



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 532 OF 2013 CONSOLIDATED WITH PETITION NOS. 12 OF 2014, 35, 36 OF 2014, 42 OF 2014, & 72 OF 2014 AND JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 61 OF 2014

ROBERT N. GAKURU & OTHERS PETITIONERS

VERSUS

THE GOVERNOR KIAMBU COUNTY.....1ST RESPONDENT

THE DEPUTY GOVERNOR KIAMBU COUNTY.....2ND RESPONDENT

THE EXECUTIVE COMMITTEE

KIAMBU COUNTY.....3RD RESPONDENT

THE HON ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

Introduction

1. This judgement is the subject of Petition Nos. 532 of 2013 filed by **Robert N. Gakuru**, Petition No. 12 of 2014 filed by **Likambu Matatu Savings & Credit Co-operative Society Ltd and Others**, Petition No. Petition No.35 of 2014 by **Quarry Owners Association of Kenya**, Petition No. 36 of 2014 filed by **Eliud Ngugi Ngigi and Others**, Petition No. 42 of 2014 filed by **Gacheru Kariuki**, Petition No. 72 of 2014 filed by **Townlink Cabs Limited** and Judicial Review Application No. 61 of 2014 filed by **Patrick Kamau Kungu & Others** variously against the Respondents herein. The said matters were consolidated as the issues involved in all the matters were similar and cut across the said causes.

The Case for the Petitioners/Applicants

2. In the said matters the Petitioners and the Applicants are seeking in the main a declaration that the *Kiambu Finance Act, 2013* gazetted vide *Kiambu County Gazette Supplement No. 8 (Act No. 3)* (hereinafter referred to as the Act) violates various provisions of the Constitution and that the same is null and void.
3. The grounds on which these matters were based were that no consultations took place and no invitations were made by the Respondents before the said Act was enacted. It was further contended that the provisions of the said Act contravene the provisions of the Constitution as it contains levies and/or taxes which the Respondents are not empowered to impose.
4. From the affidavits filed in support of the petitions and the application, it comes out clearly that

- the petitioner/applicant's complaint is centred on the fact that no proper public participation was factored into the enactment of the impugned Act and as a result thereof the Respondents passed a piece of legislation containing unreasonable provisions which provisions were punitive with some amounting to double taxation. Consequently, the petitioners/applicants have been subjected to discrimination in terms of taxation and hence exposing them to a real risk of closure of business and loss of livelihood thus denying them fundamental right to economic well-being and the right to earn a living contrary to the provisions of the Constitution.
5. According to the Petition No. 12 of 2014, although their views were sought at a meeting held between them and the members of the County Assembly at Windsor Hotel (hereinafter referred to as the Windsor Hotel Meeting) with respect to an earlier Bill and the draft Bill incorporated their view, the said Bill was rejected when the same was tabled in the Assembly. However when the impugned Act was gazetted, it was a departure from what was agreed between them and the Respondents in terms of the levying of taxes. In the said petition it was contended that the provisions of the impugned Act were contrary to what the stakeholders agreed upon and that its provision placed a heavy burden upon the said petitioner.
 6. The petitioners in petition no. 36 of 2014 on their part took issue with the fact that they were left out of the said Windsor Hotel meeting despite being members of Kabete Sub-County Business Owners and Services Association who are major stakeholders in the County.
 7. That no consultation was done was reiterated by the applicants in Judicial Review Application No. 61 of 2014. According to them the imposition of the levies in the County will expose them to unfair competition from other meat traders from the neighbouring Counties who do not face similar levies.
 8. In the submissions filed on behalf of the petitioners in petition No. 532 of 2013, it was contended that media advertisement in the Daily Nation inviting the public to Consultative forums did not indicate the Act as one of the items in the agenda. As the first Bill which was placed before the County Assembly had been rejected, it was submitted that there was a need for further consultation on the changes which were introduced therein.
 9. In his submissions **Dr Wangai**, learned counsel for the petition in petition no. 532 of 2013 submitted inter alia that Article 10 of the Constitution provides for national values and principles of governance and Clause (2)(a) identifies among others patriotism and participation of the people as one of such values and principles. According to him, the people did not participate in the enactment of the Act. In his view Article 174(c) of the Constitution which talks of objects and principles of devolved government identifies the need to give powers of self-governance to the people. It was therefore submitted that the people ought to participate in the governance as well as public financing as provided for under Article 201 of the Constitution which requires openness and accountability including public financial matters. Since Article 202(1) of the Constitution talks of sharing of revenue between the National and County Governments, the County Governments can get money from the National Government. According to learned counsel Article 209 deals with areas in which the County Government can levy taxes and source revenue and these are property, entertainment and taxes levied by virtue of an Act of Parliament. However, in other areas not mentioned the County Government has no mandate to levy taxes.
 10. With respect to the provisions of the **County Governments Act** No. 17 of 2012, it was submitted that it is provided in section 87 thereof that the participation of the citizens in the running of County Governments is recognised while section 91 thereof provides for platforms for citizens participation. Section 115 on the other hand provides for the participation in the county planning. In learned counsel's view there were no such platforms hence the people of Kiambu were not consulted. Learned counsel urged this Court to define public participation and consultation.
 11. Referring to the replying affidavit he submitted that what was exhibited as a form of public participation were names of persons who were paid which would not in his view constitute public participation without an agenda and minutes of the meeting and their contributions. Since the county has 1.6 million people the number of 935 people.
 12. It was therefore his case that to the extent that there was no consultation the Act is unconstitutional and that the mode of taxation is also unconstitutional and that the costs be awarded to the petitioners.
 13. While submitting on behalf of **Mr. Magani** for the petitioners in petition no. 2 of 2014, **Dr Wangai** contended that whereas the said petitioners were consulted on the earlier Bill the Act

