



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 353 OF 2010

**GITHUNGURI DAIRY FARMERS
COOPERATIVE SOCIETY LIMITED.....PLAINTIFF**

VERSUS

THE COUNTY COUNCIL OF KIAMBU.....1ST DEFENDANT

KENYA DAIRY BOARD.....2ND DEFENDANT

JUDGEMENT

Introduction

1. By a Plaint dated 11th November, 2010, the Plaintiff herein, **Githunguri Dairy Farmers Co-op Society Limited**, (hereinafter referred to as “the Society”) sought the following orders:

(a). a declaration that Local Government (Agricultural Produces) Adoptive By-Laws Order, 2009 are unreasonable and offends the principle of proportionality within the meaning of Wednesbury’s Principles, discriminatory, are *ultra vires* Sections 201 and 203 of the Local Government Act and section 82 of the Constitution, null and void.

(b). a declaration the Dairy Industry (Imposition of Cess and Levy) Amendment Regulations, 2010 are unreasonable within the meaning of Wednesbury’s Principles, discriminatory, are *ultra vires* Sections 19(c) of the Dairy Industry Act and Section 82 of the Constitutions and are null and void;

(c). a permanent injunction to restrain the Defendants by themselves, their servants or agents from enforcing the by-laws and regulations referred to in (a) and (b) above.

(d). a permanent injunction to restrain the 1st defendants by themselves, their servants or agents from claiming Kshs 7,654,500/= the by-laws and regulations referred to in (a) and (b) above.

(e). Costs of the suit.

2. On 23rd July, 2014, a consent was recorded between the Plaintiff and the 2nd Defendant in whose effect was to settle the claim by the Plaintiff against the 2nd Defendant. Accordingly what remains and

forms the subject of this judgement is the claim by the Plaintiff against the 1st Defendant.

Plaintiff's Case

3. According to the Plaintiff, at all material times it was paying to Kenya Bureau of Standards (hereinafter "KBS") a levy which was levied by KBS on the Plaintiff's produce. And had since 2006 paid to KBS, a sum of Kshs 2,675,236/=.

4. Section 201 of the repealed **Local Government Act** (hereinafter referred to as "the Act"), however conferred in the 1st Defendant the power to make by-laws inter alia requiring the inhabitants of the locality within which the local authority is situate to pay such taxes such as licence fees and permits and was permitted in consultation with the Minister for Agriculture under section 192A of the Act to impose a tax on agricultural products in its area which included milk and milk products.

5. However before making any by-laws the 1st Defendant was required under section 203(1) of the Act, unless otherwise directed by the Minister to give at least 14 days' notice of the intention to do so and the general purport thereof in one or more local newspapers in the area to which the by-laws were intended to apply. Fourteen days before the making of any by-laws the 1st Defendant was required under section 203(2) of the said Act, to deposit at its offices a copy of the proposed by-laws and supply a copy thereof to any person requiring the same at its own cost. Any person wishing to object to the same was at liberty to do so within 12 days of the notice.

6. It was contended that the said provision embodied the principle of consultation and was mandatory hence any by-laws made in contravention thereon were null and void. To the plaintiff the 1st defendant was obliged to ensure that the by-laws were not partial and unequal in operation as between different classes, or were manifestly unjust or oppressive and involved gratuitous interference with the rights of citizens; or imposed an economic burden on the inhabitants hence denying them a livelihood from their investment; and to have regard to other taxes being levied by other institutions or corporations. To the plaintiff under section 19A of the **Income Tax Act**, Cap 480 Laws of Kenya the Kenya Revenue Authority was such institution authorised to levy taxes on the plaintiff's profit and that the plaintiff had since July, 2009 paid corporation tax in the sum of Kshs 49,407,180/=.

7. It was the plaintiff's case that section 82(2) of the repealed Constitution barred the defendants from passing or making discriminatory by-laws taking into account the fact that Kiambu District is a farming District. However, when in September, 2009, the 1st Defendant made **Local Government (Agricultural Produce) Adoptive By-Laws Order, 2009**, (hereinafter referred to as "the Order") it discriminated against the plaintiff within the meaning of section 82(3) of the former Constitution on the ground of its local connection as a regular income generating farming activity while no similar by-laws were made in respect of tax on pyrethrum, coffee, tea or flower farmers. Further the imposition of the tax on the dairy farmers was not based on any intelligible differentia but rather on their status as farmers who received monthly sales proceeds unlike other comparators.

8. It was contended that section 2 forbids a public authority from acting in an arbitrary or capricious manner in the performance of its public functions; that by-laws which discriminate against one class of farmers by imposing onerous burden on them as opposed to others are arbitrary and capricious; that section 82(2) of the former Constitution imposed a duty on the defendants to ensure that tax burden is equitably distributed amongst citizens; that the same provision required a taxing authority to establish the tax burden being carried by a citizen before imposing a new burden; that the by-laws were unreasonable and contrary to Wednesbury principles; that they same by-laws were oppressive, perverse and irrational; that the plaintiff had legitimate expectation of being consulted before the tax burden was placed on it which expectation was frustrated by failing to give the requisite notices or inviting the plaintiff and its members to give their views before making the by-laws; and that the said by-laws offended section 82(2) of the Constitution, were *ultra vires* the said section and were null and void and of no effect.

9. It was contended that the failure to apply the principle of proportionality in exercising its powers under section 210 of the Local Government Act rendered the by-laws null and void; that unreasonable by-laws within the Wednesbury principles were ultra vires section 210 of the said Act and were null and void; that any by-laws made in contravention of section 203 of the Act were null and void; that discriminatory by-laws contravened section 82(2) of the former Constitution and were null and void.

