REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 113 OF 2014 (CONSOLIDATED WITH JUDICIAL REVIEW APPLICATION NOS. 109 & 119, OF 2014 AND PETITION NO. 274 OF 2014

IN THE MATTER OF: AN APPLIACATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

IN THE MATTER OF: THE VALUATION FOR RATING ACT- CHAPTER 266 LAWS OF KENYA

IN THE MATTER OF: THE RATING ACT – CHAPTER 267, LAWS OF KENYA

BETWEEN

REPUBLIC……..……..…….....……..……...……..APPLICANT

AND

THE NAIROBI CITY COUNTY…….....…….....…….…..RESPONDENT

AND

PIUS OMOLLO

NELLIE WANJIKU NJUGUNA (Suing as officials of KAPUTEI GARDENS ASSOCIATION)……..…….....…….…… 1ST EX PARTE APPPLICANT

HONORABLE GIDEON MIKE MBUVI KIOKO.....2ND EX PARTE APPLICANT

KAREN & LANGATA DISTRICT ASSOCIATION….....….PETITIONER

AND

AURELIO REBELO…….....……..1ST INTERESTED PARTY

JOSEPH NICHOLAS MURAGE…….....…..2ND INTERESTED PARTY

LORESHO NORTH RESIDENTS COMPANY LIMITED.....3RD INTERESTED PARTY

RUNDA ASSOCIATION.…….....……4TH INTERESTED PARTY

JUDGEMENT

Introduction

1. This judgement is the subject of Judicial Review Application Nos. 109, 113 and 119 all of 2014 and Petition No. 274 of 2014.
2. In these proceedings, the applicants and Petitioner (hereinafter referred to collectively as the Applicants) seek:

i. **An order of certiorari to quash Nairobi City Council Finance Act, 2013 assented to on 4th, September, 2013.**
ii. **Prohibition prohibiting the application of the said Act and barring the Respondent from effecting the provisions thereof pending compliance with the legal procedure for enacting the same.**
iii. **Certiorari to quash the respondents decision to levy land rates from 17% to 34% of the unimproved site value of properties in Nairobi, an order prohibiting the said decision and an order of mandamus compelling the Respondent to restore the initial rate of 17%.**
iv. **A declaration that the Respondent's decision contained in the Nairobi City County Finance Act 2013 commencing on 31/3/2014 enhancing land rates to 34% in so far as it applies to properties of the members of the Petitioner contravenes orders of court given on 12/3/1999 in Misc. Application No. 42A of 2006 between Karen & Langata District Association and the City Council of Nairobi & Another formerly High Court Misc. Application No. 272 of 1995 and is therefore null and void.**
v. **A declaration that the Respondent's decision contained in the Nairobi City County Finance Act 2013 commencing on 31/3/2014 enhancing land rates to 34% of the unimproved site value together with monthly interest of 3% in so far as it applies to properties of the members of the Petitioner was made without their involvement, consultation or participation and hence violates the constitution.**
vi. **An order be made directing the Respondent to consult with members of the Petitioner before enhancing land rates on their properties.**
vii. **A perpetual conservatory order be issued restraining the Respondent from increasing rates levied on properties of members of the Petitioner without compliance with the court order given on 12/3/1999 in Misc. Application No. 42A of 2006 between Karen & Langata District Association and the City Council of Nairobi & Another formerly High Court Misc. Application No. 272 of 1995.**
viii. **Such other orders as this Honourable Court shall deem just and fit to grant.**
ix. **Costs**

Applicants' Case

3. According to the applicants, the Respondent vide the ***Nairobi City County Finance Act, 2013*** (hereinafter referred to as "the Act) imposed rates within Nairobi City County at the rate of 34% of the unimproved site value of land which was an increase from 17% that the Respondent and its predecessor, the Nairobi City Council, levied before the promulgation of the Act. For the Respondent to pass a law increasing the said rate with an excess of 4% of the unimproved site value, it was contended that under section 6 of the ***Rating Act***, an approval was required from the Minister/Cabinet Secretary which approval was neither sought nor obtained.
4. It was therefore contended that the manner in which the Respondent increased the rates from 17% to 34% of the unimproved site value was not in compliance with the provisions of the law. To them, Article 209 (3) of the Constitution of Kenya allows a County to impose, property rates, entertainment taxes and any other tax that it is authorised to impose by an Act of Parliament. Article 210 (1) thereof, on the other hand, provides that no tax or licensing fee may be *imposed*, waived or *varied* except as provided by legislation and the word *"legislation"* is defined at Article 260 thereof as either an Act of Parliament, or a law made under authority conferred by an Act of

Parliament; or a law made by an assembly of a County government, or under authority conferred by such a law.

5. To the applicants, the ***Valuation for Rating Act*** (Cap 266 Laws of Kenya) and the ***Rating Act*** (Cap 267 Laws of Kenya) are the legislation authorizing the imposition of property rates pursuant to Article 209 (3) of the Constitution of Kenya. Section 3 of the ***Valuation for Rating Act*** empowers the rating authority at least once in every ten years or such longer period as the Minister may approve, to cause a valuation to be made of every rateable property within the area of the local authority in respect of which a rate on the value of land is, or is to be imposed, and the values to be entered in a valuation roll. Section 3 of the ***Rating Act*** empowers the County government to levy rates within its area of jurisdiction. Section 4 of the ***Rating Act*** empowers the rating authority to adopt the various forms of rating. Section 5 of the ***Rating Act*** empowers the County government to adopt alternative forms of rating with the consent of the Minister. Section 6 of the ***Rating Act*** permits the rating authority to levy land rates to a maximum of four *per centum* of the unimproved site value of land or, with the consent of the Minister, at a higher rate.
6. According to them, until any amendment, repeal or otherwise, the ***Valuation for Rating Act*** and the ***Rating Act*** still apply in the imposition of rates by a rating authority and Parliament in its wisdom thought fit to restrict the Respondent's discretion in the imposition of rates to a maximum of 4% of the unimproved site value and any value above 4% with the consent of the Cabinet Secretary,
7. It was the applicants'' case that the procedure for the enactment of Nairobi ***City County Finance Act***, 2013, was not followed and therefore its provisions and implementation is illegal, null and void.
8. According to the applicants, Article 94(1) and (6) of the Constitution vests the legislative authority in the Republic of Kenya in Parliament, and that an Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority. Articles 109(4) and 110 of the Constitution confer parliament with powers over the making of laws concerning County Governments. Section 6 of the ***Statutory Instruments Act 2013*** Laws of Kenya provides that if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument. Section 11(1) the ***Statutory Instruments Act 2013*** provides that every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament. Section 11(4) of the Act provides that If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.
9. It was contended that Act was assented to on 4th September, 2013 and soon thereafter came into effect and has been operational imposing taxes, charges, levies and fees on the public and the constituents of the City of Nairobi. To them whereas the said County legislation is a Statutory Instrument as envisaged under Section 2 of the ***Statutory Instruments Act 2013***, before the making of the Act no impact statement about the instrument was made as required by the law. Further, the said Act was not tabled before parliament for scrutiny as required by the law or at all and therefore the procedure for its legislating was flouted. Having flouted the procedure of making the law, it was their case that the said statutory instrument ceases to have effect immediately and becomes void.
10. To the applicants, had the Act been scrutinized by parliament most of the levies imposed would have been reviewed or otherwise passed by parliament thus giving the provisions thereof the constitutional sanctity. In their view, the making, enactment and the passing of the Nairobi City County Finance Bill was unprocedural and went against the spirit of the law, it flouts the Constitution, the provisions of the ***Statutory Instruments Act*** and is a candidate of judicial review.
11. It was the applicants' case that concerned with the unaccountable use of rates by the predecessor

to the 1st Respondent, City Council of Nairobi, the 1st Applicant (hereinafter referred to as "the Association") through HCMA 272 of 1995 went to court and obtained orders directing a special account be opened where property rates would be accounted into. That dispute, it was disclosed had been precipitated by the deplorable state of service delivery within Karen and Langata yet the association members were dutifully remitting rates to the then Council. It was asserted that the obligation to comply with the said orders vests with the 1st Respondent herein in terms of Article 33 of the Sixth Schedule of the Constitution as it is the legal successor of the City Council of Nairobi.

12. It was averred that sometimes on the 22nd December 2013, the 1st Respondent allegedly invited members of the public to a meeting at Safari Park Hotel Nairobi ostensibly to discuss intended increase of property rates within Nairobi. However, the association administration had closed office for Christmas holiday and a majority of its members had either closed their offices or had travelled. In the circumstances, the association did not learn about the said meeting until the residents started receiving demand notes for new rates effective 31st March 2014 and on making enquiries, learnt that a meeting was allegedly held sometimes on 22nd December 2013. On further enquiries the association has established that the decision was communicated through County Gazette Notice. Despite protestations by the Association, the Respondent did not respond.
13. It was therefore the applicants' case that the decision to levy the new rate is unconstitutional as there was no meaningful public participation within the meaning of Article 10 and 201 of the Constitution and no consultation was had between the Respondent and the Association. Besides, the imposition of the new rate without due regard to the orders of court made in **Misc. Appl. No. 42A of 2006 between Karen Langata District Association and City Council of Nairobi formerly High Court Misc. Application No. 272 of 1995** is null and void and of no effect.
14. To the applicants, the 1st Respondent's decision implementing the new rate without adherence to the constitution is in contravention of the residents' fundamental rights and freedoms and in the absence of reasons or justification for the increase of property rates, the Respondents' decision is arbitrary, capricious and should be set aside. Further, the failure by the Respondent to provide a justification for the new rate implies that there was no valid reason for the increase and the decision was therefore unreasonable.
15. It was averred that the Applicants had a legitimate expectation that the 1st Respondent's decision would be made in strict fidelity to the law and to the extent that it did not do so, the decision to levy the new rate is unconstitutional and should be quashed.
16. While appreciating that the Respondent had the power to raise taxes, funds etc for its expenses outgoings and for development projects etc. the applicants nevertheless were of the view that County Governments have to follow National Legislation as provided for in Article 190(2) of the Constitution which reads:-

    County Governments shall operate financial management systems that comply with any requirements prescribed by National Legislation.