- contained new figures which were different from the one which were contained in the Bill that was rejected. He further submitted that the mode of advertisement in the *Daily Nation* Newspaper did not lend itself to a proper avenue for public participation in that the advertisement was only on 17th August 2013 for a meeting to be held on 20th August, 2013 without proper circulation of the notice. To him the said advertisement cannot be a basis of consultation since the same was in any case in English language which is not the local dialect of the majority of the residents of the County. To him the advert itself was confusing in the sense that it did not speak of the Act.
14. On behalf of the petitioner in petition No. 35 of 2014, it was submitted that the fact that so many suits have arisen from so many different quarters over the same Act of one legislature goes to show that there is great folly not only in the contents of the Act but also in the manner in which it was enacted. According to the petitioners herein, the public advertisement which appeared in the *Daily Nation* Newspaper of 17th August 2013 mentioned a discussion of the County Integrated Plan and did not address itself to the contents of the proposed *Finance Bill* hence had no direct bearing on the Kiambu **Finance Act**, 2013.
 15. It was therefore submitted that the Respondents did not engage in sufficient or proper public participation hence the Act is unconstitutional. Apart from that it was contended that under Article 209 of the Constitution only the National Government may impose Income Tax, Value Added Tax, Customs and other duties and Excise Tax while a County may impose Property Tax, Entertainment Tax and any other Tax authorised by an Act of Parliament. However, both Governments may impose charges for the services they provide such as parking, trade licences etc. although the taxation and other revenue raising powers of a County cannot be exercised in a way that prejudices national economic policies, economic activities across the County boundaries or the national mobility of goods, service, capital or labour. However, it was the petitioners' view that the levy of Kshs 1/= on every stone transported from the members' quarries as stipulated under Schedule I part VII of the Act qualifies as a production tax since there is no service shown that the Respondents are providing. Secondly to impose taxes on the goods as they are transported as stipulated in Schedule I Part VII is a contravention of Article 209(5) which prohibits counties from prejudicing economic activities across County boundaries since the effect of the said action would be to discourage the sell of quarried stones to persons outside the County.
 16. It was further submitted that to require the quarry owners to collect the said illegally imposed taxes would be to force the quarry owners to be tax collecting agents without following the law and by forcing the said quarry owners to provide free services contrary to Articles 25(b) and 209(4) of the Constitution. Since part 2(7) of the 4th Schedule to the Constitution deals with Trade Development and Regulation to include market trade licences etc. it was submitted that the Schedule does not deal with imposition of new taxes or raising of existing levies hence the imposition of the Transport taxes under Schedule I Part VII of the Act falls outside the ambit of the said Schedule 4 of the Constitution which deals with the provision of services. It was therefore submitted that even had the Respondents adhered to the requirement of public participation the actions of the Respondents would still have been illegal.
 17. Submitting on behalf of the said petitioners **Mr Murithi**, their learned counsel while associating himself with the submissions made by **Dr Wangai** reiterated the contents of the written submissions filed in the said petition that the levying of Kshs 1/= per stone was a tax and not a levy since it is based on a turnover and is not therefore a licence which is a one off charge for services rendered.
 18. According to the petitioners in petition No. 36 of 2014, in the exercise of the powers conferred by Article 185 of the Constitution Kiambu County Assembly prepared Kiambu County *Finance Bill* 2013. However the said Bill was prepared and passed without proper participation and consultation of the public/petitioners of Kabete Sub-county and to a larger extent the residents of Kiambu County contrary to sections 87 and 115 of the *County Government Act*, 2012 which provide for the principles of citizenship participation in the counties and public participation in county preliminary process. It was submitted that the raising of permits and licence fees by between 100% and 30% is out of reach of many of the petitioners who are small scale traders.
 19. It was submitted that the Act did not provide the petitioners with timely and reasonable access to information to enable them make an informed decision contrary to Article 35 of the Constitution since many members were not aware and were never consulted on the Act. It was contended that the documents exhibited to the replying affidavit do not disclose the minutes of the proceeding and

