



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.486 OF 2013

BETWEEN

**NAIROBI METROPOLITAN PSV SACCOS
UNION LIMITED.....1ST PETITIONER**

**MT. KENYA MATATU OWNERS
ASSOCIATION.....2ND PETITIONER**

**CHANIA TRAVELLERS CO-OPERATIVE SAVINGS
AND CREDIT SOCITY LIMITED.....3RD PETITIONER**

**INDIMA (NJE) COOPERATIVE SAVINGS
AND CREDIT SOCIETY LIMITED.....4TH PETITIONER**

**KUKENA SAVINGS AND CREDIT COOPERATIVE
SOCIETY LIMITED..... 5TH PETITIONER**

**THIKA ROAD TRANSPORTERS
SACCO LIMITED.....6TH PETITIONER**

**THIKA TRAVELLERS CHOICE
SACCO LTD.....7TH PETITIONER**

**RUNA TRAVELLERS CHOICE
SACCO LTD.....8TH PETITIONER**

**NARUGI DEVELOPMENT
SACCO LTD.....9TH PETITIONER**

KANGEMA TRAVELLERS CO-OPERATIVE	
SAVING AND CREDIT SOCIETY.....	10TH PETITIONER
NANYUKI EXPRESS CABS	
SERVICES SACCO.....	11TH PETITIONER
NUCLEAR INVESTMENTS LTD.....	12TH PETITIONER
MURANG'A SHUTTLE	
SERVICES LTD.....	13TH PETITIONER
NAMUKIKA SACCO LIMITED.....	14TH PETITIONER
NAMUKIKA SACCO LTD.....	15TH PETITIONER
NENO SACCO LTD.....	16TH PETITIONER
MERU NISSAN OPERATORS SACCO	
SOCIETY LIMITED.....	17TH PETITIONER
MTN SACCO LTD.....	18TH PETITIONER
NTK TRAVEL SERVICES MULTIPURPOSE	
COOPERATIVE SOCIETY	
LIMITED.....	19TH PETITIONER
KIAMBU MARAFIKI MATATU SACCO LTD	
(KIAMBU SACCO LTD).....	20TH PETITIONER
KAKA TRAVELLERS COOPERATIVE SAVINGS AND	
CREDIT COOPERATIVE SOCIETY	
LIMITED.....	21ST PETITIONER
KAMUNA SAACO LTD.....	22ND PETITIONER
MWIKI PSV SAVINGS AND CREDIT	
COOPERATIVE SOCIETY LIMITED.....	23RD PETITIONER
EASTLEIGH ROUTE SAVINGS AND	
CREDIT COOPERATIVE SOCIETY LIMITED.....	24TH PETITIONER
NGUMBA TRAVELLERS SAVINGS AND CREDIT COOPERATIVE	
SOCIETY LIMITED.....	25TH PETITIONER
DANDORA USAFIRI TRAVELLIERS SAVINGS AND	

CREDIT CO-OPERATIVE SOCIETY LIMITED.....26TH PETITIONER

AND

COUNTY OF NAIROBI GOVERNMENT.....1ST RESPONDENT

NAIROBI CITY COUNTY BOARD.....2ND RESPONDENT

THE TRANSITION AUTHORITY.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Introduction

1. This Petition is in respect of Clause 6.1 of the **Nairobi City County Finance Act of 2013** (hereinafter 'The Act') which has *inter alia* authorized the Nairobi City County to change the motor-vehicle parking levies of Ksh.140, which fee the Petitioners claim is oppressive and offends the provisions of **Article 209(5)** of the **Constitution**. The Petitioners are particularly aggrieved with that Clause because it was enacted in violation of the principle of public participation in the legislative making process and that the Respondents thereby violated **Articles 184** and **196** of the **Constitution**. That the 1st Respondent also failed to follow due process in enacting Act as it failed to publish the said Act in a recognised gazette thus preventing the Petitioners from participating in the process of enacting the Bill into law, in violation of **Article 10(2)** of the **Constitution**. Further, that the Respondents failed to abide by the High Court decision in *Republic v City Council of Nairobi & 2 Others, Ex Parte Kaka Travellers Cooperative Savings & Credit Society Limited & Others, Nairobi HC JR No. 323 of 2010* where it was held that under the provisions of **Section 72B** of the **Traffic Act**, the City Council of Nairobi could only levy parking charges by way of parking meters and enactment of by-laws in that regard.
2. The Petitioners have therefore invoked this Court's jurisdiction in protection of their consumer rights as users of parking services offered by the 1st Respondent, the Nairobi City County, under their right to the protection of the law afforded to them by **Article 27** of the **Constitution**, and the enforcement of the Principle of Rule of law enshrined in the **Consumer Protection Act**, The **Traffic Act (Cap 403)**, The **County Government Act**, the **Urban Areas and Cities Act**, The **County Governments Act** and the **Statutory Instruments Act of 2013**.
3. In their Petition dated 3rd October 2013, the Petitioners seek the following orders;
 - “(a) *A declaration do issue that paragraph 6.1 of the Schedule to the Nairobi County Finance Act, 2013 is unconstitutional, to the extent that there was no public participation in the process of the making, and enactment of the said Nairobi County Finance Act, 2013.*
 - (b) *A declaration do issue that the Petitioners are entitled to enjoy the exercise of their right to fully participate in the legislative process leading up to and the enactment of the Nairobi County Finance Act, 2013 and in particular paragraph 6.1 of the Schedule thereof, in accordance with Article 174(c) and Article 184(1)(c) of the Constitution.*
 - (c) *A declaration do issue that by the issuance of paragraph 6.1 of the schedule to the Nairobi County FINANCE Act, 2013 without affording the Petitioner's any opportunity to lodge petitions or protests in regard thereto, the Petitioners' right to so petition under Article 37 of the Constitution had, and has been interfered with and hence violated.*
 - (d) *A declaration do issue declaring that the contents of paragraph 6.1 of the Schedule to the Nairobi County Finance Act, 2013 is unconstitutional.*

(e) A declaration do issue declaring that the 2nd Respondent's officers implementing any aspect of paragraph 6.1 of the Schedule to the Nairobi County Finance Act, 2013 is , and amounted to a breach of Article 46(c) of the Constitution to which extent the said act is, and was unconstitutional.

(f) An order directing the deletion and expunging from record of Nairobi County Government statutory instruments deposited with the Clerk of the Nairobi County Government, of Paragraph 6.1 of the Schedule to the Nairobi County Finance Act, 2013.

