Interpretation and General Provisions Act.**
7. **Whether the County Government of Kiambu has authority to impose or levy parking fees, business permits, single business permits and/or business or trade license fees.**
8. **Whether the fees levied by Kiambu County Government such as mining royalties amount to unfair/unjustifiable/unreasonable double taxation.**
9. **Whether the fees charged by County Government of Kiambu are exorbitant and whether the same were levied without just cause.**

10. Whether the roads used by the Petitioners are within the jurisdiction of the Kiambu County Government or the national government.
11. Whether the Respondents followed the prescribed procedure under the Public Finance Management Act, Cap 412 with respect to its Finance Act, 2014 when prescribing the applicable tariffs and/or prices and whether public participation meetings where illegal tariffs and/or prices were discussed constitutes a meeting or an illegal meeting.
12. Whether there was a failure to incorporate the amendments made to the Kiambu Finance Bill by the Committee of whole County Assembly, 2014.

**Whether Kiambu Finance Act, 2014 is a statutory instrument under the Statutory Instruments Act, 2013.**

71. The first issue for determination is whether the provisions of the *Statutory Instruments Act* apply to *Kiambu County Finance Act, 2014*. In order to determine this issue the starting point is whether the Act in question is a statutory instrument as defined under the *Statutory Instruments Act*. Under section 2 of that Act:

*"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.*

72. On non-compliance with the provisions of the *Statutory Instruments Act*, it was submitted that the *Nairobi City County Finance Act, 2013* is not a national legislation for which legislative authority of Parliament can be exercised, thus the 2<sup>nd</sup> Ex Parte Applicant's averments are evidently misconceived. To the Respondent, how it executes its constitutional functions or exercises its constitutional powers within its area of jurisdiction can only be legislated upon by the Respondent's County Assembly and that this argument is buttressed by the provisions of Article 185(1) and 185(2) of the Constitution of Kenya, which states thus:

***(1) The legislative authority of a county is vested in, and exercised by, its county assembly.***

***(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.***

73. Thus, to the Respondent, legislative power of the Respondent is not donated to the Respondent by a statute; it derives from Article 185(1) and 185(2) of the Constitution of Kenya. It is therefore incomprehensible on what basis the 2<sup>nd</sup> Ex Parte Applicant construes the Respondent as "a regulation making authority". The *Statutory Instruments Act No. 23 of 2013* that the 2<sup>nd</sup> Ex Parte Applicant cited clearly defines "a regulation making authority" to mean "**any authority authorised by an Act of Parliament to make statutory instruments**". The Respondent is a constitutionally created state organ, exercising powers and executing functions set out in the Constitution, not an Act of Parliament; to construe the Respondent as "a regulation making authority" is manifest of either a condescending attitude that the 2<sup>nd</sup> Ex Parte Applicant carries of the Respondent or lack of appreciation of the law that constitutes the Respondent. Laws that the Respondent enacts are not so enacted pursuant to a power that Parliament donates to the Respondent. Articles 185(1) and 185(2) of the Constitution of Kenya expressly empowers the Assembly of the Respondent to enact laws that prescribe how the Respondent executes its functions and exercises its powers. The argument by the 2<sup>nd</sup> Ex Parte Applicant that the *Nairobi City County Finance Act, 2013* is a "Statutory Instrument" is evidently misconceived.

74. In this case the Act in question was passed pursuant to Article 185(2) of the Constitution. It was not enacted in execution of a power conferred by or under an Act of Parliament. Accordingly, it is my view and I so hold that the *Nairobi City County Finance Act, 2013* was not a statutory

instrument as defined under section 2 of the *Statutory Instruments Act*. Apart from that the Act cannot be construed *ejusdem generis* with or analogous to one or other of the instruments mentioned in the Act.

75. It follows that the provisions of the *Statutory Instruments Act* do not apply to the *Nairobi City County Finance Act, 2013* and the said Act cannot be challenged on the basis of the failure to comply therewith.

