



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT ACT**

**AT ELDORET**

**ELC PETITION NO 5 OF 2020**

**IN THE MATTER OF: ARTICLES 22, 23, 27, 209 (3) AND 210 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 (1), 191 (2) & (3), 201 (b) (i), 209 (3) & (5) AND 210 (1) OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**EASTERN PRODUCE KENYA LIMITED, SIRET TEA COMPANY**

**LIMITED, KAKUZI PLC (KABOSWA ESTATE),**

**KIBWARI PLC, TOYOI INVESTMENTS LIMITED,**

**KIPKEIBON ESTATES LIMITED.....1<sup>ST</sup> PETITIONERS**

**KENYA TEA GROWERS ASSOCIATION.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NANDI.....RESPONDENT**

**JUDGMENT**

**Introduction**

The 1<sup>st</sup> Petitioners are limited Liability companies incorporated in Kenya under the Companies Act Chapter 486 (now repealed). That the 1<sup>st</sup> Petitioners' headquarters is in Nairobi with tea estates *inter alia* in Nandi County within the Republic of Kenya. Further that the Petitioners are involved in intensive agricultural farming with a focus on tea.

The 2<sup>nd</sup> Petitioner Kenya Tea Growers Association is an association registered under the repealed Trade Union's Act with members who promote the common interests of the tea plantation sub sector in cultivation and manufacture of tea and accounts for 40% of the production in Kenya. Its members within Nandi County are namely, Nandi Tea Estates Limited, Williamson Tea Kenya Plc (Kaimosi Tea Estates), Williamson Tea Kenya Plc (Tinderet Tea Estates), Kapchorua Tea Kenya Plc and Emrok (EPZ) Tea Factory Ltd.

The Respondent is the County Government of Nandi established under Article 176 of the Constitution of Kenya, 2010.

**PETITIONERS' CASE**

By a petition dated 16<sup>th</sup> March 2020 the Petitioners herein aver that the respondent enacted the Nandi County Finance Act 2019 which came into operation on 12<sup>th</sup> April 2019 and was amended vide Nandi County Finance (Amendment) Act, 2019 which was published on 30<sup>th</sup> December 2019.

The Petitioners further state that the Nandi County (Amendment) Act 2019 imposes land rates on all rateable property within the County based on the acreage covered under tea, coffee and sugar cane.

The Petition further states the Act provides that the land rates among other charges provided in the Ninth Schedule thereto are levied to the Rating Act (CAP 267 Laws of Kenya)

The Petitioners also state that pursuant to the Nandi County Finance Act, 2019 and the Nandi County (Amendment) Act 2019, the Respondent by invoices No. 577, 578, 579, 1852, 1853, 1854, 1855, 1857, 1858, 1859, 1861, 1862 and 1863 dated 16<sup>th</sup> January 2020 has demanded from the 1<sup>st</sup> petitioners land rates charged at the rate of Kshs. 2000/= per acre for a total of 21, 972.92 acres, being a total amount of Kshs. 43,946,060/ payable to the Nandi County Revenue Fund.

Further that the Respondent similarly by invoices No. 1932, 575, 1869, and 1871 dated 14<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> January 2020 respectively, has demanded from 3 members of the 2<sup>nd</sup> Petitioner land rates charged at the rate of Kshs. 2000/= per acre amounting to Kshs. 21, 738, 460/ and that the remaining members were yet to receive their respective invoices as at the time of filing this petition.

The Petition states that the respondent has previously been charging the 1<sup>st</sup> Petitioners land rates at a rate of Kshs. 0.5% of the value per acre for the area under tea (value being Kshs. 90,000/, being 45/= per acre and members of the 2<sup>nd</sup> Petitioner were charged land rates at Kshs. 100 per acre.

The Petitioners challenge the above provisions on the following grounds;

(i) The Respondent in failing to comply with the provisions of the Rating Act (Cap 267) and the Valuation for Rating Act (Cap 266) while varying and/or imposing the land rates for the year 2020 and beyond, is in clear violation of Article 210 (1) of the Constitution, as such variation and/or imposition of land rates is not made as provided by legislation.

(ii) The differentiation of the property holders under items 1A and 1B of section 6 of the Nandi County Finance (Amendment) Act, 2019 based on the acreage owned is unfair, unreasonable, without justification and discriminatory and therefore in breach of the Petitioners' rights under Article 27 (1), (2) and (4) and 201 (b) (i) of the Constitution.

The Petitioners further take issue with Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 in so far as it imposes a charge of Kshs. 5/= per every Kilogram of tea plucked by use of tea plucking machines.

The Petitioners challenge this provision on the following grounds:

(i) The imposition of charges on machine-plucked tea is not contemplated as a form of and/or method of rating under sections 4, 5, 6, 8 or 9 of the Rating Act (Cap 267) and therefore contravenes the provisions of Article 210 (1) of the Constitution as it is not made as provided by legislation.

(ii) Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 infringes on the Petitioners' rights under Article 40 (2) (b) of the Constitution in so far as it limits and/or restricts the Petitioners' enjoyment of their right to adopt modern technology in agriculture.

(iii) Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 creates a differentiation and/or distinction between machine plucked tea and other modes of plucking, which is unfair, unjustifiable, unreasonable, discriminatory and therefore in violation of Article 27 (1) (2) and (4) of the Constitution.

(iv) The Respondent in imposing a charge on machine-plucked tea is in contravention of Article 40 (3) of the Constitution which protects the Petitioners' right to own property free from interference by any of the state organs or public officers.

The Petitioners state that the respondent is empowered under Article 209(5) of the Constitution, to impose property rates, however such power is qualified to the extent that it should not be exercised in a manner that is prejudicial to the national economic policies and activities across county boundaries or the national mobility of goods, services, capital or labour.

The petitioners therefore state that the Respondent's decision to vary the land rates from Kshs 450/= per acre to Kshs 2000/= per acre is arbitrary and contravenes the clear provisions of Articles 40, 47, 50 and 210(1) of the Constitution and the Rating Acts.

That the Respondent has without due regard to the procedures contemplated under Section 4 of the rating Act varied the method of rating from Site Value Rate under section 6 of the Rating Act and applicable prior to enactment of the Nandi County Finance (Amendment) Act 2019, to an Area Rate under section 5 of the Rating Act for the year 2020.

From the above grievances, the Petitioners pray for the following orders:

a) This Honourable Court be pleased to declare that the variation of land rates by the Respondent under the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 was contrary to the provisions of Articles 27, 40, 50, 191, 201 and 210 of the Constitution and is therefore null and void.

b) This Honourable Court be pleased to declare that the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Ninth Schedule to the Nandi County Finance (Amendment) Act, 2019 in so far as they provide for the imposition and/or variation of land rates by the Nandi County is null and void for being contrary to Article 191 (2) and (3) of the Constitution.

c) This Honourable Court be pleased to quash the Respondent's invoices demanding land rates from Petitioners for the year 2020 pursuant to the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019.

d) This Honourable Court be pleased to declare the imposition of charges on machine-plucked tea by the Respondent under item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 is contrary to the provisions of Articles 27, 40 and 210 (1) of the Constitution and is therefore null and void.

e) This Honourable Court be pleased to grant a permanent injunction restraining the Respondent from demanding and collecting any land rates from the Petitioners pursuant to Item 1 of the Ninth Schedule to the Nandi County Finance Act, 2019 and Item B of section 6 of the Nandi County Finance (Amendment), Act 2019, without due regard to the provisions of the Rating Act (CAP 267) and the Valuation for Rating Act (CAP 267), until such time as the appropriate county legislation on rating and valuation for rating has been duly enacted.

f) This Honourable Court be pleased to grant a permanent injunction restraining the Respondent from demanding any charges on machine-plucked tea pursuant to Item 7 of the Nandi County Finance Act, 2019.

g) Such other orders as this Honourable Court shall deem just.

h) Costs of this Petition

The petitioner had filed a notice of motion contemporaneously with the petition seeking for conservatory orders which orders were granted in the interim pending the hearing of the application *inter partes*. On 23<sup>rd</sup> June 2020 Counsel for the respondent informed the court that they were willing to compromise the application for purposes of fast tracking the hearing of the petition with orders that status quo be maintained pending the hearing and determination of the petition.