(g) An injunction do issue permanently restraining the 1st Respondent (County Government of Nairobi), and the 2nd Respondent by themselves, their officials, parking Attendants contracted company or companies so contracted to collect parking fees in the City of Nairobi and its peri-urban areas, or any person, servant and or agent howsoever of the 1st and 2nd Respondents, acting under or at their behest, from imposing, charging, levying or demanding from the Petitioners/Applicants, the Applicants Members or Member of the public the daily parking fee of Ksh. 300 or any sum exceeding the sum of Ksh.140 currently chargeable per motor vehicle per day within Nairobi under the zonal jurisdiction of the County Government of Nairobi, and such of the seasonal parking levies applicable to PSV vehicles such as operated by the Petitioners and their members, as are contained in Paragraph 6.1 of the Schedule to the Nairobi County Finance Act, 2013 titled, 'Transportation Unit Services'.

(h) The Petitioners be compensated by way of damages.

(i) Costs of the Petition and interlocutory proceedings.”

4. The undisputed facts in this Petition are in any event as follows;

The Petitioners are legal entities duly incorporated and are duly licensed public service vehicle (PSV) operators ferrying passengers from, and between Nairobi County and the outlying Counties. The 1st Respondent is the County Government managing the affairs of the Nairobi County and in particular the parking services. The 1st Respondent as mandated by the law published the **Nairobi County Finance Act of 2013**, (The Act) containing Schedule of intended parking fee levies that are an increment from the current parking fees of Ksh.140 per day. Paragraph 6.1 was titled “*Transportation Unit Services*” and contained the increment aforesaid and which affects all the public service vehicles plying in and out of Nairobi as well as private motorists.

Case for the Petitioner

5. The Petitioners' case is contained in their Petition, affidavits of James Bukhala Makwakwa sworn on 3rd October 2013 and on 24th October 2013 and that of Michael Kariuki sworn on 3rd October 2013 as well as written submissions dated 28th October 2013.

6. In essence, the Petitioners claim that **Article 190(1) and (2)** of the Constitution binds a County Government to adhere to National Legislation in enacting any specific County Legislation. That the 1st Respondent ought to have followed the provisions of the Traffic Act in levying parking fees, as this is the Statute that has been enacted by Parliament at Part VIA to govern the imposition of parking fees and the same has never been amended or repealed. They thus allege that if Paragraph 6.1 of the Schedule to Nairobi County Finance Act is left to stand, it will constitute a violation of Part VIA of the Traffic Act as well as **Article 10(2)(b)** of the **Constitution**. They further submitted that this court could not depart from its earlier decision in ***Republic ex parte Kaka Travellers Sacco Ltd (supra)*** as the 1st Respondent has never appealed against that decision.

7. They further claim that **Paragraph 6.1** of the Schedule of the Act does not comply with the provisions of **Article 190(1) and 190(2)** as the 1st Respondent has taken away the benefit of the

- formula set out in the **Traffic Act** in calculating the parking fee to be levied and that all the consumers of the parking services in Nairobi County will thus be denied the benefit of this formula. They also stated that the provisions of **Section 72G** of the **Traffic Act**, elaborately set out the parameters of the levying parking of fees and imposes sanctions in the event of infractions. The Petitioners relied on the case of **Powell v May (1946) 1 ALL ER 444** where it was held that a by-law that is repugnant to the general law is invalid.
8. They claimed that the 1st Respondent has by its impugned legislation refused to avail to the Petitioners and all consumers of parking fee services in Nairobi County the benefit of pro-rated charge in parking fee commensurate with the time they spend in parking space, and that action cannot be justified as lawful exercise of power. They relied on the case of **Powell v May (supra)** where the Court also held that it was beyond the powers of a County Council to enact by-laws which prohibit them from doing what the general statutes enable them to do. On the same point, the Petitioners further relied on the cases of; **Government of the Republic of South Africa v Irene Grootboom (2001) SA 46 CC** and Supreme Court decision in **The Matter of Attorney General, Supreme Court Constitutional Application No. 2 of 2012.**
 9. It was the Petitioners submission flowing from the above that the duty to consult the public in matters affecting parking matters goes back to 1968 when **Section 72(a)** of the **Traffic Act** was enacted. They claimed that in the aftermath of the enactment of the **County Government Act of 2011**, the duty to consult and public participation has been more elaborated as set out in **Sections 88 to 91** of the **County Governments Act, 2011**. They submitted further that it was not enough to call a public meeting and brand it as a 'stakeholders' meeting because there is no evidence in any case to demonstrate that the 1st Respondent summoned stakeholders with the intention of having their views views aired on proposed parking fee increments. They relied on the cases of **Consumer Federation of Kenya (COFEK) v Minister for Information and Communication & 2 others (2013) e KLR** and also **Elle Kenya Limited & Others v Attorney General & 3 Others (2013) e KLR** where this Court examined the issue of public participation in specific contexts.
 10. The crux of the Petitioners case is that **Paragraph 6.1 aforesaid** imposes a blanket parking fee regardless of the amount that one spends in a parking lot and which act therefore violates Part V1A of the **Traffic Act**. They submitted in that regard that Parliament's intention in enacting the Traffic Act was to protect consumers of parking space and envisaged an initial charge to be imposed for parking space and subsequently a sum pro-rated against one's occupation of the Parking space. That the rates intended to be imposed by the 1st Respondent do not meet this imperative, and thus must therefore be rejected.
 11. In any event, the Petitioners insist that levying of parking fee must be by prescribed instruments such as the ones specified under the Traffic Act (parking meters) and that until necessary by-laws are passed by the relevant authority and the by laws have specified the manner of imposing parking fees. The parking fee presently levied cannot lawfully be charged. They claim that the mere specification of a flat monthly or seasonal ticket as contemplated under paragraph 6.1 of the impugned legislation does not constitute enactment of by laws that meet the threshold of Part V1A of the Traffic Act. Accordingly, the effect of the implementation of the 1st Respondent's parking fees as contained in the impugned Act would oust the relevant national legislation, being the Traffic Act, which according to the Petitioners has afforded the Petitioners protection in the levying of parking fees. They further contend that the imposition of a blanket parking fee violates the Petitioners' rights to receive service for the use of parking space and no fair manner of determining pro-rated worth of parking service has been provided by the 1st Respondent. Further that, the intended parking fee is punitive and amounts to unjust enrichment of the 1st Respondent, because having already paid for the monthly parking fee or seasonal ticket, the 1st Respondent has not provided for lawful means of refunding the parking fee already paid if the new structure is to be implemented. They further contend that paragraph 6.1 is discriminatory and offends **Article 27(5)** of the **Constitution** and they relied on the South African Constitutional court case of **Du Plessis and Others v De Klerk and Another (1996) (CCT 8/95) ZACC 10** to buttress their argument in that regard.

