



Mombasa Law Society & 2 others v County Government of Mombasa (Environment & Land Petition 12 of 2020) [2022] KEELC 1 (KLR) (10 February 2022) (Judgment)

Mombasa Law Society & 2 others v County Government of Mombasa [2022] eKLR

Neutral citation: [2022] KEELC 1 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 12 OF 2020

JO OLOLA, J

FEBRUARY 10, 2022

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION AND THREATENED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 20, 21, 23, 27, 35 39, 40, 43, 47, 48, 50, 60, 174, 185, 186(1), 189, 190, 191, 196, 201, 209(3) AND (5), 210(1), 232 AND 260 OF THE CONSTITUTION OF KENYA 2010 AND THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RATING ACT CAP 267 LAWS OF KENYA

AND

IN THE MATTER OF THE VALUATION FOR RATING ACT, CAP 266 LAWS OF KENYA

AND

IN THE MATTER OF PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

AND

IN THE MATTER OF THE COUNTY GOVERNMENT'S ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 2015

AND

IN THE MATTER OF THE ACCESS TO INFORMATION ACT NO. 31 OF 2016

AND

IN THE MATTER OF THE MOMBASA COUNTY RATING ACT NO. 4 OF 2014

AND



**IN THE MATTER OF THE MOMBASA COUNTY
PUBLIC PARTICIPATION ACT NO. 6 OF 2017**

BETWEEN

MOMBASA LAW SOCIETY 1ST PETITIONER

**NORTH COAST RATEPAYERS AND RESIDENTS ASSOCIATION 2ND
PETITIONER**

FRANCIS KIARIE KARIUKI 3RD PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

Mombasa County Finance Act 2019 was declared unconstitutional for failure to set up a valuation court to hear any objections to increments in property tax rates prior to the enactment of the increments.

The petitioners' case was that the respondent had set out new property tax rates without giving them proper notice about the draft Valuation Roll and an opportunity to make objections at the valuation court. The valuation court was not set up and the opportunity for making objections to the valuation was not given. The court held that the Valuation for Rating and the Rating Act were operational and no evidence had been tendered to show that they had been repealed. They contained provisions that assisted in the proper valuation of properties. The court also held that the setting up of a valuation court where the value of property for which rates were payable would be assessed was crucial as it gave an opportunity to the taxpayer to cross-examine the valuer in question and offer evidence as to what the proper value of the property was. The court held that in violation of the petitioners' rights to fair administrative action, the respondent had proceeded to publish notices on the rates increment without establishing a valuation court and had thereby unilaterally determined the values of the petitioner's properties.

Reported by Ribia John

Judicial Review – scope and extent of judicial review – effect of the promulgation of the Constitution of Kenya, 2010 – whether the Constitution expanded the scope and extent of judicial review in Kenya – Constitution of Kenya, 2010, articles 23 and 47; Fair Administrative Actions Act No. 4 of 2015, section 4.

Administrative Law – legitimate expectation – taxpayers' expectation that a valuation court would be established to hear their objections on a Draft Valuation Roll proposing increment of property tax rates – whether a county government was required to comply with the provisions of sections 10 to 16 of the Valuation for Rating Act requiring the establishment of a valuation court for purposes of a proper determination of the values of properties in the county – Valuation for Rating Act (cap 266), sections 10, 11, 12, 13, 14, 15 and 16.

Statutes – interpretation of statutes – Acts of Parliament vis-à-vis County Assembly enactments – whether the enactment of the Mombasa County Finance Act 2019 violated sections 10 to 16 of the Valuation for Rating Act which required any Draft Valuation Roll to be presented before a valuation court where taxpayers' objections would be considered – Valuation for Rating Act (cap 266), sections 10, 11, 12, 13, 14, 15 and 16.

Brief facts

The petition sought a declaration that the Schedule to the Mombasa County Finance Act 2019 increasing certain rates was unconstitutional. The petitioners further sought a declaration that the Valuation Roll 2011 referred to in Kenya Gazette Notice No. 338 dated January 8, 2020 published in the Kenya Gazette Vol. CXXII No. 9 of January 17, 2020 and Kenya Gazette Notice No. 922 of February 7, 2020, which were issued under the Rating Act Cap. 267 and Valuation for Rating Act Cap. 266 were unlawful, invalid, and void *ab initio*.



The petitions also asked the court to issue an order of *certiorari* to quash the decisions of the respondent to increase the rates which were published in the Gazette Notices.

The petitioner contended that the respondent increased property taxes in complete disregard of articles 10 and 209(5) of the Constitution of Kenya, 2010 (the Constitution) and sections 132, 161, and 162 of the Public Finance Management Act No. 18 of 2012.