17. Relying on **Robert N. Gakuru and others –versus- The Governor, Kiambu County and Others, Petition Number 532 of 2013 Consolidated with Petition Numbers 12, 35, 36, 42 and 72 of 2014** it was submitted that:

    "**It is therefore clear that the County Assembly may only impose property rates and entertainment taxes unless otherwise authorized by an Act of Parliament and this position is emphasized by the provisions of Article 210(1) of the Constitution which expressly provides that no tax or licence fee may be imposed, waived or varied except as provided by the legislation. County Governments are however empowered to impose charges on services they provide...I must however stress that County Governments are under Article 175(b) entitled to have reliable sources of revenue to enable them to govern and deliver services effectively. However these entitlements must be exercised in accordance with the constitution and the law and where the existing legislation is not adequate for the purposes of efficient governance and delivery of service the County Government ought to petition the National Government to increase allocation to them or enact appropriate legislation to**

enable them carry out their constitutional mandate as required under Articles 190(1) 202 and 203 of the Constitution".

18. According to the applicants, any imposition or levying of taxes by the County Government of Nairobi can only be done in accordance with a national legislation and this clearly is a mandatory requirement of the provisions of Article 210(1) of the Constitution of Kenya which provides:

No tax or licensing fee may be imposed, waived or varied except as provided by legislation

19. The applicants relied on Article 191(2) of the Constitution and submitted that whereas, it is not in dispute the County Government has powers to impose property rates as per Article 209 of the Constitution, the taxation and other revenue-raising powers of a County shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. It was the applicants' case that whilst a County Government has powers to raise rates the procedure for the exercise of that power is provided in national legislation, that is to say, the ***Valuation of Rating Act*** (Cap 266) and the ***Rating Act*** (Cap 267) both of which are national laws. It was contended that ***Valuation of Rating Act*** (Cap 266) specifically gives a county power to levy rates and sets out elaborate procedure for levying of rates as follows: Valuation Rolls to be prepared at least once every 5 years; values to be entered in the Roll; Power to amend valuation roll and to cause supplementary valuation roll to be prepared; Valuers to have power of entry and inspection and to obtain information; Contents of draft valuation roll; Basis of valuation; Deposit of draft Valuation and Supplementary Valuation Roll, which is open for public inspection, taking of copies or extracts, publication by notice to call for objections, sending to every rate payer within 21 days after the laying before a meeting of local authority (County Government); Objections to draft valuation and supplementary valuation rolls; Valuation Court to hear objections; and Appeals to Higher Courts.
20. The applicants averred that it was admitted by the Respondent herein that the last Valuation Roll the then Nairobi City Council published was in 1982. Other attempts to prepare and use valuation rolls were unsuccessful as was decided in the case of **Jacqueline Resley –versus- Nairobi City Council H.C Misc. Appl.No. 1517 of 2001**. In another similar later case of **Jacqueline Resley versus The City Council of Nairobi Misc Civil Appl. No. 1654 of 2004**, the Court held that strict compliance of with the provisions of cap 266 is in carrying out ratings is mandatory.
21. It was the applicants' case that similarly ***The Rating Act*** provides for the imposition of rates on land and buildings in Kenya.
22. To them the elaborate procedures in the two national Acts have been totally ignored by the Nairobi City County (sic) in simply doubling the rates payable by Nairobi Rate payers despite the fact that these two Acts are still extant. It was averred as the various provisions of the Act purporting to increase Land Rates are in conflict with the express provisions of both the ***Rating Act*** and the ***Valuation of Rating Act***, a county legislation or a provision thereof which is in conflict with either the Constitution or a national legislation will be a nullity to the extent of such conflict.
23. To the applicant, every County must enact Finance laws which are uniform throughout the counties hence one county cannot simply double the rates and another triples it or halves it and the County cannot ignore national legislation to choose its own method of imposing rates but must follow the law and procedure in the two national Acts. To the applicants, it is a cardinal principle of taxation laws that the taxing statutes must be strictly construed against the taxing authorities.
24. The applicants therefore submitted that the ***Nairobi City County Finance Act 2013*** pursuant to which the offending exorbitant rates have been imposed is not only unconstitutional, but in conflict with the ***Valuation of Rating Act*** and the ***Rating Act*** thus null and void.
25. It was submitted that under Article 165(3)(d)(ii) of the Constitution, this court has jurisdiction to determine 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. This position was based in **Civil Appeal No. 290 of 2012 - Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** in which the Court of Appeal held;

"The High Court had jurisdiction to review and set aside the appointment of the appellant

on grounds of constitutionality or legality. We make this conclusion based on *Article 165 (3) (d) (ii)* of the Constitution which grants the High Court jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of a question regarding whether an appointment by any organ of the Government is inconsistent with, or in contravention of the Constitution"

26. It was submitted that Article 201 of the Constitution on principles of public finance provides that there shall be openness and accountability including public participation in financial matters. The Applicants submitted that the power to impose and/or enhance property rates under **Article 209(3) (a)** of the Constitution is fettered by the requirements under **Article 201.** As regards accountability, it is contended that the Respondent was under a constitutional obligation to account for property rates previously collected before a decision to enhance could be made.
27. To them, no attempt whatsoever was made to account for rates previously collected. Since property rates as a revenue raising mechanism is intended to enhance service delivery to the residents, it was argued that the Respondent ought to demonstrate how previous rates have been utilized in the absence of which, there cannot be any reasonable justification for enhancement. This requirement to account is even more significant taking into account the findings of the High Court in **Misc. Appl. No. 42A of 2006 formerly High Court Misc. Application No. 272 of 1995** between the Petitioner and the Respondent's predecessor, City Council of Nairobi, where it was held: -

"Towards those persons particularly rate payers from whom the authority collects money a local authority "stands somewhat in the position of trustees or managers of the property of others."……To this extent, it is my view that Local Authority must have it as a duty to those rate payers that it will handle the money collected under proper accounting procedure".

28. It was contended that the Respondent should have had regard to the said court orders since it is the legal successor of the City Council of Nairobi under Article 33 of the Sixth Schedule of the Constitution. Besides under section 3 of the Act, orders relating to financial management issued under the defunct City Council of Nairobi is deemed to have been given, issued or made under the authority of the County Assembly of the Respondent. To the extent that the impugned decision to enhance property rates was made without regard to a valid court order, the same is null and void *ab initio* and is a nullity in law. In support of this submission, reference was made to **Petition no. 3 of 2014 Hon. Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 5 Others** in which it was held;

"We are in agreement with the above authorities, to the effect that anything done in disobedience of court orders is null and void abinitio and is a nullity in law....We must state at this point that disobedience of court order is a grave issue as it undermines the rule of law. Article 10 of the Constitution identifies the rule of law as one of the national values and principles of governance. Article 3 of the Constitution is very clear that every person has an obligation to respect and defend the Constitution. So that any person who disobeys a court order also violates the Constitution."

29. The applicants similarly relied on In **Petition No. 518 of 2013 Judicial Service Commission vs. Speaker of the National Assembly & Attorney General [2013] eKLR,** where this court held:

"Respect of Court Orders however disagreeable one may find them is a cardinal tenet of the Rule of Law and where a person feels that a particular order is irregular the option is not to disobey it with impunity but to apply to have the same set aside. When the decision to obey particular court orders are left to the whims of the parties public disorder and chaos are likely to reign supreme yet under the preamble to our constitution we do recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."

30. In addition to the said decisions the applicants underscored, the National Values and Principles of

Governance, participation of the people and accountability set out under Article 10 of the Constitution, participation of the people and accountability and contended that the Respondent violated this constitutional imperative by failing to consult with the Petitioners. To them, the purported public forum called by the Respondent which they allege constitutes public participation was to seek views on the budget estimates generally and not whether the Respondent should enhance property rates and to what extent. In any event, such consultation does not meet the requirements of meaningful public participation as set out in **Petition No. 532 of 2013 Robert N. Gakuru & Others vs. The Governor Kiambu County& Others** where this court held;

" 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 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 as possible such as churches, mosques, temples, public barazas national and vernacular broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."

31. It was submitted that the alleged participation fell short of the standard laid down by court in the ***Robert N. Gakuru Case*** aforestated.
32. Further support was sought from **Petition no. 21 of 2013 John Muraya Mwangi & 495 Others v. Minister for State for Provincial Administration & Internal Security & 2 Others**, in which the Court held:

" The concept of public participation in matters of governance is as important as it is vexing. It is derived from the Constitution. Under Articles 1(1), (2), (3). The sovereign power is vested in the people and is exercised by them directly or through elected officials. Article 10 further provides that the national values and principles of governance which binds all state organs, state officers and all persons whenever any of them applies or interprets the Constitution or makes or implements public policy decisions include democracy and participation of the people, good governance, integrity, transparency and accountability."

33. The applicants further sought support from **Republic vs. Interim Independent and Boundaries Commission & Another Exparte Eliot Lidubwi Kihusa & 5 Others [2012] e KLR** in which the Court held:

"Meaningful public participation must give effect to the purposes of the Constitution i.e promote accountability, transparency and good governance. Must give weight to public consensus, consider submission and give reasons for its ultimate decision."

34. It was the Applicants' case that the decision to impose new property rates without meaningful public participation and consultation with its members clearly demonstrates that it did not discharge its mandate in consonance with the Constitution and is therefore invalid, null and void. Besides, to the extent that no reasons were given or justification for the increase, the impugned decision is arbitrary, capricious and should be set aside. Article 47 of the Constitution, it was added, guarantees the right to fair administrative action and provides that where a right or fundamental freedom of a person is likely to be adversely affected by administrative action, the person has the right to be given reasons for the action. It was the Applicants' contention that the Respondent's decision threatens the right to ownership of property guaranteed under the Bill of Rights - Article 40. Accordingly and in line with Article 47, reasons or justification for the

increase ought to have been given and to the extent that this was not done even after the Petitioner wrote requesting for reasons, the Respondents decision is unconstitutional, null and void.