10. A party from paying a total of Kshs 98,677,086.00 in form of taxes to the various institutions including the 1st Defendant, it was contended that the introduction of the said Order was meant to impose a tax burden on the plaintiff amounting to Kshs 12,879, 631.45 in contraventions of section 82(2) of the former Constitution, sections 201 and 203 of the Act.

11. It was contended that on 21st July, 2010, the 1st Defendant demanded on the strength of the said Order that the Plaintiff pays it the sum of Kshs 7,654,500 being the purported cess due from it a demand which the Plaintiff contends is illegal hence the Plaintiff is not obliged to pay the same or any part thereof.

12. It was on the basis of the foregoing that the Plaintiff instated this suit claiming the orders sought herein.

13. The Plaintiff's case was expounded in the supporting affidavit sworn by **Charles Ndichu Mukora**, its Chairman on 11th November, 2010.

14. In its submissions, the Plaintiff relied on **Professor S. W. Wade** and **C. F. Forsyth** have said this in their 10th Edition of **Administrative Law**, Oxford University Press, 2009 at page 481 where it is stated:

“In administrative law the great merit of the declaration is that it is an efficient remedy against *ultra vires* action by government authorities of all kinds including ministers and servants of the crown and in proper cases even the crown itself. If the court will declare some action, either taken or proposed is unauthorized by the law that concludes the point as between the plaintiff and authority. If then his property is taken, he has his ordinary legal remedies; if an order is made against him he can ignore it with impunity, if he has been dismissed from an office he can insist that he still holds it. All these results flow from the mere fact that the rights of the parties have been declared.”

15. In further support of its case, the Plaintiff relied on the provisions of Order 3 Rule 10 of the former **Civil Procedure Rules** in which it was provided that **“No suit shall be open to objection on the ground that a merely declaratory judgment or other order is sought thereby...”**

16. In the Plaintiff's opinion, its case in summary is that (i) the **Local Government (Agricultural Produces) Adoptive By-Laws Order, 2009** is illegal, null and void because it is discriminatory; unreasonable; breached the rules of natural justice; *ultra vires* and arbitrary; the By-laws are illegal and null and void; the plaintiff has proved on a balance of probabilities that this is the case; (ii) that the imposed cess and processor's levy vide **Local Government (Agricultural Produce Cess) Adoptive By-Laws Order, 2009** and has increased to tax burden of the plaintiff and its members by 100%; their imposition will render dairy farming economically unviable, kill dairy farming, take away the only source of livelihood for the dairy farmers and as a result, the plaintiff will automatically collapse; and (iii) that the total sum claimed by both defendants as at the time of filing this suit is over Kshs. 16 Million.

17. It was submitted that the 1st defendant was a local authority within the meaning of the repealed **Local Government Act** and under Section 201 of the Local Government Act, as read with Section 192A of the **Agriculture Act**, the 1st defendant had powers to make by-laws and in consultation with the Minister for Local Government, impose cess on agricultural product in its area and that milk and milk products are agricultural products within the meaning of the said **Agriculture Act**. Pursuant to

the power donated to it by the said section 201 of the *Local Government Act* and section 192 of *Agriculture Act*, the 1st defendant purported to make the impugned by-Laws under the *Local Government (Agricultural Produce Cess) Adoptive By-Laws Order, 2009* by which time the Plaintiff was paying other taxes to the 1st Defendant. Concerned with the introduction of milk cess by County Councils (like the 1st defendant) when such Councils are not providing any services to the dairy industry, the Plaintiff requested the 1st Defendant to take steps to stop such County Councils from levying cess and the 1st defendant undertook to specifically pursue the matter as it amounted to double cessing.

18. The plaintiffs submitted that judicial review is available to challenge subsidiary legislation which is *ultra vires*. The challenge can be done through application for such orders as *certiorari* or *mandamus* or *prohibition* or through such private law remedies as the declaration. In support of this submission, the Plaintiff relied on **H. R. W. Wade** and **C. F. Forsyth**, *Administrative Law*, 10th Edition and *De Smith's Judicial Review*, 6th Edition, chapter 15 and chapter 14 respectively which described the growth of the declaration and injunction as remedies available when a public authority exceeds his authority. It was the plaintiff's submission that the defendants exceeded their respective authorities in making the subsidiary legislation whose validity is challenged in these proceedings. Citing paragraphs 168 and 185 of Volume 1 of the *Halsbury's Laws of England*, 4th Edition, the Plaintiff submitted that:

“An injunction is a discretionary equitable remedy awarded by a superior court or judge...to restrain the imminent threat or the commission or continuance of unlawful acts in which case the injunction is prohibitory...the courts have jurisdiction to award injunctions against other public bodies and officers...There is a general power to make a declaration whether there be a cause of action or not at the instance of any party who is interested in the subject matter of the declaration...the declaration claimed must relate to some legal right...the remedy by declaration is available to ensure that a board or other authority set up by parliament makes its determination in accordance with the law.”

19. To the applicant, in administrative law, based on **Chaganlal vs. Kericho Urban District Council (1965) 3 EA 70**, subsidiary legislation will be invalidated if it is unreasonable. The Plaintiff also contended that over the last few decades, the courts have recognized the doctrines of irrationality and proportionality as establishing the limit of law making power or competence of public authorities and relied on **Republic vs. City Council of Nairobi**, in which Honourable **Lady Justice Wendoh** cited with approval, the following discussion of the doctrine of irrationality by the House of Lords in **CCSU vs. The Minister for Civil Service 1985 1 AC 375**:

“By irrationality, I mean what can now be succinctly be referred as *Wednesbury unreasonableness*. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

20. It was also contended based on the **Eighth Edition** of *Administrative Law*, OUP, 2000, by **H W. Wade** and **C. F. Forsyth** that:

“Just as with other kinds of administrative action, the court must sometimes condemn rules of regulations for unreasonableness. In interpreting statutes, it is natural to make the assumption that Parliament could not intended powers of delegated legislation to be exercised unreasonably so that the legality of the regulations becomes dependent upon their content.”