The respondent on the other hand opposed the petition and stated that the review of the rates was necessary and long overdue given that the last one was done way back in 1991. It was the respondent's case that in enacting the Mombasa County Finance Act 2019, it complied with due process and conducted public participation where it collected views from all stakeholders and other members of the general public. The respondent further stated that the issue of the failure of the respondent to set up a valuation court to hear and determine objections was unsupported by any law.

Issues

- i. Whether the promulgation of the Constitution of Kenya, 2010 expanded the scope and extent of judicial review in Kenya.
- ii. Whether the repeal of section 23 of the County Government Public Finance Management Transition Act No. 8 of 2013 also repealed the Valuation for Rating Act and the Rating Act.
- iii. Whether a county government was required to comply with the provisions of sections 10 to 16 of the Valuation for Rating Act requiring the establishment of a valuation court for purposes of a proper determination of the values of properties in the county.
- iv. Whether the enactment of the Mombasa County Finance Act 2019 violated sections 10 to 16 of the Valuation for Rating Act which required any Draft Valuation Roll to be presented before a valuation court where taxpayers' objections would be considered.
- v. Whether the decision of the County Government of Mombasa to increase property tax rates was unlawful and unconstitutional for;
 1. failure by the County Government to set up a valuation court to consider the objections to the Draft Valuation Roll pursuant to section 12 of the Valuation for Rating Act; and,
 2. infringing on the taxpayers' legitimate expectation that the published Draft Valuation Roll would be presented before a valuation court where objections to it would be considered.

Relevant provisions of the Law

County Government Public Finance Management Transition Act No. 8 of 2013 (Repealed)

Section 23 - Charges and rates

For the avoidance of doubt, until a new law relating to imposition of rates and charges is enacted, County Governments, urban areas and cities may, with necessary modifications, continue to impose rates and charges under the law for the time being in force in relation thereto.

Valuation for Rating Act (cap 266)

Section 10 - Objections to draft valuation and supplementary valuation rolls

(1) Any person (including the local authority or any person generally or specially authorized in that behalf by the local authority) who is aggrieved—

(a) by the inclusion of any rateable property in, or by the omission of any rateable property from, any draft valuation roll or draft supplementary valuation roll; or

(b) by any value ascribed in any draft valuation roll or draft supplementary valuation roll to any rateable property, or by any other statement made or omitted to be made in the same with respect to any rateable property,

may, on the payment of a non-refundable fee of five hundred shillings and on the prescribed form, lodge an objection with the town clerk at any time before the expiration of twenty-eight days from the date of publication of the notice referred to in section 9(3).



(2) No person shall be entitled to urge an objection before a valuation court unless he has first lodged the notice of objection; but it shall be competent for a valuation court to agree to consider an objection although notice thereof has not been given in accordance with this section.

(3) The town clerk shall, within twenty-one days after the date on which a notice of objection is lodged with him, send a copy thereof to the rateable owner of the rateable property to which the objection relates, if that person is not the maker of the objection.

Section 11 - Uncontested draft valuation and supplementary valuation rolls

(1) If, on the expiration of the period of twenty-eight days referred to in section 10(1), no objections have been received, or if all objections duly received have been withdrawn before the day fixed for the first sitting of the valuation court, the town clerk shall endorse upon the draft valuation roll or draft supplementary valuation roll and sign a certificate to that effect.

(2) The town clerk shall publish notice that the valuation roll or supplementary valuation roll has been signed and certified under this section.

Held

1. Following the promulgation of the Constitution of Kenya, 2010 (the Constitution), the scope and extent of judicial review had been greatly expanded. Article 23(3)(f) of the Constitution expressly gave the courts powers to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Of greater significance however was article 47 of the Constitution which entitled every person who had been or was likely to be affected by administrative action to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.
2. The Fair Administrative Actions Act, 2015 enacted pursuant to article 47(3) of the Constitution had radically altered the judicial review landscape in Kenya in conformity with the transformative Constitution. That Act defined administrative action to include powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body or authority that affected the legal rights or interest of any person to whom such action related.
3. Section 4 of the Fair Administrative Action Act echoed article 47 of the Constitution and reiterated the entitlement of every person to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms were likely to be affected by an administrative decision, the administrator ought to have given the person prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations. Such a person was equally entitled to be supplied with information, material and evidence to be relied upon in making the decision.
4. In recognition of the status of public participation as a national value and principle of governance under article 10 of the Constitution, the Fair Administrative Action Act codified public participation as an integral part of public administrative action. Accordingly, where any proposed administrative action was likely to materially and adversely affect a group of persons or the general public, the administrator was required to issue a public notice of the proposed administrative action and to invite public views on the proposal.
5. The petitioners were ratepayers and residents within the respondent's sphere of jurisdiction. That being the case, they stood to be affected by any changes that the respondent would make to its existing valuation roll and that the respondent was thus duty-bound to make changes in the roll in strict compliance with the law and procedures in place.
6. Section 10 of the Valuation for Rating Act provided that any person who was aggrieved by Draft Valuation and Supplementary Valuation Rolls to lodge an objection with the town clerk at any time before the expiration of twenty-eight days from the date of the publication of the notice referred to in section 9(3) of that Act.