- the agenda of deliberations. The omission to exhibit the minutes and proceedings of the alleged public forums weakened the legitimacy and diminishes the public confidence in the county government and leads to the conclusion that the alleged forums were not for the enactment of the *Finance Bill* and in any case the *Finance Bill* was not an item in the agenda of the forum whose agenda was ambiguous.
20. It was therefore submitted that the Act contravened the constitutional and statutory provisions.
 21. According to **Mr Kiragu**, learned counsel for the petitioner in petition No. 36 of 2014, apart from seeking the common prayers, his clients were seeking an order directing the County Assembly to amend the Act and lower the charges. He similarly associated himself with the submissions made by other counsel and added that his clients are representative of the people of Kabete which has residents of more than 30,000 though only 201 participants allegedly attended the consultative forum and were paid Kshs 500/- as a form of inducement.
 22. The applicants in judicial review application no. 61 of 2014 on their part submitted that the Act was superfluous as there exists a taxation regime that is applicable uniformly to a subsidiary legislation and that to the extent that there is in force subsidiary legislation No. 147 of 2008 the Act is illegal. Further the Act is discriminatory and biased as it is being enforced selectively against the 1st applicant. The applicants also submitted that there was no consultation and public participation and the rights of the residents were infringed and that the Act is an affront to public policy.
 23. In his oral address **Mr Mungao**, learned counsel for the applicants in application no. 61 of 2014, associated himself with the foregoing submissions although the County Government has its own slaughterhouse, the fees which are being levied against the 1st applicant are not applicable to the County Government's slaughterhouse hence the County Government's action amounts to unfair trading practices and its action is discriminatory. Since these charges do not apply to other neighbouring counties, it is likely that the slaughterhouses bordering the County will move out and leave the 1st applicant's abattoir. It was further submitted that the charges levied in so far as they are based on the volume of trade are uncertain.
 24. Citing several provisions of the Constitution, **James Gacheru Kariuki**, the petitioner in petition no. 42 of 2014 contended that the *Finance Act* contravenes the provisions of Article 120(1) and 209(3) of the Constitution and is hence illegal and unconstitutional. On his part, **Anthony Ikonya Mwaniki**, the Managing Director of **Townlink Cabs Limited**, the petitioner in petition no. 72 of 2014, while associating himself with the foregoing submissions contended that by seeking to have the petitioner pay parking fees while it is already subjected to payment of single business permit, the County Assembly has imposed double taxation since business permit includes parking.

Respondents' Case

25. The case for the Respondents as gleaned from the replying affidavits filed herein was that the entire Kiambu County including the petitioners is represented in the County Assembly of the County Government of Kiambu (hereinafter referred to as the Assembly) by elected leaders and that the Assembly is the legislative organ of the County Government of Kiambu. According to the respondents the introduction of the Act was preceded by invitations for public participation and consultation. To this end the Bill was submitted to the Assembly for debate and consideration on 2nd October 2013 by the County Executive Committee member for finance and planning in accordance with the budget proposal for 2013-2014 financial year and prior thereto the draft Bill was published in the official website of the County on 17th August 2013 and an invitation to the public made to participate therein. Apart from that a notice was published in the *Daily Nation* of the same day towards the same end. A notice was also circulated to churches in the county for publication on 18th August 2013 and the public was consulted on and participated in the deliberations of the contents of the Bill on 20th August 2013 before its submission to the Assembly which was preceded with a request to the Law Reform Commission for review and confirmation.
26. Although the County *Finance Bill*, 2013 was rejected by the Assembly on 13th November, 2013 with recommendations on what needed to be included, it was the respondents' position that these recommendations included in the reintroduced County *Finance Bill* 2013 on 3rd December, 2013

