



**THE REPUBLIC OF KENYA**

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

**PETITION NO 2 OF 2016.**

**IN THE MATTER OF PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10 OF THE  
CONSTITUTION**

**AND**

**IN THE MATTER OF THE RIGHT TO PUBLIC PARTICIPATION AND PARTICIPATORY  
GOVERNANCE IN MAKING OF LAWS**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT AND RELATED LAWS**

**AND**

**IN THE MATTER OF THE OBJECTS OF DEVOLUTION AND DEVOLVED GOVERNMENTS  
UNDER CHAPTER ELEVEN OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLE 196 AND RELATED LEGISLATIONS BY THE COUNTY  
GOVERNMENT OF MACHAKOS**

**AND**

**IN THE MATTER OF THE FINANCE ACT, 2015 ENACTED BY THE COUNTY ASSEMBLY  
OF MACHAKOS TO OPERATIONALISE THE FINANCIAL OBLIGATIONS OF THE  
COUNTY**

**AND**

**IN THE MATTER OF ARTICLES 19,20,21,22 AND 23 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE SOVEREIGNTY OF THE PEOPLE UNDER BETWEEN**

**DRICON TRANSPORTERS SAVINGS**

**AND CREDIT CO-OPERATIVE SOCIETY LIMITED.....APPLICANT**

**VERSUS**

**JUDGMENT**

**Introduction**

The Petitioner is a registered society under the Cooperative Societies Act, Cap 490 of the Laws of Kenya. The 1<sup>st</sup> Respondent is the devolved government established under the Constitution charged with overseeing the affairs of Machakos County. The 2<sup>nd</sup> Respondent is the legislative organ of the 1<sup>st</sup> Respondent as mandated under the Constitution.

The Petitioner filed a petition dated 3<sup>rd</sup> February 2016, wherein it contended that it is a transport company charged with ferrying of quarry and sand material to and from Machakos County. Further, that the Respondents have enacted the Machakos County Finance Act 2015 which legislation has led to the increment in fees, charges and or levies imposed in the County. It was stated that the legislation provides for increment in the charges or fees levied for sand harvesting and quarrying, all of which form the core economic venture carried out by the Petitioner, therefore the increment will cause economic hardship on it and higher financial obligations on the citizens.

The Petitioner also contended that in effecting the increment, the Respondents were jointly and severally obligated under Article 10 and 196 of the Constitution as read together with section 117 of the County Governments Act to ensure an adequate public participation process where citizens are familiar, informed or educated about the intended legislative business.

The Petitioner is seeking the following reliefs in the Petition:

1. A declaration to be issued to the effect that a devolved government is obligated under Articles 10 and 96 of the Constitution as read together with Section 117 of the County Government Act to initiate and conduct adequate citizen participation prior to enactment of any legislation.
2. A declaration to be issued to the effect that the Respondents jointly and severally in enacting the Finance Act, 2015 failed to undertake extensive, adequate public and citizen participation with the Petitioner on matters relating to sand harvesting and quarry services consequently rendering the fees, levies and or charges contained in the enacted legislation void and contrary to Articles 10 and 196 of the Constitution as read together with Section 117 of the County Governments Act.
3. A declaration to be issued to the effect that the Respondents jointly and severally in enacting the Finance Act, 2015 introducing levies, charges and or fees for quarry and sand harvesting services without adequate public participation and awareness rendered the provisions arising therefrom void.
4. A prohibition to be issued barring the Respondents jointly and severally through their officers, agents, servants, assigns, employees or any such persons acting under their control, direction and supervision from collecting any charges, levies, fees or payments due as arising from any sand harvesting, quarrying and related activities carried out by the petitioner or its members based on the Finance Act, 2015.
5. An order of mandamus compelling the Respondents jointly and severally to resubmit the proposals on any intended variance of fees, charges, payments and or levies arising from sand harvesting and quarrying services within Machakos County and consequently ensure due process is followed prior to any change in taxation or financial burden of the citizenry.