7. Section 11 of the Valuation for Rating Act allowed the respondent to publish a notice of the Valuation Roll as it did in the Kenya Gazette Notice of January 9, 2020 where no objections were received or where all the objections received had been withdrawn. Otherwise, the respondent was required to set up a valuation court as provided under section 12 of that Act to consider the objections and make a determination thereon as provided under section 16 of the Act. That crucial step was missed by the respondents.
8. The valuation court was the only forum where each ratepayer received a notice to appear and was heard before the court. The valuation court provided the only forum where a ratepayer could cross-examine the respondent's valuer and call his/her own witnesses to give their opinion or testimony as to what they considered to be the proper value of the property. Only after hearing the objections could the valuation court amend the draft Valuation Roll. By proceeding to publish notices on the new rates before establishing a valuation court, the respondent had unilaterally determined the values of the petitioners' properties.
9. If indeed the Valuation for Rating Act and the Rating Act had been repealed as the respondent contended, then the notices issued by the respondent inviting members of the public for the inspection and objections on the valuation roll as well as the Kenya Gazette Notice of January 9, 2020 increasing the rates were not based on any existing legislation and were in breach of article 210 of the Constitution which prohibited the imposition of any tax or licensing fee other than as provided by legislation.
10. Section 23 of the County Government Public Finance Management Transition Act No. 8 of 2013 was repealed on September 30, 2013. There was no basis for the proposition that with the repeal of the provisions, the Valuation for Rating Act and the Rating Act stood repealed. The respondent failed to place before the court any law expressly repealing the two statutes. They ought to have complied with the provisions requiring the establishment of a valuation court for purposes of a proper determination of the values of the petitioners' properties.
11. From past practice and in accordance with the provisions of the Valuation for Rating Act the petitioners reasonably expected that a valuation court would be established to hear their objections. That was a reasonable expectation since the respondent had issued public notices inviting their objections pursuant to the Act.
12. A legitimate expectation arose where a person responsible for taking a decision had induced in someone a reasonable expectation that he would receive or retain a benefit or advantage. It was a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations was at the root of the constitutional principle of the rule of law, which required predictability and certainty in Government dealings with the public. Accordingly, the increment of property rates by the respondent was undertaken in total disregard of the law and in violation of the rights of the petitioners.

Petition allowed.

Orders

No order as to costs.

Citations

Cases

Kenya

1. *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd.* Civil Appeal 185 of 2001; [2002] KECA 8 (KLR) - (Explained)
2. *Republic v Kiambu County Executive Committee & 3 others ex-parte James Gacheru Kariuki & 9 others* Judicial Review 4 of 2016; [2017] KEHC 5037 (KLR) - (Explained)
3. *Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd* Judicial Review 470 of 2016; [2017] KEHC 8337 (KLR) - (Explained)



Uganda

Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300 - (Explained)

Statutes

Kenya

1. Access to Information Act (cap 7M) In general- (Cited)
2. Constitution of Kenya articles 10, 20, 21, 23, 27, 35, 39, 40, 42, 47, 48, 50, 60, 174, 176, 185, 186(1); 189; 190; 191; 196; 201; 209(3)(5); 210(1); 232; 260- (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 4- (Interpreted)
4. Public Finance Management Act (cap 412A) sections 132, 161, 162- (Interpreted)
5. Rating Act (cap 267) section 15- (Interpreted)
6. Societies Act (cap 108) In general- (Cited)
7. Valuation for Rating Act (cap 266) sections 9(3); 10; 12; 13; 14; 15; 16- (Interpreted)

Advocates

Ms Katisya and *Ms Osino* for the petitioners

JUDGMENT

Background

1. This matter was initially filed at the Mombasa ELC being Constitutional Petition No 6 of 2020. The matter proceeded by way of Affidavit evidence and written submissions before the Honourable Justice Munyao Sila at Mombasa. However, when the learned judge retired to write the Judgement it did strike him that as a ratepayer in Mombasa, he stood to benefit from the Judgment in the event the Petition succeeded.
2. Upon noting the possible conflict of interest and after notifying the parties herein, the learned judge recused himself from the matter on November 4, 2020 and referred the file to the ELC Presiding Judge, the Honourable Justice Samson Okong'o to appoint another judge to write the Judgement.
3. Accordingly, and following the directions given by the ELC Presiding Judge on November 10, 2020, this matter was transferred to the ELC Malindi on February 3, 2021.