**Whether Kiambu Finance Act, 2014 is similar to Kiambu Finance Act, 2013 and whether the judgement in Petition 532 of 2013 declaring Kiambu Finance Act, 2013 unconstitutional has a bearing on the constitutionality of Kiambu Finance Act, 2014.**

76. It is not in doubt that in Petition No. 532 of 2013 as consolidated *Kiambu County Finance Act, 2013* was found by this Court to be unconstitutional. The basis for that finding was that the enactment did not meet the threshold of the requirement for public participation as mandated under the Constitution.

77. In arriving at the said finding the Court did not consider the merits of the said legislation. Accordingly, in so far as the said decision was concerned, a subsequent enactment by the Respondent of a Finance Act cannot be said to have been contrary to the said decision if that subsequent instrument met the threshold of public participation.

78. As rightly contended by the Respondent, the Respondent is properly entitled to enact Finance Acts in each financial year and in so far as Petition No. 532 of 2013 is concerned, so long as the threshold and guidelines outlined by the Court in the said Petition relating to public participation are complied with, no objection can be successfully taken based on the same Petition even if the same legislation is subsequently reproduced in its material aspects. In other words this Court cannot be called upon to nullify a subsequent Act which complies with the principle of public participation as expounded in Petition No. 532 of 2013 simply because that subsequent enactment reproduces the contents of the nullified Act.

**Whether there was public participation in the process leading to the enactment of Kiambu Finance Act, 2014.**

79. In this case, the Petitioners contend that there was no public participation by the County before it enacted the *Kiambu County Finance Act, 2014*.

80. This Court has had occasion to give guidelines on how to achieve maximum public participation in *Robert N. Gakuru & Others vs. The Governor Kiambu County & 3 Others Petition No. 532 of 2013*, in which this Court expressed itself as follows:

**“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it 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 many 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.”**

81. The Court was however quick to point out that what matters is that:

***“...the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that***

*is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public”.*

82. Therefore whereas a certain piece of legislation or action may require a more extensive public participation, others may not necessarily require the same amount of public participation. Again the extent of the awareness required depends on various factors. However the minimum is that *public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates*. Anything that falls below that standard will simply not do. A purported public facilitation, which for example locks out persons who due to their professional or business engagements do not ordinarily reside within the County but are voters therein, for example may be impeached. In my view facilitation must be undertaken in a manner that both the residents and non-residents of the County are made aware of the proposed action. Whereas facilitation within the County may be more intensive than outside the County, the information must reasonably be broadcasted in as wide medium as possible so as to reach those within and without the County.

83. Therefore what amounts to public participation facilitation? As was held by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra):

**“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.”**

84. My view is reinforced by the decision in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**, where **Ngcobo, J** held *inter alia* as follows:

**“Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other...What our constitutional scheme requires is “the achievement of a balanced relationship between representative and participatory elements in our democracy.” The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only**

through elected representatives but also through participation in the law-making process... To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected...Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values [and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."

85. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.
86. In this case, the County averred that between 19<sup>th</sup> May, 2014 and 26<sup>th</sup> May, 2014, there were consultative meetings in 9 sub-counties undertaken by the Task Force on the Bill and minutes of the same were exhibited. It would seem that these meetings took place in Sub-county office grounds, various Churches, Dispensary grounds, Halls and Administrative premises. Further memoranda were received from two other sub-counties. A summary of the views received from the said sub-counties were similarly exhibited. There were also newspaper adverts inviting comments.
87. This issue calls into question what amounts to public participation facilitation. As was held by **Ngcobo, J** in **Doctor's for life International vs. The Speaker National Assembly and Others** (supra):

"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.....”

88. The issue of who and to what extent the issue of public participation ought to be determined was dealt with as follows:

“Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

“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.”

The standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government’s fulfilment of positive obligations to realise social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that “reasonable measures may be taken” to regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if ‘it is reasonable and justifiable to do so in an open and democratic society.’ Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. “In dealing with the issue of reasonableness,” this Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. ‘In dealing with the issue of reasonableness,’ this Court has explained, ‘context is all important.’ Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. 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 public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public

participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity beginning with the broader duty to take steps to ensure that people have the capacity to participate.....”

89. It must however be made clear that not all persons must be heard. In Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 the Court of Appeal held:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

90. As Ngcobo, J rightly appreciated:

“Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament’s judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament’s judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings.