- an exemption of the 6 months period having been obtained. The Respondents' position was that the legislative process subsequent to the reintroduction of the *Finance Bill*, 2013 into the Assembly and the enactment of the *Finance Act*, 2013 did not require any consultation with the Petitioners in the manner implied or at all. An invitation to the public having been made and public participation and consultation having been undertaken before the introduction of the initial *Finance Bill*, 2013 into the Assembly.
27. The Bill then went through the requisite legislative process having been preceded by the widest public consultation and engagement in accordance with the Constitution, *The Public Finance Management Act*, 2012 and the *County Government Act*, 2012, hence its provisions are lawful and valid. It was contended that both stakeholders and the public were invited to participate and did participate in the process leading to the enactment of the Act and that the same neither infringes upon the Constitutional rights of the petitioners nor does it impose harsh, primitive, offensive exorbitant permit fees as alleged.
 28. It was the respondents' case that the County Government is empowered by the Constitution, the *County Government Act* 2012 and *Public Finance Management Act 2012* to impose permit fees, licence fees, rents fees charges for services to finance its operations and provision for services which do not infringe upon the petitioners' rights. The said levies having been sanctioned by the Act the same are lawful and proper.
 29. According to the Respondents the meeting held on 17th September, 2013 at Windsor Hotel did not have anything to do with the discussions on the *Finance Bill* and the Act but was called to discuss broad issues of development within the County hence there was no agreement with respect to parking fees with the petitioners or at all. To them in the absence of particularisation of the constitutional provisions breached, the orders sought are not warranted.
 30. On behalf of the Kiambu County Assembly, it was submitted after setting out what the Respondents believe were the petitioners' complaints and the Respondents' response that fundamental rights and freedoms are specifically set out in Chapter Four of the Constitution of Kenya, 2010 which rights and freedoms are individually identifiable and defined from article 26 to 51 of the Constitution. It follows therefore, that a breach of any of the rights and freedoms must be specifically pleaded, particulars thereof set out and facts in respect thereof indicated in the Affidavit of a petitioners which the Petitions do not. Hence as it cannot be ascertained what actual right or freedom has been contravened and in what way, the Petitions should fail on the author of the decisions in Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR and Stephen Njuguna & others –vs- Hon. Lewis Ngunyai & others, H.c Petition No. 118 of 2011 (UR) where it was held that:

“The jurisdiction of the court under Article 22 and 23 of the Constitution is one for enforcement of fundamental rights and freedoms guaranteed under the Bill of Rights. Each right under the Constitution is specifically defined and has specific contents. It therefore follows that a party who invokes these provisions must set out clearly the sections or provisions he claims have been infringed or violated and show how these sections are infringed in relation to him. The principle has been established in a long line of cases dating from Anarita K. Njeru vR [No. 1] (Supra).....I also agree with the respondent that the petitioners' complaints are of a general nature and relate to dissatisfaction in the manner the ESP has been implemented. If this is the case, then, unless there are specific provisions of the Bill of Rights that have been infringed, I consider that the petition is lacking in merit.”

31. It was submitted that although the Petitioners claim that the Respondent has breached Articles 1, 2, 47 and 196 (1) (a) and (b) of the Constitution, only articles 47 and 196 (1) (a) and (b) are relevant to the issues in dispute here and whereas Article 47 concerns fair administrative action, the Petitioners have not demonstrated how, in light of the evidence in the Replying Affidavit of the Respondent, this Article was contravened. Article 196 (1) (a) and (b) on the other hand relates to public participation. However, the Petitioners have again, failed to demonstrate contravention by the Respondent. It was therefore submitted that the Petitions should be dismissed for failure of adequate pleading, particulars and evidence of violation of fundamental rights and freedoms.
32. According to them, though it cannot be denied that public participation in legislation is a constitutional and statutory requirement, the Petitioners have, in their written submissions shifted

- from their main pleaded complaint to an alternative complaint of want of consultation. However, the fact is that there was public participation and no discussions or an agreement on the parking fees were ever held and/or made respectively, on 17th September, 2013 with the Petitioners or at all.
33. The Respondents' case was that Article 209(4) of the Constitution donates the power to the national and county governments to impose charges for the services they provide and there was no plea or evidence whatsoever that the Respondent did not act in accordance with these constitutional requirements in the enactment of the Act. In support of this submission the Respondents relied on **Nairobi Metropolitan PSV Saccos Union Limited & 25 others –vs- County of Nairobi Government & 3 others (2013) eKLR.**
34. In his oral address, **Mr Havi** submitted that the preamble to the Act deals with fees and charges which is a power the County Government can deal with under Article 209(3) of the Constitution providing for the power to impose taxes and charges. In the 4th Schedule Part II to the Constitution the County Government has the functions and as regards trafficking and parking raised in petition No. 12 of 2014, the Respondent was empowered to levy charges and fees in respect thereof. With respect to petition No. 532 of 2013, it was submitted that it was difficult to understand the petitioner's grievances save for complaints about burial charges and rent for housing all of which the County Government is empowered by the Constitution to deal with. Under Article 209, it was submitted the County Government may impose property rates hence the petitions in so far as they allege unconstitutionality are without merit.
35. On public participation, it was submitted that the County Government of Kiambu is an elected Government and is representative of the people of Kiambu with a County Assembly. Therefore the people of Kiambu must understand that democracy is to elect leaders to formulate policies and to govern. Public consultation and participation has been given by the Act and the Constitution hence the question of definition of participation is moot and reference was made to sections 87 and 88 of the County Government Act which provide for the principle of participation. Section 88, learned counsel submitted deals with how citizens are to participate by way of petitions yet none of the petitioners have demonstrated that any petitioned. He submitted that the Respondents have demonstrated that the County Government prepared the platform for the participation. Since the petitioners have representatives in the Assembly the court must exercise restraint in micro managing administrative action as the plethora of petitions is not indicative of the failure of the Government but that of the petitioners. In the result the court was urged to dismiss the petitions with costs.
36. On his part **Mr Masese**, learned for Respondents in petition Nos. 35, 36, 41, 42, 61 and 72 while associating himself with **Mr Havi's** submissions submitted that under Article 185(2) of the Constitution the County Government have been given the power to legislate and provide for services in the 4th Schedule in exercise of which the Kiambu **Finance Act** was enacted. Learned counsel submitted that the functions and powers in the 4th Schedule in the Constitution as read with Articles 185 and 209 thereof have given the power to legislate hence the Act is as a result of powers donated by the Constitution. In support of this submission reliance was placed on **Nairobi Metropolitan PSV Saccos Union Limited & 25 others –vs- County of Nairobi Government & 3 others** (supra).
37. It was submitted that an Act of Parliament is presumed to be Constitutional which presumption can only be rebutted by a petitioner and in considering whether the Act is unconstitutional the Court must give effect to the provisions of the Constitution. In this case Articles 185 and 209 as read with the 4th Schedule to the Constitution mandate County Governments to provide services to residents of the County and come up with legislation.
38. With respect to the judicial review it was submitted that what is sought to be quashed is a letter rather than a decision hence the same cannot be quashed. Petition No. 72, it was submitted that the pleadings contravene section 34 of the Advocates Act as read with Order 9 of the Civil Procedure Rules as they are signed by the petitioner who did not annex evidence that he was a duly authorised agent of the petitioner. In the result he similarly urged the Court to dismiss the petitions.