35. The Court was urged that in construing the constitution it is enjoined to do so in a manner that promotes it purpose, values and principles one of which under Article 10 is the requirement for public participation and consultation. The impugned decision clearly militates against this fundamental constitutional imperative. Furthermore, imposition of property rates is in exercise of revenue raising powers under Part 3 of Chapter Twelve of the Constitution. Exercise of such power is limited by the provisions of Article 209(5) of the Constitution in that it should not undermine economic activities. It is contended that the net effect of the drastic increase in property rates by over 30% will invariably undermine economic activities in which land is a key resource.
36. According to the applicants, if the people of Kenya intended that the County Assembly should levy any other taxes and charges they would have expressly stated so in the Constitution as it applies to rates and entertainment taxes. Subjecting all other taxes to be levied as indicated by an Act of Parliament meant that any such levies, taxes, tariffs and charges were subject to scrutiny by Parliament and therefore to Statutory Instruments Act. Here, it was submitted that pursuant to Statutory Instruments Act 2013, Laws of Kenya, the Respondent did not follow the correct procedure for enactment of the Nairobi City County Finance Act and this Honourable Court should call for and quash the Act. It was therefore contended that the actions by the Respondent were unlawful and that Notice of Motion Application dated 3rd April 2014 ought to be allowed.
37. According to the applicants, the enabling legislation for the purposes of levying of rates are the provisions contained in the ***Rating Act*** and the ***Valuation for Rating Act***. The ***Nairobi City County Finance Act***, on the other hand, it was averred is:

"AN ACT of the Nairobi City County Assembly to provide for the various taxes, fees and charges for services, and for other revenue raising measures by the county government; and for matters incidental thereto"

38. It was therefore the applicants' case that the ***Nairobi City County Finance Act, 2013*** is not the enabling legislation for the imposition of land rates. According to the applicants, the ***Rating Act*** has clearly prescribed the manner rates are to be imposed if they were above 4% of the unimproved site value. Whenever statute has set out a framework for the exercise of powers conferred on public authorities, then these public authorities may not derogate from the set provisions. Support for this position was sought in **Misc. Application No 1654 of 2004, Jacqueline Resley vs. City Council of Nairobi [2006] eKLR; Bradbury and others vs. Enfield London Borough Council (1976) I W L R P 1311**
39. It was reiterated that ministerial consent was paramount to ensure the legality of the imposition of 34% of the Nairobi County Government rates and reference was made to the decision by the Court of Appeal in **Civil Appeal No. 68 of 2012 Clerk, County Council of Wajir & Another vs. Allabdullahi Ahmed Ex-parte Republic [2004] eKLR.**
40. It was submitted that the Respondents have conceded at paragraph 40 of their Replying Affidavit to have relied on the 1982 valuation roll which in their words was *"dully developed and approved."* The development of that roll was done in accordance with the ***Valuation for Rating Act*** which was and still is the enabling legislation for the development of valuation rolls that are to be used by rating authorities. With regard to the imposition of rates, the Respondents have also conceded at paragraph 42 of their Replying Affidavit to have relied on provisions of the ***Rating Act***. They state that the Respondent's County Assembly has not legislated on the procedure for the issuance of rates demand notices and have therefore fallen back on ***Rating Act***. The applicants therefore submitted that the ***Rating Act*** has specific procedures for the imposition of rates and it was wrong for the Respondent to apply sections of the ***Rating Act*** while ignoring other key provisions such as Section 6 of the Act.

Respondent's Case

41. According to the Respondent, prior to the enactment of the Constitution of Kenya, 2010, the Respondent's predecessor, City Council of Nairobi, charged rates on the basis of the ***Valuation for Rating Act*** (Cap 266) Laws of Kenya and the ***Rating Act*** (Cap 267) Laws of Kenya,

particularly on the basis of the following legal provisions:

a. Section 3 of the ***Valuation for Rating Act*** that enjoined a local authority to prepare a valuation roll of all rateable property within its area of jurisdiction once in every ten year or prepared in such longer period that the Minister for Local Government might approve;
b. Section 3 of the ***Rating Act*** that enjoined a local authority to levy rates over rateable property within its area of jurisdiction to finance the affairs of the local authority;
c. Section 4 of the ***Rating Act*** that permitted a local authority to levy rates by use of an area rate; an agricultural rental value rate; a site value rate; or a combination of a site value rate and improvement rate;
d. Section 5 of the ***Rating Act*** that permitted a local authority, with the authority of the Minister for Local Government to levy rate by use of a flat rate upon the area of land; a graduated rate upon the area of land; a differential flat rate or a differential graduated rate upon the area of land depending on the use of the land; an industrial rate upon area of land; a residential rate upon area of land; or by use of any other method of rating upon the area of land that a local authority might resolve;
e. Section 6(1) of the ***Rating Act*** which permitted a local authority, where there was in place a valuation roll or a supplementary valuation roll that specified only the unimproved site value of land, to levy land rates at the rate of four percentum of the unimproved site value of land or at such other rate approved by the Minister for local government.
f. Section 15(1) of the ***Rating Act*** enjoined the Local Authority to, by way of thirty day notice, publish the rate amount payable in a financial year and unless another date is otherwise stated, the rates would be due on the 1st day of January in a financial year;
g. Section 16(3) of the ***Rating Act*** entitled a local authority to charge simple interest at the rate of three percentum or such other simple interest rate prescribed by the Minister for Local Government, on any sum remaining unpaid after the due date; and
h. Section 17 of the ***Rating Act*** entitled a local authority to issue rates demand notices to rate payers in default, and if the rates demand notices were not honoured within 14 days of service, the local authority would institute proceedings in a subordinate court to recover the rates. If the local authority were successful in the rates recovery suit, the local authority would enforce the decree of the subordinate court in the ordinary manner under the Civil Procedure Rules.

42. It was contended by the Respondent that in view of the foregoing, it is not correct legal position as contended by the Petitioner that payment of land rates by the members of the Petitioner to City Council of Nairobi was exclusively governed by the ***Local Government Act*** (Cap 265) Laws of Kenya and the judgement of and order of the Learned Honourable Justice (Rtd) A. I. Hayanga delivered on 28th day of January 1998 in **Nairobi High Court Miscellaneous Application No. 42A of 2006** ***(formerly Nairobi High Court Miscellaneous Application No. 272 of 1995).***
43. It was further contended by the Respondent that it is not correct legal position as contended by the Petitioner that the ***Rating Act*** fixes payment of land rates at 4% of the Unimproved Site Value as section 6(1) of the ***Rating Act*** permitted a local authority, where there was in place a valuation roll or a supplementary valuation roll that specified only the unimproved site value of land, to levy land rates at the rate of four per centum of the unimproved site value of land or at such other rate approved by the Minister for local government.
44. The Respondent disclosed that in the year 1982, the predecessor of the Respondent, City Council of Nairobi, duly prepared a valuation roll that has been in force in the Respondent as the basis for the levying of rates and that sometime in the year 2001, the predecessor of the Respondent, City Council of Nairobi, attempted to prepare and enforce a new valuation roll, but in a High Court Judgment and Order in **Jacqueline Resley vs. The City Council of Nairobi, Nairobi HCCC No. 1517 of 2001 [2002] eKLR** delivered on the 11th day of March 2002, the Court ordered the Respondent's predecessor, City Council of Nairobi to levy rates under the 1982 valuation roll. Since the due preparation and enforcement of the 1982 valuation roll by City Council of Nairobi, the Minister for Local Government, in exercise of his powers under the afore-cited section 6(1) of the Rating Act, regularly approved the levying of land rates by the City Council of Nairobi at rates ***above*** the rate of *four percentum* of the unimproved site value of the rateable property, which rates, the City Council of Nairobi duly published.
45. According to the Respondent, with the enactment of the Constitution of Kenya, 2010, the primary

legal framework for the levying of land rates by the Respondent fundamentally changed in view of:

0. The creation of the Respondent as a distinct and interdependent level of Government from that of the national government as set out in ***Articles 6(1) and 6(2) of the Constitution of Kenya*** as read together with the provisions of the ***First Schedule*** thereof;
0. The conferment on the Respondent exclusive functions under ***Part 2 of the Fourth Schedule of the Constitution of Kenya***;
0. The provisions of ***Article 209(3) (a) of the Constitution of Kenya*** that empowers the Respondent to impose property rates, as a species of tax, to finance the Respondent's functions and powers;
0. The provisions of ***Article 210(1) of the Constitution of Kenya*** which permits charging of tax provided for by "***legislation***;"
0. The provisions of Article 260 of the Constitution of Kenya which defines **"legislation"** to include "***a law made by an assembly of a county government or under authority conferred by such a law***" and
0. The provisions of ***Articles 185(1) and 185(2) of the Constitution of Kenya*** which vests legislative authority of the Respondent in the Respondent's County Assembly and mandate the Respondent's County Assembly to make laws ***that are necessary for, or incidental to***, the effective performance of the functions and exercise of the powers of the Respondent under the Fourth Schedule of the Constitution of Kenya.

46. To the Respondent, unlike in the case of the Respondent's predecessor, City Council of Nairobi:

a. The Respondent is a distinct level of government from the national government, with exclusive constitutional functions vested in it;
b. The power of the Respondent to levy land rates is not donated to the Respondent by the Rating Act (Cap 267) Laws of Kenya and or by the judgement and order of the Learned Honourable Justice (Rtd) A. I. Hayanga delivered on 28th day of January 1998 in **Nairobi High Court Miscellaneous Application No. 42A of 2006** ***(formerly Nairobi High Court Miscellaneous Application No. 272 of 1995)***, but by the Constitution itself, at Article 209(3) (a) thereof;
c. The law that sets out the criteria on how the Respondent should levy land rates ***within its area of jurisdiction*** is not the Rating Act (Cap 267) Laws of Kenya and or the judgement of and order of the Learned Honourable **Justice (Rtd) A. I. Hayanga** delivered on 28th day of January 1998 in **Nairobi High Court Miscellaneous Application No. 42A of 2006** ***(formerly Nairobi High Court Miscellaneous Application No. 272 of 1995)*** as contended by the *Petitioner*, but the legislation enacted by the Respondent's County Assembly under the provisions of Article 185(2) of the Constitution of Kenya.