The Petitioners' Case

4. By their Petition dated February 24, 2020, the Mombasa Law Society, North Coast Ratepayers and Residents Association and Francis Kiarie Kariuki (hereinafter the petitioners) pray for:
 - (a) A declaration that the Schedule to the Mombasa County Finance Act 2019 increasing the rates be declared unconstitutional;
 - (b) A declaration that the Valuation Roll 2011 referred to in Kenya Gazette Notice No. 338 dated January 8, 2020 published on the Kenya Gazette Vol CXXII No 9 of January 17, 2020 and Kenya Gazette Notice No. 922 of February 7, 2020 which were issued under the Rating Act cap 267 and Valuation for Rating Act Cap. 266 is unlawful, invalid and void *ab initio*;
 - (c) An order of *certiorari* to quash and remove to this honourable court the decisions of the respondent to increase the rates which were published in the Gazette Notice No. 338 dated January 8, 2020 and Kenya Gazette Notice No 922 of February 7, 2020;



(d) An order compelling the respondent to publish the following information to the petitioner:

- (i) Information on how the Valuation Roll of 1991 which was used to calculate rates until the year 2019 was abandoned and the legal process that has been used to arrive at the purported Valuation Roll of 2011.
- (ii) Information on whether there was an increment of rates based on the alleged Valuation Roll of 2011 and to what extent.
- (iii) The process of effecting the increases and changes and the relevant gazette notices and statutes.
- (iv) Information on all the objections filed by the property owners in the County of Mombasa against the Valuation Roll 2011.
- (v) Information on the form of rating adopted in the preparation of the purported Valuation Roll of 2011 and whether it is for unimproved site value or market value of the property and proof of the entire process through which the purported Valuation Roll of 2011 was prepared and adopted.
- (vi) Information on the views on the increased rates based on the alleged Valuation Roll of 2011 obtained from the Cabinet Secretary, National Treasury and the Commission on Revenue Allocation as required under the Public Management Finance Act, 2012 *Rating Act* and the *Valuation for Rating Act*.
- (vii) Information on the approval by the Cabinet Secretary in charge of Devolution on the form of rating before the implementation of the alleged Valuation Roll of 2011 and the new rates as per the contents of the Gazette Notices.
- (viii) Information regarding the final 2011 Valuation Roll.

(e) Costs.

5. Those prayers arise from the petitioners' contention that the County Government of Mombasa (the respondent) has increased property taxes in complete disregard of articles 10 and 209(5) of the *Constitution of Kenya* and sections 132, 161 and 162 of the *Public Finance Management Act* No 18 of 2012.
6. The petitioners assert that on or about October 3, 2018, the respondent invited the public to inspect a draft valuation roll which proposed to substantially increase the unimproved site values of ratable properties in Mombasa County. Several objections were raised by ratepayers to the said draft valuation roll in accordance with section 10 of the *Valuation for Rating Act*. It is the petitioners' case that contrary to the requirements of section 12 of the Act, the respondent failed to establish a Valuation court to hear and determine the objections.
7. The petitioners aver that despite its failure to comply with the said section 12 of the Act, the respondent proceeded to publish in the Kenya Gazette of January 9, 2020 Notice increasing the property rates effected from January 1, 2020 and payable by March 31, 2020 for commercial/industrial properties



at 1% and for residential/agricultural properties at 0.75%. By a second notice published in the Kenya Gazette Notice No 922 of February 7, 2020, the increment of the rates was indicated as follows:

- (i) Commercial/Industrial property – 0.8%
 - (ii) Residential/Agricultural property – 0.6%
8. The petitioners contend that the rates in the first and second notices are based on the unimproved site values in the alleged 2011 Valuation Roll. It is their case that hitherto, rates have been based on the Unimproved Site Values of the 1991 Valuation Roll which remains in force and that the alleged Valuation Roll of 2011 is arbitrary, illegal, unprocedural and in breach of the Constitution, the Public Finance Management Principles and the Laws of Kenya.
9. The petitioners further assert that the Mombasa County Rating Act No 4 of 2014 passed by the Mombasa County Assembly, with a commencement date of October 1, 2013, is in conflict with the Valuation for Rating Act cap 266 and the Rating Act cap 267 of the Laws of Kenya. It is further their case that both the first and second notices were issued under the Rating Act by the County Secretary of the Respondent in total disregard to the existing Mombasa County Rating Act No 4 of 2014. By so doing, the respondent's Executive arm has usurped the constitutional and legislative mandate of the Mombasa County Assembly which encompasses the elected representatives of the citizens of Mombasa.
10. The petitioners hence accuse the respondent of illegally and in contravention of the Constitution and the principles of devolution resorting to the Valuation and Rating Act and the Rating Act only despite the enactment of the Mombasa County Rating Act No 4 of 2014 which guarantees the citizenry participation in the process through their elected representatives. Accordingly the petitioners assert that the constitutional rights of the ratepayers of the County of Mombasa are threatened and have been violated and hence the orders sought in the Petition.