Determinations

39. Before proceeding with the matters, I directed the parties to formulate the issues for determination of this Court.

40. Pursuant thereto, the following broad issues were formulated for determination by this Court.

1. **Whether the Kiambu Finance Act, 2013 was passed with sufficient public participation as required by the Constitution of Kenya, 2010.**
2. **Whether the County Government of Kiambu is entitled to publish and/or raise new or existing taxes.**
3. **Whether the levies and charges under the Kiambu Finance Act are within the meaning of the 4th Schedule of the Constitution of Kenya.**

41. Before determining these issues it is important to deal with the legal provisions which are relevant to the matters before this Court.

42. Article 10 of the Constitution of Kenya provides as follows:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality,

(c) good governance, integrity, transparency and accountability;

and

(d) sustainable development.

43. Article 174 of the Constitution provides:

The objects of the devolution of government are—

(a) to promote democratic and accountable exercise of power;

(b) to foster national unity by recognising diversity;

(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

(d) to recognise the right of communities to manage their own affairs and to further their development;

(e) to protect and promote the interests and rights of minorities and marginalised communities;

(f) to promote social and economic development and the provision of proximate, easily

accessible services throughout Kenya;

(g) to ensure equitable sharing of national and local resources throughout Kenya;

(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

(i) to enhance checks and balances and the separation of powers.

44. Article 196 on the other hand provides:

(1) A county assembly shall—

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

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

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

(3) Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.

45. Article 201 of the Constitution provides:

The following principles shall guide all aspects of public finance in the Republic—

a. there shall be openness and accountability, including public participation in financial matters;
b. the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

(ii) revenue raised nationally shall be shared equitably among national and county governments; and

(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;

(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

(d) public money shall be used in a prudent and responsible way; and

(e) financial management shall be responsible, and fiscal reporting shall be clear.

46. Section 87 of the *County Government Act*, 2012 provides:

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

a. Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

b. Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the

- granting of permits and the establishment of specific performance standards;*
- c. *protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;*
- d. *legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;*
- e. *reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;*
- f. *promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and*
- g. *recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight*

47. Section 115 of the same Act provides:

1. *Public participation in the county planning processes shall be mandatory and be facilitated through—*
 - (a) mechanisms provided for in Part VIII of this Act; and*
 - (b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—*
 - (i) clear strategic environmental assessments;*
 - (ii) clear environmental impact assessment reports;*
 - (iii) expected development outcomes; and*
 - (iv) development options and their cost implications.*
2. *Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.*

48. These being constitutional provisions one needs to keep in mind the words of **Mahomed, Ag. JA** in Namibian case of **S v Acheson 1991 (2) SA 805 (Nm HC) at 813** that:

“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.”

49. From the foregoing provisions it is clear that public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management.