47. Further, unlike local authorities which under the provisions of section 247 of the now repealed ***Local Governments Act*** (Cap 265) exercised their mandate through by-laws approved by the Minister, under the provisions of Article 185(2) of the Constitution of Kenya, the Respondent exercises its mandate in the Fourth Schedule of the Constitution, and its powers under the Constitution, including the power to levy property rates, through laws passed by its County Assembly. To it, under section 7 of the Transitional and Consequential Provisions of the Constitution of Kenya all laws in force immediately before the effective date (including the ***Rating Act*** (Cap 267) Laws of Kenya and the judgement of and order of the Learned Honourable Justice (Rtd) **A. I. Hayanga** delivered on 28th day of January 1998 in Nairobi High Court Miscellaneous Application No. 42A of 2006 (formerly Nairobi High Court Miscellaneous Application No. 272 of 1995)) continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. It was therefore its position that the provisions of the judgement of and order of the Learned Honourable Justice (Rtd) **A. I. Hayanga** delivered on 28th day of January 1998 in Nairobi High Court Miscellaneous Application No. 42A of 2006 (formerly Nairobi High Court Miscellaneous Application No. 272 of 1995) and the ***Rating Act*** (Cap 267) Laws of Kenya are only relevant in relation to the powers of the Respondent to levy property rates to the extent that the Order and the legislative provisions conform to the Constitution of Kenya, 2010. However the

said judgement which was delivered before the enactment of the Constitution of Kenya, 2010 is not relevant to the current procedure for exercise of power by the Respondent to levy property rates for the reasons that:

a. The order by the Learned Judge that members of the Petitioner pay property rates into special account maintained by the Petitioner instead of direct payment of rates to the Respondent would patently breach Article 210(1) of the Constitution of Kenya which requires that ***the procedure*** for imposition of tax, including property rates, be premised on a legislation. There is no legislation in Kenya today that contemplates payment of land rates in the manner directed by the Learned Judge almost seventeen years ago;
b. The order by the Learned Judge that the Respondent levies property rates against the members of the Petitioner by establishing a special rates fund account for the area of the Karen & Langata District Association patently breaches and usurps the legislative authority of the Respondent's County Assembly under Article 185(2) of the Constitution of Kenya to *"make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule (including regulating the power of the Respondent under Article 209(3) (a) of the Constitution to levy property rates against the Petitioner)"*;
c. The order by the Learned Judge interpreted the provisions of section 215 of the Local Government Act (Cap 265) Laws of Kenya. The ***Local Government Act*** was, pursuant to the provisions of 134(1) of the ***County Governments Act*** No. 17 of 2012 "repealed upon the final announcement of all the results of the first elections held under the Constitution" which happened on or about the 9th day of March 2013. Nowhere does the ***County Governments Act*** No. 17 of 2012 provide for or contemplate levying of rates against the Petitioner in the manner directed by the Learned Judge almost seventeen years ago, and it is preposterous of the Petitioner to insist that the Respondent is enjoined to comply with the repealed and now irrelevant provisions of section 215 of the ***Local Government Act*** in levying rates against the Petitioner;

48. The national legislation governing prudence and accountability in the management of revenue raised or received by the Respondent is no longer the repealed ***Local Government Act*** (Cap 265) Laws of Kenya as deleteriously contended by the Petitioner, but the ***Public Finance Management Act*** (Cap 412C) of the Laws of Kenya, particularly at Part IV thereof. The Respondent's case was therefore that the Petition was grossly misconceived and clearly premised on a faint appreciation of the legislative framework upon which the Respondent levies land rates and accounts for revenue it collects and receives.
49. It was further contended that the Constitutional validity of the Act, in general and Schedule 6.1 of the Act, in particular has been comprehensively challenged and settled in **Nairobi HC Petition No. 486 of 2013, Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others versus County of Nairobi & 3 Others** where a judgment was delivered on the 18th day of December 2013 in which judgement the Learned Honourable **Justice Isaac Lenaola**, in dismissing the appeal challenging the constitutionality of Schedule 6.1 of the Act 2013 expressed himself as follows in material paragraphs of his said judgment:

0. The power of County Assembly to make laws is not donated by statute, but pursuant to the provisions of Article 185(2) of the Constitution of Kenya which states that *"A county assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule"* **– paragraph 62 of the Judgment**
0. This Court cannot enter into the arena of deciding what fee is reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of Nairobi City County – **paragraph 58 of the Judgment**;
0. Article 209(4) of the Constitution empowers national and county governments to impose charges for the services they provide. **paragraph 62of the Judgment**

50. Consequently, the Respondent's case was that the Constitutional validity of the Act, having been determined by the said case, the Petition and Application herein are superfluous, grossly

incompetent, frivolous and clearly misinformed.

51. In its view, the Respondent relied on 1982 Valuation Roll in the levying of land rates within its area of jurisdiction notwithstanding that it is a matter of public notoriety that land values in Nairobi City County have increased manifolds since the year 1982.Whereas the *Petitioner* contend that the Respondent increased land rates without following the due process of the law, the Respondents duly complied with every legal requirement required of it in enacting the Act in general and schedule 2.1 of the Act which forms the basis for the increased land rates, explained hereunder. To the Respondent, the budget making process in Kenya culminating into the enactment of a Finance Act by a County Government, is primarily governed by the Constitution of Kenya and the ***Public Finance Management Act*** (Cap 412C) (Rev. 2012) Laws of Kenya, which stipulate the following procedure for budget making and enactment of the Finance Act by the Respondent:

a. Pursuant to the provisions of section 125 of the Public Finance Management Act, budget making process entails making an overall estimation of the county government's revenue and expenditures; preparing budget estimates for the county government and submitting the estimates to the county assembly; approval of the estimates by the county assembly; enactment of an appropriation laws and any other laws required to implement the county government's budget; and implementation of the county government's budget. ***It is the statutory duty of the County Executive Committee member for finance to ensure that there is public participation in the budget process***.
b. Pursuant to the provisions of sections 129, 130, 131, 132 and 133 of the Public Finance Management Act, the County Executive Committee Member for Finance is required to:

i. Submit to the County Executive Committee, for its approval, budget estimates, documents supporting the budget of the county government and draft bills required to implement the county government budget; and
ii. Once the county executive committee approves the estimates, the County Executive Committee Member for finance submits to the County Assembly the budget estimates, supporting document and any other bills required to implement the budget, other than the Finance Bill, **by 30th April** in that year;
iii. The Clerk of the County Assembly then prepares and submits to the County Assembly for approval, the budget estimates;
iv. Once the county assembly approves the budget estimates, the county executive committee member for finance prepares and submits a County Appropriation Bill to the county assembly for the approved estimates
v. Before the County Assembly considers estimates of revenue and expenditure, the relevant committee of the county assembly discusses and reviews the budget estimates taking into account the views of the County Executive Committee member for finance and the public on the proposed recommendations and tables its report to the county assembly;
vi. Within ninety days of passing the Appropriations Bill, the county assembly considers and approves the Finance Bill, with or without amendments.
vii. The Bill once passed is assented to and published. Article 199(1) of the Constitution of Kenya provides that county legislation takes effect once published in the *Gazette*.

52. It was contended that once the Respondent's Executive Committee approved the budget estimates prepared by the County Executive Committee Member for Finance, the Respondent advertised and conducted two stakeholder workshops at Charter Hall on 24th April 2013 and 26th April 2013 that were duly attended by various stakeholders ranging from residents of Nairobi City County, elected leaders at the County and national Governments, National Government ministries and departments, diplomatic missions, development partners, international organisations, opinion leaders, professional bodies, Non-Governmental organisations, business community, residential associations, religious organisations, academic institutions, medical institutions, financial institutions, independent offices and commissions established by the Constitution and the media among others. The Respondent also published the budget estimates on its website for the public to scrutinize and submit any comments. Subsequent to the stakeholder forum, the Respondent's

County Executive Committee Member for Finance submitted to the Clerk of the Nairobi City County Assembly budget estimates of revenue and expenditure together with the public comments that the Respondent received in the stakeholder forums it conducted at Charter Hall 24th April 2013 and 26th April 2013. The Clerk of the County Assembly then prepared and forwarded the budget estimates to the County Assembly for approval. Once the Nairobi City County Assembly approved the budget estimates, the county executive committee member for finance prepared and submitted a County Appropriation Bill to the county assembly for the approved budget estimates. Once the Nairobi City County Assembly enacted the Appropriations Act, on 2nd July 2013, the Respondent submitted to the County Assembly a proposed Finance Bill pursuant to the provisions of Article 183(2) of the Constitution of Kenya and Standing Order No. 111 of the Nairobi City County Assembly Standing Orders, for consideration.

53. The Respondent added that the Clerk of the Nairobi City County Assembly, forwarded the proposed Finance Bill to the Speaker of the County Assembly who approved it for publishing. Indeed, in a letter dated 3rd July 2013, the Clerk of the County Assembly communicated to the Respondent the decision of the County Assembly on the proposed Finance Bill and advised that the proposed Bill be published under Standing Order No. 117 of the Standing Orders of the County Assembly. On 5th July 2013, the Respondent's County Executive Committee Member for finance requested that the County Assembly Budget and Appropriations Committee to convene during recess to finalize their analysis of the Finance Bill in order that the Respondent might operationalise the budget for the Financial Year 2013/2014 and in its meeting held at Charter Hall on 18th July 2013, the Nairobi City County Assembly Budget and Appropriations Committee resolved that in order to facilitate public participation in the enactment of the Finance Bill, the Clerk of the County Assembly would publish the Bill on the Assembly's website and invite stakeholders that would have any further comments on the Bill. The Committee also would take into account the views expressed by stakeholders in the two Stakeholders Forums held at Charter hall on 24th April 2013 and 26th April 2013 on the Respondent's budget estimates. Consequently, the Respondent published the Bill at the Government Printer in the Nairobi City County Gazette Supplement No. 3 of 2013 and forwarded 150 copies of the published Finance Bill to the Nairobi City County Assembly for debate and approval or rejection which went through the normal procedure for passing Bills in the County Assembly, and was passed on 28th August 2013.

54. It was disclosed that on 19th August 2013, the Nairobi City County Assembly held a joint workshop with the Respondent Treasury at the Kenya School of Government to discuss the Respondent's Finance Bill, 2013 and on the 21stAugust 2013, the Nairobi City County Assembly Budget and Appropriations Committee, having taken into account the public views expressed at the stakeholder forums of 24th April 2013 and 26th April 2013, the comments made by stakeholders on the Assembly website, and the views of the Respondent's County Executive Committee Member for finance, laid their report on the Respondent's Finance Bill, 2013 on the Floor of the whole Nairobi City County Assembly. That the report of the Committee made recommendations for amendment on various provisions of the Finance Bill 2013. On 28th August 2013, the Chairperson of the Nairobi City County Assembly Budget and Appropriations Committee moved the proposed amendments in the Committee report on the Respondent's Finance Bill for discussion. The County Assembly discussed the proposed amendments, wherein some of the proposed amendments were adopted, while some reviewed or rejected. The Assembly then passed the Finance Bill, 2013, having in its wisdom effected a number of amendments to the Bill.

55. The Respondent averred that in a letter dated 3rd September 2013, the Speaker of the Nairobi City County Assembly forwarded to the Governor of the Respondent the duly passed Finance Bill, 2013 for Assent. The Governor of the Respondent assented to the Bill, whereupon the Respondent sent the Bill to the Government Printers for publication in the Nairobi City County Gazette as Gazette Supplement No. 7 of 2013 as passed by the County Assembly.

56. It was therefore the Respondent's case that the Nairobi City County Finance Act, 2013 in general and Schedule 2.1 thereof in particular was duly enacted as required by law contrary to the misconceived and deleterious allegations of the *Petitioner and that* the Respondent effectively involved the public in enacting the Nairobi City County Finance Act, 2013 in general and

Schedule 2.1 thereof in particular in compliance with the provisions of Articles 10 and 201 of the Constitution of Kenya, and the Judgment of the High Court in the **Republic versus Interim Independent and Boundaries Commission & Another, Ex Parte Eliot Lidubwi Kihusa & 5 Others [2012] eKLR,** contrary to the deleterious allegations of the Petitioner.

57. The Respondent held the view that the Respondent's County Assembly has not legislated on the procedure for issuance of rates demand notices and that by dint of the provisions of section 8(2) of the ***County Governments Act*** No. 17 of 2012, the Respondent is permitted to fall back on the relevant provisions of the corresponding national legislation, being the ***Rating Act*** (Cap 267) of the Laws of Kenya, dealing with the issuance of rates demand notices to issue the rates demand notices to the Petitioner as it did in this matter. To it, there is nothing illegal or un-procedural in the impugned rates demand notices that the Respondent issued to the Petitioner. It was its case that:

a. It is a settled principle restated in the case of ***Commission for the Implementation of the Constitution versus Parliament of Kenya and 2 Others*****, Nairobi HC Pet. No. 454 of 2012 [2013] eKLR**, that Courts should not act as regents over what is done in a legislative body unless the Constitution is contravened; that declaring a legislation as unconstitutional is a serious issue with deep seated ramifications and the Court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established; and
b. It is a settled principle restated in the United States Supreme Court case of ***United States versus Butler*****, 297 U.S. (1936)**, that when a statute enacted by a legislative body is challenged, Courts have only one duty: to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former and having done so, that duty ends; the Court neither approves nor condemns any legislative policy.

58. Its further position was that prior to the granting of stay order by this Honourable Court in this matter, the Respondent already collected rates specified in Schedule 2.1 of the ***Nairobi City County Finance Act***, ***2013*** in the sum of **Kshs. 1,936,905,624.00** from over 61,000 rate payers in Nairobi City County since the 1st day of January 2014, and expended the collected revenue to its mandatory essential constitutional functions set out in Part 2 of the Fourth Schedule of the Constitution of Kenya hence granting the Applications herein threatens to paralyse the entire operations of the Respondent to the gross detriment of the over four million residents of Nairobi City County that exclusively depend on the Respondent for the provision of the daily essential services set out in Part 2 Schedule Four of the Constitution of Kenya. Further granting the Applications herein would only exacerbate disarray and confusion in the Respondent since the rateable owners who have complied will be further reinvigorated to throng the Respondent's premises to seek refunds from the Respondent of the "surplus" rates they paid to the Respondent which monies the Respondent already expended in its mandatory essential constitutional functions set out in Part 2 of the Fourth Schedule of the Constitution of Kenya. It was disclosed that the Respondent already budgeted for and depends on the revenue under Schedule 2.1 of the Nairobi City County Finance Act, 2013 to perform its Constitutional mandate under Part 2 of the Fourth Schedule to the Constitution of Kenya. If the Respondent fails to collect the revenue stipulated under the ***Nairobi City County Finance Act, 2013*** in general and Schedule 2.1 thereof in particular, the Respondent will suffer huge deficits in its 2013-2014 budget as to paralyze its operations and with no remedy.
59. To the Respondent, the Petition and the Application are grossly incompetent, misconceived, frivolous and ought to be dismissed with costs to the Respondent.
60. It was submitted that the right to administrative action that is lawful, reasonable and procedurally fair now draws its legitimacy as a fundamental right in Article 47(1) of the Constitution of Kenya, 2010, which states as follows: *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."* Judicial review orders are therefore no longer exclusively common law remedies as evident in Article 23(3) (f) of the Constitution of Kenya. However, when a judicial review remedy will lie and the nature of the specific judicial review order that is tenable is a well trodden path. Based on **Kenya National Examination vs The Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 Others, CA No. 266 of 1996 [1997] eKLR** it was submitted that the decision set out the scope of Judicial Review

orders of certiorari, mandamus and prohibition as follows:

"…Until 1992, the heading for Order 53 was "ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI." Legal Notice No. 164 of 1992 changed that heading to "APPLICATIONS FOR JUDICIAL REVIEW" and that heading is retained in the current rules vide Legal Notice No. 5 of 1996 which restored the position to the pre-1992 meddlesome amendments which were, understandably, ruled ultra vires the provisions of the Law Reform Act. Why is it necessary for us to go into this historical explanation?, one may ask. Our answer to that is that we think the time has now come for this court to set out and explain as far as is within our power, the efficacy and scope of each of the remedies, namely mandamus, prohibition and certiorari…. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It 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… prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…. The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAWS OF ENGLAND, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: - "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 and 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." At paragraph 90 headed "the mandate", it is stated: "The order must command no more than the party against whom the application is made 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."… Like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

61. It was submitted that considering that the Respondent already made the decision to levy land rates at 34% of the unimproved site value at the time when the Applications herein were filed, the orders of prohibition and mandamus sought in the Applications are inefficacious, untenable in law and ought to be declined by Court. As the applicants did not prove the grounds for the grant of the orders sought, it was submitted that the Applications grossly fall short of meeting the threshold for granting any judicial review orders sought. To the contrary, the Respondent submitted that it legally and procedurally levied rates of 34% of unimproved site value of property within its area of jurisdiction, hence the *Ex Parte* Applicants contentions are grossly misconceived.
62. According to the Respondent, prior to the enactment of the Constitution of Kenya, 2010, the Respondent's predecessor, City Council of Nairobi, charged rates on the basis of the ***Valuation for Rating Act*** (Cap 266) Laws of Kenya and the ***Rating Act*** (Cap 267) Laws of Kenya. Under the

provisions of Section 3 of the ***Valuation for Rating Act***, a local authority was enjoined to prepare a valuation roll of all rateable property within its area of jurisdiction once in every ten year or to prepare a valuation roll in such longer period that the Minister for Local Government might approve. Section 3 of the ***Rating Act*** empowered a local authority to levy rates over rateable property within its area of jurisdiction to finance the affairs of the local authority. Under section 4 of the ***Rating Act***, a local authority would levy rates by use of an area rate; an agricultural rental value rate; a site value rate; or a combination of a site value rate and improvement rate. Section 5 of the ***Rating Act*** permitted a local authority, with the authority of the Minister for Local Government to levy rate by use of a flat rate upon the area of land; a graduated rate upon the area of land; a differential flat rate or a differential graduated rate upon the area of land depending on the use of the land; an industrial rate upon area of land; a residential rate upon area of land; or by use of any other method of rating upon the area of land that a local authority might resolve. Lastly, section 6(1) of the ***Rating Act*** which permitted a local authority, where there was in place a valuation roll or a supplementary valuation roll that specified only the unimproved site value of land, to levy land rates at the rate of four per centum of the unimproved site value of land or at such other rate approved by the Minister for local government. However, the Respondent contended that the applicable law for levying land rates by the Respondent has fundamentally changed under the Constitution of Kenya, 2010 and that the ***Valuation for Rating Act*** (Cap 266) Laws of Kenya and the ***Rating Act*** (Cap 267) Laws of Kenya must therefore be read in accordance with section 7 of the Transitional and Consequential Provision of the Constitution of Kenya which states that:

"(1) All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution;

(2) If, with respect to any particular matter –

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State Organ of public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict"

63. It was submitted that the mandate of the Respondent to levy land rates now derives directly from the Constitution of Kenya, 2010, not from the ***Valuation for Rating Act*** (Cap 266) Laws of Kenya and the ***Rating Act*** (Cap 267) Laws of Kenya as misconceived by the ex Parte Applicants since Article 209(3) (a) of the Constitution of Kenya provides that a county may impose property rates…". To the Respondent, under the provisions of Article 210(1) of the Constitution of Kenya, "No tax or licensing fee may be imposed, waived or varied except as provided by legislation" and the Constitution defines "legislation" in Article 260 thereof to include "a law made by an assembly of a county government, or under authority conferred by such law." It was therefore submitted that the Constitution of Kenya in Article 185(2) mandates County Assemblies, including the Respondent's County Assembly, to legislate on how the County Government exercises its "functions" and "powers" including the power to levy land rates and provides:

"A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth schedule."

64. It was therefore the Respondent's case that it is constitutionally mandated to levy property rates in terms of legislation passed by its County Assembly, which in this case is the ***Nairobi City County Finance Act, 2013,*** **t**he current applicable law in levying of property rates. In recognition that during transition, a County Assembly may not legislate at once, on every aspect of execution of functions or exercise of power by a County Government, the ***County Governments Act*** No. 17 of

2012 enables a County Government to import the relevant provision of a national legislation dealing with a specific matter in question to guide the exercise of power by the County Government and provides in section 8(2) thereof as follows:

"If a county assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation, if any, shall with necessary modification apply to the matter in question until the county assembly enacts the required legislation."

65. In issuing the Rates Demand Notice, it was contended that the Respondent imported the provisions of section 17 of the ***Rating Act*** entitled a local authority to issue rates demand notices to rate payers in default as the ***Nairobi City County Finance Act, 2013*** did not specify how the Respondent would issue rates demand notices to the rate payers within its area of jurisdiction who are in arrears. However, it was contended that as the applicable law for levying land rates within the Respondent's area of jurisdiction is the ***Nairobi City County Finance Act, 2013,*** the provisions of a National law, such as the ***Valuation for Rating Act*** (Cap 266) Laws of Kenya and the ***Rating Act*** (Cap 267) Laws of Kenya can only imported in a matter relating to levying of rates by the Respondent if such relevant matter has not been legislated upon by the Respondent's County Assembly.
66. It was contended that **Justice Lenaola** has had occasion to deal with the question of validity of the ***Nairobi City County Finance Act***, 2013 in general and Schedule 6.1 of the Act in **Nairobi HC Petition No. 486 of 2013, Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others versus County of Nairobi & 3 Others** and in a judgment delivered on the 18th day of December 2013, the Learned Judge, in dismissing the Petition, rendered himself as follows at paragraph 62 thereof:

"Looking at the provisions of Section 72B of the Traffic Act, I do not think it is the operative and superior law for calculating parking fees in the Counties and also at the national level as claimed by the Petitioners. I say so because the powers conferred on a County Assembly to make law is found in Article 185 (2) which states as follows; "A county assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule." A perusal of Section 5(c) of the Fourth Schedule to the Constitution demonstrates that County Governments have the exclusive mandate over the County transport which includes "traffic and parking". Further Article 209(4) of the Constitution empowers national and county governments to impose charges for the services they provide. One such service provided by the county government is parking under Section 5(c) aforesaid"

67. Based on the said decision, this Court was urged to find that the mandate of the Respondent to levy property rates within its area of jurisdiction do not derive from National legislation like the ***Valuation for Rating Act*** (Cap 266) Laws of Kenya and the ***Rating Act*** (Cap 267) Laws of Kenya, but from the Constitution of Kenya, in Article 185(2) thereof and that the applicable legislation for levying of rates by the Respondent in its area of jurisdiction is not the two pieces of legislation, but the law passed by the Respondent County Assembly under the provisions of Article 185(2) of the Constitution of Kenya for purposes of levying property rates, which in this case is the ***Nairobi City County Finance Act, 2013***.
68. It was submitted that the question as to whether the Respondent followed the due process in levying land rates in Nairobi City County at 34% of the unimproved site value is answered by interrogating the procedure followed in enacting the Act, and the extent to which that process complied with the legal requirements for enactment of a Finance Act by a County Government. Enactment of a Finance Act by a County Government, it was contended, is the culmination of a budget making process by the County Government which process is governed by the Constitution of Kenya and the ***Public Finance Management Act*** (Cap 412C) (Rev. 2012) Laws of Kenya and that the Respondent complied with the procedure for enacting the Finance Act, in general, and schedule 2.1 thereof and that most essentially, the enactment of the Nairobi City County, 2013 in general, and Schedule 2.1 thereof, involved effectual public participation. It was disclosed that the

Petitioners are part of members of the public who were duly invited by the Respondent and submitted their views on the Respondent's 2013-2014 budget estimates at the stakeholder forums of 24th April 2013 and of 26th April 2013 and if the Ex Parte Applicants failed to submit their views at the stakeholder forms of 24th April 2013 and or of 26th April 2013, the ex Parte Applicants cannot be heard to blame the Respondent for their failure to utilize the opportunity that the Respondent duly presented to them. The Act was enacted by the duly elected representatives of the public in the Nairobi City County Assembly. To the Respondent, it effectively involved the Public in its budget making process for the financial year 2013/2014 right from the time it prepared its budget estimates of revenue and expenditure to the time that the Act was enacted into law in compliance with the provisions of Articles 10(2) (b); 196(1) (b) and 184 of the Constitution of Kenya on public participation in governance of counties and in legislative making process, contrary to the unfounded contentions of the Ex Parte Applicants. In support of this position the Respondent relied on **Commission for the Implementation of the Constitution versus Parliament of Kenya and 2 Others, Nairobi HC Pet. No. 454 of 2012 [2013] eKLR**, ***Mount Kenya Bottlers Limited & 3 others v Attorney General and Others*, Nairobi Petition No. 72 of 2011 [2012] eKLR** and **Nairobi HC Petition No. 486 of 2013, Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others versus County of Nairobi & 3 Others,** in which the Minster of **Health vs. New Clicks South Africa (PPTY) Ltd (2006) (2) SA 311**, at paragraphs 155-158 was cited and urged the Court on the basis of the evidence presented, to find that the Respondent effectively involved the public in enacting Schedule 2.1 of the ***Nairobi City County Finance Act, 2013*** that prescribes land rates as being, *inter alia*, 34% of the Unimproved Site Value. Further, that the Respondent complied with the due process in enacting the Act in general, and Schedule 2.1 thereof, in particular.

69. According to the Respondent, the expenditure of the revenue that the Respondent seeks to collect in Schedule 2.1 of the Act was justified to the public by the Respondent, and by the Nairobi City County Assembly and the Ex Parte Applicants have not demonstrated how the charges set out in Schedule 2.1 of the Act prejudice national economic policy, economic activities across county boundaries or national mobility of goods, services, capital or labour as to justify quashing of Schedule 2.1 of the Act, under Article 209(5) of the Constitution of Kenya.
70. It was further submitted that the Court of Appeal, on the 3rd day of October 2014, delivered a landmark judgment in the case of **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others, Nairobi CA No. 42 of 2014**, which is on all fours to the principles for which the Court's guidance is sought in this matter. To the Respondent, both this case and **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others, Nairobi CA No. 42 of 2014**, challenge the constitutional validity of ***Nairobi City County Finance Act 2013*** on alleged grounds that the Act was enacted without public participation; and that the Act violates National legislation, being ***Traffic Act*** (Cap 403) Laws of Kenya for the case of the Appeal case; and the ***Valuation for Rating Act*** (Cap 266), the ***Rating Act*** (Cap 267) and ***Statutory Instruments Act*** No. 23 of 2013 for this case. The Court of Appeal, it was submitted, has in the cited case now determined what amounts to public participation; and priority of legislation between county and national legislation in relation to mandate or power exclusively vesting in a County Government.
71. On priority of legislation between ***Traffic Act*** (Cap 403), **a national legislation**, and ***Nairobi City County Finance Act 2013***, **a county legislation**, it was submitted that the Court of Appeal held as follows at paragraph 28 of the Judgment:

"In so far as the Constitution created County Governments and gave them certain functions and legislative authority to make laws for effective performance of those functions, we find that the judge was right in declining to declare paragraph 6.1 of the Finance Act unconstitutional. We do not agree with Mr. Kinyanjui's contention that although section 18(a0 of the 4th Schedule of the Constitution gives the functions of transport and communication to the National Government, the County Government is an organ of the Constitution, the one that is vested with the function of determining matters of traffic and parking fees. If it was the intention of the drafters of the Constitution to give the function of parking to the National Government, they should have expressly said so. Instead, the Constitution states clearly that the functions of regulating traffic and parking are vested in the County Governments. In addition, the Traffic Act gives room to a local

authority (read County Government) to use any other method in calculating the parking fees other than what is provided for under Section 72(B). As stated, we find no conflict between the Finance Act, the Traffic Act. Even if there was, the Finance Act would prevail as the Constitution created the County Governments and gave them legislative powers and functions of regulating traffic and parking"

72. It was therefore submitted that the Court of Appeal, being satisfied that the ***Nairobi City County Finance Act 2013*** met the threshold for public participation and was the superior law as compared to national legislation in regulating traffic and parking functions and powers of the County Government, dismissed the Appeal.
73. The Respondent's position was that contrary to the unfounded allegations of the Ex Parte Applicants, the Respondent did not prepare a new valuation roll that would have no doubt reviewed upwards the value of property in Nairobi City County set out in the 1982 Valuation Roll. Because of this outright misrepresentation by the Ex Parte Applicants, the Respondent was constrained to take the trouble to disclose to the Court the entire 1982 Valuation Roll as was duly approved and still relied upon by the Respondent in levying land rates
74. The Respondent further relied on the principle restated in the United States Supreme Court case of **United States versus Butler 297 U.S. 1 (1936)**, that when a statute enacted by a legislative body is challenged, Courts have only one duty: to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former and having done so, that duty ends; the Court neither approves nor condemns any legislative policy. The Court held as follows in this regard:

    "When an Act of Congress is appropriately challenged in a court, it is the duty of the Court to compare it with the article of the constitution which is invoked and decide whether it conforms to that article. All that the Court does or can do in such cases is to announce its considered judgment upon the question; it can neither approve nor condemn any legislative policy; it can merely ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution."

75. The Respondent cited in support of its case the Court of Appeal decision in the case of **Municipal Council of Mombasa versus Republic, Ex Parte Umoja Consultants Ltd, Nairobi Civil Appeal No. 185 of 2001**, in which it was held as follows:

    "Mr. Justice Waki clearly recognised this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

76. Further reliance was placed on **Nairobi HC Petition No. 486 of 2013, Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others versus County of Nairobi & 3 Others,** in which **Lenaola, J** held that a Court *"cannot enter into the arena of deciding what fee is reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the 1st and 2nd Respondents. This Court will only intervene if the Petitioners had demonstrated that in charging the parking fees, the Respondents have violated the existing law or acted in contravention of the law."*
77. It was the Respondent's case that it acted within its jurisdiction to levy the impugned land rates;

that it followed the due process in enacting schedule 2.1 of the of the ***Nairobi City County Finance Act, 2013*** that sets out the land rates; and that it accorded the public, including the Ex Parte Applicants herein the right to be heard before the impugned levies were imposed, and urged the Court to find and hold that land rates charged by the Respondent in 2.1 of the of the Act are valid and it is not within the jurisdiction of Judicial Review Court to determine what levies in land rates are appropriate or inappropriate, as that is the mandate of the Respondent and its County Assembly.

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

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

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

79. Thus, to the Respondent, legislative power of the Respondent is not donated to the Respondent by a statute; it derives from Article 185(1) and 185(2) of the Constitution of Kenya. It is therefore incomprehensible on what basis the 2nd Ex Parte Applicant construes the Respondent as "a regulation making authority". The Statutory Instruments Act No. 23 of 2013 that the 2nd Ex Parte Applicant cited clearly defines "a regulation making authority" to mean **"any authority authorised by an Act of Parliament to make statutory instruments"**. The Respondent is a constitutionally created state organ, exercising powers and executing functions set out in the Constitution, not an Act of Parliament; to construe the Respondent as "a regulation making authority" is manifest of either a condescending attitude that the 2nd Ex Parte Applicant carries of the Respondent or lack of appreciation of the law that constitutes the Respondent. Laws that the Respondent enacts are not so enacted pursuant to a power that Parliament donates to the Respondent. Articles 185(1) and 185(2) of the Constitution of Kenya expressly empowers the Assembly of the Respondent to enact laws that prescribe how the Respondent executes its functions and exercises its powers. The argument by the 2nd *Ex Parte Applicant* that the ***Nairobi City County Finance Act, 2013*** is a "Statutory Instrument" is evidently misconceived. A statutory instrument is that which is defined in section 2 of the ***Statutory Instruments Act*** No. 23 of 2013 to mean *"any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established* ***in the execution of a power conferred by or under an Act of Parliament*** *under which that statutory instrument or subsidiary legislation is expressly authorised to be issued."*

Determinations

80. I have considered the Petition and Judicial Review applications which are the subject of the instant judgement. In my view the following are the issues which fall for determination:

1. **Whether the *Nairobi City County Finance Act, 2013* was passed with sufficient public participation as required by the Constitution of Kenya, 2010.**
2. **Whether the provisions of the *Statutory Instruments Act* No. 23 of 2013 were applicable to the *Nairobi City County Finance Act, 2013* and whether they were complied with.**
3. **Whether the provisions of the *Valuation for Rating Act* (Cap 266) and the *Rating Act* (Cap 267) were applicable to the determination by the Respondent of the rate payable in the Nairobi City County and whether they were complied with.**

4. **Whether the Respondent's decision was in violation of an existing Court order.**
5. **What order as to costs ought to be made.**

81. Before determining these issues it was contended that as the decision impugned has already been made, the orders sought herein are incapable of being granted. In my view where a decision has been made, a party cannot seek to prohibit the same without having the same quashed. However where the decision is in the process of being made and the only decision that was taken was that the action in question be undertaken, I do not see why the Court cannot in those circumstances prohibit the decision from being concluded even without quashing the decision that the same be undertaken. That is my understanding of the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** where the Court expressed itself as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, *where a decision has been made*, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. *Prohibition cannot quash a decision which has already been made*; it can only prevent the making of a contemplated decision…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…Only an order of *certiorari* can quash a *decision already made* and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."** [Emphasis mine].

82. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** it was held that:

> **"It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters**

not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made..."

83. This was this Court's holding in **Republic vs. Director of Public Prosecutions & Others ex parte Eric Kibiwott & Others Nbi Judicial Review Civil Application No. 89 of 2014.**
84. In this case, the applicants are challenging the implementation of the ***Nairobi City County Finance Act, 2013*** with respect to *inter alia* the payment of rates at an enhanced percentage. It is not alleged that the said enhanced rate is nolonger being implemented. It is therefore my view that the orders sought herein if merited are still capable of being granted.
85. It was contended that the enactment of the ***Nairobi City County Finance Act, 2013*** failed to pass the constitutional muster as stipulated *inter alia* under Article 10 of the Constitution. According to the Applicants, the period given for the persons affected to participate in the said process was unreasonable and did not afford them sufficient time to so participate. Here I must say that public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by ***Black's Law Dictionary*** 9th Edn. at page 358 as "*the act of asking the advice or opinion of someone*", "participation" on the other hand is defined at page 1229 thereof as "*the act of taking part in something, such as partnership*…" Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public. This position was appreciated in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** as hereunder:

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

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

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

African position requires just that."

87. As was held 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)**:

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

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

> **"Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other…….What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process… To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected…..Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values [and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution**

that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to…public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."

89. In **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC),** it was held that:

"For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case."

90. However the caution expressed by **Sachs, J** in **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)** must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:

"The passages from the *Doctors for Life* majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect."

91. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that

are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

92. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by **Lenaola, J** in **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013**, public participation is not the same as saying that public views must prevail. This position reflects the view held in ***Doctors for Life Case*** (supra) to the effect that:

"Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings. However, for citizens to carry out their responsibilities, it is necessary that the legislative organs of state perform their constitutional obligations to facilitate public involvement. The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process. Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the lawmaking process may not be able to participate and make such contributions."

93. This position was adopted by the Court of Appeal in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others, Nairobi CA No. 42 of 2014** in which it pronounced itself as follows:

"…As Kenya Bus Operators and Double M Operators are among the PSV operators, it means that the appellants had notice of the public for a but only a few attended. As the trial judge correctly observed, the words of Chaskalson, CJ, in South African case of MINISTER FOR HEALTH V NEW CLICKS SOUTH AFRICA (PTY) LTD, succinctly cover the situation in this case:

> ***"It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made."***

What is necessary is that reasonable notice is given and the views of those who attend are taken into consideration. In this case, none of the above mentioned PSV operator groups who attended the 1st Respondent's consultative for a as well as the representatives of the Motorist Association complained that the notice given to them was too short. Similarly, the other appellants did not adduce any evidence that the notice given was insufficient. In the circumstances, it would not be right to annul the 1st respondent's Finance Act on mere submissions of counsel that the appellants were not accorded a reasonable opportunity to air their view on it."

94. It was averred that sometimes on the 22nd December 2013, the 1st Respondent allegedly invited members of the public to a meeting at Safari Park Hotel Nairobi ostensibly to discuss intended increase of property rates within Nairobi. However, the association administration had closed

office for Christmas holiday and a majority of its members had either closed their offices or had travelled. In the circumstances, the association did not learn about the said meeting until the residents started receiving demand notes for new rates effective 31st March 2014 and on making enquiries, learnt that a meeting was allegedly held sometimes on 22nd December 2013. On further enquiries the association has established that the decision was communicated through County Gazette Notice. Despite protestations by the Association, the Respondent did not respond.

95. As rightly submitted by the Respondent, it is clear that the issues which were the subject of the said Court of Appeal decision with respect to public participation are the same issues being articulated in these proceedings. The Court of Appeal having disabused that notion, it is not open to this Court to investigate that matter with a view to arriving at a different decision.

96. I have however considered the material placed before me in particular the averments made by the Respondent towards achieving optimum public participation and I am satisfied that the said steps met the constitutional threshold. Accordingly, I decline to grant the orders sought herein on the basis that the principle of public participation was not adhered to.

97. The next issue for determination is whether the provisions of the ***Statutory Instruments Act*** **No. 23 of 2013** were applicable to the ***Nairobi City County Finance Act, 2013*** and whether they were complied with. It was contended that if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument. It was further contended that section 11(1) the ***Statutory Instruments Act 2013*** provides that every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament and that section 11(4) of the Act provides that If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void. In other words the applicants were contending that the failure by the Respondent to comply with the provisions of the ***Statutory Instruments Act*** rendered the Act null and void.

98. In order to determine this issue the starting point is whether the Act in question is a statutory instrument as defined under the ***Statutory Instruments Act***. Under section 2 of that Act:

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

99. In this case the Act in question was passed pursuant to Article 185(2) of the Constitution. It was not enacted in execution of a power conferred by or under an Act of Parliament. Accordingly, it is my view and I so hold that the ***Nairobi City County Finance Act, 2013*** was not a statutory instrument as defined under section 2 of the ***Statutory Instruments Act***. Apart from that the Act cannot be construed *ejusdem generis* with or analogous to one or other of the instruments mentioned in the Act.

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

101. The next issue for determination is whether the provisions of the ***Valuation for Rating Act*** **(Cap 266)** and the ***Rating Act*** **(Cap 267)** were applicable to the determination by the Respondent of the rate payable in the Nairobi City County and whether they were complied with. It is not contested that the Respondent has the power to determine the rates payable on properties within the Nairobi. What is contended is that the procedure to arriving at that determination was never followed.

102. According to the applicants, the Respondent ought to have complied with the provisions of the above two pieces of legislation. That the Respondent did not comply therewith is not in doubt. However the Respondent contends that in light of the current constitutional dispensation the provisions of the said Acts were inapplicable in determining the rates payable. In my view, if the

consent of the Minister or Cabinet Secretary was necessary before the Respondent could increase the rate in the manner it did, and it did not do so it would not matter that the Respondent would be faced with an untidy situation in which it would be required to refund the sums received as a result thereof.

103. I associate myself with the decision in **Resley vs. The City Council of Nairobi [2006] 2 EA 311** where the court stated the following:

"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."

104. I also agree with the holding in **Bradbury and others vs. Enfield London Borough Council (1976) I W L R P 1311** in which it was stated that:

"… 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 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 …"

105. To that extent the decision by the Court of Appeal in **Civil Appeal No. 68 of 2012 Clerk, County Council of Wajir & Another vs. Allabdullahi Ahmed Ex-parte Republic [2004] eKLR** is in point. In that case it was held:

"It is our considered view that once the local authority exercises the discretion and chooses to impose cess on an agricultural produce, the Minister for Agriculture must consent and then consult with the Minister for Local Government and if approval is granted, the cess can be imposed. We hold that a local authority cannot impose cess on an agricultural produce without consent of the Minister for Agriculture who must consult and obtain approval from the Minister for Local Government. Such consent, consultation and approval are mandatory before cess can be levied on an agricultural produce...From the foregoing, it is our considered view that the learned Judge did not err in law by finding that approval of the Minister for Local Government obtained upon consultation with the Minister for Agriculture is a mandatory requirement before cess can be imposed on an agricultural produce."

106. In my view a relief cannot be denied solely on the basis that the decision sought to be quashed has been undertaken and that the quashing thereof would lead to difficulties. Though that is factor to be considered in deciding whether or not to exercise the undoubted discretionary jurisdiction, to hold that in all cases where hardship is likely to result from the grant of otherwise merited reliefs would be to grant to administrative bodies and authorities blank cheques as it were to disobey statutory provisions with impunity and make decisions which are otherwise illegal. There is

nothing in my view that would bar this Court from carrying out its constitutional mandate when called upon to do so and where the circumstances warrant and justify such action. The courts, it has been held, must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to endanger serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience and that would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law. In my view this Court is beholden to the rule of law even if heaven would fall as a result thereof. See **Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146.**

107. Article 40 of the Constitution bars Parliament from enacting a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description. In my view, this provision applies with equal force to laws passed by County Assemblies. The said Assemblies cannot therefore arbitrarily:

limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

108. The Respondent however urged this Court to consider the provisions of section 7 of the Transitional and Consequential Provisions of the Constitution of Kenya. That provisions states:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

109. Article 191 of the Constitution provides:

(1) This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.

(2) National legislation prevails over county legislation if—

(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or

(b) the national legislation is aimed at preventing unreasonable action by a county that—

(i) is prejudicial to the economic, health or security interests of Kenya or another county; or

(ii) impedes the implementation of national economic policy.

(3) The following are the conditions referred to in clause (2)

(a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual

counties;

(b) the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by

establishing—

(i) norms and standards; or

(ii) national policies; or

(c) the national legislation is necessary for—

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across county boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(4) County legislation prevails over national legislation if neither

of the circumstances contemplated in clause (2) apply.

(5) In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.

(6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency.

110. Article 259 of the Constitution defines "*national legislation*" as meaning:

"an Act of Parliament, or a law made under authority conferred by an Act of Parliament".

111. "***County legislation***" on the other hand is defined by the same *provision as:*

"a law made by a county government or under authority conferred by a county Assembly".

112. From the foregoing it is clear that whereas ***Nairobi City County Finance Act, 2013*** is a county legislation, the ***Valuation for Rating Act*** **(Cap 266)** and **the** ***Rating Act*** **(Cap 267)** are clearly national legislation. That there is a conflict between the county legislation and the national legislation with regard to the manner in which rates are to be imposed within he Nairobi County is not in doubt. If there had been no such conflict these proceedings would have been rendered unnecessary. Under Article 191 aforesaid the first condition for the national legislation to override county legislation is that the national legislation must either apply uniformly throughout Kenya and further that the provisions of Article 191(3) must have been fulfilled in that firstly, the national legislation must provide for a matter that cannot be regulated effectively by legislation enacted by the individual counties; secondly, the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing norms and standards or national policies; and thirdly, the national legislation must be necessary for the maintenance of national security; the maintenance of economic unity; the protection of the common market in respect of the mobility of goods, services, capital and labour; the promotion of economic activities across county boundaries; the promotion of equal opportunity or equal access to government services; or the protection of the environment.

113. Under the ***Rating Act*** "rating authority" is defined in section 2 thereof to encompass three kinds

of local authorities. Section 5 thereof provides for alternative methods of area rating. What comes out clearly from the foregoing is that even before the devolved system of government came into existence by the promulgation of the Constitution of Kenya, 2010, there was no uniform rate in the Country. It follows that the ***Rating Act*** cannot be said to ***apply uniformly throughout Kenya*** when it comes to the rates payable by the property owners. Accordingly, Article 191(2)(a) cannot be invoked in order for the ***Rating Act*** to supersede the ***Nairobi County Finance Act, 2013***.

114. The next provision for consideration is Article 191(2) and that is whether the ***Rating Act*** is aimed at preventing unreasonable action by a county that is prejudicial to the economic, health or security interests of Kenya or another county; or impedes the implementation of national economic policy. The ***Rating Act***, is expressed in its preamble to be:

An Act of Parliament to provide for the imposition of rates on land and buildings in Kenya; to amend the law relating to valuation and rating in Kenya; and for purposes connected therewith and incidental thereto.

115. It is clear that the ***Rating Act*** is an enabling Act. It is neither restrictive in its purpose nor regulatory on the powers of the County Assemblies to impose rates. In my view, it is meant to enable the County Assemblies collect funds necessary for them to meet their obligations of providing services to the residents of the County. In other words it is not aimed at preventing unreasonable action by a county that is prejudicial to the economic, health or security interests of Kenya or another county; or impedes the implementation of national economic policy. Accordingly, it is my view and I so hold that the ***Rating Act*** cannot supersede the provisions of a County legislation in the event of a conflict therewith. This decision is informed by the requirement under Article 191(5) of the Constitution for the Court to "prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict". I must hasten to add that the mere fact that the Court makes a determination on the conflict does not as is stipulated in Article 191(6) of the Constitution "invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency." Therefore the two national legislation the subject of these proceedings are not hereby invalidated but are inoperative to the extent of their inconsistency. It follows that there is nothing inherently wrong in referring to other provisions of the same as long as they are not in conflict with the county legislation.

116. The importance of the devolved system of governance was appreciated by the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** in which **Mutunga, CJ** expressed himself as follows:

"The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state..."

117. The learned President of the Supreme Court continued:

"Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents

the *raison d'être* of the Senate as "to protect" devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities…..National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya's social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act.*"

118. There is an elaborate procedure for the enactment of county legislation with public participation playing a pivotal role therein. This procedure was not available during the tenure of the local authorities as opposed to County Governments. In this scheme of things, to subject the enactment of a county legislation which is otherwise in compliance with the Constitution to the ministerial fiat would be to defeat the letter and the spirit of devolution. As section 7(1) of the Transitional and Consequential Provision of the Constitution of Kenya provides:

All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

119. Accordingly both the ***Rating Act*** and the ***Valuation for Rating Act*** must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with this Constitution. For the said legislation to conform to the Constitution, they must be interpreted in a manner that gives recognition to the principle of devolution including the independence of the devolved governments. Under Article 185 the legislative authority of a county is vested in, and exercised by, its county assembly and the a county assembly is empowered to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. Under Article 209(1)(a) of the Constitution a county is empowered to impose property rates.

120. However as I held in ***Gakuru Case*** (supra):

"In my view the spirit of the devolved system of governance in this country was meant to bring services to the people and to ensure equitable sharing of the resources by the people of the Republic of Kenya. It was meant to bring to end the hitherto existing centralised system of governance which was geared towards rewarding the cronies, supporters and court jesters. However the drafters of the Constitution were well aware of the risk of the country being compartmentalised into semi-states with god fathers or war lords as the chief executives. Accordingly, proper safeguards were put into place to ensure that in spite of the devolved system of governance the country remained a one unitary State and was not transformed into a confederacy. Accordingly, in legislating the County Assemblies in the devolved governments must take into account the fact that their devolved units must co-exist with other units and that their actions do not unduly infringe upon the rights of residents of other units as enshrined under the Constitution. Unless this restriction and limitation on the

powers of the devolved units is observed there is a risk of some counties being a preserve of a certain class by making life intolerable for certain classes of people hence forcing them out of those counties to other counties where less stringent legislation prevail. In other words devolution was not meant to balkanise the country into fiefdoms."

121. In other words in performing its functions a county assembly must adhere to the letter and spirit of the Constitution and as was held by **Mahomed, Ag. JA** in Namibian case of **S v Acheson 1991 (2) SA 805 (Nm HC) at 813**:

"the constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

122. Where a County Assembly acts contrary to what is expected, its decision if unmerited is capable of challenge on the ground of arbitrariness. In this case, the applicants contended that the 1st Respondent's decision of implementing the new rate without adherence to the constitution is in contravention of the residents' fundamental rights and freedoms and in the absence of reasons or justification for the increase of property rates, the Respondents' decision is arbitrary, capricious and should be set aside and that the failure by the Respondent to provide a justification for the new rate implies that there was no valid reason for the increase and the decision was therefore unreasonable. Based on the material before me, I am however unable to find that the decision by the Respondent was arbitrary particular in light of the finding by the Court of Appeal that there was adequate public participation in the enactment of the ***Nairobi County Finance Act, 2013***.
123. If the Respondent is misusing the taxes collected by the residents of the County, there are proper and adequate legal recourse to be taken against the officers concerned including the dissolution of the Assembly. However, the Court ought not to starve the Assembly of its resources to which it is legally entitled simply on the basis that the same is bound to be misused.
124. The next issue for determination is whether the Respondent's decision was in violation of an existing Court order. It is clear that the order alleged to have been violated was made under the repealed ***Local Government Act*** which has since been replaced by the ***County Governments Act***. Under the current constitutional dispensation, devolution is a key pillar in the values and principles of governance in Chapter 10 of the Constitution. In my view, all the pre-Constitution of Kenya, 2010 decisions must now be looked at in the light of the current constitutional dispensation. This does not mean that all such decisions ought to be ignored but must be interpreted and construed in a manner that gives effect to the Constitution.
125. Under Article 210(1) of the Constitution, no tax or licensing fee may be imposed, waived or varied except as provided by legislation. There is no legislation which has been cited by the applicants which is in conformity with the current constitutional framework that would warrant the orders granted by **Hayanga, J**. Accordingly, that order must be construed in accordance with the current Constitutional dispensation and the prevailing legal regime.
126. In the premises I find that in enacting the ***Nairobi County Finance Act, 2013***, the Respondent did not violate the said order.
127. Having considered all the issues raised before me in the instant judicial review applications and petition, I find no merit therein. Before I pen-off however, I wish to express my sincere gratitude to learned counsel who appeared in these matters for their research. If I have not referred to all the decisions cited, it is not out of lack of appreciation for their industry.

Order

128. In the result Judicial Review Applications Nos. 109, 113 and 119 and Petition No. 274 all of 2014 are hereby dismissed.
129. On the issue of costs, since these were matters affecting not just the applicants and petitioner but the residents of Nairobi County, there will be no order as to costs.

130.It is so ordered.

Dated at Nairobi this 21st day of September, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mohamud for the Applicant in JR No. 119 of 2014

Miss Mutemi for Miss Kwamboka in JR No. 109 of 2014 and Mr Ng'ang'a in Petition No. 274 of 2014

Mr Makokha for the Respondent

Mr Kwaruka for the 1st Interested Party and holding brief for Mr Shah for the Applicant in JR 113 of 2014

Cc Patricia