91. The County Government has however adduced evidence showing that not only was the Bill leading to the said Act widely advertised but that there was reasonable participation from the various sub-counties constituting the County Government of Kiambu. Whereas the views of the residents may not have been swallowed hook, line and sinker, that does not necessarily mean that there was no public participation. As was cautioned by Sachs, J in Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC):

“The passages from the *Doctors for Life* majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one’s views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process,

which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication...There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat."

92. This position was adopted by **Majanja J's** decision in Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others (supra) when he expressed himself as follows:

**"The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**

93. *The learned Judge, added that:*

***"I must state that although the Act was condemned on the basis of lack of public participation, the parties who impugned the Act on the basis did not demonstrate to the Court how the National Assembly had failed to achieve public participation within the constitutional parameters taking into account the process from the time the bill was initiated by the CIC upto its enactment. The parties did not address me on the standard to apply in order to assess the level of public participation in the legislative process. I am therefore unable to find and hold that the Act is unconstitutional for want of public participation. The petitioners have not demonstrated what standard or whether what was done effectively undermined the value of public participation. I find no reason to impugn the legislature on this basis"***

94. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by **Lenaola, J** in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government

**& 3 Others Petition No. 486 of 2013**, public participation is not the same as saying that public views must prevail.

95. What the Courts are saying was that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed. In other words public participation ought not to be taken as a mere formality for the purposes of meeting the constitutional dictate. Public participation is an important element in the legislative process as was appreciated by **Ngcobo, J** in **Doctors for Life International vs. The Speaker National Assembly and Others** (supra) to the effect that:

**“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 institutions 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 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 our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy.”**

96. Here I must say that public participation ought not to be equated with mere consultation. Whereas “consultation” is defined by ***Black’s Law Dictionary*** 9<sup>th</sup> Edn. at page 358 as “*the act of asking the advice or opinion of someone*”, “participation” on the other hand is defined at page 1229 thereof as “*the act of taking part in something, such as partnership...*” Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public. This position was appreciated in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** as hereunder:

**“If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.”**

97. In this case, the County contended that in response to the public reception to the implementation of the rates and fees under the ***County Finance Act, 2014***, its Executive Committee Member for Finance published in the gazette ***The Kiambu County Finance (Amendment of the Schedules (No. 3) Order, 2015*** in which most of the disputed rates and fees levied under the Schedules were either reduced or eliminated. The particulars of the said levies were contained in the said Order. That Order was dated 7<sup>th</sup> May, 2015, obviously after the commencement of these proceedings. That Order cannot be deemed to amount to a consideration of the public concerns that guided the enactment of the Act since the Act was passed in 2014 while the Order came in 2015. However, where the dispute in question goes to the merit of the decision as opposed to its validity, the Court

in arriving at its decision would be entitled to take into account the fact that the complaint has been rectified.

98. In this case I have considered the steps undertaken by the County Government of Kiambu before the enactment of the ***Kiambu County Finance Act, 2014*** and whereas the Court may well be of the view that there was room for improvement, I am not satisfied that there were no reasonable avenues provided by the County through which its residents could not voice their concerns on the said Bill. In other words based on the circumstances of this case, the petitioners have not achieved the threshold necessary for the nullification of the County legislation based on lack of public participation.

**Whether the Kiambu Finance Act, 2014 contravenes sections 23, 25 and 120(1) of the County Government Act, 2012**

99. The Petitioners contended that the County fancifully and illegally enacted the Act without regard to the process prescribed by provisions of section 23 of the ***County Government Act Cap 65 Laws of Kenya*** which provides that a Bill shall be published by including the Bill as a supplement in the County Gazette and the Kenya Gazette. They further accused the County of oppressively, irregularly, irrationally and unlawfully enacting the ***Kiambu County Finance Act 2014*** without regard to the process prescribed by the provisions of section 25 of the ***County Government Act Cap 265 Laws of Kenya***, which provides that a legislation passed by the County Assembly and assented to by the governor shall be published in the *County Gazette* and *Kenya Gazette* within seven days after assent.