50. Due to its centrality it is important to determine what exactly amount to public participation.

51. This principle has been dealt with by the South African Constitutional Court in a number of matters. It must be appreciated that the Constitution of South Africa has several similarities to our own current Constitution. To appreciate these similarities it is necessary to reproduce section 72 of

the Constitution of South Africa. The said section provides:

“(1) The National Council of Provinces must –

(a) facilitate public involvement in the legislative and other processes of the Council and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken –

(i) to regulate public access, including access of the media, to the Council and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”

52. In order to understand how the South African Constitutional Court has interpreted the principle of public participation, I will reproduce in extenso the pronouncements of the said Court in the following cases.

53. 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)**, Ngcobo, J who delivered the leading majority judgement expressed himself as follows:

“The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected.... Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalisation of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.....”

54. While appreciating that political participation is also contained in international instruments the Judge then proceeded to determine what constitutes participation in the following terms:

“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.....The international law right to political participation reflects a shared notion that a nation’s sovereign authority is one that belongs to its citizens, who ‘themselves should participate in government – though their participation may vary in degree.’.....This notion is expressed in the preamble of the Constitution, which states that the Constitution lays “the foundations for a democratic and

open society in which government is based on the will of the people.” It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created.....The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values “a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.....”

55. Public participation ought not to be seen as a derogation from Parliamentary representation or representation at the County Assembly level. This the Judge recognised by expressing himself as follows:

“In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the lawmaking processes. Parliament must therefore function in accordance with the principles of our participatory democracy.....”

56. What then does facilitation of public participation connote? The issue was dealt with by the Judge thus:

“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.....”

57. The issue of who and to what extent the issue of public participation ought to be determined was dealt with as follows:

“Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

The standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government’s fulfilment of positive obligations to realise social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that “reasonable measures may be taken” to regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if ‘it is reasonable and justifiable to do so in an open and democratic society.’ Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. “In dealing with the issue of reasonableness,” this Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. ‘In dealing with the issue of reasonableness,’ this Court has explained, ‘context is all important.’ Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense,

public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity beginning with the broader duty to take steps to ensure that people have the capacity to participate.....”

58. The Judge then proceeded to deal with the evidence that was placed before it and expressed itself as follows:

“At the outset, it is necessary to comment on the evidence presented by the respondents. The respondents’ evidence includes several broad and sweeping claims, amongst other things, that the NCOP Select Committee and the respective provincial portfolio committees ‘have conformed with the requirements of sections 59, 72 and 118 of the Constitution by holding public hearings . . . [,] by inviting members of the public to participate either by making oral or written submissions, and by extensively advertising and publicising the fact that the relevant committees would be meeting in relation to one or more of the contested Bills.’ These allegations are largely unsupported by any documentary evidence. In addition, some of the allegations are inconsistent with the documents furnished by the respondents and with what this Court was told in the course of oral argument was common cause between the parties. There is no suggestion on the record that the NCOP held public hearings or invited written representations on any of the Bills. Insofar as the provincial legislatures are concerned, some but not all of the provinces held hearings in respect of some but not all of the Bills. Some provincial legislatures considered written representations that had been submitted to the National Assembly but it is not clear on the record whether any of them invited new or supplementary representations from the public. In the result, this Court has had to work with evidence that leaves a great deal to be desired and to speculate on what may have happened. It is not desirable that this should have happened in a case such as this, where the facts are crucial to determining whether the NCOP complied with its constitutional obligations.....It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions. The requirement that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.....”

59. That the nature and the extent of public participation may depend on the nature of what is at hand is not in doubt. However, that does not permit the complete blackout of the public from participation and this was similarly recognised by the Judge in holding as follows:

“It is true, as discussed previously, that time may be a relevant consideration in determining the reasonableness of a legislature’s failure to provide meaningful opportunities for public involvement in a given case. There may well be circumstances of emergency that require urgent legislative responses and short timetables. However, the respondents have not demonstrated that such circumstances were present in this case. When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.”

60. The Judge then considered the options available to the Court where the Court finds that the Constitutional threshold of public participation is not met and held:

“I have found that the NCOP failed to fulfil its constitutional obligation comprehended in section 72(1)(a) in relation to the CTOP Amendment Bill and the THP Bill. Pursuant to section 172(1)(a) of the Constitution, this Court is obliged to declare that the conduct of the NCOP in this regard is inconsistent with the Constitution and is therefore invalid. The respondents did not contend otherwise. A declaration to that effect must accordingly be made. The question which was debated in the Court is whether the CTOP Amendment Act and the THP Act must as a consequence be declared invalid. Counsel for the respondents contended that this Court has no power to declare the resulting statute invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers. This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, ‘there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.’ But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government.”

61. The Judge added:

“When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O’Regan J explained in a recent minority judgment, ‘the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.’ In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; ‘[w]hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid’. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the ‘Constitution is supreme . . . ; law or conduct inconsistent with it is invalid’. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid.....”