Counsel further agreed by consent that pending the hearing and determination of the petition, the petitioners do continue paying the old rates and the petition be canvass by way of written submissions which were duly filed.

### **PETITIONERS' SUBMISSIONS**

The Petitioners relied on the facts as set out in the Petition and the Supporting Affidavits sworn Denis Gitaka and Apollo Kiarri together with their Further Affidavit sworn on 28<sup>th</sup> July 2020 by Denis Gitaka.

Counsel submitted that it is on record that the Respondent conceded that it is exercising the power to impose property rates through the provisions of the Rating Act (Cap 267) and the Valuation for Rating Act (Cap 266), therefore the issue of conflict between the National and County legislation does not arise hence the Petitioners therefore abandon their challenge under Article 191 (2) of the Constitution.

Counsel submitted that the Petition is brought pursuant to the provisions of Article 22 of the Constitution of Kenya, 2010 which entitles the Petitioners to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23 (i) and (iii) of the Constitution vests this honourable Court with jurisdiction to hear and determine the Petition and grant the appropriate reliefs.

The Petitioners listed the following issues for determination:

a) Whether the variation and/or imposition of land rates by the Respondent under the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 is in violation of Articles 27 (1) (2) and (4), 201 (b) (i) and 210 (1) of the Constitution of Kenya, 2010;

b) Whether the imposition of charges on machine-plucked tea by the Respondent under Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 violates the provisions of Articles 27 (1) (2) and (4), 40 (2) (b) and 210 (1) of the Constitution of Kenya 2010;

c) Whether the Petitioners are entitled to the prayers sought.

On the 1<sup>st</sup> issue as to whether the variation and/or imposition of land rates by the Respondent under the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 is in violation of Articles 27 (1) (2) and (4), 201 (b) (i) and 210 (1) of the Constitution of Kenya, 2010, the petitioners submitted that the material and facts presented before this Honourable Court disclose a genuine case wherein the Respondent is in blatant violation of the Constitution and the Petitioners' rights as stated thereunder.

The Petitioners highlighted the following:

That Item 1 of the Ninth Schedule to the Nandi County Finance Act, 2019 imposes land rates on rateable property based on a percentage of market value per acre of land with the property being categorized into different zones; while Items 1A and 1B of the Nandi County Finance (Amendment) Act, 2019 amend Item 1 of the Ninth Schedule to the Nandi County Finance Act, 2019 by imposing land rates on all rateable property within the County based on the acreage covered under tea, coffee or sugar cane.

The Petitioners submit that Article 210 (1) of the Constitution precludes the Respondent from imposing, waiving or varying any tax except as provided by legislation which may be an appropriate County legislation, or in the absence thereof, the appropriate National legislation.

The Petitioners further submit that The Nandi County Rating Bill, 2016 which would have been the appropriate County legislation for this purpose is yet to be passed into law and is currently pending before the Nandi County Assembly hence not presently available for purposes of satisfying Article 210 (1) of the Constitution.

Counsel relied on the case of **County Government of Kwale vs Kenya Airports Authority [2017] eKLR**, where the Court of Appeal stated as follows:

*“The power to impose property rates by County Governments is enforced **through the provisions of the Rating Act and Valuation for Rating Act** both of which according to paragraph 7 of the Sixth Schedule of the Constitution are to be construed with necessary alterations, adaptations, qualifications and exceptions in order to bring them into conformity with the Constitution. **In addition, the County Governments enact their respective Finance Acts which regulate the issues of taxation in the Counties.**” (Our Emphasis)*

It was the Petitioners ‘counsel’s submission that in varying the land rates payable within its jurisdiction, the Respondent is strictly bound to apply the provisions set out in both the **Rating Act (Cap 267) and Valuation for Rating Act (Cap 266)** therefore it is not sufficient to merely state, as it does at Schedule 9 of its Finance Act, 2019, that the charges are levied pursuant to the Rating Act Cap 267.

Counsel for the Petitioners submitted that there is a Constitutional obligation placed on the Respondent under Article 210 (1) to vary the land rates **“as provided”** by legislation, i.e. the Rating Act and the Valuation for Rating Act and in order to satisfy the threshold set under Article 210 (1), the Respondent is obligated to strictly adhere to and apply the provisions and procedures set out in these statutes.

Mr. Nyakundi Counsel for the Petitioners urged the court to note that the Respondent has not controverted the Petitioners’ assertion that it is bound to strictly apply the provisions of the Rating Act and the Valuation for Rating Act prior to variation of the old rate and/or imposition of a new rate. That there was no evidence of any Supplementary Valuation Roll prepared or any application of the procedures provided under either the Rating Act or the Valuation for Rating Act.

Counsel also relied on the case of **Republic of Kenya vs Municipal Council of Nyeri Ex Parte Ringroad Residents Association (2016) eKLR**, where the Court held as follows with regard to non-adherence to the provisions of the Rating Act and Valuation for Rating Act by a local authority;

*It was incumbent upon the respondent to prove that the objectors had been served through any of the means prescribed, more particularly, under section 30 (2) of the Act... In the absence of proof of service as prescribed by the Act, the only conclusion that one can make is that the respondent did not send a notice of the Valuation of the Rateable property to every rateable owner as prescribed under section 9(4); in other words, it flouted this provision of the law.*

*Having so held, it would have been worthwhile to end this matter here and grant the application for the simple reason that failure to observe a mandatory statutory requirement renders the ensuing act illegal or invalid; in **Jacqueline Resley versus The City Council of Nairobi (2006) 2 EA 311**, this Court Visram and Ibrahim JJ (as they then were) addressed this issue of the necessity to comply with the statutory provisions by public authorities such as the respondent; the court said as follows:*

*‘In this case there is an apparent disregard of statutory provisions by the respondent, which are of a fundamental nature. The Parliament has conferred powers on public authorities in Kenya and clearly laid a framework is clear, **there is an obligation on the public authority to strictly comply with it to render its decision valid...**’ (Our emphasis)*

It was counsel’s further submission that the provisions of the Rating Act and the Valuation for Rating Act safeguard the Petitioners’ right to due process and as such the Respondent’s failure to abide by the statutory provisions under these Acts has resulted in the Petitioners’ right to due process protected under Article 210 (1) being curtailed. That the variation and imposition of the exorbitant land rate for the year 2020 is not only devoid of fair and due process as set out under the Valuation for Rating Act but is also without any basis and clearly adversely affects the Petitioners.

The Petitioners therefore submitted that Items 1A and 1B of section 6 of the Nandi County Finance (Amendment) Act, 2019 vary and increase the payable land rates without following the procedures as set out under the Rating Act and the Valuation for Rating Act is arbitrary and contravenes the provisions of Article 210 (1) of the Constitution to the extent that such variation and/or increment is not made **“as provided by”** legislation.