21. In the Plaintiff's view, this statement applies to the actions of the 2 defendants when they made the by – laws whose validity is challenged in this suit. It was submitted that at the time the purported by-laws were made, section 82 of the former Constitution which prohibited discrimination was in force.

22. The Plaintiff cited **High Court Miscellaneous Civil Application No. 383 of 1995: Royal Media Services Ltd vs. Commissioner of Customs & Excise**, in which **Honourable Lady Justice Rawal**, as she then was, interpreted the prohibition of discrimination under that section as prohibiting an act of a public authority which is arbitrary and expressed herself as follows:

“... government which is irrational, capricious or arbitrary and the same term is unconstitutional. I shall whole heartedly agree with Justice Suba Rao who warned that official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination, one knows where one stands but the wand of official arbitrariness can be waved in all directions indiscriminately.”

23. According to the Plaintiff, in USA, the prohibition of discrimination is contained in Amendment no. 14 of the US Constitution which guarantees everyone equal protection of the laws while in India, which **Rawal, J** (as she then was) relied on it is Article 14 of the Constitution which prohibits discrimination. Similarly, the High Court of Tanzania too has followed the interpretation of Article 14 of the Indian Constitution by the Supreme Court in **Deepak Sibal vs Punjab University AIR 1969 SC 903** whose headnote states:

“It is now well settled that Article 14 forbids class legislation but does not forbid reasonable classification. Whether a classification is a permissible classification under Article 14 or not, two conditions must be satisfied, namely, that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out from the group and that the differentia must have a rational nexus to the object sought to be achieved by the statute in question.”

24. To the Plaintiff, the dairy farmers who are only some of the farmers in Kiambu County have been discriminated against as the burden of paying taxes ought to be shared by all farmers and relied on the Tanzanian case of **A. A Sisywa and 35 Others vs. Principal Secretary, Ministry of Finance & Another** High Court of Tanzania at Dodoma, Civil Case no. 5 of 1994 (unreported). It was contended that the burden of proof of such justification or that the differentia is intelligible and has rational nexus to the object sought to be achieved is squarely on the 1st defendant which burden had not been satisfied by an explanation as to why the 1st defendant left out of the tax bracket, the other classes of farmers. The Plaintiff relied on ***Human Rights in Tanzania Selected Cases and Materials*** by **Chris Maina Peter** in which the case of **A. A Sisywa and 35 Others vs. Principal Secretary, Ministry of Finance & Another** High Court of Tanzania at Dodoma, Civil Case no. 5 of 1994 (unreported) is quoted at page 415 as the leading authority on Equality before the law and discrimination and that the court in considering whether a statute in question is discriminatory held that if the statute gives a different treatment to a group of people mainly on account of their status in life; and if the discrimination is not based on an intelligible differentia and that the differentia has no rational nexus to the object sought to be achieved by the statute impugned, then that is illegal. That case, it was disclosed involved taxation targeting salon owners and those who owned station wagon cars and it was brought by persons who were operating taxi business. The new tax was declared discriminatory and unconstitutional. The plaintiff submitted that its case was similar hence it was clear from the foregoing that the discrimination of the plaintiff and its members had no rational nexus to the object of raising revenue for the 1st defendant and that the different treatment is arbitrary and not based on any justifiable ground. It is plainly because only dairy farmers have a steady source of income from their activities and are better placed to be taxed than other farmers. The need for the 1st defendant to collect revenue cannot override the fundamental right against discrimination.

25. Since this suit concerns subsidiary legislation which is purportedly made under the Local Government Act it was submitted for it to be valid, the subsidiary legislation must adhere to the principal Act. In this case, it was contended that the 1st defendant cannot make by-laws which are not permitted by the ***Local Government Act*** and relied on **J. Resley vs. City Council of Nairobi** and **Republic vs. City Council of Nairobi** in support of this proposition. At page 91 which concerned the former authority, the court cited with approval the following statement of the law:

“If a local authority does not fulfil the requirements of the law, the court will see that it does fulfil them...It is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide for safeguards for her Majesty’s subjects. Public bodies and ministers must be compelled to observe the law, and it is essential that bureaucracy should be kept in its place...As we stated earlier, the purpose of the court is to ensure that the decision making process is done fairly and justly to all parties. Blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed.”

26. It was submitted that where law making authorities like the City Council of Nairobi in the above mentioned two cases fail to abide by the law, the court will invalidate the by-laws made by them. In the case before the court, the subsidiary legislation takes the form of by-laws and regulations which the plaintiff submitted are invalid and sought declaration that they be declared null and void. In the Plaintiff’s view, the principles of law are the same whether the court is approached through judicial review or through a plaint.

27. Based on **A.A Sisyva vs. Principal Secretary, Ministry of Finance** (supra) it was submitted that:

“the need for the government to collect revenue cannot override the fundamental right against discrimination. According to international standards of Human Rights ... a discriminatory law on account of the status of life whose discriminatory effect is not based on any intelligible differentia and where the differentia is not based on a rational nexus to the object of the statute sought to be achieved, cannot be held to be in public interest. Otherwise the guaranteed rights will be an empty shell. As stated by Kisanga JA ...

‘Any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with those requirements otherwise the guaranteed rights under the Constitution may easily be rendered useless by the means of derogation or claw back clauses of that very same Constitution.’