62. The justification for this course is to be found in Article 2(4) of our Constitution which provides as follows:

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

63. Dealing with a similar provision the Judge pronounced himself thus:

“Thus in peremptory terms, section 72(1)(a) imposes an obligation on the NCOP to facilitate public participation in its legislative and other processes including those of its committees. And the supremacy clause of the Constitution requires that this ‘obligation [which is] imposed by [the Constitution] must be fulfilled.’ Public involvement provisions therefore give effect to an important feature of democracy: its participative nature. The ‘participation of citizens in government . . . forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives.’ Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. 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. What is significant in the context of the present case is the legislative scheme contemplated by our Constitution. That scheme envisages that the provinces will participate in the proceedings of the NCOP and thus in the national legislative process ‘in a manner consistent with democracy’. The purpose of this participation is ‘to ensure that provincial interests are taken into account in the national sphere of government.’ The provincial interests must of course be determined in a manner that is consistent with our democracy, in particular, in a manner that complies with the duty to facilitate public participation in the law-making process. Permitting the public to participate in the law-making process ensures that the provincial interests are taken into consideration in a manner that is consistent with the Constitution. Under our Constitution, therefore, the obligation to facilitate public involvement is a requirement of the law-making process. It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid.....”

64. It may be argued that where the action taken is in consonance with the Constitution in its formal aspects then the mere fact that there was no public participation ought not to nullify such otherwise legal action. However the Judge dealing with the issue said:

“The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected.”

65. However the Court cannot be blind to the effects of such action which is not “substantially” illegal and where as a result of its implementation certain rights may have been acquired and obligations undertaken which may cause chaos and lead to undesirable disruption and vacuum. Whereas that state of affairs does not legitimise the action undertaken an abrupt change may be undesirable and in such circumstances the Court may invoke its powers under Article 23(3) of the Constitution to grant an appropriate remedy including the suspension of the invalidity of the action taken with such period as would enable the authority concerned to remedy the defect.

66. On this point the Judge expressed himself as follows:

“However, these two statutes have come into operation. Members of the public may have already taken steps to regulate their conduct in accordance with these statutes. An order of invalidity that takes immediate effect will be disruptive and leave a vacuum. In terms of section 172(1)(b)(ii), this Court has discretion to make an order that is just and equitable, including an order suspending the declaration of invalidity. Parliament must be given the opportunity to remedy the defect. In these circumstances, I consider it just and equitable that the order of invalidity be suspended for 18 months to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution.”

67. It must however be made clear that not all persons must be heard orally. Therefore even in cases where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified. It was therefore held by the Judge 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.”

68. Sachs, J who concurred with Ngcobo, J had this to add:

“The principle of consultation and involvement has become a distinctive part of our national ethos. It is this ethos that informs a well-defined normative constitutional structure in terms of which the present matter falls to be decided. This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions. It should be emphasised that respect for these three inter-related notions in no way undermines the centrality to our democratic order of universal suffrage and majority rule, both of which were achieved in this country with immense sacrifice over generations. Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended. Accountability of Parliament to the public is directly achieved through regular general elections. Furthermore, we live in an open and democratic society in which everyone is free to criticise acts and failures of government at all stages of the legislative process. Yet the Constitution envisages something more. True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. They are

accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years. Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense.⁷ It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.

69. According to the learned Judge:

“A vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits. A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.”

70. 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.”

71. However the caution expressed by Sachs, J in Merafong Demarcation Forum and Others vs.

BCLR 968 (CC) must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:

“The passages from the *Doctors for Life* majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one’s views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government’s mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.....Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication..... There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat.

72. In this case, it is not in doubt that there was an earlier Bill which was tabled before the Assembly which Bill was rejected. According to the respondents there were certain recommendations which were made by the Assembly which recommendations were taken into account in the Bill which gave rise to the Act. The Respondents’ position is that there was no necessity for the subsequent Bill to be subject to further public participation. In fact it is not claimed that the said subsequent Bill was so subjected. According to the petitioners who were consulted earlier what was contained in the said subsequent Bill was not what had been agreed upon during the earlier consultation. In my view where a Bill has been rejected by the Assembly and a fresh Bill introduced as opposed to mere amendments, the principle of public participation must equally apply. Unless this is so the principle may be defeated by the Assembly simply rejecting a Bill in which the public has had an input with its own Bill disregarding the input by the public and not subjecting it to public participation. That in my view would defeat the very principle of public participation. As was aptly put in **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others** (supra):

“Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve..... I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid.”

73. 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.
74. These principles are clearly enumerated in the objects of devolution in Article 174 of the Constitution which has been reproduced elsewhere in this judgement.
75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many 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. Dealing with the issue I wish to reiterate what was held in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) to the effect that:

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote”

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

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

“Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens....[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few.....It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.....In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament’s duty to facilitate public

involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.”

77. Similarly 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 that:

“...the provincial legislatures have broad discretion to choose the mechanisms that, in their view, would best facilitate public involvement in their processes. This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.....The purpose of permitting public participation in the lawmaking process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.”