12. It was also the Petitioners argument that if indeed the 1st Respondent held any consultative meeting with the Petitioners before the enactment of paragraph 6.1 of the Act, that consultation was insufficient and ineffectual as to amount to non-consultation. They relied on the case of **Buckinghamshire County Council & Others v Secretary of State for Transport (2013) EWHC 481** where it was held that there can indeed be consultations which amount to consultation at all.
13. The Petitioners further submitted that the 1st Respondent is unlikely to suffer any prejudice by complying with the law and they seek this Court's intervention to ensure that it complies with the law especially the **County Governments Act**, the **Statutory Instruments Act, No. 23 of 2013**, Part V1A of the **Traffic Act** and the **Urban Areas Cities Act of 2011**, the latter which in their view, were passed to safeguard the arbitrariness of the then local government authorities in the by-laws making process.
14. The Petitioners thus urged the court to intervene and suspend the implementation of the impugned legislation as was held in **R ex parte Gabriel Limion Kaurai and Another v Minister for Transport and Others, Nrb JR Misc. Applc No. 109 of 2004.**

1st and 2nd Respondent's submissions

15. The 1st Respondent, County of Nairobi Government and the 2nd Respondent, Nairobi City County Board, in response to the Petition filed replying affidavits sworn by Jacob Ngwele and Lilian Ndegwa on 16th October 2013. They also filed written submissions dated 28th October 2013.
16. In summary, their case is that the 1st and 2nd Respondents actively involved the public in enacting the Nairobi City County Finance Act 2013, and that they complied with the due budget making process by County Governments as set out in the Constitution, the Public Finance Management Act, Section 72B of the Traffic Act, as well as the interpretation made by Korir J in **Republic ex parte Kaka Travellers Sacco Ltd (supra)**. That they also sufficiently published and publicised the Nairobi City County Finance Bill, 2013, the Nairobi **County Appropriations Act 2013** and the **Nairobi City Finance Act 2013** as required in **Article 199(1)** of the **Constitution** and related laws.
17. It was their submission therefore that they involved the public in enacting the Nairobi City County Finance Act, 2013 because five advertisements were carried in local daily newspapers of national circulation and on the 1st Respondent's website as well inviting the public to participate in stakeholder forums held at the 1st Respondent's Charter Hall premises to discuss and input on the 1st Respondent's proposed 2013/2014 budget estimates of revenue and expenditure. That following the public advertisements, the 1st and 2nd Respondents conducted the stakeholders forums on the estimates of 2013/2014 budget of revenue and expenditure and which was attended by 301 stakeholders and further, that on 26th April 2013 another forum was attended by 70 stakeholders who all expressed their views and views were taken into account in the enactment of the **Nairobi City County Finance Act, 2013**.
18. That the stakeholders who attended the two forums ranged from residents of Nairobi City County, the Motorists Association of Kenya, 'Double M' operators, Kenya Bus Operators, elected leaders at the County and national governments, National Government Ministries and departments, diplomatic missions, development partners, international organizations, opinion leaders, professional bodies, Non-Governmental organizations, the business community, residential associations, religious organisations, academic institutions, medical institutions, financial institutions, independent offices and commissions established by the Constitution as well as media houses.
19. They claimed that at the stakeholders forums, the 1st Respondent explained to the public its estimates of revenue and expenditure for the financial year 2013/2014 and the budget estimates were discussed at a plenary where the public gave their comments on the budget estimates and the

- 1st and 2nd Respondents responded to the comments made by the public. They specifically alleged that at the stakeholders forum of 26th April 2013, the 1st and 2nd Respondents informed the public that it intended to increase parking fees and justified why it was necessary to do so which was to enable the Respondents introduce an effective bus system, construct multi-parking spaces and eliminate roundabouts.
20. Further that in the public stakeholder forum of 24th April 2013, the 1st and 2nd Respondents notified the public that they would increase house rent, licenses and parking fees to economically viable levels that would enable the 1st Respondent meet the actual cost of service delivery to the residents of Nairobi. That the 1st Respondent's budget estimates and expenditure for the financial year 2013/2014 which it published on its website in advance of the stakeholder forum was easily accessible to the public at the public stakeholder forums of 24th April 2013 and 26th April 2013, and that the 1st Respondent explained to the public how it intended to spend the revenue it hoped to raise. They added that the areas of expenditure generally included routine maintenance of roads, street lighting and traffic signals.
21. It was the further position of the 1st and 2nd Respondents that public participation for estimates and budget for the financial year 2013/2014 did not end at the County Executive level. That on 18th July 2013, the Nairobi City County Assembly Budget and Appropriation Committee was mandated by the County Assembly to consider the recommendations of the County Assembly on Finance Bill, 2013 and also resolved to consider the views expressed by stakeholders in the two stakeholders fora held on 24th April 2013 and 26th April 2013, and the Bill was also published in the Assembly's website to allow stakeholders to comment on the Bill and thereafter submit their memorandum to the Committee.
22. That the said Budget and Appropriations Committee and the Nairobi City County Assembly effected a raft of amendments to the said Bill, on 28th August 2013, as to the costs of licensing breakdown vehicles, reserving parking bay daily and annually, registering taxis, trailers and matatus, seasonal tickets for private vehicles, matatus, minibuses, breakdown vehicles and also clamping charges, before it was passed into an Act.
23. The 1st and 2nd Respondents contended that prior to the meeting of the Nairobi City County Assembly on 28th August 2013, to discuss the **Nairobi City County Finance Act**, the Respondents, the Treasury and Members of the Nairobi City County Assembly held a day long joint workshop at the Kenya School of Government on 19th August 2013, to discuss the 1st Respondent's Finance Bill, 2013.
24. It was therefore the submission of the Respondents that the Petitioners, were among the members of the public who were duly invited by the 1st Respondent to submit their views on the 1st Respondent's 2013-2014 budget estimates at the stakeholders fora of 24th April 2013 and 26th April 2013. That if they failed to submit those views then they cannot be heard now to blame the 1st and 2nd Respondents for their own failure to utilize the opportunity duly and lawfully presented to them. That the impugned Act was in any event enacted by the duly elected representatives of the public in the Nairobi City County Assembly and they submitted that they actively involved the public in its budget making process for the financial year 2013/2014 right from the time of preparation of the budget estimates of revenue and expenditure to the time that the **Nairobi City County Finance Act 2013** was enacted into law. That therefore the 1st Respondent complied with the provisions of **Articles 10, 184 and 196** of the Constitution on public participation in governance of counties and in legislative making process, contrary to the unfolded allegation of the Petitioners.
25. It was also the contention of the 1st and 2nd Respondents that the eventual parking fees stipulated in **Schedule 6.1** of the Act cannot be said to be oppressive within the meaning of **Article 209(5)** of the Constitution, as contended by the Petitioners, since the expenditure of the revenue that the 1st Respondent seeks to collect in Schedule 6.1 was justified to the public by the 1st Respondent's Executive Committee and by the National City County Assembly. They claimed that the