**The Petitioner's Case**

The Petitioner's case is set out in the said Petition and the supporting affidavit sworn on 3<sup>rd</sup> February 2016 by Bernard Githaka Kamau, its chairman. The Petitioner contends that the Respondents enacted the Machakos County Finance Act 2015 which legislation has led to increment in the fees, charges and or levies imposed by the County for sand harvesting and quarrying, all of which form a core economic venture carried out by them, and consequently the increment will occasion economic hardship.

The Petitioner further contends that Article 10 of the Constitution obligated that the national values and principles of governance, including public participation, are binding on all, including the Respondents. Further, that while the Respondents have discretion to increase any levies, charges and fees applicable to any services rendered by the County Government, the same should be undertaken fairly as provided by Article 201 of the Constitution.

It is the Petitioner's argument that as stakeholders who play a pivotal economic role in the affairs of the Respondents, their adequate public participation prior to enactment of the impugned legislation was mandatory and requisite. The Petitioner also averred that as business people, they are obligated to make certain payments to the 1<sup>st</sup> Respondent in fulfilment of the Constitutional mandate of paying for services rendered to them, and have been doing so under the Finance Act 2014. However, that the increment by the Respondents in the Finance Act, 2015 is substantial and has shot up by either a 100% margin or even more in other instances, and has exposed members to serious hardship financially. The Petitioners annexed copies of receipts issued under the two Acts as exhibits.

The Petitioner asserts that the Respondents did not consult or even involve its members when dealing with matters relating to affairs within their purview, primarily quarrying and sand harvesting services, prior to enactment of the impugned legislation. Consequently, that the Respondents contravened the principles of good governance, acted irrationally and unreasonably, violated the principles of public finance on equal and fair sharing of the taxation burden, thus rendering the legislation void. Further, as its members derive an economic benefit arising from the quarry and sand harvesting services, they stand to be prejudiced substantially if the impugned legislation is not annulled.

### **The Respondents' Cases**

The 1<sup>st</sup> Respondent's response was in a replying affidavit sworn on 18<sup>th</sup> February 2016 by James M. Kathili, its Chief Legal Officer. It is averred therein that the 1<sup>st</sup> Respondent acting pursuant to its constitutional and statutory powers enacted the Machakos County Finance Act, 2015, to regulate and govern the taxes, duties, levies and charges. Further, that the County Executive Committee Member for Finance and Revenue Administration, Elizabeth M. Nzyoka, presented a budget statement on 25<sup>th</sup> June, 2015 to kick start the process of revenue raising through the Machakos Finance Act, 2015. The said budget statement was annexed as an exhibit.

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

It was averred that the Machakos County Sand Harvesting Act 2014 imposes licence fees on the Petitioner and its members based on market rates of sand. It was also contended by the 1<sup>st</sup> Respondent that the Petitioners have not demonstrated to this court that they have a *prima facie* case with probability of success, or that they would suffer irreparable injury that cannot be compensated by damages.

Further, that the balance of convenience tilts the scales in favour of the Respondents who would suffer a great prejudice because of the high revenue it may lose, and the great inconvenience it may incur considering its anticipated revenue generation and budget implementation were the suspension to be granted. It was stated that the Respondents are capable of compensating the Petitioner in the event that this Court finds in favour of the Petitioner.

The 2<sup>nd</sup> Respondent on its part opposed the application in a replying affidavit sworn on 20<sup>th</sup> June 2016 By Hon. Bernard Muteti Mungata, the Speaker of the County Assembly of Machakos, who stated that the deponent of the Petitioner's Supporting Affidavit has not stated whether he has authority from the Petitioner or from its unspecified members to bring the application. Further, that the Petitioner's pleadings do not disclose adequate particulars in support of their alleged cause of action relating to the alleged violations of the Constitution, to enable this Court grant the reliefs sought herein.

The 2<sup>nd</sup> Respondent also claimed that the Petitioner's pleadings offend the doctrine of separation of powers, as the same invite this Court to direct County Assemblies on their procedures and how they ought to run their affairs, and seek to impede the functions of Constitutional office holders.