Under Article 64 (5) of the Constitution, I declare that the motor vehicle surtax Act, 1994 as unconstitutional and so void for being discriminatory of the affected group on account of their status in life. The law which is void is as if it was not there i.e. not passed by Parliament. As Nyarari CJ stated in the case of the Tanzania Court of Appeal...a void law is not operative at all and so any title or money paid under a void law are not operative. The same view was expressed by Georges CJ...and so if any of the affected or targeted group all over Tanzania has paid any tax pursuant to that void law, he is entitled to refund of the same.”

28. In support of this position, the Plaintiff relied on Article 2(4) of the Constitution which provides:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

29. The Plaintiff also relied on sections 201 and 203 of the **Local Government Act**, the legislation governing the making of by-laws.

30. It was however, the plaintiff’s case that the publication of the Order was done through a gazette notice in contravention of section 203 (2) and (3) above and that this was admitted at paragraphs 10 and 11 of the replying affidavit sworn by **Joseph K. Kiruthi**, when he deposed;

10. THAT by a Legal Notice No. 10623 of 2nd October 2009 with the approval of the Minister for Local Government, the 1st defendant published, the Local Government

(Agricultural Produce Cess) Adoptive By-Laws Order 2009 the purpose and intern of which was to levy cess for agricultural produce shown on the Schedule of the said By-Laws annexed herewith and marked “JKK-2.

11. THAT upon publication of the said Kenya Gazette Notice, no objection from any person was lodged or received by the 1st defendant.

31. The purported consultative meeting referred to in paragraph 15 of the Replying affidavit sworn by **Joseph K. Kiruthi**, it was contended was called a year after the purported By-Laws were published after the 1st defendant had already made demands for the cess on 19th January, 2010 and 21st July, 2010 with threats to sue if unpaid. In support of the submissions, the Plaintiff relied on page 112 of **Judicial Review by Michael Supperstone Q & James Goudie QC**, they state the law as follows:

It is generally accepted good communication procedure that those directly affected by administrative decisions should be consulted before the final decision is made.

32. Further reliance was placed on **Professor Paul Craig**, in his book titled **Administrative Law, Sweet and Maxwell, 6th Edition, 2008.**

33. It was therefore the Plaintiff’s view that the belated meeting was an attempt to cover up the fact that the 1st defendant did not consult before making the By-laws, was in bad faith and attending the same was of no consequence.

34. It was submitted that the law is that whether or not consultation is required, is determined partly by the express provisions of a statute or the necessary implication to be gathered from a statute. The fact that it is not expressly provided for as it is in the case of section 203 of the **Local Government Act**, does not mean that it is not required.

35. To the Plaintiff, it had a legitimate expectation that they would be consulted by the defendants but this was never met.

36. It was therefore the Plaintiff’s case that the 1st defendant did not consult it before making the said By-Laws. It did not follow the mandatory procedure provided for under Section 203 of the **Local Government Act**. The plaintiff was condemned to pay cess unheard. This was an outright breach of the rules of natural justice. The By-laws and the cess imposed pursuant to them are therefore null and void to that extent. Demanding any amount arising from the same is manifestly oppressive, unjust and unreasonable.

37. The Plaintiff averred that the 1st defendant, admitted that its By-Laws are discriminatory. The annexures to the Replying affidavit of **Mr. Joseph K. Kiruthi** showed that tea growers are charged 1/5 of the purported charge which it is levying on the plaintiff’s members milk. There is no evidence that other farmers like of coffee, horticulture pay cess. There is no equality in the treatment of different classes of farmers or implementation of the 1st defendant’s By-Laws. The target is only on those farmers who are perceived to be earning income from their activities. The discrimination is not based on any intelligible differentia. If there is any differentia, the plaintiff submits that the same has no rational nexus to the object sought to be achieved by the 1st defendants said By-Laws. If the object is to raise revenue, then why target two groups of agricultural producers and leave out all the others? There is absolutely no rationale for this.

38. Considering all the foregoing, the plaintiff submitted that it has proved its case on a balance of probabilities.

39. On the procedure and jurisdiction in judicial review, it was submitted that to ascertain the scope of the jurisdiction in judicial review in Kenya, one has to bear in mind the constitutional histories of both England and USA which have influenced the constitutional development of Kenya. The 1963

Constitution of which the 2010 version replaced by the current Constitution was in force when the subsidiary legislation under consideration was made was based on Anglo - American constitutional jurisprudence. The 1963 Constitution unlike that one of England was written. The same case applied to the current Constitution. Kenya, therefore, is very much like USA which has a written Constitution. Because Kenya is a former British colony, it inherited English law. Because of that reason, English jurisprudence continues to be of relevance to Kenya. However, an account must always be made of the changes that take place both in Kenya and in Britain. It is not in all respects that Kenyan law is the same as English law. The Plaintiff therefore submitted that this Honourable court has original and unlimited jurisdiction to determine the dispute herein. On the allegations that determining this suit amounts to usurping the 2nd defendant's statutory powers and will cause chaos in the dairy industry lack legal basis reference was made to Jaquene Resley –vs- City Council of Nairobi [2006] eKLR, where it was held:

“as we stated earlier, the purpose of the court is to ensure that the decision making process is done fairly and justly to all parties. Blatant breaches of statutory provisions cannot be termed as mere technicalities by the defendant. That law must be followed is not a choice and the courts must ensure it is followed. The statements by the defendants that this court's role is only supervisory will not be accepted and neither will the view that this court will usurp the functions of the valuation court in determining this matter. This court is one of inherent and original jurisdiction and it is our duty to ensure that the law is followed. In the case of Bradbury & Others –vs- Enfield London Borough Council (1976) 1 WLRP 1131 it was stated that:

‘If a local authority does not fulfil the requirements of the law, this court will see that it does fulfil them. It will not listen readily to suggestions of “chaos”. Even if chaos should result, still the law must be obeyed.’”