The Respondent's Case

11. The County Government of Mombasa (the respondent) however denies any wrong doing and objects to the grant of the prayers sought. In a replying affidavitsworn on its behalf by the Chief Officer, Lands & Physical Planning Dr Jeophita June Mwajuma and filed herein on June 15, 2020, the respondent avers that prior to the promulgation of the Constitution of Kenya, 2010, the Municipal authority being an extension or organ of the National Government had the power and duty to levy rates to meet all liabilities falling to be discharged out of the general rate fund.
12. The respondent further avers that the laws applicable to the defunct local authorities in relation to the imposition of rates were the Valuation for Rating Act (cap 266) and the Rating Act (cap 267). However with the advent of the Constitution of Kenya 2010 the County Governments were placed with obligations and powers inter alia to impose property rates which can only be exercised by legislation.
13. The respondent avers that following the repeal of the County Government Public Finance Management Transition Act No 8 of 2013, it did through the County Assembly of Mombasa enact the Mombasa County Rating Act No 4 of 2014 to give effect to article 210(1) of the Constitution of Kenya 2010.
14. The respondent denies that its County Rating Act 2014 is in conflict in any way with the said cap 266 and cap 267 which stood repealed by the Constitution of Kenya, 2010 and the County Governments Public Finance Management Transition Act, 2013 and asserts that the issue of the failure of the Respondent to set up a valuation court to hear and determine objections is unsupported by any law.



15. The respondent asserts further that in enacting the said Mombasa County Finance Act 2019, due process as provided by the law was observed including public participation being conducted to collect views from the general public and relevant stakeholders.
16. The respondent avers that as regards the increment of taxes on land it should be noted and appreciated that the Valuation Roll being used before the impugned 2011 one was the 1991 Valuation Roll, and that with the increased challenges of the current economic set up, a County also has a right to obtain revenue from the public to be able to meet its liabilities.
17. The respondent denies that the ratepayers' fundamental right to be represented before taxation has been infringed as there was public participation and consultation before the enactment of the impugned Act.

Analysis And Determination

18. I have carefully perused and considered the Petition and the response thereto. I have similarly perused and considered the detailed submissions and authorities placed before the court by the learned advocates for the parties.
19. The 1st petitioner is the Mombasa Law Society, a society registered under the [Societies Act](#) Cap. 108 of the Laws of Kenya. It describes itself as a membership organization of lawyers practicing in the County of Mombasa and its environs and as one amongst the eight branches of the Law Society of Kenya established under section 24 of the [Law Society Act](#) No 21 of 2014. The 1st petitioner asserts that it brings this suit pursuant to the provisions of sections 4(a), (b), (d), (h), 5, 6 and 24(2) of the [Law Society Act](#) aforesaid and its Constitution.
20. The 2nd petitioner is the North Coast Ratepayers Association, a society similarly registered under the [Societies Act](#) cap 108 Laws of Kenya. It describes itself as a membership organization of ratepayers and residents of Mombasa County.
21. The 3rd petitioner – Francis Kiarie Kariuki is an individual male adult who describes himself as a ratepayer resident in the County of Mombasa.
22. The respondent on the other hand is the County Government of Mombasa duly established as such under article 176 of the [Constitution of Kenya](#) and charged inter alia with the obligation and powers to impose property rates within its area of jurisdiction.
23. The petitioners contend that they bring this Petition on their own behalf and on behalf of other ratepayers within the County of Mombasa pursuant to the provisions of articles 10, 20, 21, 23, 27, 35, 39, 40, 42, 47, 48, 50, 60, 174, 185, 186(1), 189, 190, 191, 196, 201, 209(3) & (5), 210(1), 232 and 260 of the [Constitution of Kenya, 2010](#) and the 6th Schedule of the [Constitution of Kenya, 2010](#).
24. The petitioners accuse the respondent of orchestrating an illegal and unconstitutional scheme to unilaterally increase the property taxes within Mombasa County by deliberately sidelining, misinforming and misleading the ratepayers of Mombasa.
25. In this respect, the petitioners contend that on or about October 3, 2018, the respondent issued a notice inviting ratepayers to inspect and raise objections to a Valuation Roll which the respondent had prepared, upon payment of a fee of Kshs 500/=. The invitation was issued under the provisions of the [Valuation for Rating Act](#) cap 266 of the Laws of Kenya. It is the petitioners' case that many members of the 2nd petitioner responded to the said notice, paid the requisite fee and filed their objections thereto.