According to the 2<sup>nd</sup> Respondent, it is incorrect for the Petitioner to state that the enactment of the Machakos County Finance Act 2015 was done without adequate participatory public participation. It was further stated that on the 16<sup>th</sup> September, 2015 the Clerk of the County Assembly of Machakos, caused an advertisement to be placed in the *Standard* newspaper, and that in the said advertisement, all stakeholders were invited to several forums to present their views and written memoranda. Copies of the excerpt from the said newspaper containing the advertisement and the correspondence relating to the same were annexed by the 2<sup>nd</sup> Respondent.

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

The 2<sup>nd</sup> Respondent also decried lack of evidence that the taxes, charges and or levies contained in the said Act are prejudicial to national economic policies or activities or that they were either unfair or unreasonable in the circumstances of the County of Machakos. The 2<sup>nd</sup> Respondent averred that the raise of the charges and taxes as contained in the said Act was reasonable and necessary in order to continue offering services to the people. Further, that the paralysation of the operations of the entire Machakos County is highly probable given that the County relies on the taxes, charges and other fees paid for sustainability of its budget in order to realize the full effect and objectives of devolution.

### **The Issues and Determination**

The Court directed that the applications by the Petitioner be canvassed by way of written submissions and directions were given in this regard. The 1<sup>st</sup> Respondents learned counsel, B.M Musau Advocates, filed written submissions on the Petition dated 19<sup>th</sup> July 2016, while the learned counsel for the 2<sup>nd</sup> Respondent D.C Kamende Advocates also filed submissions of the same date. The Petitioner's learned counsel, Mbiyu Kamau and Co. Advocates failed to comply with the timelines set by the Court as to filing of submissions and furthermore did not file any submissions, and judgement was reserved on the basis of the pleadings and submissions filed.

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

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

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

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

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

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

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

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

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

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

The import of these provisions is that under the Constitution a person acting on behalf of the grievant may file a claim. The Petitioner is a Co-operative society and falls in the category of an association acting in the interests of its members and is therefore properly before this Court.

The substantive issues that remain for determination in the Petition are therefore three. The first issue is whether there was sufficient public participation prior to the enactment of the Machakos County Finance Act, 2015; secondly, whether the Machakos County Finance Act, 2015 is constitutional; and lastly, whether the Petitioners are entitled to the orders sought.

### ***Whether there was public participation in the enactment of the Machakos County Finance Act***

On the part of the 1<sup>st</sup> Respondent, it was urged that public participation is the duty of the members of a society to give their views and comments on matters of legislation which affect their day to day life, and is mandatory under section 115 of the County Governments Act. Further, that public participation is required to be facilitated through the mechanisms provided for in Part VII of the County Governments Act, 2012; and the provision to the public of clear and unambiguous information on any matter under consideration in the planning process.

According to the 1<sup>st</sup> Respondent it took positive steps to ensure that the public had opportunity to exercise their rights to participation in the enactment of the Machakos County Finance Act, 2015 by causing an advertisement to be put on the *Sunday Nation* on 26th July, 2015 and *Taifa Leo* publication of 26th

July, 2015 in Swahili Language inviting the members of public, traders and associations to attend forums in all the sub-counties to give their views on the Finance Bill, 2015/2016 on the date specified, which was 30th July, 2015.

Further, that the public participation also includes the indirect participation through the democratically elected representatives, and that the Constitution of Kenya, 2010 at Article 1 vests the sovereign power on the people of Kenya and further provides that the sovereign power may be exercised directly or through their democratically elected representatives.