40. Citing both English and American decisions, the Plaintiff relied on **10th Edition of *Administrative Law*, Sir William Wade and Christopher Forsyth, Oxford University Press, 2009**, at page 473, where it is stated:

“For a long time there were anomalies caused by the fact that remedies employed in administrative law belong to three different families. There is the family of ordinary private law remedies such as damages, injunction and declaration. Although the origin lies in private law, they played and continue to play a vital role in public law.”

41. Further support for this view was sought in **Volume 1 of the *Halsbury's Laws of England*, 4th Edition**, at paragraph 82 where it is stated:

“Applications for orders of certiorari, prohibition and mandamus may be made jointly here appropriate...A declaration that the decision of a statutory tribunal is invalid, may be awarded even though an application for certiorari to quash could have been brought. And in exceptional circumstances an injunction may be obtained instead of an order of prohibition. A declaration that a public body is in breach of its duties may be obtained in place of an order of mandamus. Declarations and injunctions which are awarded by the High Court, not sitting as a Divisional Court, are also obtainable in a wide range of other justifiable controversies lying outside the scope of certiorari, prohibition and mandamus.

42. Similar sentiments were expressed by **Paul Walker** in an article titled **“*Declarations, Injunctions and Damages*”** at paragraph 14(2) that:

“The prerogative orders discussed in Chapter 13 are not the only remedies open to a person who wishes to challenge administrative action. Actions which would now be described as falling within public law have long been vindicated in England and Wales by actions for damages and for statutory penalties and such rights have increasingly been the subject of applications for declarations and injunctions.”

43. The plaintiff therefore submitted that given all the foregoing, this suit and application are not bad in law, frivolous, incompetent or an abuse of the process of the court. In its view, the general issue of the procedure for approaching this Honourable Court has to be viewed against the background of **three** things. The **first** thing is that when exercising the jurisdiction to enforce fundamental rights under former section 84 of the Constitution, the court acted on the view that it had power to grant reliefs in both public law such as the orders of certiorari, prohibition and mandamus or such private law remedies as the declaration, the injunction and damages and relied on **Gathigia v Kenyatta University (2008) KLR 587. Honourable Lady Justice Mary Kasango** adopted the same approach in **Meru High Court Petition No. 4 of 2010 (formerly Nairobi High Court Petition no. 477 of 2007): Methodist Church in Kenya vs. Attorney General and 6 Others**. The **second** thing is that Article 23 of the new Constitution continues this trend of conferring on the court jurisdiction to grant remedies from either public law or private law to enforce fundamental rights irrespective of the procedure used to approach the court. The **third** thing is the taking of procedural issues to yet another level by Article 159 (2) (d) of the Constitution.

44. For the foregoing reasons, the plaintiff prays that the reliefs sought in the plaint be granted as prayed.

1st Defendant's Case

45. According to the 1st Defendant, on 2nd October, 2009, with approval of the Minister, the 1st Defendant vide Legal Notice 10623 of 2009 published the Order in order to levy cess for agricultural produce and the object of the said publication was to invite views and objections from all the entities affected thereby. However as no objection was received on 19th January, 2010 the defendant demanded for payment thereof. According to it the said Order did not only target milk producers but all agricultural producers

46. It was contended that on 21st October, 2010 the 1st Defendant invited all authorised agents to a consultative meeting scheduled for 24th November, 2010

47. According to the 1st Defendant in so far as this matter is brought by way of a plaint seeking to challenge the administrative actions of an a public authority as opposed to proceeding by way of judicial review, this Court cannot in light of sections 8 and 9 of the ***Law Reform Act*** issue orders in the nature of judicial review relief. In support of its submission, the 1st Defendant relied on ***J M Evans (1990) Judicial Review of Administration Action*** 4th Edn. at 476 as well as **R vs. The PS ex Parte Samwel Kamanga Nganga HCMCA 612 of 2004 [2006] eKLR**.

48. It was submitted that a normal suit ought not to be used to circumvent the restrictions imposed by the law on judicial review applications and relied on **O'Reilly vs. Mackman [1983] 2 AC 237** and ***Supreme Court Practice Rules*** (1985) Order 53 rr 1-14/19 that:

“where a person seeks to establish that a decision of a public body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of Judicial Review and not by way of ordinary action whether for a declaration or injunction or otherwise.”

49. According to the 1st Defendant where the by-laws have been adopted, the mere fact that they create difficulty ought not to be the basis for nullifying them. In support of this submission reliance was placed on **Secretary of State for Social Services exp Association of Metropolitan Authorities [1986] All ER 164**.

50. As the Plaintiff has not obeyed the law, it was contended that it had come to court with unclean hands. In any case, it was contended that the Plaintiff being a collecting agent did not stand to suffer any prejudice if the by-laws were implemented.

Determinations

51. I have considered the Suit herein, the affidavits filed and the submissions. In these proceedings, the concerned parties agreed that the hearing/trial shall be by way of affidavits which the parties filed in support of the interlocutory applications and such other affidavits which they may wish to file. It was further agreed on 31st October 2011, that this case will be the test suit for Nairobi High Court Misc. Civil Applications Nos. 354 of 2010 – 363 of 2010 and that the decision pursuant to the plaintiff's submissions would apply to the said cases.