Petitioners have failed to demonstrate how the parking fees would prejudice national economic policies and economic activities across County boundaries or national mobility of goods and services, capital or labour as to legitimately contend that the Schedule violates the provisions of **Article 209(5)** of the Constitution.

26. The 1st and 2nd Respondents relied on the following cases on public participation in the legislative process and the Court's role when called upon to determine the constitutionality of an impugned legislation;

- (i) *Commission for the Implementation of the Constitution v Parliament of Kenya and 2 Others, Petition No. 454 of 2012.*
- (ii) *Minister for Health and Another v New Clicks South Africa (Pty) Ltd and Others (2006) (2) SA 311.*
- (iii) *Law Society of Kenya v Attorney General Petition No. 312 of 2012.*
- (iv) *Moses Munyendo & 908 Others v Attorney General & Another Petition No. 16 of 2013.*
- (v) *United States v Butler, (1936) 297 U.S.*
- (vi) *Republic v Kaka Travellers Cooperative Savings and Credit Society Limited (supra).*

27. It was the further submission of the 1st and 2nd Respondents that the budget making process is governed by the Constitution and the provisions of **Sections 125, 129, 130, 131, 132 and 133** of the **Public Finance Management Act**. And that in accordance with these provisions, the 1st Respondent's Executive Committee for Finance prepared the 1013/2014 budget estimates of revenue and expenditure which were duly approved by the 1st Respondent's Executive Committee which then submitted the budget estimates to the Nairobi City County Assembly for consideration and the same were duly approved. Thereafter, the Nairobi City County Assembly enacted the requisite appropriation laws, including the **Appropriation Act, 2013** and the **Finance Act 2013** required to implement the 1st Respondent's budget.

28. It was also their submission that the **Nairobi City County Finance Act 2013**, complies with the provisions of **Section 72B** of the **Traffic Act** and that in any event **Section 72B** of the **Traffic Act** gives unfettered discretion to the 1st Respondent to prescribe methods for the payment of parking fees within its area of jurisdiction. They claimed that this unfettered discretion was confirmed by Korir J in the case of *Republic v Kaka Travellers Cooperative Savings and Credit Society Limited (supra)*.

29. It was their contention that the 1st Respondent exercises its mandate, including regulating public road transport, traffic and parking through laws passed by its County Assembly and that this is done under the provisions of the Fourth Schedule of the Constitution and the provisions of **Sections 7** of the **Transitional and Consequential provisions of the Constitution**. It was their submission that **section 75B (5)** of the **Traffic Act** which permitted methods for payment of parking fees have since been replaced by the laws of the 1st Respondent passed by its County Assembly prescribing methods of payment of parking fees. They claimed in that regard that the **Nairobi City County Finance Act, 2013** is both constitutionally underpinned and recognized under the provisions of **Section 72B** of the **Traffic Act** and in the context of **Section 7 schedule 6**. The Transitional and Consequential Provisions of the Constitution, for purposes of prescribing parking fees. That in the Act, Schedule 6.1 prescribed the methods for payment of parking charges in three ways;

(a) *Payment of daily parking tickets.*

(b) *Subscribing for seasonal tickets, which subscription can be monthly, quarterly, half yearly or*

annually; and

(c) *For off-street parking in automated areas, by paying Ksh. 50 per hour after the first 30 minutes of entry into the parking area.*

That therefore looking at Schedule 6.1 in that context it complies with the provisions of **Section 72B** of the **Traffic Act** and the interpretation given thereto by Korir J in **Republic v Kaka Travellers Cooperative Savings and Credit Society Limited** .

30. Specifically on the issue of the publication of Finance Bill, 2013, the 1st and 2nd Respondents claimed that the 1st Respondent published the said Bill in the Nairobi City County Gazette as Nairobi City County Gazette Supplement No. 3. while the Nairobi City County Act , 2013 was published in the Nairobi City County Gazette as Gazette Supplement No. 7 (Acts No. 2). It also submitted that the 1st Respondent published the Bill and Act through the national Government Printer and therefore met the Constitutional threshold for publishing County legislation as set out in **Article 199(1)** of the Constitution.

31. They concluded by praying that for the above reasons the Petition should be dismissed with costs.

The 3rd Respondent

32. The 3rd Respondent, **The Transition Authority**, was expunged by consent of the parties from these proceedings on 29th October 2013.

The 4th Respondent

33. The 4th Respondent the **Attorney General**, did not file any response to the Petition or make any submissions save to associate himself with the submissions of the 1st and 2nd Respondents.

Determination

34. Having set out the Parties submissions as above, and looking at the issues framed by both Mr. Kinyanjui for the Petitioner and Prof. Ojienda for the 1st and 2nd Respondents in their respective submissions, I believe there are four issues for determination in this Petition, namely;

- (a) Whether there was adequate and appropriate public participation prior to the enacting of schedule 6.1 in the Schedule to the Nairobi City County Finance Act of 2013.
- (b) Whether the 1st and 2nd Respondents complied with the law in the budget making process.
- (c) The applicable law in the collection of parking fees in the County of Nairobi.
- (d) Whether the Petitioners are entitled to the remedies sought.

Whether there was adequate and appropriate public participation prior to the enacting of Paragraph 6. 1 in the Schedule to the Nairobi County Finance Act.

35. It was the Petitioners contention that the 1st and 2nd Respondents did not hold any public consultations and there was therefore no public participation legislation.

36. On their part, the 1st and 2nd Respondents contended that they involved the public in enacting the impugned legislation and carried out five advertisements in local daily newspapers of national circulation, on the 1st Respondents website and also invited the public to participate in stakeholder forums held on 24th April 2013 and on 26th April 2013 at the 1st Respondent Charter Hall to discuss and have an input on the 1st Respondent's proposed 2013/2014 budget estimates.