Counsel cited the case of **Pevans East Africa v Betting Control and Licensing Board & 2 others; Safaricom Limited & another (Interested Parties) [2019] eKLR**, where the Court stated thus on the test for arbitrary action:

*“...Differently put, was the decision arbitrary? This necessitates consideration of the elements of an arbitrary action. Arbitrary and capricious means doing something according to one’s will or caprice and therefore conveying a notion of a tendency to abuse the possession of power. This is one of the basic standards for reviewing administrative decisions. Under the “arbitrary and “Capricious” standard, an administrative decision will not be disturbed unless it has no reasonable basis. When an administrator makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and capricious and can be invalidated by a court on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; an action not made upon consideration of relevant factors is arbitrary, capricious, an abuse of discretion. **So is an action not in accordance with law or if undertaken without observance of procedure required by law.** (Our emphasis)*

The Petitioners further submit that the differentiation of the property holders under items 1A and 1B of section 6 of the Nandi County Finance (Amendment) Act, 2019 based on the “acreage owned” is unfair, unreasonable, without justification and discriminatory and therefore in breach of the Petitioners’ rights under **Article 27 (1), (2) and (4)**. This provision further violates **Article 201 (b) (i) of the Constitution** which provides that the principles of public finance shall promote an equitable society, and in particular, the burden of taxation shall be shared fairly.

The Petitioners submit that irrespective of the acreage owned by the tea farmers within Nandi County, all tea farmers are in a similar position and are affected by similar economic factors with regards to the cultivation, processing, marketing and sale of the produce. The circumstances surrounding tea production within Nandi County are similar for all farmers within the County. Such circumstances would include; cost of production, market price and/or value of the end produce. Such factors do not affect farmers differently based on acreage owned.

The Petitioners argued that it is therefore unfair and unjustifiable for the Respondent to categorize the farmers differently on the basis of acreage owned when it comes to payment of land rates as all tea farmers being in a similar situation ought therefore to be treated equally in sharing the taxation burden.

In the case of **Jacqueline Okeyo Manani & 5 others vs Attorney General & another [2018] eKLR**, the Court held as follows:

*“Black’s Law Dictionary, 9<sup>th</sup> Edition defines “Discrimination” as:*

*“... (2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”*

Counsel further submitted that in determining whether or not the Respondent’s conduct amounted to unfair and/or unreasonable discrimination, counsel urged the court to be guided by the principles as stated in the case of **Pevans East Africa v Betting Control and Licensing Board & 2 others; Safaricom Limited & another (Interested Parties)** (supra), where the court stated thus:

*“...the principle of equality attempts to make sure that no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law or conduct complained of is likely to be used against them more harshly than others who belong to other groups.*

*The test for determining whether a claim based on unfair discrimination should succeed was laid down by South Africa Constitutional Court in **Harksen v Lane NO and others**... in which the court said:*

*They are:-*

*(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the Constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.*

*(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:-*

*(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

*(ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the Complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...*

*(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (of the Constitution).”(Our emphasis)*

The Petitioners therefore urged the court to find that differentiation and/or distinction under items 1A and 1B of section 6 of the Nandi County Finance (Amendment) Act, 2019 on the basis of the **acreage owned** is unfair, unreasonable, without justification, amounts to **unfair discrimination** and therefore is in violation of the Petitioners’ rights under **Article 27 (1), (2) and (4)** of the Constitution.

On the 2<sup>nd</sup> issue as to whether the imposition of charges on machine-plucked tea by the Respondent under Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 violates the provisions of Articles 27 (1) (2) and (4), 40 (2) (b) and 210 (1) of the Constitution of Kenya 2010, counsel submitted that with respect to Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019, the Respondent imposes a charge of KES 5 per every Kilogram of tea plucked by use of tea plucking machines which the Respondent claims that the charges levied under the Ninth Schedule to the Nandi County Finance Act, 2019, including Item 7 thereof are imposed pursuant to the Rating Act (CAP 267).

The Petitioners submit that the imposition of charges on machine-plucked tea is not contemplated as a form or method of rating under

sections 4, 5, 6, 8 or 9 of the Rating Act and therefore violates the clear provisions of Article 210 (1) of the Constitution as it is not made “**as provided**” by legislation, in this case the Rating Act.

The Petitioners further submit that the Rating Act (Cap 267) does not provide for charges on machine-plucked tea and does not provide for other revenue raising measures outside land/property rates.

It is the petitioners’ submission that the charges on machine-plucked tea cannot in any sense be deemed to be a land and/or property rate so as to come within the ambit of the Rating Act (Cap 267) hence such charges cannot therefore be levied by the Respondent pursuant to the Rating Act as stated. Machine- plucked tea charges have no legal basis is therefore illegal, null and void for violating the provisions of Article 210 (1) as it is not imposed “as provided by legislation.

The Petitioners further submit that Item 7 of the Ninth Schedule to the Nandi County Finance Act clearly violates the Petitioner’ rights as guaranteed under **Article 40 (2) (b) of the Constitution in so far as it limits and/or restricts the Petitioners’ enjoyment of their right to adopt modern technology in agriculture.**

That the imposition of charges on machine-plucked tea has no justification whatsoever, so as to warrant an additional charge. The global market prices for tea, however plucked, remain the same, in any case, the machine plucked tea may in certain cases be deemed to be of inferior quality relative to hand-picked. The Petitioners therefore submit that there would be no justification for imposing extra charges on machine-plucked tea.

It is the Petitioners’ further submission that the differentiation between machine-plucked tea and other modes of plucking is unfair and discriminatory and a clear violation of Article 27 (1) (2) and (4) of the Constitution and further that the Respondent has not furnished any rationale for only levying charges on machine-plucked tea as opposed to tea plucked using other modes. There is also no such charge imposed on any other agricultural activity within Nandi County that involves mechanization.

Counsel urged the court to be persuaded by the cases of ***Jacqueline Okeyo Manani & 5 others vs Attorney General & another*** and ***Pevans East Africa v Betting Control and Licensing Board & 2 others; Safaricom Limited & another (Interested Parties)*** (supra) in finding that this provision amounts to unfair discrimination.

On the 3<sup>rd</sup> issue as to whether the Petitioners are entitled to the prayers sought , counsel submitted that the Petitioners pray for a Declaration that the variation of land rates by the Respondent under the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 was contrary to the provisions of Articles 27 (1) (2) and (4), 201 (b) (i) and 210 (1) of the Constitution and is therefore null and void; a Declaration that the imposition of charges by the Respondent on machine-plucked tea under Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 contravenes the provisions of Article 27 (1) (2) and (4), 40 (2) (b) and 210 (1) of the Constitution and is therefore null and void.

Counsel relied on the case of ***Pevans East Africa v Betting Control and Licensing Board & 2 others*** (supra) where the court set out the test for granting declaratory reliefs as follows:

*“The tests for granting declaratory reliefs were settled in ***Durban City Council vs Association of Building Societies*** and confirmed in ***Cordiant Trading CC vs Daimler Chrysler Financial Services (Pty) Ltd.*** The Court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion.*

*The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the court’s discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future, or contingent right or obligation. Only if the court is satisfied, does it proceed to the second leg of the enquiry.*

*The other stage of the enquiry relates to whether the public officer is authorized or obliged by law to render the impugned decision. The first answer to this question lies in the constitutional principle of legality. Organs of state and public officials are creatures of statute. Unlike natural persons who may commit any act, the only requirement being that the act ought to be legal, organs and officials of state are only empowered to act to the extent that their powers are defined and conferred by the constitution and/or by statute. Any conduct by an organ or official of state beyond their constitutional and/or statutory powers violates the principle of legality. (Our Emphasis)*

The Petitioners submit that they have met the threshold for the grant of the declaratory orders sought as they not only have clear Constitutional rights that require enforcement by the honourable Court but the Respondent has also evidently acted beyond the and/or devoid of its Constitutional and statutory mandate in imposing the impugned rates and/or charges.