Reliance was placed in this regard on the decisions 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), Robert N. Gakuru & Others v Governor Kiambu County & 3 others, [2014] eKLR, Minister for Health & Another vs New Clicks South Africa (PTY) (2006) (2) SA 311, John Kinyua Munyaka & 11 Others vs County Government of Kiambu & 3 Others [2014] eKLR and Association of Gaming Operators -Kenya & 41 Others vs the Attorney General & 4 Others, [2014] eKLR, and Glenister vs President of the Republic of South Africa & Others (CCT 48/ 10) [2011] ZACC 6.**

The Court was urged to find that the County Government of Machakos discharged her duty on public participation as far as providing for public participation and facilitating public participation is concerned. The public was given a reasonable opportunity to participate. Further, the participation took place before the enactment of the Finance Act and the Petitioners slept on their rights by failing to attend the public fora.

Lastly, that the fact that the views of the public were not incorporated in the Act does not mean that there was no public participation, and that Court was also urged to dismiss the Petition on the ground that the Petitioners failed to particularize the details and manner of infringement of their constitutional rights. The decisions in **Anarita Karimi Nieru vs Attorney General [1979] KLR 154 and Matiba vs. Attorney General, High Court Misc. Applic. No. 666 of 1990** were relied on in this regard

The 2<sup>nd</sup> Respondent's learned counsel submitted that the Petition as presented did not provide proof of infringement of any of the Petitioner's rights to public participation under Article 196(1)(a)(b) of the Constitution, 2010. Further, that sections 87, 91 and 115 of the County Government's Act, No. 17 of 2012 only required facilitation of reasonable public participation, which the 2<sup>nd</sup> Respondent had complied with, and that it is not the role of the Court to determine or enumerate the extent of public participation Reference was made to the decision in **Nairobi Metropolitan PSV Saccos Union Ltd vs County of Nairobi Government & 3 Others (2013) eKLR** in this regard. Reliance was also placed on the decisions in **The Institute Of Social Accountability & Anor vs The National Assembly & 3 Others [2015] e KLR** and **Diani Business Welfare Association And Others vs The County Government Of Kwale [2015] e KLR**

It is noteworthy from the arguments made, that it is not disputed by the parties that the Constitution and other applicable laws place a high premium on public participation in the process of enacting legislation by the Machakos County Government. This is demonstrated by Articles 2(4), 10, 174, 196 (1)(b) and 201 of the Constitution, as well as sections 87, 88, and 115 of the County Government Act, section 175 of the Public Finance Management Act and the Machakos County Public Participation Act of 2014.

Article 196(1) of the Constitution has specific provisions as regards public participation in the law making processes of the county assemblies as follows:

**“(1) A county assembly shall—**

**(a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and**

**(b) facilitate public participation and involvement in the legislative and other business of the assembly and its**

committees.

**(2) A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.”**

Public participation is in addition one of the national values and principles of governance under Article 10 of the Constitution, and is also specifically provided for as one of the principles in public finance under Article 201 of the Constitution.

The issue that is in dispute is there were any efforts made by the Respondents at public participation, and if so whether they met the threshold set by the Constitution. This threshold can only be set within the context of the elements of effective public participation, which depends on dedicated education, information and outreach strategies aimed at providing the knowledge and means to access institutions of governance including legislative assemblies. The purpose of such strategies is to bring those who exist on the margins and periphery of society into the mainstream political process, creating a system of governance that is inclusive, responsive and transparent. The goal is to consolidate a form of democracy that engages with and recognises the interests of all.

The test set by the South Africa Constitutional Court in this regard 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)** is whether the legislature acted reasonably in discharging the duty to facilitate public involvement. It was held that the following factors are to be taken into account in determining the required reasonableness: (i) the nature of the legislation concerned; (ii) the importance of the legislation; (iii) intensity of the impact on the public, and other relevant factors which will depend on the circumstances of each case. Furthermore, that at least two elements are encompassed by the duty to facilitate public involvement; first, to provide meaningful opportunities for public participation in the law-making process, and secondly, to make sure that people have the ability to take advantage of the opportunities provided.

Sachs J, concurring with the majority judgment, emphasised the “special meaning” of public participation within a democracy, and held the effect of public participation should be that:

**“All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws”.**

It is with the above requirements and threshold in mind that the County Government Act and the Machakos County Public Participation Act of 2014 set out elaborate structures for public participation. Section 87 of the County Government Act provides for the principles governing citizen participation in county governments as follows in this regard.