37. The issue raised by the Petitioners as to whether they were involved in the enactment of the impugned legislation are not idle. I say so because the Constitution has established a state in which the Constitution is the supreme law and is binding upon the legislature, the executive and all organs of the State. The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at **Article 10(1)** of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. **Article 10(2)** of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, **Article 174 (c)** of the Constitution provides for the principles of devolved government and has given powers to the people to enhance self governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view, an essential part of public participation.

38. Having so said, I do not see how the 1st and 2nd Respondent failed to enhance public participation in the making of the Nairobi City County Finance Act, 2013. I have seen Advertisements by the 1st Respondents in local daily newspapers for 'Stakeholder Forum for 2013-2014 Budget Estimates' carried out on diverse dates. On 14th April 2013, in the "Sunday Nation" newspaper, the Office of the Governor placed an advertisement inviting the public and other stakeholders to attend a forum on 16th April 2013. It is stated in the advertisement that the forum would be used to influence the activities of Nairobi City County. It further states that the budgetary process would in essence guide functions such as agriculture, county health, county transport etc. This advertisement was as follows verbatim;

"STAKEHOLDERS' FORUM FOR 2013-2014 BUDGET ESTIMATES"

The Nairobi City Council is one of the 47 Counties in Kenya. However, its unique from the other counties as it is the Capital City of Kenya and generates & controls about 60% of the national GDP, among the top 5 Cities in Africa, the commercial hub and gateway to the Eastern and Central Africa, the only City in the world with a National Park within its boundaries and host to UNHABITAT headquarters and other UN agencies and numerous multinationals. We have a vision "to be the City of choice in Africa, for all to invest, work and live".

Nairobi City Council will hold the first stakeholders' forum on Tuesday, 16th April 2013 at Charter Hall at 10.00 a.m. In a ceremony to be graced by His Excellency the Governor of Nairobi City County, Dr. Evans Kidero.

Stakeholders' participation is critical for provision of quality services in the devolved government where public input, interrogation and critique is important to ensure that Nairobi City County government policies and projects are in sync with the needs and aspirations of the residents of Nairobi City County.

In this regard, we invite the public and other stakeholders to attend this important function that will influence the activities of Nairobi City County from July 2013 to June 2014. This budgetary process will guide the following functions as outlined in the fourth schedule of the Constitution. The Nairobi City County performs various functions guided by core principles in delivery of services which include public participation, transparency, accountability and integrity. The functions whose details are set out in the 4th schedule of the Constitution of Kenya include; Agriculture; County health services activities, public entertainment and public amenities; County transport, Animal control and Welfare; Trade Development and regulation; County planning and development; Pre-primary education; village polytechnics, home craft centers and childcare facilities; implementation of specific national government policies on natural resources and environmental conservation; County public works and services; Fire fighting services and disaster management; Control of drugs and

pornography and Ensuring and co-ordinating the participation of communities.

This notice therefore, serves as an invitation to representatives of all our stakeholders who include but not limited to; residents of Nairobi City County, elected leaders at County and National Governments, National Government ministries and departments, diplomatic missions, development organisations, business community, residential associations, religious organizations, academic institutions, medical institutions, financial institutions, independent offices established by the Constitution, commissions established by the Constitution and the media among others.

This serves as an official invitation for those who have not received invitation letters for this function. We look forward to your attendance, presence and contribution to this important Nairobi City County Agenda.

(Signed)

LILIAN W. NDEGWA

INTERIM COUNTY SECRETARY

39. Similarly, on 23rd April 2013, the Nairobi City County placed another advertisement in the “East African Standard”, “Daily Nation” and “The Star” newspapers informing and inviting the public to the first public participation forum on 2013-2014 Budget Estimates, which was to be held on 24th April 2013. All these advertisements had also been put in the 1st Respondent's website from 12th April, 2013 and from 19th April 2013.
40. Following these advertisement, the forums were held and the first one held on 24th April 2013, as can be seen from the Annexure availed by 1st Respondent, was attended by 301 stakeholders. In that forum those who attended included residents of City County of Nairobi, Motorists Association of Kenya, Double M Matatu operators, Kenya Bus Operators, elected leaders at the County and National Governments ministries, diplomatic missions, development partners Non-Governmental Bodies and the media. The second forum of 26th April 2013 was attended by 70 stakeholders and the attendance list reveals that Mr. Felix Wekesa and Peter Murima, Chairman of the Motorists Association of Kenya were present in this forum. From the minutes of both forums, it can also be seen that among the issues that were discussed included parking spaces, proposed revision of parking fee, towing and clamping and traffic jams. As regards parking fees, it was noted that the City County had indicated that it intended to increase parking fees by at least 30% as the fee levied currently was uneconomical and not commensurate with the actual cost of the service.
41. In addition to this forum, **annexture LWN9** in the affidavit of Lilian W Ndegwa reveals that the 1st Respondent's budget estimates of revenue and expenditure for the financial year 2013/2014 were published in its website in advance of the stakeholder forums. This information in the website is easily accessible to the public.
42. Following the above forums, on 18th July 2013, the Nairobi City County Assembly Budget and Appropriation Committee, was mandated by the Nairobi City County Assembly to consider and recommend to the County Assembly areas for Amendment in the impugned legislation. Subsequently, as it can be seen in **Annexture LWN 13** in the affidavit of Lilian Ndegwa, the Nairobi City County Assembly Budget and Appropriation Committee published the Bill in the Assembly's website so as to engage the public and enable them comment on the Bill. Following the comments made by the public, as can be seen from **Annextures LW 16 and LW 17**, the Nairobi City County Assembly Budget and Appropriations Committee and the Nairobi City County Assembly effected amendments to the impugned Bill in line with with the recommendations made by the public and stakeholders. As can also be seen at pages 19 to 20 of the Committee's proposed amendments to the Bill, the Committee proposed amendments in the transport sector within the County and which included parking fees for matatus, private cars, mini-

buses, trailers etc, licensing breakdowns, and justified why the amendments were necessary.

43. Further, on 19th August 2013, the 1st Respondent, the Treasury and Members of the County Assembly held a one day joint workshop at the Kenya School of Government to discuss in detail the proposed Finance Bill of the 1st Respondent.