52. The first issue for determination is the competency of this suit. It was contended by the 1st Defendant that in so far as this suit which seeks judicial review orders, the same ought to have been brought under Order 53 of the **Civil Procedure Rules** as read with sections 8 and 9 of the **Law Reform Act** rather than by way of an ordinary suit.

53. In deciding this issue it is important to interrogate the circumstances which prevailed at the time this suit was filed. From the prayers sought herein it is clear that the orders sought are not limited to judicial review orders but seek declaratory orders as well. However, in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**, it was held:

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.”

54. It is therefore clear that had these proceedings been commenced by way of the procedure for seeking judicial review, the reliefs in the nature of declaratory orders may well have been incompetent.

55. It is clear that Prior to September 2001 when the Legal Notice number 133 of 2001 was issued, there were no rules under section 84(6) of the former Constitution through which a party alleging violation of his fundamental freedoms and rights could approach the Court. This unfortunate scenario led to parties being sent away from the seat of justice on the basis that the Bill of Rights in the Constitution was unenforceable. However, this Legal Notice itself did not cure the problem absolutely. In **Republic vs. The Commissioner of Police ex parte Nicholas Gituku Karia Nairobi HCMA No. 534 of 2003 [2004] 2 KLR 506** it was held that it was improper to combine both judicial review applications with constitutional application, as both are special jurisdiction with a set of special rules. However, in the same decision it was appreciated that declarations state parties rights, true constructions of the Constitution or of a statute that a law is invalid or that an administrative act is invalid. What then would a person seeking orders in the nature of judicial review and declaratory orders be expected to do since such orders could not before the advent of the current Constitution be sought either in judicial review or in a Constitutional petition?

56. It is my view that no system of law ought to leave a deserving litigant with no remedy simply because there is no legal procedure prescribed for seeking and granting of the remedy. In **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi And Another [2008] 2 EA 311, Rawal, J** (as she then was) expressed herself as follows:

“In Kenya, the functions and remedies of orders of certiorari, mandamus and prohibition by way of judicial review found roots in 1956 by the enactment of the Law Reform Act (Chapter 26 Laws of Kenya) and thereafter by the Constitution of Kenya itself. Simply stated, these remedies are in our judicial system to uphold and protect and defend the rule of law, that is, to supervise the acts of government powers and authorities which affect the

right or duties or liberty of any person. The affected person may always resort to the Courts of law and if the legal pedigree is not found to be perfectly in order the court will invalidate the act which can be safely disregarded. The government is a government of laws and not of men and will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.”

57. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person’s right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

58. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, “Why then, this must be an end to it”. The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

59. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

“The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.”

60. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny litigants a remedy and must recognise that unlawful interference with a citizen’s rights give rise to a right to claim redress and if the applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it. It would in my view be a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

61. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to “illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law”.

62. What then ought a person who intends to challenge a decision and seek both judicial review

orders and declaratory orders do? Happily the Constitution now empowers the Court to grant such orders. However, even before the promulgation of the current Constitution, section 89 of the **Civil Procedure Act**, however provides:

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.

63. This was the view adopted by the then East African Court of Appeal in **Ayoob vs. Ayoob Civil Appeal No. 34 of 1967 [1968] EA 72**. In my view, even before the promulgation of the current Constitution a person could properly invoke the procedure under the **Civil Procedure Act** in respect of suits where there was no particular procedure provided for resolving disputes.

64. As I have stated hereinabove the current Constitution permits the grant of any appropriate orders and provides in Article 23(3) as follows:

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.

65. Article 47 of the Constitution on the other hand provides:

(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.

66. It is therefore clear that the right to fair administrative action is no longer just a judicial review issue but a Constitutional issue as well. As was appreciated in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)** judicial review has been said to stem 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. In my view it is no longer 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 Constitution can be granted. Whereas the remedies in judicial review are limited and restricted, the grounds cut across both. Accordingly it may not be easy to rationalize the distinct procedures under the two legal regimes – Constitutional petition vis-à-vis judicial review and one may well question the legal basis for maintaining the same distinction.

67. I therefore associate myself with 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 no longer 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.”

68. Therefore considering the jurisprudence prevailing before the advent of the current Constitution and taking into account the reality engendered by the current Constitution, I am not prepared to hold that the procedure which was adopted by the Plaintiff in these proceedings is fatal to these proceedings.

69. It is the Plaintiff’s case, that the 1st Defendant’s action in enacting the ***Local Government (Agricultural Produce Cess) Adoptive By-Laws Order, 2009***, was discriminatory and flied in the face of the Constitutional provisions. Section 82 of the former Constitution provided as follows:

(1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(1) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

70. It was the Plaintiff’s case that by enacting a law whose effect was to impose cess levies on the Plaintiff while not imposing the same on the other persons in the same sector was without justification and such differentia was unintelligible and had no rational nexus to the object sought to be achieved. In other words the 1st Defendant did not meet the legal threshold for enacting such legislation.

71. Mere discrimination, it must be remembered, is not unconstitutional. As was appreciated in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR**:

“we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective

component...In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality.”

72. In Nyarangi & 3 Others vs. Attorney General [2008] KLR 688, it was held:

“The *Blacks Law Dictionary* defines discrimination as follows: “The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- “A particular form of differentiation on illegitimate ground.”... The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found “to disqualify Negroes at a substantially higher rate than white applicants”.

73. It is therefore clear that even if the Court was to find that there is differential treatment between the milk producers and the producers of other agricultural produce in the same local authority that *ipso facto* would not necessarily constitute discrimination which is outlawed by the Constitution.