**“Citizen participation in county governments shall be based upon the following principles—**

**(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;**

**(b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the**

**establishment of specific performance standards;**

**(c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;**

**(d) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;**

**(e) reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;**

**(f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and**

**(g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.**

The Machakos County Public Participation Act of 2014 came into effect on 29<sup>th</sup> December 2014, and defines the word "public", when used in relation to public participation to mean the residents of the County, rate payers, resident civic organisation or non-governmental private sector or labour organisations with an interest in the governance of the county, and a non -resident person who because of their temporary presence in a the County consume the services or make use of facilities provided by the government. Furthermore, public participation is defined as "an open democratic and accountable process of engaging a representative sector of the public in formulating policies and developing laws that affect them."

The guiding principles for public participation in the Machakos County government are further elaborated under section 4 of the Machakos County Public Participation Act of 2014 as follows:

**(a) the communities, organizations and citizens affected by any policy decision of the government shall have the right to be consulted and shall be accorded an opportunity participate in the process of formulating policy;**

**(b) availing participants access to the information necessary to ensure meaningful participation;**

**and**

**(c) feedback to the public on how their input is included in the policy decision.**

In addition, section 6 of the said Act provides that public participation shall be undertaken by way of public consultative meetings to be conducted in accordance with the following requirements set out in the First Schedule to the Act:

**1. Be based on a realistic timeframe for the consultation, allowing reasonable period for preparation and submission of views.**

**2. Be clear as to the type of the public, community or profession to be consulted, the issues or matter for consultation and for what specific purpose.**

**3. Ensure that the consultation document is as simple and concise as possible, providing the summary of the issues or matter for consultation and clearly setting out the questions to be**

address.

4. **Publish and distribute the documents as widely as possible, including but not limited to providing hard copies, television advertisements, websites, community radio announcements and traditional media.**
5. **Ensure that all responses are carefully and open-mindedly analysed and the results made widely available to the public, including an account of the views expressed and the reasons for the decisions taken.**
6. **Disclose all information relevant for the public to understand and evaluate the decision.**
7. **Ensure that stakeholders have fair and equal access to the public participation process and their opportunity to influence decisions.**
8. **Ensure that all commitments made to the public, including those by the decision-maker, are made in good faith.**
9. **Undertake and encourage actions that build trust and credibility for the process among all the participants.**
10. **Collect and collate all data presented during public consultations.**
11. **Ensure that there is no misrepresentation of work performed or that was performed under the relevant body's direction.**
12. **Examine all of its relationships or actions, which could be legitimately interpreted as a conflict of interest by clients, officials, the public or peers.**
13. **Should not engage in conduct involving dishonesty, fraud, deceit, misrepresentation or discrimination.**
14. **Should not accept fees wholly or partially contingent on the client's desired result where that desired result conflicts with its professional judgment.**
15. **A question before the meeting shall be decided with a supporting vote of at least two thirds of the members present.**
16. **The requirement to keep minutes of proceedings of all public consultation meetings and decisions taken.**

Given these detailed requirements set by the laws that have been enacted to give effect to the constitutional requirement of public participation, I am in agreement with the decision by Odunga J. in **Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others (2014) e KLR**, wherein the learned Judge while relying on the South African Constitutional Court's decision in **Doctors for Life International vs. Speaker of the National Assembly and Others ,(CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, explored in great detail what is required for effective public participation as follows:

75. "In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the

legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forums as possible such as churches, mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that. Dealing with the issue I wish to reiterate what was held in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) to the effect that:

**“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.”**

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

**“Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens....[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few.....It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that**

**the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.....In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.”**

I have perused the replying affidavit filed by the 1<sup>st</sup> Respondent and have noted that it did not depone to, or attach the advertisement in the *Sunday Nation* and *Taifa Leo* newspapers on 26<sup>th</sup> July 2015 referred to in their submissions. I have also perused the notice of public hearings on budget estimates attached as annexure “JMK 2” to the 1<sup>st</sup> Respondent’s replying affidavit. The said notice is not dated, and there is no indication as to whether it was published or communicated to members of the public, and if so, by what means. There is thus no evidence of any efforts as to public participation provided on their part, and their actions fall well below the constitutional threshold for public participation, as well as the statutory requirements as regards public participation set out in the foregoing.