44. From the evidence tendered by the 1st Respondent it is also clear that, on 28th August 2013, the amendments proposed by the City County Assembly and Appropriation Committee to the Nairobi City County Finance Bill were discussed by the County Assembly for amendments and or for adoption. The County Assembly thereafter adopted the proposed amendments as regards the costs of licensing breakdown vehicles, reserving parking bays daily and annually, registering taxis, trailers and matatus, seasonal tickets for private vehicles, matatus, minibuses and breakdown vehicles and clamping charges.

45. Despite the above actions taken however, the Petitioners have attacked the impugned legislation on ground that it failed to comply with the process of public participation as required by the Constitution. Where legislation fails to comply with the Constitution, courts have powers to make necessary orders in that regard as was held in the Constitutional Court of South Africa in the case of *Doctor's for Life International v The Speaker National Assembly and Others (CCT 12/05) 2006 ZACC II* where it was stated as follows;

“It is trite that legislation must confirm to the Constitution in terms of both content and the manner in which it is adopted. Failure to comply with the manner and form requirements in enacting legislation renders the legislation invalid. And courts have the powers to declare such legislation invalid”.

One of the golden principles running through the Constitution is the articulation of the principle of public participation of the people at both national and county levels. With regard to participation in County level, **Article 196(1)(b) of the Constitution** provides that;

“(1) A County Assembly shall-

(a)

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

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

The essence of the duty for the public to participate in legislative process is to my mind an aspect of the right to political participation in the affairs of the State. In this aspect, the Constitutional Court of South Africa in the case of *Doctors for Life International v The Speaker National Assembly (supra)* explained the importance of public participation as follows;

“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.”

46. This right flows directly from the principle of sovereignty of the people which is in **Article 1** of the **Constitution** and which provides as follows;

“(1) All sovereign power belongs to the people of Kenya and shall be exercised only in

accordance with this Constitution.

(2) *The people may exercise their sovereign power either directly or through their democratically elected representatives.*

(3) *Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—*

(a) *Parliament and the legislative assemblies in the county governments;*

(b) *the national executive and the executive structures in the county governments; and*

(c) *the Judiciary and independent tribunals.*

(4) *The sovereign power of the people is exercised at—*

(a) the national level; and

(b) the county level.”

Applying the above principles and in the totality of the evidence before me, it is clear that the 1st and 2nd Respondents involved the public in the process leading to the enactment of the **Nairobi City County Finance Act of 2013** they engaged those who would be affected by their decision and the latter were given details of the proposals and an opportunity of stating their objections if any. To my mind the process was highly public as there were public forums, meetings with stakeholders, media reports and even lobbying and an opportunity to make written representations through written memoranda.

47. Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he expressed himself as follows;

“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 issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

48. In the instant case, the Petitioners were and are stakeholders in the affairs of the City of Nairobi and specifically as relates to the transport business. They were in that capacity invited by the 1st Respondent to submit their views on the 1st Respondent's 2013-2014 budget estimates at the stakeholder forums of 25th April 2013 and 26th April 2013. It is not in dispute that the 1st and 2nd Respondents thereafter carried out substantial public consultations and came up with a draft Bill that reflected public sentiments. A Bill was thereafter presented to the City County of Nairobi Budget and Appropriation Committee and according to the unchallenged deposition of Lilian Ndegwa, that Committee considered the public views in preparing the final budget estimates which were later on passed included in the Act that was passed by the County Assembly. Surely, after this lengthy enactment process, the Petitioners cannot now be heard to blame the 1st

Respondent while all along they were made aware of the process , right from the time of the preparation of the 1st Respondent's budget estimates of revenue and expenditure up to the time the impugned Act was enacted. The Petitioners have in any event failed to demonstrate to this Court how the 1st and 2nd Respondents failed to achieve public participation taking into account all that the 1st Respondent did in the process of enacting the impugned Act. I should say in passing that public participation is not the same as saying that particular public views must prevail.

49.It is against this background that I am unable to find that the impugned Act is unconstitutional on account of lack of public participation. I am also clear in my mind that the 1st and 2nd Respondents involved the public in enacting the Nairobi City County Finance Act as stipulated by **Article 10(2)** and **Article 196(1)(b)** of the Constitution. I am also in agreement with the sentiments expressed by Chaskalson, Chief Justice of South Africa, in the Constitutional Court of South Africa case of *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he stated that;

“[155] It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations.

[156] In parliament this is done through the publication of a Bill containing the provisions of the proposed legislation, hearings before Parliamentary Committees, and debates in Parliament where matters of principle raised by sectors of the public affected by the law can be contested.

[157] Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose, It enables people who will be affected by the proposals to make representation to the lawmaker, so that those concerns can be taken into account in deciding whether changes need to be made to the draft.

[158]This does not mean that the Minister who makes the regulations has to study thousands of pages received from the general public and respond to them. The analysis of these responses can be left to officials whose responsibility it is to consider the comments received and to report to the Minister on them.”

I am in complete agreement and I shall adopt the above words as if they were mine and will therefore hold and find that there was adequate and appropriate public participation prior to the enactment of paragraph 6.1 in the schedule to the **Nairobi City County Finance Act, 2013** but subject to what I shall say about the public advertisement in daily newspapers at the end of this judgment.

Whether the 1st and 2nd Respondents complied with the due budget making process

50.The 1st and 2nd Respondents spent considerable time in their submissions explaining the budget making process in the County government as is required by the **Public Finance Management Act** and the **County Governments Act of 2011**. Having found that the 1st and 2nd Respondents involve the public in the process leading to the enactment of the **Nairobi City County Finance Act**, I am convinced that they indeed complied with the law in the budget making process; from the making of the overall estimation of the County government revenue and expenditures, to preparing the budget estimates for the county government and submitting the estimates to the County Assembly approval of the estimates by the County Assembly, enactment of the appropriation laws and all the laws needed for the implementation of the county governments budget.

51.Looking at the Petitioners' case and their submissions, that is all there is to say on this aspect of the Petition.

The applicable law in the collection of parking fees in City County of Nairobi.

52. It was the Petitioner's submission that **Paragraph 6.1** violates part **VIA of the Traffic Act** as it imposes a blanket parking fee regardless of the time that one spends in a parking lot and that the mere specification of a monthly or seasonal ticket as parking fees offends **Part VIA** of the **Traffic Act**. They submitted that Parliament's intention in enacting the **Traffic Act** was to protect consumers of parking space and envisaged an initial charge to be imposed for parking space and subsequently a sum pro-rated against one's occupation of the Parking space. Further, that the rates the 1st Respondent intends to impose do not meet this imperative, and thus must be rejected as they are not in the prescribed instruments under the **Traffic Act** (parking meters). They claimed that the County legislation must comply with the National legislation and if not, then the same is null and void and for those reasons unconstitutional for violating **Article 190(1)** and **190(2)** of the **Constitution**.