The Petitioners further submit that even where the enactment of the County Finance Acts is regular and proper, the Respondent would not be exempted from the requirement under Article 210 (1) of the Constitution, to impose and/or vary property rates **as provided by the appropriate legislation**, in this case the Rating Act (Cap 267) and the Valuation for Rating Act (Cap 266).

The Petitioners therefore urged the court to exercise its discretion in awarding the injunctive reliefs sought; which reliefs are within the jurisdiction of the Court and which would be necessary so as to safeguard the Petitioners’ Constitutional rights while compelling the Respondent to at all times adhere to the mandatory Constitutional and statutory provisions in the exercise of its legislative mandate.

## **RESPONDENT’S CASE AND SUBMISSIONS**

Counsel reiterated the contents of the petition and submitted that the Respondent's case is that Article 210 of the Constitution does not preclude the Respondent from imposing rates as long as the same is guided by the provisions of Valuation for Rating Act Cap. 266 and the Rating Act Cap. 267 Laws of Kenya

That the Respondent has enacted the Nandi County Finance Act, 2019 which was amended in December 2019 and which Act imposes property rates on all rateable properties and provide for revenue raising measures within County Government of Nandi.

The Respondent submits that in the spirit of section 6 of the Nandi County Finance (Amendment), Act 2019 it has raised rates for agricultural land from the previous 0.5% of the site value and as a result, the rate per acre raised to Kshs. 2,000/= for properties above 250 acres and Kshs. 1,000/= for properties below 250 acres. Item 7 of the ninth schedule to the Nandi County Finance Act, 2019 imposes charges on machine plucked tea.

The Respondent further submits that these legislations underwent all the legal procedures to become law and hence the Petitioners dispute arises out of statutory function and the court should not be called to decide what an appropriate legislative provision is. The court will only intervene when a statute is unconstitutional which is not the case herein. The petitioners had a chance to present their grievances during public participation but they did not and hence their claim comes so late in the day.

Counsel listed the following issues for determination by court

- a) Whether the petition meets the threshold of a constitutional petition
- b) Whether the Respondent is entitled to impose land rates on the Petitioners properties without an enabling county legislation on rating
- c) Whether the rates charged are discriminatory and the Nandi Finance Acts in conflict with the national Rating Acts
- d) Whether imposition of property rates goes against the provision of Article 209(5) of the constitution
- e) Whether the Petition offends the doctrine of separation of powers
- f) Whether the Petitioners are entitled to the orders sought

On the 1<sup>st</sup> issue whether the petition meets the threshold of a constitutional petition, counsel submitted that the petition does not meet the threshold of a constitutional petition as the petitioners allege contravention of fundamental rights and freedoms under Articles 27(1), 191(2) & (3), 201 (b) (i), 209 (3) & (5) and 210(1) of the Constitution yet from the face of the Petition, it is apparent that the Petitioners are dissatisfied with the statutory provision and in specific Items 1 and 7 to the Ninth Schedule of the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 and hence their claim is devoid of constitutional infringement. Further that the petition does not allege breach or violation of specific constitutional provisions or infringement of specific rights and fundamental freedoms and the manner of such breach violation or infringement.

Counsel cited **Petition No. 457 of 2015 Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR** where the court in finding that a violation of Section 44 of the Banking Act was a breach of a statutory provision and which could readily be redressed through a normal civil suit subject to the usual standard of proof in civil matters held thus;-

*47. A constitutional petition on the other hand is a litigation initiated to either challenge breach of constitutional provisions or violation or infringement of rights and fundamental freedoms granted or recognized by the Constitution. These must expressly or impliedly recognized and protected rights and fundamental freedoms under the Bill of Rights. They must be the sort of rights and fundamental freedoms that belong to each individual, that are not granted or grantable by the state, and belong to individuals by virtue of their being human. These are rights and fundamental freedoms enjoyed by each individual and not collectively...*

*“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.*

Mr. Tororei further submitted that for a suit to be instituted as a constitutional petition, the same must meet the threshold as set in the case of **Anarita Karimi Njeru v Republic (1976-1980) KLR 1272** thus;

*“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he/she should set out with a reasonable degree of precision*

- i) *that of which he complains,*

ii) the provisions said to be infringed, and

iii) the manner in which they are alleged to be infringed.

Counsel also relied on this principle which was restated by the Court of Appeal in the case of **Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR** the court stated thus:-

*“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective. Principle under section 1A and 1B of the civil procedure Act (Cap 21) and Section 3A and 3B of the appellate Jurisdiction Act Cap 9.*

*Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in Constitutional petitions is an extract of this principle.”*

Counsel further submitted that the Constitution of Kenya (Protection of Rights and Procedure Rules, 2013 Rule 10(2) provides that a constitutional petition shall contain the facts relied upon; the constitution provision violated; the nature of injury caused and the relief sought.

That in the instant Petition, the Petitioners have not explained the manner in which the provisions they have listed have been violated by the Respondent and cited the case of **Harrikissoon V Attorney General of Trinidad and Tobago [1980] AC** the judge in **Petition 457 of 2015 (supra)** stated that;

*“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by the constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action...the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...”*

Counsel also relied on the case of **International Centre for policy & conflict & 5 others V. Attorney General & 5 others (2013) e KLR** where it was held that a mere citing of the constitution is not enough to elevate the dispute to a constitutional matter.

Further in the case of **Benard Murage v Fine serve Africa Limited & 3 others [2015] eKLR** the Court stated that

*“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.*

*Counsel therefore submitted that the Petition as presented fails to meet the minimum threshold for a constitutional petition and hence should be struck out with costs.*

On the second issue as to whether the Respondent is entitled to impose land rates on the Petitioners' properties without an enabling county legislation on rating, counsel submitted that the Respondent has a constitutional and statutory duty to impose property rates and any other tax as authorized by an Act of parliament. This duty is provided for under Article 209 (3) of the Constitution and parties cannot waive that obligation.

That the Respondent's right to levy land rates is derived directly from the Constitution and not from the Rating and Valuation for Rating Act and that under Article 185, the legislative authority of a county is vested in and exercised by the County Assembly which is empowered to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County government under the Fourth Schedule.

Counsel submitted that the Respondent therefore enacted the Nandi County Finance Act, 2019 and which was procedurally amended in December, 2019 and which Act is the current applicable law in levying of property rates within Nandi County. That the Respondent ensured that there was adequate public participation pursuant to article 191(1) of the Constitution and that Section 8 (2) of the County Government Act as read together with Section 7(1) to the Sixth Schedule of the Constitution permits the Respondent to use or be guided by the provisions of Valuation for Rating Act CAP 266 and Rating Act CAP 267 pending the enactment of the Respondent's own legislation and hence paragraph 14 of the Petition does not hold water.