As regards, the advertisement that was placed in the *Standard* newspaper of 16<sup>th</sup> September 2015 by the 2<sup>nd</sup> Respondent that was attached as annexure “BMM-A” to its replying affidavit, it was stated therein that consultations on the Finance Bill for the 2015/2016 were to take place in various venues of the sub-counties on 21<sup>st</sup> September 2016. No details of the Finance Bill for the 2015/2016 were provided, or how the same could be accessed. The notice given to the public by the advertisements of 5 days was in my view inadequate, given that the members of the public were then required to locate and source the Bill, and study the same so as to be able to participate effectively. The actions taken by the Respondents in my view did not meet the constitutional threshold for public participation, as well as the statutory requirements as regards public participation set out in the foregoing.

The Respondents as a result also infringed on the Petitioner’s right to participation, as the Petitioner has shown they were likely to be affected by the new rates and levies set by the Finance Bill being businesses situated in Machakos County.

***Whether the Machakos County Finance Act, 2015 is constitutional;***

The 1<sup>st</sup> Respondent submitted that it is a body corporate established under Article 176 (1) of the Constitution of Kenya, 2010 (“the Constitution”) as read together with Section 6 ( I) of the County Governments Act, 2012, with various functions as set out in the Constitution and the County Government Act. 2012. Further, that the 2<sup>nd</sup> Respondent is bestowed with authority to legislate on matters related and incidental to the functions of the 1<sup>st</sup> Respondent under Article 185 (2) of the Constitution. It was also argued that the 1<sup>st</sup> Respondent has the power under Article 186 (1) as read with section 7 (b) of the 4<sup>th</sup> Schedule of the Constitution to regulate trade through issuance of trade licences. In addition, that the 1<sup>st</sup> Respondent has the power to raise taxes as provided under Article 209 (3) of the Constitution, and to review revenue raising measures annually for each fiscal year through the budgetary process as provided for under section 132 (1) of the Public Financial Management Act.

It was contended that pursuant to the foregoing raft of powers that the 2<sup>nd</sup> Respondent enacted the Machakos County Finance Act, 2015 to regulate and govern the taxes, duties, levies and charges. Further, that the Preamble to the Machakos County Finance Act, 2015 states that it is a legislation to govern the taxes, duties, levies, charges, fees charged within Machakos County, and there is thus no illegality that can be deduced from the Preamble to the Act. Reliance was placed on the decision in **Olum & Another vs The Attorney General, (2000) 2 EA 508** that in determining the constitutionality of statutes, the court had to consider the purpose and effect of the impugned statutes and the sections thereof, and if the purpose was not to infringe a right guaranteed by the Constitution, the court is to go further to investigate the effect of the implementation. It is only when the purpose or the effect infringes a right guaranteed in the Constitution, that the statute or section in question would be declared unconstitutional.

According to the 1<sup>st</sup> Respondent, the purpose of the Machakos County Finance Act, 2015 is to govern the mode of collection of revenue in the form of taxes, levies, rates and charges within Machakos County. Further, that the effect of the implementation of the Machakos County Finance Act, 2015 is to ensure that the County Government has enough revenue to provide services to the citizens in a smooth manner. In addition, that the effect of the implementation of the Machakos County Finance Act, 2015 would be manifested in better roads being constructed, better hospitals, availability of scarce resources for instance, water to the residents of Machakos County, better schools and generally the attainment of socio-economic rights of the people of Machakos County.

It was submitted that it is therefore clear that the purpose and the implementation of the Machakos County Finance Act, 2015 does not give rise to infringement of any other rights guaranteed by the Constitution. Reliance was placed on the decision in **Queen vs Big M Drug Mart Ltd (1985) 1 SCR 295** and **John Kinyua Munyaka & 11 others vs County Government of Kiambu & 3 others [2014]eKLR** in this respect.

The 1<sup>st</sup> Respondent also relied on the doctrine of regularity in government actions which dictates that Acts of the Legislature are presumed to be regular, and the observations made in **Dickson Mwenda Kithinii vs Gatarau Peter Munya & 2 others [2013] eKLR**, to this effect. It was its submission that the Machakos County Finance Act, 2015 is regular and constitutional and should be construed as such.

Lastly, the 1<sup>st</sup> Respondent submitted that the Machakos County Finance Act 2015 had already come into force, and the members of the public have paid fees under the Act, and that an order of invalidity would be disruptive and would leave a vacuum. It was urged that this Court invokes its powers under Article 23(3) of the Constitution to grant an appropriate remedy including the suspension of the invalidity of the Act within such period as would enable the 2<sup>nd</sup> Respondent to remedy the defect. The decision in **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR** by Odunga J. in which the Kiambu Finance Act, 2013 was nullified was distinguished on the ground that no interests had been acquired under the Act.

The 2<sup>nd</sup> Respondent on its part submitted that even if the court was to find that there was breach of any provisions of the law by the 2<sup>nd</sup> Respondent, which was denied, the same would not warrant a draconian relief of declaring the Finance Act, 2015 unconstitutional and or null and void.

The relevant principles that guide this Court in making a determination on this issue were set out in **Institute of Social Accountability & another vs National Assembly & 4 others [2015] eKLR** as follows:

**“56. First, this Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.**

**57. Second, there is the general presumption that every Act of Parliament is constitutional and**

the burden of proof lies on any person who alleges otherwise (see *Ndyanabo v Attorney General of Tanzania* [2001] EA 495). We therefore reiterate that this Court will start by assuming that the *CDF Act 2013* is constitutional and valid unless the contrary is established by the petitioners.

58. Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others*, Nairobi Petition No. 3 of 2011 [2011]eKLR, *Samuel G. Momanyi v Attorney General and Another* (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 enunciated this principle as follows;

*Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.*

59. Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in *Re The Matter of the Interim Independent Electoral Commission Constitutional Application* (supra) at *para. 51* adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

*The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and ..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.*

60. Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997* (1997 UGCC 3)).”

In the present petition, it is mainly the process of legislating, and not the substance of the Machakos Finance Act of 2015 that is being challenged, and it is the legal position that if the process leading to the enactment of an Act is constitutionally flawed, then the resulting legislation is also constitutionally defective. This Court has already discussed the requirements of public participation in light of the principles of democratic and good governance and found that the required constitutional threshold was not met by the Respondents in the enactment of the Machakos County Finance Act 2015.

In addition, Article 196 of the Constitution provides that the county assembly should facilitate public participation and involvement in the legislative and other business of the assembly and its committees. This is therefore a key constitutional procedural requirement in the enactment of legislation, which if not complied with makes any legislation so enacted unconstitutional. To this extent therefore, the effect of the procedure of enactment of the Machakos County Finance Act 2015 is that it did not follow the due process provided by the Constitution, and also thereby infringed on the constitutional rights of the Petitioners to public participation.

***Whether the Petitioner is entitled to the relief sought.***

The 1<sup>st</sup> Respondent argued on this issue that the Petitioner is seeking judicial review orders of prohibition and mandamus which can only be sought in judicial review applications after leave is granted by the

Court, and not in a Petition. Therefore that the orders of Prohibition and Mandamus sought cannot be granted for want of procedure.

Further, that the Petitioner is not deserving of the Orders sought for the reasons that the 1<sup>st</sup> Respondent has demonstrated that the enactment of Machakos County Finance Act, 2015 involved sufficient public participation in the circumstances; it is not mandatory that the views and memoranda of the public have to be incorporated in the Act especially if they contradict Government policy as espoused in the budget statement; the 1<sup>st</sup> Respondent increased fees pursuant to this Act which followed the requisite procedure under the Constitution and the County Governments Act, 2012; the 1<sup>st</sup> Respondent is required under Article 175(b) of the Constitution to have reliable sources of revenue to enable her to govern and deliver services effectively thus the need and justification for increasing fees; and that the Petitioner did not particularize the nature of constitutional rights infringed.

Lastly, that the Machakos County Finance Act, 2015 had already come into force and the members of the public have paid fees under the Act.

The 2<sup>nd</sup> Respondent on its part submitted that the High Court cannot interfere with another arm of government's function, unless a clear cut case is brought on the provisions of the law are being infringed or threatened to be infringed by a body carrying out its independent mandate within the confines of the Constitution. Therefore, that Article 165(6) of the Constitution is not applicable.

I am alive to the relief that can be availed by this Court in a constitutional petition is provided for in Article 23(3) of the Constitution as follows:

**“(3) 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.”**

Orders of judicial review, including those sought by the Petitioner of prohibition and mandamus can therefore be granted by this Court if it is found that a Petitioner's constitutional rights have been denied, infringed or violated. The issue as to whether the Petitioner's rights in the Bill of Rights have been infringed was also raised by the Petitioners. In this respect it is notable that emphasize has been placed on timely access to information for greater and more meaningful public participation, and the right to information is one of the rights provided for in the Bill of Rights in Article 35 of the Constitution.

In addition, the right to public participation is a fundamental human right based on provisions of Article 33 of the Bill of Rights concerning the freedom of expression, which includes a general right to take part in the conduct of public affairs. The infringement of these rights has been demonstrated in the foregoing, in terms of the lack of opportunity and information availed to the Petitioner to exercise its rights in the enactment of the Machakos County Finance Act of 2015. The Petitioner is therefore entitled to the relief sought.

Having found that the orders of judicial review can apply, I am in addition guided by the scope of the

judicial review remedies of *mandamus* and prohibition, as held in the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR in which the said Court held *inter alia* as follows:

**“Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done....”**

I find that in the present petition, the orders of prohibition and *mandamus* may not lie, as the Respondents did attempt to undertake their constitutional duty, but were largely ineffective or incomplete in their attempt. In addition, this Court cannot order them to undertake the duty of facilitating public participation in a particular way, and it is largely left to the Respondents to determine the best way possible to undertake the same in light of their circumstances, means and budgetary calendar.

Likewise, this Court cannot prohibit the Respondents from collecting any charges, levies, fees or payments due or implementing the provisions of the Machakos Finance Act 2015 in its totality, as this would lead to a paralysis of the Respondents' operations, and it is therefore necessary that an alternative and appropriate remedy be provided.

I accordingly order as follows:

1. The Machakos County Finance Act, 2015 as enacted and assented to is hereby declared unconstitutional and against the provisions of Articles 196 and 201 of the Constitution of Kenya, 2010;
2. The Machakos County residents' and Petitioner's right to participation in the process leading to the enactment of the Machakos County Finance Act 2015 and as guaranteed under Article 196 and 201 of the Constitution, their right to information under Article 35 of the Constitution, and right to expression under Article 33 of the Constitution has been violated by the processes leading to the enact the said Act;
3. The levies, rates and fees imposed by law and in force immediately before the enactment of the

Machakos County Finance Act 2015 under the Machakos County Finance Act of 2014 shall continue to apply, and shall continue to be paid by all affected persons pending the enactment of a new Finance Act which shall be in compliance with due process and requirements of public participation as provided by the Constitution of Kenya, the County Government Act and the Machakos County Public Participation Act of 2014.

4. There shall be no order as to costs as this Petition involves a public interest issue.

Orders accordingly.

**Dated, Signed and Delivered at Machakos this 13<sup>th</sup> day of December 2016**

**P. NYAMWEYA**

**JUDGE**