100. On the part of the County, it was contended that the Kiambu County Finance Bill, 2014 was published and included as a supplement in both the *Kiambu County Gazette* and the *Kenya Gazette* to kick off its enactment process hence the Petitioners were misguided in their contention that the ***Kiambu County Finance Act, 2014*** was not duly gazetted within seven days of its assent as it was duly gazetted on 25<sup>th</sup> November, 2014 having been assented to on 19<sup>th</sup> November, 2014.

101. Sections 23 and 25 of the ***County Government Act Cap 265 Laws of Kenya*** provide as follows:

***23. A Bill shall be published by including the Bill as a supplement in the county Gazette and the Kenya Gazette.***

***25. (1) A legislation passed by the county assembly and assented to by the governor shall be published in the county Gazette and Kenya Gazette within seven days after assent.***

***(2) Subject to subsection (3), the county assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.***

***(3) A county assembly legislation that confers a direct benefit whether financial or in kind on members of the county assembly shall come into force after the next general election of members of the county assembly.***

***(4) Subsection (3) does not apply to an interest that members of county assembly have as members of the public.***

102. It is clear therefore that section 23 deals with the publication of County Bills in the county Gazette and the Kenya Gazette. The responsibility of gazetting of Bills squarely falls on the County Governments and where it is alleged that a particular Bill was never gazetted, it is upon the County Government to prove the contrary. This calls for a determination of the purpose of gazetting. In **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, it was held that the requirement that administrative and remission orders made by the Minister under two statutory provisions (section 7(1) of the Customs Tariff Act of 1976 (Act 12 of 1976) and section 28(1) of the Sales Tax Act 1976 (Act 13 of 1976)), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to

- comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation.
103. Therefore, it is my view and I so hold that unless the instrument in question expressly provides that an instrument is only valid upon gazette, the mere fact that the same was not gazetted before it came into force does not necessarily invalidate the same though the Court may well be entitled to suspend its operations until the same is gazetted. In my view, nothing turns upon non-compliance with section 23 aforesaid even if that contention is correct.
104. With respect to section 25 aforesaid, the provision is clear that once legislation is passed and assented to by the governor, the same is to be published in the county Gazette and Kenya Gazette within seven days of the assent. Pending such publication and the lapse of fourteen days after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force. In otherwise pending compliance with the law, the operationalisation of the legislation remains in abeyance though the same is not rendered null and void. It is my view therefore that the failure to comply with section 25 does not render the legislation unlawful though where a person proves that the legislation was prematurely implemented, a party may well be entitled to institute a suit for recovery of damages suffered as a result of such premature action. This in my view is the correct interpretation of section 71 of the *Interpretation and General Provisions Act*.
105. In the premises, non-compliance with sections 23 and 25 even if true does not warrant the grant of the orders sought herein. However, this Court is aware that the *Kiambu County Finance Act, 2014* was gazetted in the Special Issue of the Kiambu County Gazette Supplement No. 16 (Act No. 7) dated 25<sup>th</sup> November, 2014.

**Whether the Kiambu Finance Act, 2014 contravened section 55 of the Interpretation and General Provisions Act.**

106. Section 55 of the *Interpretation and General Provisions Act* which provides as follows:

***Save as is otherwise expressly provided by a written law, where an act or thing may or is required to be done by more than two persons, a majority of them may do it.***

107. It was contended that public participation ought to have been carried out by a more than two members of the Joint Committee. In this case, there is no provision dealing with the collection of the views of the public. Accordingly, section 55 aforesaid does not apply since the actual manner in which the collection of public views is not expressly provided by a written law.
108. Before dealing with the rest of the issues it is important to deal with the threshold of what amounts to constitutional issues. **Nyamu, J** (as he then was) in **Muiruri vs. Credit Bank Ltd & Another Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385** was of the view that:

**“A constitutional issue in my view is that which directly arises from court’s interpretation of the Constitution.”**

109. It follows that a wrong action or decision does not necessarily elevate the matter to a constitutional issue in order to warrant a party aggrieved thereby instituting proceedings by way of a Constitutional Petition. As was appreciated in **Pattni & Another vs. Republic [2001] KLR 264** in which **Harrikson vs. Attorney General of Trinidad and Tobago [1980] AC 265** was cited with approval:

**“The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the provision if it is apparent that the**

**allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”**

110. In that decision it was appreciated that:

**“No human right or fundamental freedom recognised in the Constitution is contravened by a judgement or order that is wrong and is liable to be set aside on appeal for an error of fact or substantive law even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. And where there are no higher courts to appeal to, then, no one can say that there was an error. The fundamental human right is not a legal system that is infallible but one that is fair and it is only errors of procedure that are capable of constituting infringement to the rights protection by section 1(a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction, . The error must amount to failure to observe one of the fundamental rules of natural justice.”**

111. In my view, our current Constitution pervades all aspects of life so much so that any action taken by a party may easily be transformed into a constitutional issue by simply citing some provision of the Constitution however remote. Parties who intend to commence legal proceedings by way of a Constitutional Petition therefore ought to take note of the sentiments of the Court in Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193, a decision affirmed by the Supreme Court in Peter Oduor Ngoge vs. Francis Ole Kaparo & 5 Others Petition No. 2 of 2012 [2012] eKLR where the Court of Appeal expressed itself as follows:

**“Any...inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry...It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters...My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one...The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”**

112. It is my view and I hold that the issues of the charges being exorbitant, whether there exist just cause for imposing the charges in question and whether particular tariffs ought to be imposed as opposed to the one imposed do not raise the matters to constitutional issues to warrant the filing and grant of constitutional remedies as opposed to remedies in civil law.

**Whether the County Government of Kiambu has authority to impose or levy parking fees, business permits, single business permits and/or business or trade license fees.**

113. Article 209(3) and (4) of the Constitution empowers a County to impose taxes, rates and charges specified thereunder. These are property rates, entertainment rates and any other tax that it is authorised to impose by an Act of Parliament. The County Governments are also authorised to impose charges for the services they provide. Therefore if the County Government maintains roads within its area, it may well be entitled to impose charges for the maintenance thereof. To that extent it is not necessarily unlawful for County Government of Kiambu to impose or levy parking fees, business permits, single business permits and/or business or trade license fees. As to whether the County Government of Kiambu offers services in respect of which the said charges are levied cannot be determined based on the material placed before me.

**Whether the fees levied by Kiambu County Government such as mining royalties amount to unfair/unjustifiable/unreasonable double taxation.**

114. As this Court has held time and again where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. Most importantly it must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

115. In my view, the failure to adhere and observe the express provisions of a statute or legislative Instrument by which an authority exercises jurisdiction to make a decision would render the decision illegal and illegality is one of the grounds upon which the Court is entitled to quash a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

116. With respect to mining royalties, unless there is an Act of Parliament which authorises the County Government of Kiambu to impose the same, I do not see how the same can be classified as property rates, entertainment taxes or charges for services provided by the County Government. Accordingly, in the absence of any legislation authorising the imposition of such levies, the imposition of fees on the said mining royalties clearly amounts to a violation of Article 209 of the Constitution and I so find.

**Whether there was a failure to incorporate the amendments made to the Kiambu Finance Bill by the Committee of whole County Assembly, 2014.**

117. I have found that the amendments to the Finance Bill based on the outcome of the public participation ought to have been reflected before the enactment of the Act. However, as I have held hereinabove, the same seemed to have been effected in the Order as contended by the Council since the said allegation was not controverted by the petitioners. In the premises nothing turns on the same issue.

118. It follows that the consolidated petitions fails save for the issue of the mining royalties.

**Order**

119. In the result, a declaration is hereby issued that the County Government of Kiambu, has no powers to levy fees in respect of mining royalties.

120. As the petitioners have failed substantially in the issues raised in the consolidated petitions, there will be no order as to costs.

121. Orders accordingly.

Dated at Nairobi this 23<sup>rd</sup> day of May 2016

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Munawa for the Applicant in JR No. 6 of 2015 and holding brief for Prof Wangai for the 1<sup>st</sup> Petitioner***

***Mr Ateka for the 1<sup>st</sup> Respondent***

**Cc Mutisya**