78. It was contended that the entire Kiambu County including the petitioners is represented in the County Assembly of the County Government of Kiambu (hereinafter referred to as the Assembly) by elected leaders and that the Assembly is the legislative organ of the County Government of Kiambu and that the people of Kiambu must understand that democracy is to elect leaders to formulate policies and to govern. In other words the Respondents’ position is that since the people of Kiambu have delegated to the Assembly the task of legislating and formulating policy, the action taken by the members of the Assembly must be taken to reflect the intentions of the petitioners and the residents of the Kiambu County. In my view, this position cannot be upheld in light of the clear constitutional and legislative provisions. If the stand taken by the Respondents was correct it would defeat the very requirement of public participation in legislative and policy decisions. My view has been reinforced by the decision in Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2), (supra) where Ngcobo, J expressed himself *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.”

79. In support of their position that there was public participation, the Respondents have exhibited an advertisement in the *Daily Nation* of 17th August, 2013. However, a careful perusal of the said advert reveals that apart from the mention of the *Finance Bill* in the title of the advert and the mention of the Bill in passing, there was not much mention of the said Bill. In other words there was no attempt to exhort the public to participate in the process of the enactment of the Bill. In my view there was no “facilitation”. That the *Finance Bill* was an important Bill cannot be doubted. Its effect on the people of Kiambu in terms of ordering their way of life was bound to be far reaching. It was therefore crucial that the information going out to the public be clear and ought not to have admitted any ambiguity. The other document relied upon were list of certain persons. However, the said lists only referred to County Integrated Development Plan and not the *Finance Bill*. There is no evidence at all that at the said meetings the participants were invited to comment on the said Bill let alone that the contents of the same were availed to them.

80. The next issue for determination is the scope of Article 209(3)(4) and (5) of the Constitution. The said Article provides as follows:

(3) A county may impose—

(a) property rates;

(b) entertainment taxes; and

(c) any other tax that it is authorised to impose by an Act of Parliament.

(4) The national and county governments may impose charges for the services they provide.

(5) 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.

81. It is therefore clear that the County Assembly may only impose property rates and entertainment taxes unless otherwise authorised by an Act of Parliament and this position is emphasised by the provisions of Article 210(1) of the Constitution which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. County Governments are however empowered to impose charges on services they provide. Such service would include parking and market fees. However to levy charges on the stones quarried unless authorised by an Act of Parliament or any services rendered by the County Governments towards that end would be clearly illegal. Further the levying of such taxes ought not to be such as to prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Tariffs and pricing of services must however comply with the provisions of section 120 of the **County Government Act**. The Court however is not entitled to interfere with the Tariffs and pricing of services simply on the ground that the Court would have decided otherwise since the Court ought not to substitute its opinion for that of the County Government. As long as the provisions of the Constitution and the relevant legal provisions are complied with and the applicable principles are taken into account the Court ought not to interfere.
82. I must however stress that County Governments are under Article 175(b) of the Constitution entitled to have reliable sources of revenue to enable them to govern and deliver services effectively. However this entitlement must be exercised in accordance with the Constitution and the law and where the existing legislation is not adequate for the purposes of ensuring the efficient governance and delivery of services 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.
83. It was contended on behalf of the Respondents that the petitioners/applicants ought to have petitioned the County Government pursuant to section 88 of the *County Government Act*. Whereas the said section provides for the right by a citizen to petition in writing the county government on any matter under the responsibility of the county government, it is clear that the power to declare legislation unconstitutional rests with the High Court pursuant to Article 165(3)(d) of the Constitution. Accordingly the right to petition the County Government in the circumstances of this case would not have afforded the petitioners/application an effective remedy hence that option cannot be taken to oust the jurisdiction of this Court to hear, determine and grant the orders sought herein.
84. Having considered the foregoing the inescapable conclusion I come to is that there was no public participation as contemplated under the Constitution and the **County Government Act, 2012**.
85. In the instant case, it has not been alleged that any interests have been acquired under the said Act that would militate against the immediate nullification of the said Act. Accordingly, I hereby declare that the *Kiambu Finance Act, 2013* gazetted vide *Kiambu County Gazette Supplement No. 8 (Act No. 3)* violates the Constitution and that the same is null and void.
86. On the issue of costs, it is clear that a number of the petitions were brought on behalf of the wider public in particular the people of Kiambu and just as I would have held had the petitions/application been unsuccessful, there will be no order as to costs.
87. Orders accordingly.

Dated at Nairobi this 17th day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Dr Wangai for the Petitioners in Petition No. 532 of 2013.

Mr. Mwaniki the Petitioner in Petition No. 72 of 2014

Mr James Kariuki the Petitioner in Petition No. 42 of 2014

Mr Nakhone for the Respondents