53. Before I proceed to deal with this issue, I find it necessary to restate the role of this Court in declaring a statute or law unconstitutional. There is a general presumption that statutes enacted by Parliament and in this case, a County Assembly, are constitutional and the burden falls upon the person who alleges otherwise to rebut this presumption - See *Ndyanabo v Attorney General of Uganda (2001)EA 495*. This position has also been reiterated in *Law Society of Kenya v Attorney General (supra)*, *Commission for the Implementation of the Constitution v Parliament of Kenya (supra)*, *Murang'a Bar Owners Association v Minister of State for Provincial Administration and Internal Security and Others Petition No. 3 of 2011* and *Samuel Momanyi v Attorney General and Another Petition No. 341 of 2011*.

In that respect, I adopt the words of the Supreme court of India in *Hambarda Wakhana v Union of India AIR (1960) AIR 554* where the Judges observed as follows;

“In examining the constitutionality of a statute it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.”

54. Closer home, the Courts have also held that in determining the constitutionality or otherwise of legislative provisions, regard must be had to the purpose and effect of the legislation in question. In *Olum and Another v Attorney General of Uganda (2002) 2 EA 508*, 518 the court held that;

“To determine the constitutionality of a section of a statute or Act of Parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”

55. At home, Majanja J in *Commission for the Implementation of the Constitution v Parliament of Kenya (supra)* stated as follows in the same breath;

“Parliament does not legislate in a vacuum but within an overall framework of existing laws and institutional framework and unless it is clear that a latter statute intends to repeal or otherwise replace the corresponding existent legislation, each legislative enactment continues to have the full force of law and is enforceable accordingly. As such, an Act of Parliament must be considered with reference to the state of law subsisting when it came into operation.”

56. I wholly agree and I must also emphasize that it is not for the Courts to decide what is an appropriate or right or wise legislative provision. That power falls squarely with the legislature, and in this case, the County Assembly which casts policies into statutes. The Courts will only intervene if in the face of the claims, a particular statute or part thereof contravenes the Constitution. The power to do so is donated initially to the High Court under **Article 165 (3) (d)** of the **Constitution** which provides as follows;

“1) ...

2) ...

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

There would seem to be some confusion regarding the meaning and import of the above Article but I wonder why. Its language is plain, its meaning clear and I see no ambiguity at all. In Article 165(3) (d) (iii) for example, the words used are “*the question whether anything said to be done under the authority of this Constitution or a law is inconsistent with, or in contravention of this Constitution” (Emphasis mine). Anything is everything under the Constitution or law and includes all and every act undertaken by the authority of the Constitution including the enactment*

of Bills and Acts as is the case here.

57. However, as I stated recently in **Mount Kenya Bottlers Ltd & Others v Attorney General & Others Petition No. 72 of 2011**, the Courts will also not nullify legislation because it thinks that such law was enacted in bad taste, unconscionable or inconvenient.

58. In that regard, I recall that the Petitioners have questioned paragraph 6.1 of Nairobi City County Finance Bill in levying parking fee. As it can be seen from above, this Court cannot enter into the arena of deciding what fee is reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the 1st and 2nd Respondents. This Court will only intervene if the Petitioners had demonstrated that in charging the parking fees the Respondents have violated the existing law or acted in contravention of the law.

59. The Petitioners claim that **Paragraph 6.1** violates part **VIA of the Traffic Act** as it imposes a blanket parking fee and that the County Legislation must comply with the national legislation. They further contend that **Article 190(1) and 190(2)** of the Constitution binds a County Government to adhere to national legislation in enacting any specific county law relating to the national legislation on the subject matter. In this case, the Traffic Act is the national law that circumscribes the levying of parking fee in Part 1VA.

60. Looking at **Article 190(1)**, I do not see any point to the argument that it binds a County Government to adhere to national legislation as argued by the Petitioners. It provides as follows;

“(1) Parliament shall by legislation ensure that County governments have adequate support to enable them to perform their functions.”

Article 190 (2) on the other hand provides that County Governments have been mandated to operate financial management systems that comply with any requirements prescribed by national legislation.

The question at this point is whether parking fees are part of a financial management system that County Governments have been mandated to comply with under the national legislation i.e. Traffic Act.

61. To answer that question, I will advert to the provisions of Part VIA of the Traffic Act which provides generally for powers of the County Government to make laws regarding the designation of parking places of particular relevance to the instant case are the provisions of **Section 72B** which provides follows;

“(1) There shall be paid to the local authority in respect of a vehicle left in a designated parking place charges calculated in accordance with this section or in such other manner as the local authority may by by-laws prescribe.

2. There shall be a prescribed standard period for each designated parking place and, subject to this section, the amount of the charge for a vehicle left in the parking place for a time not exceeding the standard period, called the initial charge, shall be such amount, called the standard amount, as may be prescribed, and the initial charge shall be payable on the leaving of the vehicle in the parking place: Provided that__

i. if it is so prescribed, the initial charge for a vehicle for a time not exceeding one-half of the standard period shall be one-half of the standard amount; and

ii. where paragraph (i) has effect, and it is further so pre-scribed, then, if before the end of the prescribed time a further payment of one-half of the standard amount is made, the two payments shall be treated as a single payment of an initial charge of the standard amount made on the leaving of the vehicle.

(3) If a vehicle is left in the parking place after the period for

which payment was made by the initial charge has expired, the amount of the charge shall be the amount of the initial charge together with such additional amount, called an excess charge, as may be prescribed, and the excess charge shall be payable in such manner and at such time as may be prescribed.

(4) A parking meter of a type approved by the Minister shall be

provided for each space in a designated parking place, and shall be erected as close to that space as is practicable; and -

(a) payment of the initial charge shall be made by the insertion of coins in the parking meter and turning the handle of the

parking meter to its full extent so as to indicate the length

of time paid for;

(b) subject to paragraph (c), if, at any time while a vehicle is

left in the parking place, the specified indication appears in the parking meter for the space in which the vehicle is left, it shall be presumed unless the contrary is proved that the initial charge has been duly paid and that the period for which payment was made by the initial charge has already expired;

(c) if it is proved that the time for which the vehicle has been

left in the parking place is less than the standard period, or

(where proviso (i) to subsection (2) has effect) less than half the standard period, paragraph (b) shall not have effect but it shall be presumed unless the contrary is proved that the initial charge has not been duly paid for the vehicle.