74. The issue however is whether the Plaintiff was treated with discrimination. In the impugned Order, it is clear that apart from the Plaintiff other agricultural producers such as Coffee, Tea, Wheat & Maize, Cashew Nuts, Pyrethrum, Cotton and Tobacco were similarly affected. Therefore the contention by the Plaintiff that the Order “discriminated against the plaintiff within the meaning of section 82(3) of the former Constitution on the ground of its local connection as a regular income generating farming activity while no similar by-laws were made in respect of tax on pyrethrum, coffee, tea or flower farmers” cannot on the basis of the material on record be correct.

75. In the premises I find no merit on the contention that the 1st Defendant’s decision was contrary to the Constitution on the basis of discrimination.

76. The Plaintiff contends that the 1st Defendant’s action contravened the provisions of sections 201 and 203 of the **Local Government Act** with respect to the need for consultation hence was *ultra vires* the said parent legislation. The said provisions provide as follows:

201. Subject to section 202, a local authority may from time to time make by – laws in respect of all such matters as are necessary or desirable for the maintenance of health, safety and well being of the inhabitants of its area.

203. (1) At least 14 days before the making by any local authority of any by-laws under this Act, notice of the intentions to make such by-laws and of the general purport thereof shall be given in one or more local newspapers circulating in the area to which the by-laws are intended to apply.

(2) For at least 14 days before the making of any By-Laws under this Act, a copy of the proposed by-laws shall be deposited at the offices of the local authority which intends to make the by-laws...

(3) for at least 14 days before the making of any By-Laws under this Act, a copy of the proposed by-laws shall be deposited at the offices of the local authority which intends to make the by-laws...

77. The only attempt at showing that these provisions were complied with was a reference to a ***Legal Notice No. 10623 of 2nd October 2009***. The said Legal Notice, however only notified the public of the By-laws which had been approved by the Minister. In other words it was not a “***notice of the intentions to make such by-laws and of the general purport thereof***” as contemplated by the legislation and the same did not appear in “***one or more local newspapers circulating in the area to which the by-laws are intended to apply***”. The requirement that an intention to make By-laws be notified to the residents of the area plays a very crucial factor. It triggers the process of objection to the intended By-laws without which any By-laws passed by a local authority cannot have validity. To deprive the people affected by a law an opportunity to which they are legally entitled to renders the process of the enactment of the law in my view procedurally improper. I therefore associate myself with the decision in **Resley vs. The City Council of Nairobi [2006] 2 EA 311** in which it was held:

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty’s subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”

78. In this case, clearly there was a failure to comply with the law. A Gazette Notice, even if the same contained the essential ingredients necessary to properly inform the public, which it did not, in this Country cannot be equated to a local newspaper circulating in an area. A Gazette Notice, in this country is with due respect a most unreliable mode of inviting comments from the *mwananchi* to participate in the enactment of legislation affecting him/her. The drafters of the legislation were no doubt aware of this fact when they expressly provided that the notice be in “***one or more local newspapers circulating in the area to which the by-laws are intended to apply***”.

79. I, accordingly associate myself with the code of practice as regards consultation set out by **Professor Paul Craig**, in his book titled ***Administrative Law, Sweet and Maxwell, 6th Edition, 2008***, setting out the following requirements:

- a. consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy;**
- b. be clear about the proposals, who may be affected, what questions are being asked and time scales for responses;**

- c. ensure that the consultation is clear, concise and widely accessible;
- d. give feedback regarding the responses received and how the consultation process influenced the policy;
- e. monitor the departments effectiveness of consultation including through the use of a designated consultation coordinator;
- f. ensure that the consultation follows better regulation best practice.

80. Similar guidance ought to be sought from page 387 of the **Sixth Edition of *De Smith's Judicial Review***, to the effect that:

“Proper consultation requires the “candid disclosure of the reasons of what is proposed and that consulted parties are aware of the criteria to be adopted and any factors considered to be decisive or of substantial importance”. Consultation must also be in respect of proposals, rather than merely a bland generality. Where the decision–maker has access to important documents which are material to its determination whose contents the public would have a legitimate interest in knowing, these documents should be disclosed as part of the consultation process. While consultation requires that sufficient reasons be given for the particular intelligent response to the proposals, it does not usually require that sufficient information be given about any objections to the proposals to enable those consulted to give intelligent consideration and an intelligent response to the objections. Moreover, in general, there is no duty to re-consult unless there is a “fundamental difference” between the proposals consulted on and those which the consulting party subsequently wishes to adopt, or if, after consultation has concluded, the decision-maker becomes aware of some internal material or a factor of potential significance to the decision to be made a consultation may be vitiated however where errors have been made by either the consulted party or the adviser.”

81. Proper consultation, as was appreciated in **R –v- Secretary of State for Social Services, (1986) 1 WLR, 1** entails that:

“(1) The essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice; to achieve consultation, sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice; sufficient time must be given by the consulting to the consulted party to enable it to do so, and sufficient time must be available for such advice to be considered by the consulting party; sufficient in this context does not mean ample, but at least enough to enable the relevant purpose to be fulfilled; helpful advice in this context means sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implication for the consulted party, being aspects material to the implementation of the proposal as to which the consulting party might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer;

(2) The obligation to consult in Social Security and Housing Benefits Act 1982, section 36, is mandatory, not directory;

(3) Where insufficient consultation is alleged, the challenge is to the vires of the statutory instrument; accordingly, the correct test is whether there has been sufficient consultation, rather than whether the consultation process fails to satisfy the test now known as "rationality," formerly the "unreasonable" test in Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223, CA;