Section 7(1) of the Sixth Schedule of the Constitution provides thus:-

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

Counsel cited the case of **Republic vs. Kiambu County Executive Committee & 2 others ex-parte James Gacheru Kariuki & 9 others (2017) eKLR** where the court held that:

50. This leads me to two related conclusions. First, I expressly find that Section 8(2) of the County Governments Act as read together with Section 7(1) of the Sixth Schedule of the Constitution permits the County Executive Committee to use the provisions of Valuation for Rating Act and the Rating Act to levy property rates in Kiambu County.

51. There is the related question of whether, given my finding above that Section 8(2) of the County Governments Act as read together with Section 7(1) of the Sixth Schedule of the Constitution permits the County Executive Committee to use the provisions of Valuation for Rating Act and the Rating Act to levy property rates in Kiambu County, whether such action must be taken only with the approval of the Cabinet Secretary for the time being responsible for inter-governmental relations (or Treasury as the Ex-Parte Applicants suggested). This question arises because Section 5(1) of the Ratings Act expressly states that the rating method must be elected only with the approval of the Minister? Before the Effective Date, that Minister was the Minister for Local Government.

52. The question post-2010 becomes, who, then should approve the rating method? The Ex-Parte Applicants are categorical that it should be the Cabinet Secretary. The County Executive Committee argues that it should be the County Executive Member responsible for finance in the County. My view is that the County Executive Committee is right on this one. In these days when the Constitution commands that devolution should be entrenched, it would be, in my view a step back to give the Cabinet Secretary responsible for inter-governmental relations a role in County affairs. This would be directly pernicious to the objects and principles of devolution and breach the Constitutional principle that a County Government is an independent and autonomous unit.

53. My reading is in keeping with the saving clause in Section 8(2) of the County Governments Act which provides that National legislation can be used to facilitate the running of County affairs with the necessary modifications. The modification called for here, is to substitute the word Minister with the words County Executive Member responsible for Finance.

54. It is, therefore, my finding that no approval was needed from the Cabinet Secretary before adopting the rating method provided for in the Valuation for Rating Act and the Rating Act.

On the third issue as to whether the rates charged are discriminatory and the Nandi Finance Acts in conflict with the National Rating Acts, counsel submitted that the varied rates as imposed by the Respondent are not arbitrary and discriminatory as the rates apply to all tea, maize and sugarcane farms within the County government of Nandi and has not targeted the Petitioners as suggested or at all.

That the graduated rate based on the size of land was adopted by the defunct county council and is the same system adopted by the Respondent to date and that the Respondent has not adjusted the site value at all.

Mr.Tororei counsel for the Respondent submitted that the Petitioners have in their submissions under paragraph 1.8 admitted that the Respondent has previously been charging the 1<sup>st</sup> Petitioner land rates at a rate of 0.5% of the value of the area under tea (value being Kshs. 90,000/=), translating to Kshs. 450 /= per acre while members of the 2<sup>nd</sup> Petitioners were charged land rates at a rate of Kshs. 100 per acre.

Further that under paragraph 18 of the Petition, the Petitioners indicate that there is a clear conflict between the Nandi County Finance Act, 2019 and the Nandi County Finance (Amendment) Act, 2019 on the one hand and the Rating Acts on the other hand with regards to the procedures and norms by which the land rates are to be imposed and in which case the national statutes prevails over the county legislation. Counsel argued that this is not the case as was held in the case of the **Republic v Nairobi City County exparte Job Kiruki Kiira & another [2017] eKLR** thus:

43. Under the **Rating Act** “rating authority” is defined in section 2 thereof to encompass three kinds of local authorities. Section 5 thereof provides for alternative methods of area rating. What comes out clearly from the foregoing is that even before the devolved system of government came into existence by the promulgation of the Constitution of Kenya, 2010, there was no uniform rate in the Country. It follows that the **Rating Act** cannot be said to apply uniformly throughout Kenya when it comes to the rates payable by the property owners. Accordingly, Article 191(2)(a) cannot be invoked in order for the **Rating Act** to supersede the **Nairobi County Finance Act, 2015**.

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

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

45. It is clear that the **Rating Act** is an enabling Act. It is neither restrictive in its purpose nor regulatory on the powers of the County Assemblies to impose rates. In my view, it is meant to enable the County Assemblies collect funds necessary for them to meet their obligations of providing services to the residents of the County. In other words, it is not aimed at preventing unreasonable action by a county that is prejudicial to the economic, health or security interests of Kenya or another county; or impedes the implementation of economic policy. Accordingly, it is my view and I so hold that the **Rating Act** cannot supersede the provisions of a County legislation in the event of a conflict therewith. This decision is informed by the requirement under Article 191(5) of the Constitution for the Court to “prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict”.

On the fourth issue as to whether the imposition of property rates goes against the provision of Article 209(5) of the Constitution, counsel cited Article 209(5) of the Constitution which provides that:

“The taxation of and other revenue raising powers of the 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”.

Mr. Tororei stated that the decision by the Respondent to charge Kshs. 2,000/= for properties above 250 acres and Kshs. 1,000/= for properties below 250 acres is one of the measures for raising revenue and which is aimed at providing services to the constituents of Nandi County. That the measure is not inconsistent and prejudicial to the national policy and neither is it a threat to the economy as suggested by the Petitioners. The Respondent maintains that the amount is modest, reasonable, adequate and fair to enable the Respondent to adequately discharge its mandate and in any event is way below the national rate for prime and arable land in the highlands.

Counsel relied on the case of **County Government of Kwale v Kenya Airports Authority [2017] eKLR** the Court of Appeal held that:

*“a County Government was empowered to impose property rates and such power is qualified to the extent that it should not be exercised in a manner that is prejudicial to the national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.”*

Further in the case of **Base Titanium Limited vs. The County Government of Mombasa & another [2017] eKLR** the court held as follows:-

*“In plain language interpretation, the sub-Article (5) of Article 209 of the Constitution acknowledges the power of county governments to tax under Article 209 (3) and otherwise raise revenues including the service charges under Article 209 (4), with an injunction that the said power shall not be exercised in such a manner that will prejudice the interests set out therein. Accordingly, I respectfully reject the contention in the submissions by Counsel for the Petitioner that Article 209 (5) of the Constitution provides an automatic prohibition on the power of County Governments to levy tax or other charges, when he submits that “the Constitution itself expressly prohibits the 1st Respondent from exercising the said powers and/or imposing the said tax or charges.” The prohibition is, in my view, subject to demonstration of prejudice in terms of the sub-Article 5.”*

It was counsel’s submission that the Petitioners have not provided any evidence of the national economic policies that have been prejudiced by the Respondent in levying rates on their properties and therefore the imposition of property rates by the Respondent was in accordance with Article 209(5) of the Constitution and their averment should be dismissed.

On the fifth issue as to whether the Petition offends the doctrine of separation of powers, counsel cited the provisions of Section 17 of the County Government Act provides that:-

*“The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a County Assembly.”*

The relevant law is the National Assembly (Powers and Privileges) Act and Section 12 provides:-

*“No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any Court...”*

It was counsel’s submission that the Petition offends the doctrine of separation of powers as the County Assemblies vide section 12 of the National Assembly (Powers and Privileges) Act are vested with the exclusive jurisdiction to legislate and the courts cannot be called to determine whether a particular statute/legislation or its provision is appropriate or not. The privilege is however not absolute since the court is allowed to intervene where the actions of the County Assembly have breached the Constitution as was held in the case of **Speaker of the Senate and Another and the Attorney General and Others (Advisory Opinion No. 2 of 2013)**.

That in interpreting the Constitution, a court is to be guided by the general principle that there is a rebuttable presumption that the legislation is constitutional and the onus of rebutting the presumption rests on the person who challenges the legislation which the Petitioners have failed to do. The issue of the scope of jurisdiction of courts in determining validity of legislation was well laid out in the case of **Tata Chemicals Magadi Limited v County Government of Kajiado & 2 others [2019] e KLR** where the court held:

*“128. That the Court could not enter into the arena of deciding what fee was reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the County Government. It was therefore not enough for the Petitioner to state that its operations are not able to sustain the rates owed to the First Respondent yet their Property is rateable under the relevant provisions of the law.*

*166. I concur with the 1st Respondent’s advocate assertion that it was not for the Courts to decide what an appropriate or right or wise legislative provision was. That power fell 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. This Court cannot purport to direct the First Respondent on how to exercise its duty of levying rates. The First Respondent had the mandate of legislating on the calculation of the rates payable with regard to the revenue it ought to raise. Consequently, the Court could not enter into the arena of deciding what fee was reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the County Government. Ergo, this line of attack fails too.*

Quoting the case of **Thuku Kirono & 4 others Vs County Government of Muranga (2014) e KLR** the court in **Kajiado JR 13 of 2016, Anne Wanjiru Kingori & others vs. Kajiado County Assembly & others** held thus;

*“Moreover where a statute or the constitution for that matter has expressly delegated specific functions, duties or responsibilities to a particular organ ,state or otherwise, this court will be hesitant to intervene and curtail these organs efforts to execute their statutory or constitutional mandate; it is the duty of the court to interpret the Constitution in a purposive rather than a restrictive manner .As*

*far as devolution is concerned, the county governments must be encouraged and not restrained to deliver on their devolved functions as long as they act intra vires the constitution and applicable statutes”.*

Further in the case of **Nairobi Metropolitan PSV Saccos vs. County of Nairobi Government**, the Court held that

*“this court cannot enter into the arena of deciding what fee is reasonable, convenient or proper to be levied. This court would 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”.*

Counsel therefore urged the court to find that the Petitioners have come to court to ask the court to overrule the County Assembly over the provisions of the Nandi County Finance Act, 2019 and Nandi County Finance (Amendment) Act, 2019 yet it is the County Assembly’s task and mandate to impose rates and come up with revenue raising measures is going against the doctrine of the separation of powers. That the Petitioners have equally not outlined the procedures not followed by the Respondent in imposing the rates.

On the fifth issue as to whether the petitioners are entitled to the orders sought, it was counsel’s submission that the Petitioners are not entitled to the orders sought as discussed below: -

First, under prayer A, that the Petitioners have failed to avail evidence of how the provisions of the Nandi County Finance Act, 2019 and the Nandi County Finance (Amendment) Act, 2019 were constitutionally violated.

Secondly, that the Petitioners’ prayer that the court declares the Nandi County Finance Act, 2019 and the Nandi County Finance (Amendment) Act, 2019 null and void is without basis because the legislation was validly enacted where the Petitioners just like all other residents of Nandi County were given a chance to air their reservations/views during public participation but the Petitioners chose to waive the chance only coming to court late in the day.

Further that there is no conflict in the Nandi County Finance Act, 2019, the Nandi County Finance (Amendment) Act, 2019 and the national statutes for rating as was held in the case of **Republic v Nairobi City County exparte Job Kiruki Kiara & another (supra)** that Rating Act cannot supersede the provisions of a County legislation in the event of a conflict therewith.

Thirdly, on the imposition of charges on machine-plucked tea, is within the powers of the Respondent to impose and does not in any way infringe on the rights of the Petitioners as the same applies to all persons who use machines to pluck their tea and therefore not discriminatory.

Fourthly, that orders of permanent injunction restraining the Respondent cannot issue since the Constitution under article 209(3) expressly permits the Respondent to levy property rates without the need for authorization by an Act of Parliament. Section 8(2) of the County Governments Act as read together with Section 7(1) of the Sixth Schedule of the Constitution allows County Governments to use National legislation with the necessary modifications and alterations, where the County Assembly has yet to enact legislation necessary to allow the County Government to perform its functions under schedule 4 of the Constitution. Counsel therefore urged the court to dismiss the petition with costs to the Respondent.

### **PETITIONERS’S REJOINDER**

The petitioner filed supplementary submissions in response to the Respondent’s submissions. On the issue whether the petition meets the constitutional threshold of a petition, counsel submitted that contrary to the assertions at page 3 of the Respondent’s submissions, at no time or at all have the Petitioners claimed that they are dissatisfied with the statutory provisions of the Nandi County Finance Act, 2019 and the Nandi County Finance (Amendment (Act) 2019. That it is clear from the Petition that the Petitioners’ contention is that the particular statutory provisions of the Nandi County Finance Acts have not been enacted as required under the Constitution and are therefore in violation of the expressly stated Constitutional provisions.

Counsel submitted that the Particulars of Breach of Legislation under the **Part II** of the Valuation for Rating Act as read with **section 4 (3)** of the Rating Act and Article 210 (1) of the Constitution are expressly stated at paragraphs 16 of both the Affidavits sworn by Denis Gitaka and Apollo Kiarui in support of the Petition as follows:

- a) A draft Valuation Roll must be prepared and completed, which completion is signified by an authorized valuer’s signature. This draft valuation Roll is then transmitted to the relevant officer of the County;
- b) Upon receiving the complete Valuation Roll, the said officer of the County is required to present the Roll before the appropriate meeting of the County and thereafter the Roll is made available for public inspection at the County offices;
- c) The County Officer will then publish a Notice to the effect that the Roll has been made available for public inspection. Such Notice will invite objections to the draft Roll and will also state the manner in which such objections can be lodged and the deadline for lodging them;
- d) Apart from publishing the Roll and inviting objections thereto, it is also the obligation of the County to send a Notice to every owner of a rateable property included in the Roll alerting them of the valuation of their property in the draft Valuation Roll, even where there are any changes or alterations in the valuation of the rateable property.
- e) The rates payers have a further right to lodge an objection on the Valuation Roll to the Valuation Court under section 10 of the Valuation for Rating Act.

That from the foregoing the Petition herein discloses constitutional infringement and/or violation and that the threshold set by the Respondent's cited judicial authorities on this issue has been duly met. The Respondent's failure to vary the land rates under section 6 of the Nandi County Finance (Amendment) Act, 2019, as provided by the relevant legislation is therefore a clear violation of the requirements of Article 210 (1) of the Constitution and cannot therefore be termed as a mere breach of a statutory provision that should be redressed through a normal civil suit. That the Respondent's cited cases of **Godfrey Paul Okutoyi vs Habil Olaka**, and **Harrikissoon v Attorney General of Trinidad and Tobago** are therefore not applicable under the circumstances. The constitutional jurisdiction of this court is therefore properly invoked in the Petition herein.

The Respondent's cited case of **Tata Chemicals Magadi Limited v County Government of Kajiado & 2 others** would in the circumstances not be applicable to this case. The Petitioners reiterate that they are not inviting the Court to decide what fee was reasonable, convenient or proper to be levied and neither are the Petitioners inviting the Court to direct the Respondent on how to exercise its duty of levying rates. The Petitioners only invite the Court to determine whether in exercising its legislative mandate, the Respondent was in breach of the Constitution.

The Petitioners therefore submit that the Respondent has not controverted the Petitioners' claim in the Petition herein and that the Petitioner has demonstrated a clear violation of the Constitution and is therefore deserving of the reliefs sought in the proceedings herein.

### **ANALYSIS AND DETERMINATION**

I have considered the pleadings filed herein, the law and the parties' respective submissions together with the authorities and come to the conclusion that the issues for determination in this petition are as follows:

- a) Whether this court has the jurisdiction to hear and determine this petition and whether the petition meets the threshold of a constitutional petition.
- b) Whether the variation and/or imposition of land rates by the Respondent under the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 is in violation of Articles 27 (1) (2) and (4), 201 (b) (i) and 210 (1) of the Constitution of Kenya, 2010;
- c) Whether the imposition of charges on machine-plucked tea by the Respondent under Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 violates the provisions of Articles 27 (1) (2) and (4), 40 (2) (b) and 210 (1) of the Constitution of Kenya 2010;
- d) Whether the petitioner is entitled to the orders sought.

I will first deal with the issue of the jurisdiction of the court to hear and determine this petition. The jurisdiction of a court is everything as was held in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** that:

*'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*

The Respondent submitted that this petition does not fall within the purview of constitutional petitions hence should be dealt with like any normal suit and not through a constitutional one. In other words, that the claim is that the petitioners are aggrieved by the operation of a statutory provision and not an infringement/violation of a right. The Respondent argued on the doctrine of constitutional avoidance and the doctrine of separation of powers that the court lacks jurisdiction to entertain the petition on the ground that the County Assembly vide section 12 of the National Assembly (Powers and Privileges) Act are vested with the exclusive jurisdiction to legislate and the courts cannot be called to determine whether a particular statute/legislation or its provision is appropriate or not. That the privilege is however not absolute since the court is allowed to intervene where the actions of the County Assembly have breached the Constitution as was held in the case of **Speaker of the Senate and Another and the Attorney General and Others (Advisory Opinion No. 2 of 2013)**.

In the case of **Okiya Omtatah Okoiti v Cabinet Secretary, National Treasury & 3 others [2018] eKLR** the court held that:

*"On jurisdiction to entertain this matter, and more specifically to 'interfere' with the legislative process, I find that it is not disputed that State has the obligation to collect taxes, and that Parliament therefore has the obligation to legislate to this effect. Indeed, Article 209(1) of the Constitution empowers the national government to impose taxes. The respondents' case was that the impugned legislation(s) was not intended to harm the public but rather intended to facilitate the fulfilment of the responsibility of the State to collect taxes.*

*45. My humble view is that the importance of taxation and the collection of taxes for any government cannot be gainsaid. The respondents' position was that this court should not interfere with the legislative process. To my mind however, what is before this Court is not a question on whether the respondents have fulfilled/are fulfilling a constitutional mandate but rather, whether the impugned legislation(s), and the processes leading thereto, met the relevant legal and constitutional thresholds, and whether the citizen's rights have been violated and/or are threatened with violation in the circumstances of this case.*

The Respondent in this case followed the same line of argument that Nandi County is performing its mandate of levying taxes for the benefit of the Nandi County residents. Well and good, no one is against the levying of taxes but the proper legislative procedures must be followed. If such procedures are followed, then there would be no reason for the court to intervene.

The court adopted the principle of Constitutional Avoidance in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** in the following terms:

*“[256]...The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:*

*“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is, the course which should be followed.”*

*[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”*

On the doctrine of constitutional avoidance and whether this suit constitutes a constitutional issue, in the case of **Muiruri vs. Credit Bank Ltd & Another Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385** the court was of the view that:

*“A constitutional issue ... is that which directly arises from court’s interpretation of the Constitution.”*

Similarly, in the case of **Uhuru Muigai Kenyatta vs Nairobi Star Publications Ltd [2013] eKLR** where it was held that the Constitution is not a substitute for litigating ordinary civil disputes. Further in the case of **Maggie Mwauki Mtalaki vs. Housing Finance Company of Kenya [2015] eKLR** the court held:

*“52. The test whether a Petition raises a constitutional issue, and adopted by Tuiyott J in FOUR FARMS LINTIED vs. AGRICULTURAL FINANCE CORPORATION [2014] e KLR following the decision in DAMIAN BELFONTE vs THE ATTORNEY GENERAL of TRINIDAD AND TOBAGO where it was stated *inter alia* that:*

*... where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court’s process.”*

In the case of **John Harun Mwau Vs. Peter Gastrow & 3 Others [2014] eKLR** the court stated –

*“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.*

*... It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”*

The test whether a petition meets the threshold of a constitutional petition was set out in the case of in **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** where the Court stated;

*“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”*

This principle was also emphasized by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, where it stated that:

*“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”*

The cases of **Anarita Karimi Njeru (supra)** and **Trusted Society of Human Rights vs Mumo Matemu High Court Petition No. 290 of 2012**, the petitioners have a responsibility to demonstrate, with a reasonable degree of precision, the manner in which their rights under the provisions of the Constitution have been or are threatened with violation.

In the case of **John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR** the court held at paragraph 81 that;

*“As a basic minimum, the Petitioners are required to not only cite the provisions of the Constitution which have been violated but also the manner in which they have been violated with regard to them. See the case of Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the Petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation”.*

The petitioners have to state the provisions that have been violated and the manner in which they have been violated. The Petitioners have cited Articles 40, 50 and 210 of the constitution as having been violated by the respondents. They have also cited Articles 27, 191 and 201 of the constitution.

From the pleadings it is clear that the Petitioners have clearly and precisely framed the constitutional issues arising, a clear nexus has also been established between the impugned statutory provisions, the specific constitutional provisions that have been infringed and the manner in which such constitutional provisions have been infringed.

I find that the Petitioners have met the threshold as set out in the **Anarita Karimi** case. The Petition and the Affidavit in support expressly state the Petitioners’ complaint to be;

- a) The variation and/or imposition of land rates by the Respondents under the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 which was effected by the Respondent in violation of Articles 27 (1) (2) and (4), 201 (b) (1) and 210 (1) of the Constitution; and
- b) The imposition of charges on machine-plucked tea by the Respondent under Item 7 of the Ninth Schedule to the Nandi County Finance Act, 2019 violates the provisions of Articles 27 (1) (2) and (4), 40 (2) (b) and 210 (1) of the Constitution.

This shows that the Petitioners have specifically set out the issues complained of and specific constitutional provisions that have been violated and/or infringed by the Respondent.

On the second issue as to whether the variation and/or imposition of land rates by the Respondent under the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 is in violation of Articles 27 (1) (2) and (4), 201 (b) (i) and 210 (1) of the Constitution of Kenya, 2010; It should be noted that the differentiation of the property holders under items 1A and 1B of section 6 of the Nandi County Finance (Amendment) Act, 2019 based on acreage owned, is unreasonable, without justification and discriminatory and in clear violation of Article 27 (1) (2) and (4) of the Constitution. The provision further offends Article 201 (b) (i) of the Constitution which provides that the principles of public finance shall promote an equitable society, and in particular, the burden of taxation shall be shared fairly.

Article 209(5) of the Constitution provides;

*(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.*

It can also be discerned from the pleadings that the Respondent has not given a reasonable and/or justifiable distinction between the two groups of land owners, those with less than 250 acres and those with over 250 acres. The previous formula which applied uniformly by the Respondent to all properties was 0.5% of the value of area under tea where the large property owners paid more in terms of rates relative to the smaller property owners.

The Respondent’s new prescription under items 1A and 1B of section 6 of the Nandi County Finance (Amendment) Act does not have a standard and/or uniform application on all property owners, but is discriminatory and punitive towards the larger property owners, without giving any justification for the differentiation.

On the issue as to whether the Respondent is entitled to impose land rates of the petitioners’ properties without an enabling County legislation on rating, it is not in dispute that the Respondent has the mandate to levy land rates under Article 209 (3) of the Constitution which concession is made at paragraph 11 of the Petition. The issue of whether or not the Respondent is entitled to impose land rates on the Petitioners’ properties and/or whether the Respondent is permitted to apply the provisions of the Rating Act and the Valuation for Rating Act is therefore not in dispute.

Article 209(3) of the Constitution provides that ;

*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.*

What is in issue is that the Respondent’s mandate under Article 209 (3) can only be exercised subject to the provisions of Article 210 (1) of the Constitution, which obligates the Respondent to impose and/or vary taxes as provided by legislation hence such mandate cannot be

exercised arbitrarily.

Article 210 of the constitution provides;

*(1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.*

It is also not in dispute that the Respondent is allowed to use the provisions of the Rating Act (Cap 267) and the Valuation for Rating Act (Cap 266) pending the enactment of the Respondent's own legislation on rating.

The issue at hand is whether the Respondent in its reliance on the provisions of the Rating Act and the Valuation for Rating Act is bound under Article 210 (1) of the Constitution, to strictly apply all the procedures as set out in the said statutes, and whether the Respondent has complied with the provisions of Section 4 (3) of the Rating Act and Part II of the Valuation for Rating Act .

Article 190(2) of the Constitution provides that :-

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

Further Article 191(2) of the Constitution is clear that the County Government has powers to impose property rates as per Article 209 of the Constitution, the taxation and other revenue-raising powers of a County shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

County governments have powers to raise rates but the procedure for the exercise of that power is provided in national legislation, that is to say, the Valuation of Rating Act (Cap 266) and the Rating Act (Cap 267) both of which are national laws.

The Valuation of Rating Act (Cap 266) specifically gives a county power to levy rates and sets out elaborate procedure for levying of rates as follows: Valuation Rolls to be prepared at least once every 5 years; values to be entered in the Roll; Power to amend valuation roll and to cause supplementary valuation roll to be prepared; Valuers to have power of entry and inspection and to obtain information; Contents of draft valuation roll; Basis of valuation; Deposit of draft Valuation and Supplementary Valuation Roll, which is open for public inspection, taking of copies or extracts, publication by notice to call for objections, sending to every rate payer within 21 days after the laying before a meeting of local authority (County Government); Objections to draft valuation and supplementary valuation rolls; Valuation Court to hear objections; and Appeals to Higher Courts.

The Respondent's items 1A and 1B of section 6 of the Nandi County Finance (Amendment) Act, 2019 which varies and increases the payable land rates without following the procedures as set out under the Rating Act and the Valuation for Rating Act is therefore arbitrary and is in breach of the provisions of Article 210 (1) of the Constitution to the extent that such arbitrary variation and/or increment is not effected as provided by legislation.

On the issue whether the charges on the machine plucked tea are discriminatory, the Respondent has not given any justification for imposing charges of Kshs. 5 per every kilogram of tea plucked by use of tea plucking machines which amounts to discrimination. Why the differentiation with respect to land rates above, the differentiation between machine-plucked tea and other modes of plucking? Is there a difference in the quality of tea plucked manually and machine-plucked? Is there a difference in prices of the two?

In the case of **Peter K. Waweru vs Republic [2006] eKLR**, the Court stated on discrimination thus:

*"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."*

*From the above definition, discrimination simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs, political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the Constitution prohibits any form of discrimination stating that; (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

*The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means applied to achieve that aim.*

*In this regard, the Court stated in the case of Nyarangi & 3 others v Attorney General [2008] KLR, 688 referring to the repealed Constitution: "discrimination that is forbidden by the Constitution involves an element of unfavourable bias. Thus firstly, unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the Constitutional definition of the word 'discriminatory' in section 82 of the Constitution." (Our emphasis)*

The Nandi County Finance Acts, 2019 do not provide for any procedures for determining the applicable land rates, hence the requirement for the County to enact her rating Acts or in the absence thereof, apply the national legislation on rating, i.e. the Rating Act and the Valuation for Rating Act. The County Finance Acts cannot therefore substitute and/or supersede the Rating Acts when it comes to the procedures and norms required prior to determining the applicable land rates to be levied.

On the issue as to whether the Petitioners are entitled to the orders sought, the petition has met the threshold of a constitutional petition as earlier established by stipulating their complaint, the specific constitutional provisions that have been violated and the manner in which such provisions have been violated. The Petitioners have further shown how the variation of land rates by the Respondent under the Ninth Schedule to the Nandi County Finance Act, 2019 and section 6 of the Nandi County Finance (Amendment) Act, 2019 violate the provisions of Articles 27 (1) (2) and (4), 201 (b) (i) and 210 (1) of the Constitution, so as to render the impugned provisions null and void.

The court therefore finds that Section 6 of the Nandi County Finance Act, 2019 and the Nandi County Finance (Amendment) Act 2019 were enacted in breach to the specified Articles of the Constitution and is therefore null and void.

The court having found that section 6 of the Nandi County Finance Act, 2019 and the Nandi County Finance (Amendment ) Act 2019 were enacted in breach of the specified Articles of the Constitution, and that the Respondent was further required to strictly apply the provisions of the Rating Act (Cap 267) and the Valuation for Rating Act (Cap 266, the court finds that the imposition of charges on machine-plucked tea are null and void to the extent that the Respondent purports to levy the same pursuant to the Rating Act (Cap 267). The Rating Act (Cap 267) does not contemplate charges on machine-plucked tea as a method of rating under sections 4, 5, 6, 8 or 9 thereof. These charges are therefore imposed without a legislative basis and are thus in violation of Article 210 (1), in so far as they are not made “as provided by legislation”.

These charges levied on machine-plucked tea are therefore unfair and discriminatory and clearly violate the provisions of Article 27 (1) (2) and (4) of the Constitution, to the extent that the charges are arbitrary, there being no rationale for differentiating between machine-plucked tea and other modes of tea plucking and also justifiable differentiation between other mechanized agricultural activities and mechanized tea harvesting. It is noteworthy that it is the large scale tea producers that mainly employ mechanized tea plucking.

The parties had at the beginning of the hearing of this petition consented to an order of conservatory orders and that the Petitioners continue to paying old rates pending the hearing and determination of this petition.

Having found that the Ninth Schedule of Nandi County Finance Act 2019 and section 6 of the Nandi County Finance (Amendment ) Act 2019 were enacted in breach of the specified Articles of the Constitution and therefore declared null and void, the court further issues a permanent injunction restraining the Respondent from demanding and collecting any land rates from the Petitioners pursuant to Item 1 of the Ninth Schedule to Nandi County Finance Act 2019 and Item 1B of Section 6 of the Nandi County Finance (Amendment ) Act 2019 without due regard to the provisions of the Rating Act (CAP 267) and the Valuation for Rating Act ( CAP 266)

The costs of the Petition to the Petitioners.

**DATED and DELIVERED at ELDORET this 23<sup>rd</sup> DAY OF FEBRUARY, 2021.**

***M. A. ODENY***

***JUDGE***