26. The petitioners told the court that in the meantime, they continued to pay rates on the basis of the previous years' rates percentage based on the 1991 Valuation Roll on unimproved site values as they waited for the respondent to establish a Valuation Court to hear their objections.
27. They aver that some fifteen (15) months later on January 17, 2020, they instead woke up to a notice in the Kenya Gazette issued by the respondent under the provisions of the Rating Act, which notice increased the property rates as follows:
- (i) Commercial/Industrial Property – 1%
 - (ii) Residential/Agricultural Property – 0.75%
28. It was further the petitioners case that less than three(3) weeks later on February 17, 2020, they woke up to yet another notice in the Kenya Gazette issued by the respondent changing the rates to:
- (i) Commercial/Industrial Property – 0.8%
 - (ii) Residential/Agricultural Property – 0.6%
29. While both Gazette Notices indicated that the property rates were based on unimproved site values as appears in the 2011 Valuation Roll, the petitioners aver that there was no such 2011 Valuation Roll as none had been approved. The petitioners told the court that in many cases, the new rates which the respondent required to be paid by March 31, 2020 rose by 400%. The petitioners assert that the increments were ill-timed as they came at a time when the County of Mombasa was experiencing a severe economic crunch and yet their attempts to engage the respondent on the issue were unsuccessful.
30. The petitioners accordingly aver that the respondents acts aforesaid were in violation of the following:
- (a) The principles of public participation as encapsulated under article 10 of the Constitution;
 - (b) The Principle that there can be no taxation without representation as captured under article 210 of the Constitution;
 - (c) The requirement of various laws to consult with the National Government before adopting a form or method of rating;
 - (d) The right of the petitioners to access justice and to a fair hearing as guaranteed by articles 48 and 50 of the Constitution;
 - (e) The right to fair administrative action;
 - (f) The right to property; and
 - (g) The right to access information as guaranteed under article 35 of the Constitution.
31. The respondent however denies acting in violation of the Constitution or any other laws in force. Briefly, it is the respondent's case that its predecessor, the Municipal Council of Mombasa was by law obligated to raise revenue. One way of doing so was through collection of land rates. To guide it in imposing the rates against land owners, the defunct local authorities had in place the 1991 Valuation Roll. Some 20 years thereafter, the defunct local authority embarked on an exercise to review the rates in the year 2011 but the same was not concluded.



32. The respondent told the court that with the advent of devolution in 2013 and the creation of County Governments, it took over the functions of the former Municipal Council and continued to impose and collect rates based on the 1991 Valuation Roll. Noting the changing times and the apparent increment of values of the properties overtime, the respondent told the court it opted to revive the 2011 Valuation Roll which then increased land rates.
33. The respondent asserts that in enacting the impugned Mombasa County Finance Act 2019, due process as provided by the law was observed including public participation being conducted to collect views from the general public and other relevant stakeholders. The respondent thus denies that it has infringed on the petitioners' right to be represented before taxation and/or that it has denied them access to information and an opportunity to be heard.
34. The petitioners herein are essentially asserting that their fundamental rights as guaranteed by the Constitution and other pieces of legislation have been infringed by the respondent. Accordingly they urge the court to invoke its supervisory jurisdiction to declare the respondent's actions as unlawful and to quash the same.
35. That being the case, it is important that the court sets out the purpose and scope of its supervisory functions as exercised by way of Judicial review. As was stated by the court of Appeal in Municipal Council of Mombasa v Republic ex parte Umoja Consultants Limited [Nairobi Civil Appeal No. 185 of 2001] (2002 eKLR:

“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 they 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 no sufficient evidence to support the decision and that as we have said, is not the province of judicial review.”

36. As was stated in the Ugandan case of *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA 300:

“In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...

Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example an illegality where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee when the power to do so are vested by law in the District Service Commission.

Irrationality is when there is such gross unreasonableness in the decision taken or the act done, that no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards ...



Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision.

The unfairness may be in the non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

37. Following the promulgation of the [Constitution of Kenya, 2010](#) the scope and extent of judicial review has been greatly expanded in this Country. Article 23(3)(f) of the [Constitution](#) now expressly gives the Courts powers to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Of greater significance however is article 47 thereof which entitles every person who has been or is likely to be affected by administrative action to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
38. The [Fair Administrative Actions Act, 2015](#) enacted pursuant to article 47(3) of the [Constitution](#) has radically altered the Judicial review land scape in Kenya in conformity with the transformative [Constitution of Kenya, 2010](#). That Act defines “administrative action” to include “powers, functions and duties exercised by authorities or quasi-judicial tribunals”, or “any act, omission or decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relates.”
39. Section 4 of the [Fair Administrative Action Act](#) echoes article 47 of the [Constitution](#) and reiterates the entitlement of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person’s rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations thereon. Such a person is equally entitled to be supplied with information, materials and evidence to be relied upon in making the decision.
40. In recognition of the status of public participation as a national value and principle of governance under article 10 of the [Constitution](#), the [Fair Administrative Action Act](#) codified public participation as an integral part of public administrative action. Accordingly, where any proposed administrative action is likely to materially and adversely affect a group of persons or the general public, the administrator is required to issue a public notice of the proposed administrative actions and invite public views on the proposal.
41. In their Petition before me, the petitioners question the constitutionality of the respondent’s increment of property rates and valuations claiming it was arbitrary and done in total disregard of the petitioners’ and the Mombasa residents’ right to public participation, access to information and fair administrative action. The respondent on the other hand answers that the review of the rates was necessary and long overdue given that the last one was done way back in 1991. It is the respondent’s case that in enacting the Mombasa County Finance Act 2019, it complied with due process and conducted public participation where it did collect the views from all stake holders and other members of the general public.
42. From the pleadings and the materials placed before me, there was no dispute that the petitioners herein were ratepayers resident within the respondent’s sphere of jurisdiction. That being the case, I had no doubt in my mind that they stood to be affected by any changes that the respondent would make to its existing valuation roll and that the respondent was thus duty bound to make changes in the roll in strict compliance with the law and procedures in place.



43. The genesis of these proceedings can be traced to the Notice dated October 3, 2018 as published by the respondent in the Daily Nation Newspaper of October 5, 2018. The said notice signed by the County Secretary and Head of Public Service reads in the relevant part as follows:

“Notice of Publication Of Valuation Roll In Draft

Notice is hereby given that the County Government of Mombasa has prepared a valuation roll in accordance with the *Valuation for Rating Act*, Chapter 266, Laws of Kenya, a copy of which is available for inspection at the offices of the Department at the offices of Lands, Housing and Physical Planning at Bima Tower Annex, 4th Floor and at Bima Tower, Ground Floor, Digo Road, Mombasa within normal office hours.

If there be any objection to the inclusion, omission and/or value or any other particulars in any entry the same should be lodged by way of notice of objection at Bima Tower, Ground Floor, Digo Road within twenty one (21) days of this Notice.”

44. It was not disputed that in response to the said notice, the petitioners herein, among others, lodged various objections to the draft Valuation Roll. While it was the petitioners expectation that the respondent would then establish a Valuation Court to hear and determine the objections, the respondent did not do so. Instead the Respondent proceeded to publish in the Kenya Gazette of January 9, 2020 another notice reading as follows:

“Notice of Land Rates Under Section 15 of The *Rating Act* cap 267

Notice is hereby given by the County Government of Mombasa for the calendar year starting on 1st January, 2020 as levied rates on all rateable property appearing in the 2011 Valuation Roll as follows:

(i) Commercial/Industrial - 1%

(ii) Residential/Agricultural property - 0.75%

The cited percentages are of the unimproved site values of the rateable property as appears in the said Valuation roll.

The rates are due and payable from 1st January, to March 31, 2020, after which penalties on outstanding rates will attract interest as provided in the Statute.”

45. By a subsequent Gazette Notice published on February 7, 2020, the Respondent varied the rates to 0.8% for commercial/industrial properties and 0.6% for residential/agricultural properties.
46. As it were, while the respondent did not refer to the section of the *Valuation for Rating Act* pursuant to which it published the notice on October 3, 2018, there was no doubt that the same was made pursuant to the requirements of section 9(3) of the said Act. Upon publication of the notice, section 10 of the said Act provides thus:

“10. Objection to draft Valuation and Supplementary Valuation Rolls

- (1) Any person (including the local authority or any person generally or specially authorized in that behalf by the local authority) who is aggrieved –



- (a) By the inclusion of any rateable property in, or by the omission of any rateable property from, any draft valuation roll or draft supplementary valuation roll; or
- (b) By any value ascribed in any draft valuation roll or draft supplementary valuation roll to any rateable property, or by any other statement made or omitted to be made in the same with respect to any rateable property.

may, on the payment of a non-refundable fee of five hundred shillings and on the prescribed form, lodge an objection with the town clerk at any time before the expiration of twenty-eight days from the date of the publication of the notice referred to in section 9(3).

- (2) ...
- (3) The Town Clerk shall, within twenty-one days after the date on which a notice of objection is lodged with him, send a copy thereof to the rateable owner of the rateable property to which the objection relates, if that person is not the maker of the objection.”

- 47. Under section 11 of the same Act, the respondent was allowed to publish notice of the Valuation roll as it did in the Kenya gazette notice of January 9, 2020 where no objections were received or where all the objections received had been withdrawn. Otherwise, the respondent was required to set up a Valuation Court as provided under section 12 of the Act to consider the objections and make a determination thereon as provided under section 16 of the Act.
- 48. From the material placed before me, it was apparent that this crucial step was missed and hence the petitioners grievances herein. As it were, the Valuation Court is the only forum where each ratepayer receives a notice to appear and is heard before the court. The Valuation Court provides the only forum where a ratepayer can cross-examine the respondent’s valuer and call his own witnesses to give their opinion or testimony as to what they consider to be the proper value of the property. Only after hearing the objections can the Valuation Court amend the draft Valuation Roll.
- 49. By proceeding to publish Notices on the new rates before establishing a Valuation Court, it was obvious to me that the respondent had unilaterally determined the values of the petitioners’ properties.
- 50. Explaining their failure to comply with the provisions of sections 10 to 16 of the [Valuation for Rating Act](#), the respondents came up with the rather curious position that both the [Valuation for Rating Act](#) (cap 266) and the [Rating Act](#) (cap 267) stood repealed by virtue of section 23 of the County Government Public Finance Management Transition Act No 8 of 2013.
- 51. I say so because the notices issued by the respondent inviting members of the public for the inspection and objections on the valuation roll as well as the Kenya Gazette Notice of January 9, 2020 increasing the rates, are according to the respondent itself, based on the [Valuation for Rating Act](#) and the [Rating Act](#). If indeed the two Acts of Parliament had been repealed as the respondent now contends, then the said notices were not based on any existing legislation and are thus in breach of article 210 of the [Constitution](#) which prohibits the imposition of any tax or licensing fee other than as provided by legislation.



52. The said section 23 of the County Government Public Finance Management Transition Act No 8 of 2013 which was repealed on September 30, 2013 did provide as follows:

“23. For the avoidance of doubt, until a new law relating to imposition of rates and charges is enacted, County Governments, urban areas and cities may, with necessary modifications, continue to impose rates and charges under the law for the time being in force in relation thereto.”

53. With respect, I did not find any basis for the proposition that with the repeal of the said provisions, the *Valuation for Rating Act* and the *Rating Act* stood repealed. At any rate as the Court of Appeal stated in *Republic v Kiambu County Executive Committee & 3 others ex-parte James Gacheru Kariuki & 9 Others* [2017]eKLR:

“The Public Finance Management Transition Act was repealed with respect to the approved revenue raising measures of the defunct local authorities following the coming into effect of the County Governments. However, the position with respect to property rates is that, as aforesaid, it is a revenue raising measure that is expressly permitted under the *Constitution of Kenya 2010*. As analysed above the County Executive Committee could utilize existing National Legislation to continue imposing property rates until appropriate County Legislation is enacted. Coupled with that authorization is the necessary authorization to continue using the Valuation Rolls used by the defunct local authorities. There is nothing illegal or improper ... in the County Executive Committee, in the exercise of its executive power, adopting the Valuation Rolls used by the defunct local authorities.”

54. The respondents have not placed before me any law expressly repealing the two statutes and it is therefore my finding that they ought to have complied with the provisions requiring the establishment of a valuation court for purposes of a proper determination of the values of the petitioners properties.

55. To this effect, I agree with the petitioners submissions that they had expected from past practice and in accordance with the provisions of the *Valuation for Rating Act* that a Valuation Court would be established to hear their objections. This was a reasonable expectation since the respondent had issued public notices inviting their objections pursuant to the said Act.

56. As was stated in *Republic v Principal Secretary Ministry of Mining ex-parte Airbus Helicopters Southern Africa (PTY) Limited* [2017] eKLR;

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in Government dealings with the public.”

57. It follows therefore that the increment of property rates by the respondent was undertaken in total disregard of the law and in violation of the rights of the petitioners. Accordingly, I am persuaded that there is merit in the Petition dated February 24, 2020. I allow the same in terms of Prayers (a), (b), (c) and (d) thereof.

58. I make no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 10TH DAY OF FEBRUARY, 2022 VIA MICROSOFT TEAMS.



J. O. OLOLA

JUDGE

IN THE PRESENCE OF:

Ms Katisya with Ms Osino for the Petitioners

No appearance for the Respondent

Court assistant - Kendi