(4) The power to make the regulations is conferred on the Secretary of State, and his is the

duty to consult; both the form or substance of new regulations and the time allowed for consulting before making them, may well depend in whole or in part on matters of a political nature, as to the force or implications of which the Secretary of State rather than the court is the best judge; when considering whether or not consultation has in substance been carried out, the court should have regard not so much to the actual facts which preceded the making of the regulations as to the material before the Secretary of State when he made the regulations, which material includes facts or information as it appeared or must have appeared to the Secretary of State acting in good faith, and any judgments made or opinions expressed to him before the making of the regulations about those facts which appeared or could have appeared to him to be reasonable;

(5) The urgency of the need for the regulation as seen by the Secretary of State was such, taking into account the nature of the amendments proposed, that the Department was entitled to require that views in response to its invitation for comments should be expressed quickly; the urgency of the need for the regulations, as seen by the Secretary of State, taking into account the nature of the amendments proposed, was not such that the Department was entitled to require views to be expressed within such a short period that those views would or might be insufficiently informed or insufficiently considered so that the applicants would or might be unable to tender helpful advice;

(6) Taking into account both the urgency of the matter, as seen by the Department, and the material features of the regulations, and bearing in mind that the applicants had no knowledge until after the regulations were made of one of their features, the Secretary of State failed to fulfil his obligation to consult before making the regulations; the time allowed was so short, and the failure to provide amendments was such that, as the Department must have known even without imputing to them precise knowledge of the applicants' internal arrangements, only piecemeal, and then only partial, assistance could be given;

(7) In the ordinary case, a decision made ultra vires is likely to be set aside, in the present case the applicants sought to strike down regulations which had become part of the public law of the land; it may be that when delegated legislation is held to be ultra vires, it is not necessarily to be regarded as normal practice to revoke the instrument;

(8) As a matter of pure discretion, the statutory instrument would not be revoked for the following reasons: only one of the six associations which had been and habitually were consulted had applied for revocation, and that one applied only on the ground that it was not properly consulted; the regulations had been in force for about six months and authorities must have adapted themselves as best they could to the difficulties which they imposed on them; if the regulations were revoked, all those who had been refused benefit because of them would be entitled to make fresh claims, and all authorities would be required to consider each such claim; the amendment regulations had been consolidated into the Housing Benefit Regulations 1985 (SI 1985, No 677) and which had come into operation, which regulations were not challenged.”

82. Though the principle of “public participation” may be distinguished from “consultation” the former is, in my view, akin to the latter. I therefore wish to quote the holding in the decision in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others [2014] eKLR** which dealt with “public participation” in which the Court expressed itself as follows:

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

intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many 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.’”

83. As was appreciated in High Court in Misc. Application No.220 of 2005 in the matter of Republic vs. Evans Gicheru (Hon) & 3 Others ex parte Joyce Manyasi, where a regulation is couched in mandatory terms, it demands strict compliance and the non-compliance with the spirit and letter of such a regulation is fatal to any action taken in pursuance thereof.

84. This Court was urged to decline the orders sought on the basis of the time lapse between the time the said Order was published and now. Whereas a delay in moving the Court may well warrant the denial to give an otherwise merited relief, that delay must be traced to the petitioner’s doorstep. Here, it is not contended that the delay was occasioned by the Plaintiff’s inaction. As was held by the Court of Appeal in Stephen S. Pareno vs. Judicial Service Commission of Kenya [2014] eKLR:

“We have on our own, considered the above findings in the light of the facts and principles of law applicable and we find that the appellant was genuinely aggrieved not only by the learned trial Judge’s reasoning but also by his digression from the core business he had been invited by the appellant to adjudicate upon which was namely to issue an order of certiorari by way of Judicial review. Instead he digressed into other extraneous issues which according to the appellant were calculated to justify the withholding of a relief which had in fact crystallized in his favour... We however agree with the finding of the learned trial Judge that the relief of judicial review by way of certiorari is available where breach of rules of natural justice is proven. Having said so, we find it strange that the learned judge withheld this relief from the appellant despite agreeing with the appellant’s contentions that regulation 26 of the Judicial Service Commission Regulations had been flouted... The appellant’s grievance in the judicial review proceedings was not that reasons had not been given by the respondent

for his dismissal, but that a wrong process had been employed to relieve him from his employment service with the respondent. In other words, he alleged excess jurisdiction by a public body which is a criteria for one to seek the relief of judicial review by way of certiorari. What the appellant moved to attack was the process leading to the decision reached and not the merits of the decision reached. He should have therefore been accorded the relief sought.”

85. Having considered the suit herein and as there is clearly no evidence of compliance with the mandatory provisions of the law in enacting the impugned Order, I find merit in this suit.

Order

86. Accordingly I grant the following orders:

(a) a declaration that Local Government (Agricultural Produce Cess) Adoptive By-Laws Order, 2009 are *ultra vires* Sections 201 and 203 of the Local Government Act and are therefore null and void.

(b) a permanent injunction restraining the 1st Defendants by themselves, their servants or agents from enforcing the said by-laws.

(c) a permanent injunction to restraining the 1st defendants by themselves, their servants or agents from claiming Kshs 7,654,500/= by virtue of the said by-laws.

(d) Costs of the suit are awarded to the Plaintiff to be borne by the 1st Defendant.

87. For avoidance of doubt this judgement will apply to Nairobi High Court Misc. Civil Applications Nos. 354 of 2010 – 363 of 2010.

88. I wish to apologise for the delay in delivering this judgment which was occasioned by the number of files affected and involvement in other pressing matters. I also thank counsel and the Parties for understanding. I further express my gratitude to learned counsel for their industry and research in this matter. If I have not referred to each and every decision cited, it is not due to lack of appreciation for the same.

Dated at Nairobi this 21st day of May, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Karanja for Dr Kuria for the Plaintiff

Mr. Thiong'o for 1st Defendant

Cc Patricia