(5) Notwithstanding anything contained in this section, a local

authority may, by by-laws, prescribe other methods for the

payment of parking fees in respect of a vehicle left in each

designated parking place.

1. Looking at the provisions of **Section 72B** of the **Traffic Act**, I do not think it is the operative and superior law for calculating parking fees in the Counties and also at the national level as claimed by the Petitioners. I say so because the powers conferred on a County Assembly to make law is found in **Article 185 (2)** which states as follows;

“A county assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule.”

A perusal of **Section 5(c)** of the Fourth Schedule to the Constitution demonstrates that County Government have the exclusive mandate over the County transport which includes “traffic and parking”.

Further **Article 209(4)** of the Constitution empowers national and county governments to impose charges for the services they provide. One such service provided by the county government is parking under Section 5(c) aforesaid

2. Looking again at **Section 72B (1)** of the **Traffic Act**, I am unable to agree with the Petitioners that the 1st Respondent is obligated to charge parking fees in the manner prescribed by Part V1 of the Traffic Act and by use of parking meters in designated parking space. A casual reading of Section 72B(1) reveals that the County Assembly may calculate the parking fees in accordance with the provisions of **Section 72B** or in such a manner as it may prescribe. This section provides that ;

“72 B (1) There shall be paid to the local authority in respect of a vehicle left in a designated parking place charges calculated in accordance with this section or in such other manner as the local authority may by by-laws prescribe. “

To my mind, the manner in which a County Government therefore charges parking fees is not cast in stone. It is up to the respective County to designate the manner in which it will charge the fees, and this may include the use of parking meters as stated in **Section 72 B (4)**.

64. It must be understood that the Traffic Act was enacted in 1968 or thereabouts, way before the Constitution, 2010 was promulgated. Between 1968 and 2010, there were no county Governments and the “distribution of functions between the National Government and the County Governments” was all but a mirage.

Local authorities cannot be equated to County Governments as the structure and design of the Constitution has given County Governments an elevated position as one of the organs to which sovereignty of the people of Kenya is delegated under Article 1 of the Constitution reproduced elsewhere above.

In that context, traffic and parking issue have been deliberately given to County Governments and if the Traffic Act purports to taken away that mandate, as is argued by the Petitioners then Section 7 of Schedule 6 has the answer. It provides as follows;

“(1) All law in force immediately before the effective Existing laws.

date continues in force and shall be construed with the alterations,

adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

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

(a) a law that was in effect immediately before the effective

date assigns responsibility for that matter to a particular State

organ or public officer; and

(b) a provision of this Constitution that is in effect assigns

responsibility for that matter to a different State organ or

public officer, the provisions of this Constitution prevail to the extent of the conflict.”

The Traffic Act must be bought to conformity and must therefore be construed with the devolved County Government structure in mind and it cannot supersede County Legislation on an issue exclusively reserved for the County Government, not by Statute, like the Traffic Act but by the Constitution itself.

65. But suppose I am wrong? Then, I am still convinced that the law on charging of the parking fees is very clear because The proviso to Section 75B at **Section 72B(5)** has given the 1st Respondent as a successor to the local authority as unfetterd discretion to prescribe the methods for the payment of

parking fees. This Section states that;

“72B (5) Notwithstanding anything contained in this section, a local authority may, by by-laws, prescribe other methods for the

payment of parking fees in respect of a vehicle left in each

designated parking place.” (Emphasis mine)

The Petitioners questioned Scheduled 6.1 which has prescribed the methods for payment of parking charges including payment for daily parking tickets, subscribing for seasonal tickets which can be monthly, quarterly, half yearly or annually, and also for off-street parking in automated areas. In my understanding, this section has given the 1st Respondent powers to make by laws on how payment of parking fees is to be effected. It is not for this Court as stated elsewhere above to measure the convenience or appropriatenesses of that method. The 1st Respondent is the body mandated under the Traffic Act as well as by the Constitution to determine the parking fees to be paid for parking in designated places within the City County of Nairobi and the method to pay that parking fees.

66. I must also state that this Court cannot direct the 1st Respondent on how to exercise its duty of levying parking fees. The 1st Respondent has the option of legislating on the calculation of parking fees and in its wisdom it has done that having taken into consideration public views, its policies as well as the revenue it ought to raise. The Petitioners have failed to demonstrate how the levying of parking fees in the manner proposed by the 1st and 2nd Respondent has prejudiced national economic policies, economic activities across the County, mobility of goods, services, capital and labour. In my view, it is not enough for the Petitioners to state that they will shy away from entering the city because of the high parking fees levied by the 1st Respondent. They have a duty to demonstrate how that will affect the national economic policies and they have failed to do so.

67. **Whether the Petitioners are entitled to the Remedies sought**

It is obvious that once I have faulted the Petitioners on their interpretation of Schedule 6.1 of the Finance Act, 2013, none of their prayers can be granted.

However, I heard them to say that the actions of the 1st and 2nd Respondents are in contempt of the decision of Korir J. in the **Kaka case (supra)**. I have perused that decision and all that the learned judge did was to point the City Council of Nairobi to Section 72 B reproduced above and ordered them to make by-laws with regard to calculations for parking charges. There is no conflict between his decision and my findings above save that whereas the City Council had made no by-laws before confirming new parking charges, the 1st and 2nd Respondents have done so using the Nairobi City County Finance Act, 2013 which is superior to any by-law. The **Kaka** case is therefore of no help to the Petitioners.

Conclusion

68. It is obvious to me that the Petitioners, in spite of their spirited argument to the contrary have made no case that they are entitled to the orders sought in the Petition and I shall therefore order as follows;

(i) The Petition dated 3rd October 2013 is dismissed

(ii) There will be no order as to costs.

I must conclude this judgment by expressing my sincere gratitude to Prof. Ojienda and Mr. Kinyanjui for their industry and able presentation of their respective client's' cases. Their assistance in the eloquent articulation of issue raised in this Petition greatly enriched this judgment. I must also commend my Research Assistant Ms. Carolene Kituku for her in-depth legal research on the law and analysis of the

issues in this judgment that facilitated the speedy preparation of this judgment.

69. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Kinyanjui for Petitioners

Prof. Ojienda for 1st and 2nd Respondents

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE