REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 434 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF JUDGEMENT IN THE HIGH COURT PETITION NO 532 OF 2013 CONSOLIDATED

WITH PETITIONS NOS. 12 OF 2014, 35, 36,42 & 72 OF 2014 AND JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 61 OF 2014 DELIVERED ON 17TH APRIL 2014

BY HON. JUSTICE G V ODUNGA.

AND

IN THE MATTER OF THE RULING IN COURT OF APPEAL AT NAIROBI IN CIVIL APPLICATION

NUMBER 97 OF 2014 (UR NO. 80/2014) (AN APPLICATION FOR STAY OF EXECUTION FROM

THE JUDGEMENT AND DECREE OF THE HIGH COURT OF KENYA AT NAIROBI (ODUNGA J)

DATED 17TH APRIL 2014 IN THE HIGH COURT PETITION NO. 532 OF 2013 CONSOLIDATED

WITH PETITIONS NO 12 OF 2014, 35,36,42 & 72 OF 2014 AND JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 61 OF 2014 DELIVERED ON 18TH DECEMBER 2014

BY KARANJA, OUKO & MOHAMMED, JJA.

AND

IN THE MATTER OF KIAMBU FINANCE ACT 2014

AND

IN THE MATTER OF KIAMBU FINANCE ACT 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

EXPARTE APPLICANTS: ROBERT GAKURU & JAMOFASTAR WELFARE ASSOCIATION

JUDGEMENT

Introduction

1. By a Motion on Notice dated 14th December, 2015, the *ex parte* applicants herein, **Robert Gakuru & Jamofastar Welfare Association**, seek the following orders:

> 1. **A Judicial Review Order of Certiorari to remove to this Court to quash the Kiambu Finance Act, 2015.**
>
> 2. **Costs of the Application.**

Applicant's Case

2. According to the ex parte applicants, the Respondent re-enacted ***Kiambu Finance Act, 2014*** as ***Kiambu Finance Act, 2015*** (hereinafter referred to as "the Act") without the guidelines issued by this Court in Petition No. 532 of 2013 (hereinafter referred to as "the Petition"), which was filed challenging the ***Kiambu Finance Act, 2013***. According to the applicants, in the said petition this Court declared ***Kiambu Finance Act, 2013*** unconstitutional, null and void and an application filed before the Court of Appeal seeking to stay the said decision was disallowed.

3. The applicants averred that though the Respondent drafted Kiambu County Public Participation Bill/policy, the same was never enacted into law. However notwithstanding the foregoing, the Respondent on 1st December, 2014 purported to enact ***Kiambu Finance Act, 2014*** without public participation and that the challenge to the said Act is the subject of Petition No. 603 of 2014. Notwithstanding the outcome of the challenge to the said 2014 Act, the Respondent proceeded to re-enact the 2015 Act without following the guidelines issued by this Court in the said Petition as no public consultations were undertaken as required by the Constitution and the enabling laws in enacting the same.

4. It was averred that the residents of Kiambu were informed of the existence of the ***Kiambu Finance Act, 2015*** on 1st December, 2015 and that the same was to be operational on 9th December, 2015.

5. It was the applicants' case that the findings and directions given by the Court in the said Petition on public participation remain in force as Courts do not act in vain hence the 2015 Act ought to be stayed pending the judgement in Petition No. 603 of 2014.

6. In their submissions the applicant relied on Articles 1, 10, 28, 43, 174, 179, 202 and 209 of the Constitution. It was further submitted that the enactment of the ***Kiambu County Finance Act, 2015*** offended the provisions of sections 87, 91, 102, 104 and 115 of the County Governments Act, No. 17 of 2012

7. It was submitted on behalf of the ex parte applicants that democracy relates to the elected representative and participation of people to direct involvement in decision making. In support of this

position the Applicants relied on the decision of **Ngcobo, J** in **Doctor's for life International vs. The Speaker National Assembly and Others (CCT12/05) [2006] ZACC 11**.

8. This Court was therefore urged to find that the said ***Kiambu County Finance Act, 2015*** is unconstitutional.

Respondent's Case

9. In response to the application, the Respondent contended that the issues raised in this application are the same ones in the pending Petition No. 603 of 2014 (Consolidated). According to the Respondent, from the applicant's pleadings, ***Kiambu Finance Act, 2015*** is being unexplainably lumped together with the two previous Acts yet the ***Kiambu Finance Act, 2015*** is a distinct law whose enactment should be judged on its own merits and not through guilt by simple association.

10. According to the Respondent this Court declined to stay the 2014 Act in Petition No. 603 of 2014 despite several applications seeking the same.

11. The Respondent contended that it was untrue that the residents of Kiambu were informed of the existence of the 2015 Act on 1st December, 2015. According to it the County Government put an advert in Daily Nation dated 2nd June, 2015 soliciting views from the members of the public for inclusion into the Bill and further to improve awareness in the enactment of the same, simultaneously posted on its official website the same for ease of access and download.

12. It was the Respondent's case that as opposed to the 2013 Act which was nullified by the Court, the development of the 2015 Act was undertaken in an environment of intense public consultation and participation hence the process cannot be factually, legally and constitutionally faulted. In its view, the process was guided by best practices in community engagement and dialogue and that in enacting the same, the Respondent intensely consulted with the residents of Kiambu County and in response thereto, key stakeholders in the County sent their views through written memoranda for inclusion into the Bill.

13. It was disclosed that the applicants themselves presented two memoranda dated 8th June, 2015 and 18th June, 2015 in which they raised their concerns on the Bill in which they sought a factoring in of 50% reduction in fees and charges. It was therefore the Respondent's case that it was insincere for the applicants to act as though they only learnt of the 2015 Act on 1st December, 2015. Apart from the foregoing, it was averred that the applicants held a meeting with the County Government at which they raised their concerns on the high charges in the 2014 Act affecting their members. Pursuant to section 6(1) of the 2014 Act, the County Executive Committee Member for Finance by order published in the gazette the ***Kiambu County Finance (Amendment of the Schedules (No. 4) Order, 2015*** which reduced some of the charges the applicants had complained of and that these complaints were factored in the 2015 Act.

14. It was the Respondent's case that the applicants were disappointed in not getting each and every one of their demands met, which is not what the doctrine of public participation presupposes. The Respondent disclosed that to guide the process, a Finance Bill Taskforce was constituted to collect views from the public and that a video of public participation proceedings was recorded of residents of the County airing their views on the 2015 Bill. After the County Executive of Kiambu completed its extensive public participation process and presented the Bill, the Assembly conducted another round of extensive public participation in order to achieve consensus.

15. The Respondent submitted that the allegations by the ex-parte Applicants that Kiambu residents were not consulted, raise eyebrows and that pertinent legal questions arise from their claim as to the number of persons that ought to 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."**

16. 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, the Respondent followed the findings of the esteemed Honourable judges to the letter as it appointed a taskforce and committees 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 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."**

17. 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 on 2nd June, 2015 for meetings that were held from 23rd June to 29th June 2015 hence the notice period was more than sufficient for the public to participate as indeed they did. According to it, its obligation is only to avail the right to public participation and it is upon the public to utilise the said right and participate. 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. In this respect, the Respondent relied on **Majanja J's** decision in **Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others [2013] eKLR**.

18. It was contended that the Respondent offered the Kiambu public a reasonable opportunity to participate in the enactment of the ***Kiambu Finance Act 2015*** and that the ex-parte Applicants have not proven otherwise.

19. In the Respondent's view, the Applicants were challenging the merits of the rates and charges for government housing included in the ***Kiambu Finance Act, 2015*** and not the process itself that led to the enactment of those particular rates. Therefore, the applicants were effectively asking this Court to sit in appeal of those rates. It was averred that the Applicants agitated for massive reductions of the rates during the public participation process but were disappointed when the reductions included in the Act did not meet their extreme expectations and it was this disappointment and not lack of public participation is what precipitated these proceedings. In the applicants' view, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It was therefore submitted that the proper proceedings through which the Applicant should have challenged the rates in the Act is through a constitutional petition where the courts have leeway to consider merits of the law challenged vis-à-vis rights under the Constitution and that Article 23 of the Constitution, provides for an order of Judicial Review as an appropriate relief that may be granted in the enforcement of the Bill of Rights. Clearly, as the Applicant had the option to bring his application under Article 22 and 23 of that Constitution, but opted for Judicial Review proceedings under Order 53 of the ***Civil Procedure Rules,*** the Court was urged not consider what is effectively an application for enforcement of the bill of rights under the Constitution.

20. According to the Respondent, the jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order and that Article 159 cannot be a basis upon which the Applicant justifies the procedural impropriety. First, pleadings are a tenet of substantive justice, as they give fair notice to the other party and the whole object of pleadings is to bring the parties to an issue, and

the meaning of the rules to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. To the Respondent, the whole meaning of the system is to narrow the parties to define issues for determination. In its view, the jurisdiction of the High Court in judicial review and in a petition for enforcement of the Bill of rights is invoked by the procedure a party pursues. In judicial review the special jurisdiction is invoked under Order 53 of the ***Civil Procedure Rules*** while the jurisdiction of the court to enforce fundament rights is invoked under Articles 23 & 258 of the Constitution. It was therefore submitted that the applicants invoked the jurisdiction of the High Court under Order 53 hence it not open for the Court to convert and alter the proceedings by considering the merits of the legislation.

21. In the Respondent's the legislation itself and its contents cannot be classified as a decision to be challenged in judicial review.

22. On the issue whether the Respondent was unlawfully demanding fees from Kiambu residents under the guise of the nullified ***Kiambu Finance Act, 2013*** that was later christened ***Kiambu Finance Act, 2014*** which was itself re-enacted as ***Kiambu Finance Act, 2015*** without following the orders of the Court in Petition 532 of 2013, it was submitted that the correct position was that the Respondent was/is demanding fees from Kiambu residents under the ***Kiambu Finance Act, 2015***. In its view, it was clear from the ex-parte Applicant's pleadings that the ***Kiambu Finance Act 2015*** was being unexplainably lumped together with the two previous Acts, yet the ***Kiambu Finance Act 2015*** was a distinct law whose enactment should be judged on its own merits and not through guilt by simple association. The Respondent explained that Kiambu County enacts the Finance Act in every financial year to provide the legal and statutory basis of levying of charges and fees for services which the county provides to its residents. The Act is enacted pursuant to the provisions of Article 209(4) of the Constitution provides that the national and county governments may impose charges for the services they provide. It is necessary to enact a legal framework every year to comply 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. According to it, the ***Kiambu County Finance Act 2013***, the ***Kiambu County Finance Act 2014*** and ***Kiambu County Finance Act 2015*** are totally unrelated as each Act lapses at the end of the respective financial year and cannot be used to levy taxes in the subsequent year. According to it, the ***Kiambu Finance Act 2015*** is not a mere regurgitation of the ***Kiambu Finance Act 2013*** or the ***Kiambu Finance Act 2014*** as erroneously claimed by the ex-parte Applicants.

23. The Respondent added that similarity in the structure of the two Acts vis-à-vis Schedules does not render the ***Kiambu Finance Act 2015*** a carbon copy of the ***Kiambu Finance Act 2014***. It expounded that the content differs especially in Part VI which denotes the rates paid by members of the *ex-parte* Applicant who reside in county government houses. However, the maintenance of a similar structure in successive legislation should not be mistaken for regurgitation. Similar practice abounds at the national level and that of importance is the rates charged.

24. With respect to the allegation that the residents of Kiambu were informed of the existence of ***Kiambu Finance Act, 2015*** on 1st December, 2015 and that the same would be operational on 9th December, 2015, the Respondent submitted that the ex-parte Applicants intentionally misguided this Court through material non-disclosure in order to obtain the stay granted. It reiterated the contents of the replying affidavit and concluded that a party who approaches the Court seeking *ex-parte* orders is under a strict obligation of material disclosure and that Courts rely on Advocates, as officers of court, to make full and material disclosure of all the relevant facts in order for it to achieve justice for all parties, especially so in the *ex-parte* stage.

25. According to the Respondent, the issues raised by the *ex-parte* Applicants in this Application are the same ones pending in Petition 603 of 2014 as consolidated to wit;

a. Whether ***Kiambu Finance Act 2014*** is similar to ***Kiambu Finance Act 2013***.

b. Whether the County Government of Kiambu conducted public participation in the process of enacting ***Kiambu Finance Act 2014.***

c. Whether the judgement in petition 532 of 2013 declaring ***Kiambu Finance Act, 2013*** unconstitutional has a bearing on the constitutionality of ***Kiambu County Finance Act, 2014***.

26. The Respondent therefore contended that it was improper for the *ex-parte* Applicant to regurgitate these issues in this Application knowing very well the judgement on the same issues was pending in Petition 603 of 2014. In any case, it was submitted, the above issues are superfluous to this Application as the ***Kiambu Finance Act 2015*** is a distinct law whose process of enactment should be judged independently and not by mere association.

27. In conclusion the Respondent contended that the enactment of the ***Kiambu County Finance Act 2015*** was undertaken in an environment of intense public consultation and participation hence the process cannot be factually, legally and constitutionally faulted, and it was duly guided by the best practices in community engagement and dialogue. It reiterated that pursuant to the provisions of the ***Kiambu Finance Act 2015,*** the County Government of Kiambu is expected to collect over Kshs. 3 Billion shillings principally from rates and other levies. This collection supplements the annual equitable share received from the National Treasury. It will significantly enable the County Government to execute functions allocated to it in Schedule 4 of the Constitution. Quashing the Act it was submitted would hamstrung the provisions of services and the revenue collection in the County and affect the provisions of government services to the people yet there were no reasons to warrant the Certiorari at all. In its view, it was in the public interest that the ***Kiambu Finance Act 2015*** is sustained.

28. Since in its view there was no merit in this Application the Respondent urged the Court to hold that:

a. There was sufficient public participation in the process leading to the enactment of the ***Kiambu County Finance Act 2015***.

b. The ***Kiambu Finance Act 2015*** is a distinct law whose enactment process should be judged on its own merits and not through guilt by simple association.

c. The ***Kiambu County Finance Act 2015*** should continue being operationalised, implemented and executed.

29. Consequently the Respondent sought orders for the dismissal of this application with costs.

Determinations

30. I have considered the issues raised before me in this application. 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.

31. 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.

32. 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.

33. The Respondent contended that taking into account the prayers sought herein which relate to alleged violation of the Constitution, the applicants ought to have moved the Court by way of a Constitutional

Petition as opposed to judicial review application. With due respect, this submission cannot be sustained in the current constitutional dispensation. This Court is aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in **R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815**, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

> **"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

34. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3 I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

35. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

> **"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."**

36. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that:

"… like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century…"

37. Article 259 of the Constitution of Kenya, 2010, places a constitutional obligation on courts of law to develop the law so as to give effect to its objects, principles, values and purposes. This position was appreciated in the South African case of **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99,** with respect to the provisions of the Constitution of that Country which bears similarities to our own Constitution. In that case, the Constitutional Court of South Africa (**Chaskalson, P**) expressed itself as follows:

"Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution…Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

38. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

39. It is therefore clear that judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution and the conventional grounds for judicial review take a secondary role after the constitutional benchmarks. I must however hasten to draw attention

of legal practitioners and litigants to the decision of the South African Constitutional Court, in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health** (supra) that:

> **"The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law…Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."**

40. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the ***Law Reform Act*** and Order 53 of the ***Civil Procedure Rules*** have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the ***Civil Procedure Rules*** should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent. It is however incorrect to contend that the Court in a judicial review application cannot apply the constitutional benchmarks in order to award an otherwise deserved relief.

41. One needs to recall the holding in **O'Reilly vs. Mackman [1982] 3 WLR 604, 623** where **Lord Denning** expressed himself as follows:

> **"Just as the pick and shovel is nolonger suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 30 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 30 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by**

interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty."

42. In our case, it is my considered view that this Machinery was achieved by the promulgation of the current Constitution under which Article 23(3) of the provides:

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

43. The current Constitution provides in Article 47 as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

44. It is therefore clear that the right to fair administrative action is nolonger just a judicial review issue but a Constitutional issue as well. As was appreciated in **Re Bivac International SA (Bureau Veritas)** (supra) it is my view that it is nolonger possible to create clear distinction between the grounds upon which judicial review remedies can be granted from those on which remedies in respect of violation of the and Constitution can be granted. Whereas the remedies in judicial review are limited and restricted, the grounds cut across both. In my view, this was the basis upon which it was held by **Ringera, J** (as he then was) in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393** that mandamus is an appropriate remedy to compel the performance of a constitutional duty. If that position is correct then I do not see any reason why violation or threatened violation of the Constitution cannot be a ground for issuing judicial review orders.

45. It was contended by the Respondent that a legislation is not a decision which is capable of being the subject of judicial review proceedings. What amounts to "a decision" for the purposes of judicial review is described in ***Public Administration, A Journal of The Royal Institute of Public Administration,*** by **PH Levin,** at page 25 where it is stated that a decision is a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. Going by that description I do not see why an enactment of a legal instrument cannot be termed as a decision for the purposes of its amenability to review by the Court in the exercise of its supervisory jurisdiction.

46. In this case, the applicants contend that there was no public participation by the Respondent before it enacted the ***Kiambu County Finance Act, 2015***. Here I must say that public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by ***Black's Law Dictionary*** 9th Edn. at page 358 as "*the act of asking the advice or opinion of someone*", "participation" on the other hand is defined at page 1229 thereof as "*the act of taking part in something, such as partnership…*" Therefore public participation is not a mere cosmetic venture or a public relations exercise. 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."**

47. As I held in ***Gakuru*** (supra):

> **"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that."**

48. This issue calls into question 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."

49. 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."**

50. 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.

51. 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.

52. The Respondent has however adduced evidence showing that not only was the Bill leading to the said Act widely advertised but that the applicants themselves participated by giving their views thereon. Whereas the views of the applicants may not have been swallowed hook, line and sinker, that does not necessarily mean that there was no public participation. However the caution expressed 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)** must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:

> **"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."**

53. 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."

54. 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 **Doctor's 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."

55. This issues 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…"

56. 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…"

57. 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."**

58. 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.**

59. In this case, there is no evidence that the residents of Kiambu County were never afforded an opportunity of being heard on the Bill before it was enacted. Contrary to the allegation made by the applicants, the process of enactment of the impugned Act commenced in June, 2015 and the applicants were not only afforded an opportunity of being heard but did actually present their views on the Bill. Their contentions that the Bill was published in December was clearly untrue and was meant to mislead this Court into granting undeserved orders. I join myself in the lamentations of **Madan, J** (as he then was) in **N vs. N [1991] KLR 685** when he expressed himself in the following terms:

> **"I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."**

60. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief*. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment*. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding**

> **that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."** [Emphasis added].

61. Having considered the conduct of the applicants herein, it is my view that they do not deserve the orders sought in this application.

62. The applicants also raised the issue in their submissions that the ***Kiambu County Finance Act, 2015*** was not gazetted. That was not one of the grounds pleaded in the Statement of Facts filed herein. Order 53 rule 4(1) of the ***Civil Procedure Rules*** provides that:

> ***no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

63. This Court is therefore barred from relying on that ground which was raised for the first time in the submissions to grant the orders sought herein.

Order

64. In the result, the Notice of Motion dated 14th December, 2015 fails and is dismissed with costs to the Respondent.

65. Orders accordingly.

Dated at Nairobi this 16th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Prof. Wangai for the Applicant

Mr Ateka for Mr Wanyama for the Respondent

Cc Mutisya