



**Car Importers Association of Kenya v County Government of Mombasa (Constitutional Petition E002 of 2022) [2023] KEELC 20653 (KLR) (2 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20653 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CONSTITUTIONAL PETITION E002 OF 2022**

**LL NAIKUNI, J**

**OCTOBER 2, 2023**

**IN THE MATTER OF: ARTICLE 1, 2(4), 10, 21, 22, 23, 27, 28,  
35, 47, 118 AND 174 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: VIOLATION OF ARTICLE 10, 27 47,35, 118 AND  
174 OF THE CONSTITUTION AND THE COUNTY GOVERNMENTS  
ACT, NO. 17 OF 2012 BY THE COUNTY GOVERNMENT OF MOMBASA**

**AND**

**IN THE MATTER OF: THE POLICY BY THE COUNTY GOVERNMENT OF  
MOMBASA TO RELOCATE ALL IMPORTED USED MOTOR VEHICLE CAR  
DEALERS FROM THE CENTRAL BUSINESS DISTRICT AREA OF MOMBASA  
TOWN TO JOMVU AREA PLOT NO. MN/V/290 FOR THE SAID CAR  
IMPORTERS TO CARRY THEIR BUSINESSES OF SELLING USED MOTOR**

**VEHICLES THEREAT**

**AND**

**IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION AND FAILURE  
BY THE RESPONDENT TO INVOLVE THE RELEVANT STAKEHOLDERS BEFORE  
COMING UP WITH THE POLICY TO RELOCATE ALL IMPORTED USED MOTOR  
VEHICLE CAR DEALERS FROM THE MOMBASA CENTRAL BUSINESS DISTRICT  
AREA TO JOMVU AREA FOR THE SAID MOTOR VEHICLE DEALERS TO CARRY  
THEIR BUSINESSES OF SELLING USED IMPORTED MOTOR VEHICLES THEREAT.**

**BETWEEN**

**CAR IMPORTERS ASSOCIATION OF KENYA ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... RESPONDENT**



## JUDGMENT

### I. Preliminaries

1. The Judgment of this Honourable Court pertains to the filed Petition dated 3<sup>rd</sup> February, 2022 by the Petitioners herein – “The Car Importers Association of Kenya” on 15<sup>th</sup> November, 2022. [The Constitution](#) Petition was brought under the dint of the provisions of Articles 1, 2 (4), 10, 21, 22, 23, 27, 28, 35, 47, 118 and 174 of [the Constitution](#) of Kenya 2010. It was against the Respondent herein.
2. Upon service, and while opposing the Petition, the Respondent filed their responses accordingly.

### II. The Petitioners’ Case

3. The Petitioners sought for the following orders:-
  - a. A declaration that the Petitioner’s members have a right to be involved in the decision-making process leading to their intended relocation from the Mombasa Central Business District to Jomvu area.
  - b. A declaration that the intended relocation of the Petitioner’s members from the Mombasa Central Business District to Jomvu area without giving them a chance to be heard in the violation of Articles 10,47,118 and 174 of [the Constitution](#) of Kenya,2010.
  - c. An order be made that the Petitioner’s aforesaid members have a right to carry out their said businesses of selling imported used motor vehicles in their car showrooms that they currently operate from situated in the Central Business District of Mombasa Town and that the Respondent has no right to force the said members to relocate to Jomvu area on Plot No.MN/V/290 as demanded by the Respondent.
  - d. The costs of the petition.
  - e. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

### III. The legal foundation of the filed Petition

4. The Petition was founded on the following legal provisions:
  - a. Article 10 on all state officers and public officers are bound to adhere to national values and principles of governance.
  - b. Article 20 (1) (2) and (3) (b) on protection of fundamental rights to be mandatorily protected by the court by adopting the interpretation that most favors the enforcement of a right or fundamental freedom.
  - c. Article 23 (1) (3) on the right to a conservatory order.
  - d. Article 25 on the right to a fair trial.
  - e. Article 27 on the right to equality and freedom from discrimination.
  - f. Article 47 on right to fair administrative action.
  - g. Article 43 on right to social and economic wellbeing.



- h. Article 20 (3) (b) of the Constitution of Kenya, on the court is mandatorily obligated to adopt the interpretation of the bill of rights and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
- i. The Petitioner's fundamental rights as set out in the constitution shall be infringed if the interim measures of protection are not granted as stipulated under Articles 22 and 23 of the Constitution of Kenya.

#### IV. The brief facts

5. The brief facts of the case were that the Petitioner is a duly registered association of car importers of Kenya. The Petitioner represents seventy-three (73) importers of used motor vehicles. Its registered members deal in the business of selling imported used motor vehicles and they had at all material times been carrying out the said business within the central business district area of Mombasa Town and its environs. The Respondent by a Notice dated 7<sup>th</sup> January, 2022 and on other dates had directed that it would relocate the members of the Petitioner from the Mombasa central business district to Jomvu area with effect from thirty (30) days of the said Notices.
6. The said decision made by the Respondent would adversely affect the Petitioner's members as their businesses were fundamentally reliant on large cash transactions. Consequently, to avoid cases of theft and other acts of insecurity, the said businesses, must, of necessity, be carried out in an area that was well served by banks. Mombasa central business district area passes that test while Jomvu area never passed that test as there were no banks operating at or near Jomvu. It would therefore be impossible to carry on the said business transactions in the Jomvu area as cases of robbery with violence, thefts and muggings would be the order of the day. This was because the Petitioner's Members would not afford to operate from the intended location as there were no Police Stations, residential quarters, schools, supermarkets or like such other amenities.
7. The business of selling imported used motor vehicles were complimented by the existence of garages as such imported used motor vehicles required to be serviced and maintained prior to being sold. While many garages abound in the central business district of Mombasa Town, there were no garages in Jomvu area designated by the Respondent for the said business to be carried out by the members of the Petitioner thereby the intended relocation was unrealistic.
8. The business of the members of the Petitioners' association were in direct competition with such household motor vehicle dealers such as CMC well known for Volkswagens' and Range Rovers, DT Dobie for Mercedes Benz, Toyota Kenya Limited for Toyota vehicles, Simba Colt Motors for Mitsubishi vehicles and so forth. The said entities were however not affected by the said relocation policy. Clearly, there was open discrimination by the Respondent against the members of the Petitioner/Applicant association vis-a-viz the aforesaid competitors.
9. Judicial Notice may be taken of the fact that the current National Government policy of transporting all imported containers through the Standard Gauge Railway (SGR) as opposed to transportation by road had adversely affected the economic activities, particularly in Mombasa, so much so, such that the only serious business activity currently sustaining Mombasa Town and its residents was the business of selling imported used motor vehicles. Through it, many other businesses that directly and indirectly rely on it was surviving thereby sustaining the livelihoods of many people. However, the intended relocation of the said businesses to Jomvu area would translate to the final blow that would floor Mombasa Town, particularly in the area of hotels, banks, garages and so forth.



10. The Petitioner stated that there never existed the requisite infrastructure in the Jomvu area to sustain the business operations that relate to the selling of imported used motor vehicles and the safety of the owners thereof would be highly prejudiced because as the saying goes: there was security in numbers, which would be lost when the members of the Petitioners were pushed to the Jomvu area that was highly deserted and where there was rarely little or no business activities going on. The intended relocation was a valley which needed to be leveled so as to allow construction of structures which process could not be undertaken within that short time that the Respondent had prescribed. To that extent the Respondents decision was utterly unreasonable.
11. The Petitioner had existing leases with private property owners whereby the Respondent had no power or capacity at all to interfere with. Therefore, the threatened action by the Respondent to interfere with the said private leases existing between the said members of the Petitioner and the said property owners would be a clear abuse of power on the part of the Respondent. Whereas the Respondent's Vision 2035 was a good idea, to enable the same to be properly actualized, there was need for the Respondent to allow full public participation to take place so that the stakeholders (like the Petitioner's members) were fully involved, thereby avoid a situation where the Respondent made ivory tower decisions without knowing the full impact of such decision to the affected stakeholders.
12. The Petitioner's members were ready and willing to comply with the decision to be allocated as directed by the Respondent, provided that the said members was relocated to an area that had the necessary amenities where the said members would be in a position to carry out their businesses without suffering undue hardships. In other words, let the Respondent properly prepare the intended relocation area, involve the Petitioner's members in public participation whereafter, the said members would fully comply with the said directive.
13. The Petitioner stated that since its members have been operating in Mombasa central business district at all material times, they had a legitimate expectation that the Respondent should have involved them in before the Respondent made a decision to relocate the Petitioner's members to the said Jomvu area. The Respondent never involved the Petitioner's members at all in arriving at the said decision.
14. The Petitioner stated that in year 2020 the Respondent unilaterally decided to force the members of the Petitioner to relocate from the Central Business District area of Mombasa Town to Miritini area, next to the Standard Gauge Railway (SGR), Mombasa Terminus. The Petitioner filed Mombasa High Court Constitutional Petition No.8 of 2020 against the Respondent to challenge the said decision. The court vindicated the stand taken by the Petitioner. However, the current decision by the Respondent to relocate the same members of the Petitioner to Jomvu area of Mombasa was similar to the one that the Respondent made in the year 2020 and which was quashed by the court. That the Respondent had repeated the same kind of decision without undertaking any type of public participation and without considering the fact that Jomvu area just like the Standard Gauge Railway (SGR) Mombasa Terminus at Miritini, never had the necessary infrastructure to sustain the carrying out of the business of selling imported used motor vehicles was clear evidence of the fact that the Respondent had no respect for the provision of Articles 10, 43, 47 118 and 174 of *the Constitution* of Kenya, 2010.
15. The Respondent had not indicated who was the registered proprietor of Plot No. MN/V/290. Additionally, the Respondent had not advised the said members of the Petitioner the terms and conditions that would apply to the intended tenancies, for example, what the applicable monthly rent would be and to whom it would be paid to. Therefore, the said forced relocation was shrouded in a lot of mystery and was thereby quite unrealistic. In fact, the Respondent had not advised the said members of the Petitioner whether the land was a freehold or under lease and whether those who



might want to buy would buy or not, yet some of the Petitioner's members were actually the owners of their properties that they operate from. It was hence unrealistic to expect the said members to leave the security of operating from their own properties only to be at the mercy of a landlord(s) that the said members had no relationship with.

16. The Respondent had issued the members of the Petitioner with trade licenses for the year 2021/2022. The said licenses were issued upon the members having paid to the Respondent the prescribed trade license charges. The said trading licenses amounts to the authorization by the Respondent to the said members to carry out their trading activities from the premises indicated on the said licenses. Therefore, the abrupt decision by the Respondent to deny the said members from carrying out their trading activities from the said premises was unreasonable and amounts to an abuse of power. It also raised the issue as to the integrity of the Respondent obtaining money from the said members by false pretenses (that the said members would be allowed to carry out their trading activities from the authorized premises which representation the Respondent had now acted contrary to).
17. The Petitioner stated that by acting in the manner complained of in this Petition, the Respondent had violated and/or had threatened to violate clear provisions of *the Constitution* and the law in the manner in which it was planning to relocate the Petitioner's members from Mombasa central business district to Jomvu area.
18. The Petitioner relied on particulars of breach of public trust and constitutional provisions by the Respondent:-
  - a. The Respondent had violated Articles 1 (1), 118 and 174 of *the Constitution* of Kenya, 2010 by failing to give the Petitioner a right to participate in the decision made by the Respondent regarding the relocation of the Petitioner's members from Mombasa central business district to Jomvu area.
  - b. The Respondent had violated the provision of Article 47 of *the Constitution* of Kenya, 2010 by failing to invite the Petitioner to take part in the process giving rise to the decision to relocate the Petitioner's members from Mombasa central business district to Jomvu area yet the said decision affected the Petitioner's members.
  - c. The Respondent had violated the provision Article 10 of *the Constitution* of Kenya, 2010 by failing to act in an accountable and transparent manner so as to uphold the rule of law, transparency, accountability and good governance in the manner in which it has made the said decision which decision did not address critical issues as set out in Paragraphs 13 and 14 above.
  - d. The Respondent had violated the provision Article 27 of *the Constitution* of Kenya, 2010 by threatening to relocate the Petitioner's members from Mombasa Central Business District area to Jomvu area and leave the Petitioner's competitors, to wit, dealers in new imported motor vehicles such as Toyota Kenya and others in the Mombasa central business.
19. The Petitioner's said members who were as follows:



<b>No.</b>	<b>Company Name</b>	<b>License No.</b>
1.	Gede Enterprises Limited	ARN-AAA00QR9
2.	Kenya Malik Motors	ARN-AAA02YY4
3.	Pirzada Motors Company Ltd	ARN-AAA06OY2
4.	Zeni Motors Limited	ARN-AAA05DM0
5.	Choudhry Motors Limited	ARN-AAA04RU8
6.	Choudhry Motors Limited	ARN-AAA02VZ4
7.	Sitara Trading Company Ltd	ARN-AAA04WO8
8.	RZ Motors (K) Limited	ARN-AAA05GW9
9.	Aman Cars and General Ltd	ARN-AAA01KZ1
10.	Mombasa Cars Park Ltd	ARN-AAA05SP3
11.	Fuji King Motors Ltd	ARN-AAA02YJ6
12.	Yuasa Motors Ltd	ARN-AAA03CN4
13.	Nobel Trading Ltd	ARN-AAA01UW0
14.	Punjab Trading Co.Ltd	ARN-AAA01XD5
15.	Sleek Trading Limited	ARN-AAA05OZ6
16.	Auto Japan (Mombasa) Ltd	ARN-AAA03BA1
17.	Carworld Kenya Ltd	ARN-AAA03DG8
18.	Interdunia Mombasa Limited	CGM006-0032399
19.	Wazir Auto Limited	ARN-AAA01BK5
20.	Apex Japan Limited	CGM006-0032832
21.	Al-Siddique Motors Limited	ARN-AAA05LA2
22.	Malik Boek Co. Ltd	ARN-AAA00LG5
23.	Citi Motors Ltd	ARN-AAA02HU4
24.	Sealand Motors Ltd	ARN-AAA02CT4



25.	Impact East Africa Ltd	ARN-AAA01ZHO
26.	Hina Trading Limited	ARN-AAA05WL5
27.	Hira Trading Limited	ARN-AAA05RH3
28.	Rana Auto Selection Limited	ARN-AAA00GST
29.	Vanna Limited	ARN-AAA01SJ5
30.	Alibaba Motors Limited	ARN-AAA02WR6
31.	Khilji Enterprises Ltd	ARN-AAA00D07
32.	Cosmos Cars Ltd	ARN-AAA00V17
33.	Zest Automobile Limited	ARN-AAA00KN7
34.	Lakhan Motors Ltd	ARN-AAA02XS3
35.	Meezan Motors Ltd	ARN-AAA02ZP9
36.	Darson Trading Ltd	ARN-AAA06QM0
37.	Ayan Automobiles Ltd	ARN-AAA02YG7
38.	Azan Motors Ltd	ARN-AAA01CT2
39.	Moiz Motors Ltd	ARN-AAA02X27
40.	Gorgeous Trading Co. Ltd	ARN-AAA01TE9
41.	Bell Motors (K) Ltd	ARN-AAA01FZ4
42.	Bell Motors (K) Ltd	ARN-AAA01FM8
43.	Auto Cats International Ltd	ARN-AAA02XO6
44.	Al-Alyaan Motors Ltd	ARN-AAA02WX7
45.	Al-Alyaan Motors Ltd	ARN-AAA00HM6
46.	Al-Fadhil Motors Ltd	ARN-AAA01BQ4
47.	Qasim & Yahya Ltd	ARN-AAA05TPO
48.	Shahzad Motors Ltd	ARN-AAA00BY2
49.	Shahzad Motors Ltd	ARN-AAA0AGEO



50.	Shahzad Motors Ltd	ARN-AAA02PN1
51.	Osaka Motors Kenya Ltd	ARN-AAA04BE0
52.	Fahari Cars Ltd	ARN-AAA04BE0
53.	Al-Ginza Automobiles Ltd	ARN-AAA00IP7
54.	Avenue Motors Ltd	ARN-AAA011N5
55.	Mussab Motors Ltd Taskys	ARN-AAA05DZ2
56.	Taj Ventures Limited	ARN-AAA00BQ4
57.	Nafas World Auto (K) Ltd	ARN-AAA02XR3
58.	Nafas World Auto (K) Ltd	ARN-AAA02XR5
59.	Ken-Bangla Motors (E.A) Ltd	ARN-AAA02TD6
60.	Rehmaan Trading Ltd	ARN-AAA06UH4
61.	Fortune Automobile Company Ltd	ARN-AAA05HL3
62.	Bolpak Trading Co.Ltd	ARN-AAA01CL7
63.	Tatla Motors Ltd	ARN-AAA00XP8
64.	Liberty Motors Ltd	ARN-AAA000H9
65.	Sekai Car Sales Limited	ARN-AAA011KO
66.	Lizaz Enterprises Ltd	ARN-AAA00QQ9
67.	Radha Motors Limited	ARN-AAA06DJ3
68.	Yahya Car Sales (K)Ltd	ARN-AAA05BK3
69.	Kayani Motors Limited	ARN-AAA00JS7
70.	Niigata Motors Limited	ARN-AAA04VZ9
71.	Ramna International Motors Co. Ltd	ARN-AAA00MQ0
72.	Al-Husnain Motors Ltd	ARN-AAA05KZ9
73.	Mirza & Company International Ltd	ARN-AAA0IDV9



74.	Bhinder Corporation Ltd	ARN-AAA00WA6
75.	Aisha Auto Kenya Limited	ARN-AAA00NG7

20. The Petitioner stated that the Respondent's aforesaid decision was utterly unreasonable and on the basis of Waynesburg's unreasonableness, the Respondent should be restrained from its aforesaid unreasonable and unwarranted actions against the members of the Petitioners.
21. The said decision shall result in the members of the Petitioner being driven from carrying out their business which would translate to the said members from failing to make any income thereby resulting in a denial to the said members from sustaining themselves and their families.
22. The Respondent had failed to explain why in year 2020, it decided to relocate the said Petitioner's members to Miritini but when the said decision was quashed by the court via Mombasa High Court Constitutional Petition No. 8 of 2020, the Respondent had changed goalposts and had now decided to force the said Petitioner's members to relocate to Jomvu area which had the same handicaps and setbacks as the Miritini area. Thereby, the said decision had not been made in good faith.
23. The Respondent was subject to *the Constitution* and the bill of rights contained therein. Therefore, the Respondent must be directed to act in accordance with the Constitutional dictates. Indeed, the High Court as the custodian of the bill of rights was entitled to interfere where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the Constitution*.
24. The matters aforesaid occurred in Mombasa County within the jurisdiction of this Honourable Court. The issues raised in this Petition related to matters of land use in that the Respondent threatens to interfere with the members of the Petitioner from continuing to use the premises that they operated from in carrying out their businesses (See page 11 of this Petition). Additionally, the Respondent's decision involved the intended relocation of the said members of the Petitioner to use, occupy and operate from the said intended property cited as Plot No.MN/V/290, Jomvu, Mombasa. (See paragraph 15 of this Petition). Consequently, the court herein had the appropriate jurisdiction to determine this Petition viz - a - vis the High Court and notwithstanding that there was concurrence of jurisdiction by the two courts to determine this Petition, the Environment and Land Court has greater jurisdiction since the subject matter of this Petition involved use and enjoyment of land situated in Jomvu, Mombasa.
25. The Petition was premised on the testimonial facts, grounds and the averments made out in the 14 Paragraphed Affidavit of Peter Otieno who averred that:
- a. He was the National Chairman of the Applicant herein hence competent to swear this affidavit on behalf of the Applicant. Annexed to the affidavit and marked as annexure "PO - 1" was a copy of the relevant authorization and of the Certificate of Registration of the Applicant.
  - b. The members of the Applicant were in the business of importing used motor vehicles which they sell at a profit/loss.
  - c. Most of the members of the Applicant had at all material times operated in the central business district of Mombasa Town. They had always been licensed as such. He annexed some samples of trade licenses that were issued by the Respondent to the members of the Applicant over various periods of time which he marked as "PO - 2".
  - d. The members of the Petitioner was as set out in Paragraph 16 of the Petition.



- e. Since the beginning of year 2020, the Respondent directed that it would relocate the members of the applicant association from the Mombasa Central Business District to Jomvu area. The members of the Petitioner was opposed to the said relocation and reiterated the following facts:
- i. The Petitioner's members businesses were fundamentally reliant on large cash transactions. Consequently, to avoid cases of theft and other acts of insecurity, the said businesses must, of necessity, be carried out in an area that was well served by banks. Mombasa central business district area passes that test while Jomvu area never passed that test as there was no banks operating at or near the Jomvu area. It would therefore be impossible to carry on the said business transactions in the Jomvu area as cases of robbery with violence, thefts and muggings would be the order of the day.
  - ii. The business of selling imported used motor vehicles was complimented by the existence of garages as such imported vehicles required to be serviced and maintained prior to their being sold. While many garages abound in the central business district of Mombasa, there was no such garages in Jomvu area.
  - iii. The business of the members of the Petitioner were in direct competition with such household motor vehicle dealers such as CMC well known for Volkswagens' and Range Rovers, DT Dobie for Mercedes Benz, Toyota Kenya Limited for Toyota vehicles, Simba Colt Motors for Mitsubishi vehicles and so forth. The said business entities were however not affected by the said relocation policy. Clearly, that was open discrimination by the Respondent against the members of the Petitioner.
  - iv. Judicial Notice may be taken of the fact that with the current National Government policy of transporting all imported containers through the SGR as opposed to transportation by road had adversely affected the economic activities, particularly in Mombasa so much such that, the only serious business activity currently sustaining Mombasa town and its residents was the business of selling imported second hand motor vehicles, thereby many other businesses that directly and indirectly relied on it were surviving thereby sustaining the livelihood of many people. However, the intended relocation of the said businesses to Jomvu area would translate to the final blow that would floor Mombasa town particularly in the area of hotels, banks, garages and so forth.
  - v. Generally speaking, there never existed the requisite infrastructure in the Jomvu area to sustain the business operations that related to the selling of imported used motor vehicles and so the safety of the owners thereof would be highly prejudiced because as the saying goes that, there was security in numbers, which would be lost when the members of the Petitioners were pushed to the Jomvu area that was highly deserted and where there was little or no business activity going on. It would also not be easy for customers to access the Jomvu area as it was also not safe for them to travel carrying huge sums of money from banks situated in the central business district.
  - f. The actions of the Respondent contravened the Rules of Natural Justice and also contravene a number of Constitutional requirements which would therefore warrant the Honourable court to make the appropriate orders as prayed herein.
  - g. The proprietors of the Petitioner's members and their employees sustained themselves and their families from the business they carried out in selling second hand imported motor vehicles. Therefore, the threatened relocation would result in the complete destruction of the



business carried out by the members of the Petitioner. To avoid such a catastrophe from taking place the Deponent humbly beseeched the court to allow the Petition.

- h. The members of the Petitioner were apprehensive that the Respondent may enforce its directive any time soon. In the circumstances, it was absolutely important that this matter be accorded the urgency it deserved by issuing the appropriate protective orders, otherwise the Petitioner's members shall suffer irreparable losses if the Respondent executes its aforesaid threats.
- i. He reiterated the contents set out in the Petition particularly with regard to the violations of the law by the Respondent and the consequential loss that the members of the Petitioner would thereby suffer.
- j. In the year 2020 the Respondent threatened to relocate the same members of the Petitioner to Miritini area. The Petitioner filed Mombasa High Court Constitutional Petition No.8 of 2020 against the Respondent. The said Petition succeeded.
- k. It was surprising that the Respondent had this time round decided to relocate the very same members not to Miritini area, but to Jomvu area of Mombasa. However, the following concerns had not been addressed by the Respondent in arriving at the said decision:-
  - i. Like Miritini; Jomvu area never had the necessary infrastructures to sustain the said members to viably carry out their said businesses thereat.
  - ii. The Respondent had not indicated who the proprietor of the Plot No. MN/V/290 in Jomvu where it intended to relocate the Petitioners members to.
  - iii. That he annexed photographs of the said property in Jomvu where it was clear that the same never had a proper road network; it had no amenities such as washrooms and it was impossible to imagine how business operations could take place in an area that looked like an open jungle. He marked the said photographs as annexure marked as "PO - 5".
  - iv. The Respondent had completely failed to undertake any public participation exercise and so the said decision was made without the involvement of the Petitioner at all.
  - v. The Petitioner's members already had existing leases with private property owners in Mombasa Town Central Business District and it had not been explained by the Respondent how the Respondent shall have the capacity to interfere with such tenancies when the Respondent was not the proprietor of such properties. This was a clear abuse of power by the Respondent. That by way of example, he annex copies of three (3) Lease Agreements which he marked as annexure "PO - 6".
  - vi. That some of the Petitioners members who operated from the Mombasa Town Central Business District actually own the properties that they operate from. He annexed copies of three (3) title deeds which he marked as annexure "PO - 7" as an example of the statement made herein. It would therefore be illogical to expect such members to forfeit the security that they had in that regard only for them to be forced to enter into tenancies with landlords that the said members had no relationship with.
  - vii. That it was reasonable and legitimate for the said members of the Petitioner to know whether the area that they were being required to relocate to will be offered to them on tenancy basis or outright sale terms.



- i. The Respondent had issued the members of the Petitioner with trade licenses for the year 2021/2022. The said licenses were issued upon the members having paid to the Respondent the prescribed trade license charges. The said trading licenses amounts to the authorization by the Respondent to the said members to carry out their trading activities from the premises indicated on the said licenses. Therefore, the abrupt decision by the Respondent to deny the said members from carrying out their trading activities from the said premises was unreasonable and amounts to an abuse of power. It also raised the issue as to the integrity of the Respondent obtaining money from the said members by false pretences (that the said members would be allowed to carry out their trading activities from the authorized premises which representation the Respondent had now acted contrary to).

## V. Response to the Petition by the Respondent

26. While opposing the Petition, on 20<sup>th</sup> June, 2022, the Respondent responded to the Petition by way of a 11 paragraphed affidavit sworn by TAURIQ BALALA where in verbatim he averred:-
  - a. He was the County Executive Committee Member in charge of competent to swear the Affidavit.
  - b. The Respondent was mandated under the provision of Section 56 of the *Physical and Land Use Planning Act* Part Act 2019 to plan and control the use and Development of Land and Buildings in the interest of proper and orderly development within Mombasa County.
  - c. The Respondent had since the year 2014 sought to decongest the city of Mombasa and part of its strategy was to have car sales showrooms to move to a centralised area outside the Central Business District.
  - d. While this still remained the aim and desired outcome, the impugned Notice dated 7<sup>th</sup> January 2022 was withdrawn and suspended indefinitely vide the letter dated 12<sup>th</sup> January 2022 to give room for consultation and public participation.
  - e. By the time the Petitioner was filing this suit on the 4<sup>th</sup> February 2022 the said Notice had already been suspended to allow for the participation that the Respondent was complaining of in the Petition.
  - f. In fact he called a press conference on the 13<sup>th</sup> January 2022 where he informed the public of the suspension of the said Notices. Video evidence of this could still be assessed online for example through <https://www.youtube.com/watch?v=3dawflr3fqk> which link provided how the same was reported by NTV Station.
  - g. Therefore, the Petition had been overtaken by events as the Notice Complained of was no longer in force and was in fact was not in force on the 4<sup>th</sup> February 2022 when this suit was filed.
  - h. The Petition was an abuse of the court process and should be dismissed with costs.

## VI. Submissions

27. On 28<sup>th</sup> March, 2023, while all parties were present in Court, they were directed to file their written submissions as a way to dispose off the Petition. Upon confirmation of full compliance with the filing of submissions, the Honourable Court reserved a date for the delivery of Judgment on notice accordingly.



## A. The written submissions by the Petitioner

28. The Petitioner through the law firm of Messrs. Gikandi & Company Advocate filed its written submissions dated 6<sup>th</sup> February, 2023. Mr. Kabebe Advocate submitted that the Petition before court sought for protective orders to restrain the Respondent from interfering with the Petitioner's members business of selling imported used motor vehicle within Mombasa Central Business District. The Petition was supported by an affidavit sworn by Peter Otieno on 3<sup>rd</sup> February, 2022. He stated that the Petition was opposed by the Respondent vide a Replying Affidavit sworn by Taufiq Balala on 20<sup>th</sup> June, 2022
29. According to the Learned Counsel, the basis of the Petition was that the Respondent through a notice dated 7<sup>th</sup> January, 2022 directed that it would relocate the members of the Petitioner from the Mombasa central business district to Jomvu area in Miritini. Members of the Petitioner (herein after collectively referred to as the Petitioner) carry out business of selling imported used second hand vehicles. The said members had their showrooms located in various parts of Mombasa central business district area. The said decision was made without involving the Petitioner who was majorly affected by the same.
30. The Learned Counsel informed Court that being aggrieved by the said notice the Petitioner filed the Petition herein on behalf of its members to restrain the Respondent from enforcing such a drastic move which would drastically affect the car showroom owners' business and impact negatively on the economy of Mombasa.
31. He averred that the Respondent in it's Replying Affidavit dated 20<sup>th</sup> June, 2022 conceded that the decision to relocate the members of the Petitioner was made without conducting public participation. Further, by the Respondent's letter dated 12<sup>th</sup> January, 2022 the Respondent had not completely withdrawn the intended relocation of the Petitioner to the contentious locality in Jomvu area but the Respondent had merely suspended the said decision. The Petitioner was therefore entitled to have the dispute herein determined by the court so that the members of the Petitioner did not continue living anxiously and/or sitting on the horns of dilemma.
32. The requirement for public participation in decision making process by the Respondent was enshrined under Article 196 of *the Constitution* of Kenya. This requirement was further cemented by the principle of Natural Justice which espoused that no man should be condemned unheard. Indeed this was emphasized by the Court of Appeal in the case of "the Nyongesa & 4 others – Versus - Egerton University College [1990]eKLR where the court stated as follows:

“The compliance with the rules of natural justice is emphasized in Halsbury's Laws of England, Third Edition Volume II para 122 at page 65 that: "An order of prohibition may be granted to restrain, and an order of certiorari may be granted to bring up and quash the decision of, a person or body exercising judicial or quasi-judicial functions if he or it fail in its duty to act in good faith, and to listen fairly to both sides, and to give fair opportunity to the parties in the controversy adequately to present their case and to correct or contradict any relevant statement prejudicial to their view.”

“It is axiomatic at every seating or hearing that each party to the particular dispute will have been notified to attend, to prepare to be heard and to have ready his witnesses. It is unthinkable for elders to proceed to hear only one side to a boundary dispute and make a decision on that material alone. That is the application of natural justice. There is nothing alien in it. It is part of the Kenya culture pertaining to settlement of controversies.”



“However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side. It does not assist for anyone to question or criticize the particular posture of courts. It is the duty of courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or enquiry are of an internal disciplinary character.”

33. The Learned Counsel submitted that the Petitioner had tabled evidence to show that the Respondent never involved the Petitioner in arriving at the decision of relocating the Petitioner’s business from Mombasa to Jomvu area in Miritini. A grave violation of Natural Justice. Indeed the Respondent had on various occasions threatened to relocate members of the Petitioner and this led to the filing of Mombasa High Court Constitutional Petition No 8 of 2020 which case was decided in favour of the Petitioner. The Counsel stated that it was surprising that the Respondent had decided to continue with its acts of violation contrary to provisions of the law and the existing judgment rendered in the aforementioned case. Such decision was therefore null and void for all purposes for want of public participation which was paramount and a requisition of Natural Justice.
34. It was the contention by the Learned Counsel that the principle of Public Participation flowed from Article 1 of *the Constitution* of Kenya 2010 and was a key pillar in the objects of devolution under the provision of Article 174 of *the Constitution*. The decision made to relocate the Petitioner was unlawful and in contravention of *the Constitution* for want of public participation. The Respondent failed to take necessary steps to ensure that the views of the Petitioners were obtained before unilaterally making a public declaration that it would relocate the Petitioners from Mombasa central business district to Jomvu in Miritini area.
35. He was of the assertion that the said decision therefore violated the Petitioners rights to and the provision of Section 91 of the County Government Act by infringing on the Petitioner’s Respondent being a public body was mandated to administer fair administrative action as stipulated under the provision of Articles 10, 47, 118 and 174 of *the Constitution* of Kenya,2010.
36. To buttress this point, the Learned counsel relied on the case of: “Robert N. Gakuru & Others – Versus - Governor Kiambu County & Others (2014) eKLR where the court addressed how public participation should look like and stated as follows:

“.....it is clear that public participation plays a central role in both legislative and policy function of the Government whether at the National or management and planning and performance management. Due to its centrality it is important to determine what exactly amount to public participation.

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

- “(1) The National Council of Provinces must-
  - (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and



- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken -
  - (i) to regulate public access, including access of the media, to the Council and its committees; and
  - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
- (2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”

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

37. In the case of:- “Doctors for Life International – Versus - Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC). Ngcobo, J who delivered the leading majority judgment expressed himself as follows:

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

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

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



states that *the Constitution* lays “the foundations for a democratic and open society in which government is based on the will of the people. “It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created.....The very first provision of our democracy, includes as part of those values “a multi-party system of openness.” Commitment to principles of accountability, responsiveness and but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.....”

39. From the reasoning in the above decision, it was the Learned Counsel’s contention that this court has jurisdiction to direct that in the event the Respondent decided to enforce the notice dated 7<sup>th</sup> January 2022 the same amounted to violation of the Petitioner’s rights enshrined in *the Constitution*. The Respondent should be aware that that any decision it intended to make that touched on the business of the Petitioner, the members should be involved in the process. This was what public participation was all about.
40. The nature of the Petitioners business was that they dealt with huge amounts of cash. In order to avoid cases of theft and other acts of insecurity, the Petitioners’ business must, as of necessity, be carried out in an area that was well served with banks. It was quite discernible that most banks were located in the central business district. Mombasa central Business District passed the test whereas Miritini area never did as there were no banks operating at or near Miritini area. Therefore it would be next to impossible to carry out the business in Jomvu as cases of organized theft and robbery with violence would be the order of the day. This would negatively impact on the economy of Mombasa as the crime rate if foreseeably likely to shoot up.
41. In essence, he submitted that there was no requisite infrastructure existing in Jomvu, Miritini area to sustain the business operations that related to the business of the Petitioner. The intended relocation would therefore be very prejudicial to the Petitioner’s members and the economy of Mombasa in general.
42. The business of selling imported used motor vehicles was complimented by the existence of various other businesses whose existence was vital for the survival of the Petitioners’ business. For instance the said motor vehicle required to be serviced, repaired or fitted with various spare parts and washed before being sold or displayed in the showrooms. These services could only be obtained in garages and car wash booths many of which were located in the Central Business District of Mombasa. There were no garages or car-wash places in Jomvu area where the Respondent intended to relocate the Petitioner’s thus the intended relocation would adversely affect the Petitioner’s business.
43. He informed Court that the members of the Petitioner were the owners of various showrooms situated in Mombasa Central Business District. Some of the Petitioners had long term leases on the showrooms the Petitioners incurred huge sums of money to modify the said therefore cause the Petitioners to suffer grave irreparable damages in terms of money and resources invested by the Petitioners to modify the said premises. It was worth to note that some Petitioners executed long-term leases some of which had been fully paid. The threatened relocation by the Respondent would therefore frustrate the said and the Petitioner was likely to suffer the consequences. The Respondent’s intended action was therefore an abuse of power as the Respondent had no capacity to interfere with the private leases existing between the Petitioners and the property owners. Additionally, the said property owners were required to pay



land rates and rents by the Respondent and the said funds could only be raised by leasing out the said premises. Relocating the Petitioners would translate to the said property owners losing business thus they were likely to default in paying of land rates and rents. The consequence of this was that the economy of Mombasa would be adversely affected.

44. He stated that the Respondent, being a state organ, is subject to the provisions of Articles 10 and 47 of *the Constitution* of Kenya 2010. The Respondent was clearly not acting in a credible, transparent or open manner as required by *the Constitution*. The Respondent's decision to relocate the Petitioners was made without according the Petitioners a chance to be heard. The said decision was an affront to the principle of Natural Justice which required that no man should be condemned unheard. The same did not amount to fair administrative action.
45. He opined that the Petitioners' business is in direct competition with big household motor vehicle dealers such as CMC Motors, BT Dobie, Toyota Kenya, Simba Colt Motors. These motor vehicle dealers as well had their showrooms located in Mombasa Central Business District. However, the said entities were not affected by the Respondent's relocation policy. The Respondent had not tendered any reason as to why such entities were not required to relocate. This clearly was an open discrimination against the Petitioners as the Respondent's actions clearly demonstrate biasness and favoritism as the Respondent was according the said entities unfair preferential treatment at the expense of the Petitioners. The Respondent's action was therefore contrary to the provision of Article 27 of *the Constitution* which outlawed discrimination and further an affront to the provision of Article 47 of *the Constitution* which advocated for fair administrative action.
46. The Counsel asserted that the relocation of the Petitioners had not been justified by the Respondent at all. The Petitioners were operating lawfully in Mombasa Central Business District and had employed a number of people in their said business. The Petitioners also paid taxes to the Respondent to operate the said businesses. There was no evidence tendered before this court that any person or group of people had lodged a complaint to the Respondent or any Government authority for that matter complaining about the Petitioner's business or operations. Similarly the Respondent had not tabled any report or research carried out to justify the decision to relocate the Petitioners from Mombasa Central Business District.
47. Therefore, the Learned Counsel submitted that following the reasons raised in these submissions, this Petition ought to succeed by a declaration that the intended relocation of the Petitioner from Mombasa Central Business district to Jomvu area in Miritini was a decision that could not be enforced for want of public participation and natural justice. Besides, the Petitioner had highlighted the challenges and serious setbacks that its members were likely to face should the Respondent proceed with it impugned intended Act.
48. In the circumstances, the Learned Counsel submitted that the Petition was well founded in law particularly on the issue of public participation. In actual fact, the Respondent appeared to have conceded that the Petition was well laid out by the contents of its Replying Affidavit. They relied on the decision in the case of "Car Importers Association of Kenya – Versus - Kenya Revenue Authority" where Justice Ogolla allowed the Petition as the Petitioner therein had not been involved in that matter's decision making process. That decision applied with equal force to the Petition herein and for that reason, they urged the Court to follow the reasoning therein and allow this Petition.

## **B. The Written Submissions by the Respondent**

49. The Respondent through the law firm of Messrs. Soni & Associates Advocates LLP filed their written submissions dated 27<sup>th</sup> February, 2023. Mr. Mutugi Advocate reiterated the prayers in the Petition



dated 3<sup>rd</sup> February, 2022 stating that the said Petition was supported by the Affidavit of service of Peter Otieno, the National Chairman of the Petitioner. The Respondent filed their response to the Petition dated 20<sup>th</sup> June, 2022 and served on the same date.

50. The Petitioner in their Petition claimed that the Respondent wanted to unilaterally relocate the members of the Petitioner without participation of the members of the Petitioner, thus violating their constitutionally guaranteed rights and freedoms. The Respondent in their response to the Petition, adduced evidence to the effect that following a stakeholders meeting on 12<sup>th</sup> January, 2022, the notice of relocation of the members of the Petitioner stood vacated pending further deliberations between the members of the Petitioner and the Respondent as well as inviting members of the public to share their views on the whole relocation process as well as getting views on the continued operations of the members of the Petitioner within the Mombasa Central Business District.
51. The stakeholders meeting of 12<sup>th</sup> January, 2022 bore the letter dated 12<sup>th</sup> January, 2022, notifying the members of the Petitioner of the deliberations of the meeting and a further media briefing, which may be accessed on <https://www.youtube.com/watch?v=3dawflr3fqk>, relocation had been revoked pending further deliberations and public participation.
52. On whether the Respondent breached public trust and constitutional provisions the Learned Counsel submitted that public trust doctrine was anchored on the principle of sustainable development. Sustainable development was not a polysemous concept as its meaning was internationally acknowledged as it was in the Brundtland Report (1987) to mean “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs”. *The Constitution* under the provision of Article 69 (1) of *the Constitution* states that State organs, State officers, public officers and all persons in their application or interpretation of *the Constitution* or enactment, application, or interpretation of any law or development and implementation of any public policy decision the principle of sustainable development inter alia must be paramountly considered.
53. The above proposition was alluded to by the Petitioner in their Petition under the contents of Paragraph 11, where the Petitioner insinuated that the Respondent made the ivory decision to relocate the members of the Petitioner without participation of the Petitioner and/or the public in possible realization of the Respondent's Vision 2035. As illustrated above, the public trust doctrine was hinged on environmental human rights. Every person had a right to a clean and healthy environment which included the right to have the environment protected for the benefit of the present and future generations; to this had a direct nexus on the economic and social rights enshrined in the provision of Article 43 of *the Constitution* of Kenya, 2010.
54. In the instant case, the Respondent sought to relocate the members of the Petitioner from their current locations in the Mombasa Central Business District to Jomvu in exercise of their powers as mandated under the provision of Section 56 of the Physical Planning and Land Use Act, 2019. However, the relocation of the members of the Petitioner, was stopped and had never taken place.
55. According to the Counsel the Vision 2035, which the Petitioner agreed was a viable idea that required public participation. In furtherance and to ensure said public participation, the Respondent held a stakeholder member of the Petitioner until a time when public participation would be done. It was thus the Respondent's submission to this Honorable Court that the Respondent had not breached any public trust as envisaged under *the Constitution* of Kenya, 2010 and/or any other written law of the Republic of Kenya.



56. On who should pay the costs, the Learned Counsel referred to the Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition,(Nairobi) Law Africa) 2011, page 94:-

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

57. The provision of Section 27 of the Civil Procedure Rules, 2010, places upon the Court the discretion to award Costs to the successful party as demonstrated in the decision in the cases of: “Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no.6 of 2014 as quoted by Hon. Justice John Mativo in his decision in the case of “Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & another [2016] eKLR the court held as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

58. Justice Mativo went on further to quote “Orix (K) Limited – Versus - Paul Kabeu & 2 others [2014] eKLR where it was held “inter alia:-

“.....the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have

59. To summarize on the issue of Costs, Justice Mativo in the above decision quoted the works of Justice (Retired) Richard Kuloba in the earlier cited book states as follows:-

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part”

60. At page 101 of the same book, Kuloba authoritatively states as follows:-

“The law of costs as it is understood by courts in Kenya, is this, that where a Plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the Plaintiffs right to costs. If the Defendant, however innocently, has infringed a legal right of



the Plaintiff, the Plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”

61. It was the Learned Counsel argument that the Honourable Court being by the above, the Respondent had proved that it did not relocate the members of the Petitioner thus not breaching any public trust and/or any constitutional provisions and prayed that this Honorable Court does exercise its discretion in the Respondent’s favor and award them costs.

## VII. Analysis and Determination

62. I have carefully considered all the filed pleadings pertaining to the Petition dated 3<sup>rd</sup> February, 2022, the Affidavits by both the Petitioner and the Respondent, the articulate written submissions, the cited authorities provisions of Constitution of Kenya and the Provisions of the law.
63. Several issues were canvassed by the parties in the pleadings regarding the impact of the impugned negotiations and agreement. However, after evaluating the material before the Court and after listening to the parties, I have condensed the issues that fall for my determination as follows:-
- a. Whether the Constitution Petition meets the threshold of a Petition as enshrined in the Constitution of Kenya.
  - b. Whether there was an effort of the State’s obligation to allow public participation in public policy processes; and
  - c. Whether there was any violation, denial and threat of the fundamental rights entitled to the Petitioner by the Respondent. .
  - d. Who will bear the costs of the Petition?

### Issue No. a). Whether the Constitution Petition meets the threshold of a Petition as enshrined in the Constitution of Kenya.

64. In this Petition, the Petitioner seeks a declaration that the Petitioner’s members have a right to be involved in the decision-making process leading to their intended relocation from the Mombasa Central Business District to Jomvu area; a declaration that the intended relocation of the Petitioner’s members from the Mombasa Central Business District to Jomvu area without giving them a chance to be heard in the violation of Articles 10,47,118 and 174 of the Constitution of Kenya,2010; an order be made that the Petitioner’s aforesaid members have a right to carry out their said businesses of selling imported used motor vehicles in their car showrooms that they currently operate from situated in the Central Business District of Mombasa Town and that the Respondent has no right to force the said members to relocate to Jomvu area on Plot No.MN/V/290 as demanded by the Respondent and the costs of the petition.
65. This Honourable Court must establish the constitutional basis of the petition which is founded under paragraph 23 to 25 which include:-
- a. Article 10 - all state officers and public officers are bound to adhere to national values and principles of governance.
  - b. Article 20 (1) (2) and (3) (b) -protection of fundamental rights to be mandatorily protected by the court by adopting the interpretation that most favors the enforcement of a right or fundamental freedom.
  - c. Article 23 (1) (3) - the right to a conservatory order.



- d. Article 25-the right to a fair trial.
  - e. Article 27- right to equality and freedom from discrimination.
  - f. Article 47-right to fair administrative action.
  - g. Article 43- right to social and economic wellbeing.
  - h. Article 20 (3) (b) of *the Constitution* of Kenya, the court is mandatorily obligated to adopt the interpretation of the bill of rights and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
  - i. The Petitioner's fundamental rights as set out in *the constitution* shall be infringed if the interim measures of protection are not granted as stipulated under Articles 22 and 23 of *the Constitution* of Kenya.
66. As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-
- This Constitution shall be interpreted in a manner that:-
- a. Promotes its purposes, values and principles;
  - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - c. Permits the development of the law; and
  - d. Contributes to good governance.....”
67. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
68. Based on the principles set out in the edit of the Court of appeal case of “the Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Another (2013) eKLR provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru – Versus - Republic [1980] eKLR 154 where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-
- “Constitutional violations must be pleaded with a reasonable degree of precision.....”
- Further, in the “Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:
- “The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.
69. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable court is fully satisfied that the Petitioner herein have dutifully complied and fully met



the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent herein and pleading for the prayers sought.

**Issue No. b). Whether there was an effort of the State’s obligation to allow public participation in public policy processes; and**

70. Under this Sub heading, the Honourable Court wishes to intensively assess whether there was any public participation before the Respondent undertook this critical policy decision to re -locate the Petitioner from their usual place of conducting business to a different location. Moreover, the Petitioner has brought out the aspect of public participation. The Petitioner’s case is anchored on the failure of the Respondent to involve them in the shift of their business from the Mombasa Central Business to Jomvu. The Petitioner urged that the Respondent was and is under a duty to involve them by dint of *the Constitution* and various international law instruments to which Kenya is party to.

71. Consequently, this Honourable Court also finds and holds that there has been a violation of the Petitioner’s Rights guaranteed under Article 47 of *the Constitution* and that the Respondent has not adhered to the provisions of Articles 10 of *the Constitution*. Article 47 stipulates as follows:

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

72. Additionally, the provision of Section 4 (3) and (4) of the *Fair Administrative Action Act*, which was enacted to implement Article 47, lays down the procedure to be adopted by Public Officers when taking administrative actions, as follows:

- “(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-



- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

73. The provision of Section 12 of The Act provides that:

“The act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.”

74. In the case of: *Onyango Oloo – Versus - Attorney General* [1986-1989] EA 456 the Court of Appeal expressed itself as follows:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...”

75. Article 10 of *the Constitution* of Kenya provides as follows:

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them--
  - (a) applies or interprets this Constitution;
  - (b) enacts, applies or interprets any law; or
  - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include--
  - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - (b) human dignity, equity, social justice, inclusiveness, equality,
  - (c) good governance, integrity, transparency and accountability; and



(d) sustainable development.

76. The provision of Article 174 of *the Constitution* provides:

The objects of the devolution of government are—

- (a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognizing diversity;
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) to recognize the right of communities to manage their own affairs and to further their development;
- (e) to protect and promote the interests and rights of minorities and marginalized communities;
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) to ensure equitable sharing of national and local resources throughout Kenya;
- (h) to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and
- (i) to enhance checks and balances and the separation of powers.

77. The provision of Article 196 on the other hand provides:

- (1) A county assembly shall—
  - (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and
  - (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.
- (2) A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.
- (3) Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.

78. The provision of Section 87 of the County Government Act, 2012 provides:

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

- a. Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;
- b. Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;
- c. protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;



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

79. Section 115 of the same Act provides:

Public participation in the county planning processes shall be mandatory and be facilitated through—

- a. mechanisms provided for in Part VIII of this Act; and
- b. provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—
  - i. clear strategic environmental assessments;
  - ii. clear environmental impact assessment reports;
  - iii. expected development outcomes; and
  - iv. development options and their cost implications.

Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.

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

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

81. From the foregoing provisions it is clear that public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management. Due to its centrality it is important to determine what exactly amount to public participation.



82. In the case of “Doctors for Life International – Versus - Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), Ngcobo, J who delivered the leading majority judgement expressed himself as follows:

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

83. The Petitioner has made many allegations relating to the Respondent’s public declarations on relocation policy that requires members of the Petitioner’s association to move to Miritini: Unfortunately, little evidence was provided to substantiate the allegations, except evidence heavily gleaned from Newspaper cuttings. In the case of:- “Andrew Omtata Okoiti & 5 Others – Versus - Attorney General & 2 others [2010] eKLR the Court held as follows: -

“This case however, can hardly go far because the petitioners have solely relied on newspaper cuttings in discharging their evidentiary burden which approach is rather flawed. The probative value of such cuttings is not in line with the requirements of the Evidence Act and most importantly, their probative value points to the direction of hearsay, which then impugns their admissibility. Without diluting the existing principles on the discharge of evidentiary burden, an allegation of such weight cannot be founded on opinion pieces written by authors who most likely sourced their information from 3<sup>rd</sup> parties.

84. The Respondents have failed in this constitutional duty placed on them. However, in the opinion of this court, the Respondent’s intention, in the absence of a properly convened public meeting, will most likely be given expression through newspapers. Further, the petitioner herein is apprehensive of such intention on the part of the Respondent. And the Respondent has not done anything to assuage the Petitioner’s worries.

85. The position taken in “Lochner – Versus - New York 198 U.S. 45 (1905) remained in vogue in the United States for at least three decades. Over that period, the Court would strike down numerous attempts by state governments to pass laws aimed at protecting consumers or improving working conditions or otherwise regulating the economy – all under the guise of a liberty the Court found in the Due Process Clause of the 14th Amendment as opposed to any specific text in the Constitution. The US Supreme Court was, in effect, impliedly reading into the Constitution a strong “liberty” or “freedom” clause in the Constitution which protected economic liberties which were not explicitly protected by the text of the Constitution. The impact of this jurisprudential trend was to severely limit the ability of the government to direct economic policy in order to protect or channel in a given direction the health, morals, safety; or the general welfare of the public. Lochner, a bakery owner who was found guilty



under the Bakeshop Act, challenged the constitutionality of the Act. The Supreme Court agreed with *Lochner* and struck down the Bakeshop Act holding that the offending section of the Bakeshop Act was unconstitutional because it was an interference with the right of contract between employers and employees, and that “the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.” Therefore, the Court concluded, the right to contract one’s labour was a “liberty of the individual” protected by *the Constitution*.” The US Supreme Court stated:

“The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labour in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labour is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.”

86. Justice Oliver Wendell Holmes, who would later be regarded as one of the founders of the American Legal Realism wrote perhaps his most important dissent in opposition to the approach taken by the majority in the case. He famously wrote:

“This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14<sup>th</sup> Amendment does not enact Mr. Herbert Spencer’s Social Statics.”

87. In the United States, the Supreme Court changed course and backed away from its *Lochner* line of cases in the mid-1930s. This heralded a trend towards increasing deference to state regulation of economic matters out of the principle that the government generally has much leeway to direct economic matters and policy as long as it does not use that power to enact oppressive and unjust laws. The Supreme Court announced the departure in “*West Coast Hotel Co. – Versus - Parrish*, 300 U.S. 379 (1937). In this case, the majority, in a passage that heralds the modern day approach to the question of the constitutional freedom to contract, stated thus:

“What is this freedom? *The Constitution* does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, *the Constitution* does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which



menace the health, safety, morals, and welfare of the people. Liberty under *the Constitution* is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular.... [F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.”

88. This is the correct approach to the regulation of economic activities which our Constitution divines. In its various principles as well as in its structure and variety of civil, political, social, economic, cultural and group rights which *the Constitution* enumerates, *the Constitution* plainly envisages a directive role of the State in respecting, promoting, and fulfilling the various enumerated fundamental rights of individuals and groups. Such a directive role, of necessity, means that the State has leeway to regulate and limit the freedom to contract by individuals in order to achieve other public interest objectives including the objective of achieving the social and economic rights of citizens. Put differently, it is true of the Kenyan Constitution, as it is of the US Constitution, that:

“The liberty secured by *the Constitution* ...to every person...does not import an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. Jacobson – Versus - Massachusetts, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed.”

89. In this instant case the Petitioner has faulted the Respondent for denying them the right to choose where they want to per take their business most importantly did not involve them in he planning of the said move from the Mombasa Central Business area to Miritini. The truth is the Respondent has legitimate governmental interests, permitted by *the Constitution*, to impose certain reasonable restraints on freedom of business and where to do it. However while the Respondent has much leeway to impose reasonable limitations to the freedom to choose economic activities in the common good and where to conduct these economic activities, such limitations must be reasonable; non-discriminatory; non-oppressive; and procedurally imposed for them to pass constitutional muster. A party who claims that his freedom or liberty under *the Constitution* has been impermissibly abrogated or limited, therefore has the onus to demonstrate the following four things.

90. First, to establish whether the allegedly violated right is an enumerated right or freedom under *the Constitution*. If the concerned freedom or right is a fundamental one enumerated under the Bill of Rights, the State is required to justify any abrogation or limitation under Article 24 of *the Constitution*. In such a case, the onus immediately shifts to the State to demonstrate that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” In addition, the State must show that all the other requirements under Article 24 of *the Constitution* are satisfied.

91. Second, where the right or freedom allegedly violated or limited is not an enumerated right or freedom and is, instead, a non-fundamental right or a right generally covered under the general subtext of freedom or liberty under *the Constitution* or some other penumbral right or freedom as permitted under Article 19(3)(b) of *the Constitution*, a person claiming a violation is required to demonstrate that the abrogation or limitation is either unreasonable or oppressive. The Claimant can satisfy this requirement by showing two things:



- a. One, that the particular Policy or law in question does not serve any legitimate governmental interest; or
  - b. Two, that the particular Policy or law is not rationally related to the articulated governmental interest. Differently put, the means and goals of the Policy or law must be rationally related. A Claimant can succeed in showing that a law is unreasonable or oppressive if he can show that the means chosen to achieve the legitimate governmental interest is not rationally related to legitimate government goals.
92. Third, even where a policy or law passes muster under the rational basis test, it is incumbent for the State/County Government to demonstrate that the Policy or law limiting the non-fundamental right was crafted after a process of public participation or administrative fair hearing in which those most affected by the Policy or law have been given an opportunity to air their views and to have those views considered before the Policy or law is made final. This is a due process requirement.
93. Fourth, even where the impugned Policy or Law survives procedural scrutiny under the rational basis test and survives further scrutiny for public participation and administrative fairness, it must further survive a substantive scrutiny as to its impacts or effects on the rights of the Claimant. If the impugned Policy or Law otherwise violates an enumerated fundamental right or freedom in its effects (as opposed to its text and intent which must meet the requirements under Article 24 and is covered in the first requirement above), a Court would still find the impugned Policy or Law impermissible. For example, a Claimant can demonstrate that the specific Policy or Law being challenged has violated his or her social and economic rights under Article 43 of *the Constitution* as applied under Article 20 of *the Constitution*.
94. In the present case, on the basis of the pleadings and submissions, the Petitioner has shown the impugned directives that did not serve any legitimate governmental interests and where they were not involved in the decision making yet the same affected their livelihoods and their businesses. The Respondent in their replying affidavit deponed that the Respondent is mandated under Article 56 of the *Physical and Land Use Planning Act* Part Act 2019 to plan and control the use and Development of Land and Buildings in the interest of proper and orderly development within Mombasa County.
95. Be that as it may, the Respondent further went to aver that since the Year 2014 sought to decongest the city of Mombasa and part of its strategy was to have car sales showrooms to move to a centralized area outside the Central Business District. While this still remains the aim and desired outcome, the impugned Notice dated 7<sup>th</sup> January 2022 was withdrawn and suspended indefinitely vide the letter dated 12<sup>th</sup> January 2022 to give room for consultation and public participation. By the time the Petitioner was filing this suit on the 4<sup>th</sup> February 2022 the said Notice had already been suspended to allow for the participation that the Respondent is complaining of in the Petition. The Petition therefore has been overtaken by events as the Notice Complained of is no longer in force and was in fact was not in force on the 4<sup>th</sup> February 2022 when this suit was filed.
96. The starting point is *the Constitution*. Article 2 inter alia declares *the Constitution* as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of *the Constitution* is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of *the Constitution* is invalid. Article 3 places an obligation upon every person to respect, uphold and defend *the Constitution*.
97. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law or makes or implements any public policy decisions.



98. [\*The Constitution\*](#) also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

Any 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.

99. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in the case of:- "Robert N. Gakuru & Others – Versus - Governor Kiambu County & 3 Others [2014] eKLR while referring to the South African decision in the case of "Doctors for Life International – Versus - Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

"According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process".

100. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10<sup>th</sup> Edition defines 'consultation' as follows: -

"The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

101. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in the case of: "Legal Advice Centre & 2 others – Versus - County Government of Mombasa & 4 others [2018] eKLR quoted with approval Ngcobo J in the case of:- "Matatiele Municipality and Others – Versus - President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

'.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say...."

102. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others – Versus - Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR the Court addressed the concept of consultation in the following manner: -

".... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy,



legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. (emphasis added)

103. Consultation or stakeholders engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

104. This Honourable Court stresses on the importance of public participation which cannot be gainsaid. The Court of Appeal in the case of "Legal Advice Centre & 2 others – Versus - County Government of Mombasa & 4 others (Supra) while dealing with the aspect of public participation in law-making process stated as followed: -

“The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning”.

105. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in the case of "Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra) referred to Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1<sup>st</sup> Respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

**Issue No. c). Whether there was any violation, denial and threat of the fundamental rights entitled to the Petitioner by the Respondent.**

106. Under this sub – heading, the Court needs to critically assess on whether there was any violation, denial and threat of the fundamental rights entitled to the Petitioner. To begin with, and for avoidance of doubt, this Honourable Court holds that the move to Miritini of the Petitioner's members by the Respondent needed constitutional mandated public participation as clearly elaborated by the Petitioner that the businesses are their livelihoods and that in 2020 the Respondent unilaterally decided to force the members of the Petitioner to relocate from the Central Business District area of Mombasa Town to Miritini area, next to the Standard Gauge Railway (SGR), Mombasa Terminus. The Petitioner filed Mombasa High Court Constitutional Petition No.8 of 2020 against the Respondent to challenge the said decision. The court vindicated the stand taken by the Petitioner. However, the current decision by the Respondent to relocate the same members of the Petitioner to Jomvu area of Mombasa is similar to the one that the Respondent made in 2020 and which was quashed by the



- court. That the Respondent has repeated the same kind of decision without undertaking any type of public participation and without considering the fact that Jomvu area just like the Standard Gauge Railway (SGR) Mombasa Terminus at Miritini, does not have the necessary infrastructure to sustain the carrying out of the business of selling imported used motor vehicles is clear evidence of the fact that the Respondent has no respect for Articles 10, 43, 47 118 and 174 of *the Constitution* of Kenya, 2010.
107. Further, the Petitioner was unaware who the registered proprietor of Plot No. MN/V/290 is. Additionally, the Respondent has not advised the said members of the Petitioner the terms and conditions that will apply to the intended tenancies, for example, what the applicable monthly rent would be and to whom it would be paid to. Therefore, the said forced relocation is shrouded in a lot of mystery and is thereby quite unrealistic. In fact, the Respondent has not advised the said members of the Petitioner whether the land is a freehold or under lease and whether those who might want to buy would buy or not, yet some of the Petitioner's members are actually the owners of their properties that they operate from. It is hence unrealistic to expect the said members to leave the security of operating from their own properties only to be at the mercy of a landlord(s) that the said members have no relationship with.
108. Additionally, and as has already indicated, there is no question that there was no attempt to subject the Impugned Directives to public participation in any way. And even though the Respondent claimed in its replying affidavit that it had withdrawn the impugned directives, it did not communicate the same to the Petitioner.
109. A decision removing all sets of options from an economic actor, targeted group, participants in a particular trade or profession and requiring them to channel their economic activities in a particular direction, is, definitionally, one that must be arrived at after due consultations and meaningful public participation. As is administratively fair under Article 47 of *the Constitution* and the Fair Administrative Actions Act.
110. The Court has already held that the Impugned Directives required public participation. It has also been stated above and the finding of this court that no public participation was undertaken before the Impugned Directives were effected. For these reasons, the Impugned Directives are, constitutionally infirm.
111. The Impugned Directives are, also, for the same reasons, a violation of Article 47 of *the Constitution*. By the Respondent's own admission, no efforts whatsoever were taken to ensure compliance with Article 47 of *the Constitution* and the Fair Administrative Actions Act as it has not made any effort to contravene that it engaged the Petitioner before arriving at the decision to move the Defendant.
112. Article 47 of *the Constitution*. Sub-articles (1), (2) and (3) states that:-
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
  - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
    - (a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
    - (b) promote efficient administration



113. The legislation that was contemplated under Article 47(3) is the Fair Administrative Act. Section 5(1) thereof provides that: -
- (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—
    - (a) issue a public notice of the proposed administrative action inviting public views in that regard;
    - (b) consider all views submitted in relation to the matter before taking the administrative action;
    - (c) consider all relevant and materials facts; and
    - (d) where the administrator proceeds to take the administrative action proposed in the notice—
      - (i) give reasons for the decision of administrative action as taken;
      - (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and
      - (iii) specify the manner and period within which such appeal shall be lodged.
114. From the foregoing discussion, there is no doubt the Impugned Directives were administrative actions. In sum, they were administrative actions because they affected the legal rights and interests of the Petitioner, their customers, and stakeholders. As such they had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.
115. The Impugned Directives did not conform to the requirements of Article 47 of *the Constitution* and Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the Respondent had to do the following:
- a. Give notice of the intended directives to the Petitioner and its members;
  - b. Afford an opportunity to the Petitioner and its members and even the general public as they are the consumers of the commodities that would be taken to Mitirini;
  - c. Give reasons for the decisions made – in this case, the Impugned Directives.
116. None of these happened. For this reason alone, the impugned Directives are constitutionally infirm. The Petitioner contends that the Respondent’s actions threaten the Mombasa residents’ right to the highest attainable standards of economic and social rights as guaranteed under Article 43 of *the Constitution* of Kenya. It is now a well settled principle that a Petitioner ought to demonstrate with some degree of precision the right it alleges has been violated, the manner it has been violated, and the relief it seeks for that violation – see Anarita Karimi Njeru (Supra) and Trusted Society of Human Rights Alliance (Supra). It is well established in the Petition and the arguments from the Petitioner as outlined in the foregoing did not allege that there was infringement of the specific rights provided for in Article 43, but instead focused on demonstrating the infringements on their right to livelihood, as forming the basis for the infringement of the rights in Article 43.
117. Therefore, in terms of proof of infringement, in order to succeed on this claim, the Petitioners need to prove that the Respondents have caused harm or injury to, or limited their work and related activities in cargo handling and transport, either by way of direct actions or by omission to take reasonable steps



to prevent such harm and injury. This burden of proof is provided under sections 107(1) (2) and 109 of the *Evidence Act* as follows:

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

118. The issue of the burden of proof on a Petitioner in a Constitutional Petition was addressed by the Supreme Court in “Communications Commission of Kenya & 5 Others – Versus - Royal Media Services Limited & 5 Others [2014] eKLR:

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru – Versus - Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

119. The Petitioner in this respect filed an affidavit in support of the petition wherein its representative made various averments detailed in the foregoing as regards the manner of infringement by the Respondent in terms of the deleterious effects of the impugned directives and the impact they will have on their businesses and livelihood plus its employees.
120. I do take note that there was a withdrawal of the directives but I also do note that the effect of the directives had already been felt and that the constitutional rights of the Petitioner’s members had already been infringed.
121. From the foregoing, this Court finds and holds that the Respondent failed to comply with Article 47 of *the Constitution*, and with provisions of the Fair Administrative Act in arriving at the impugned decision. This Court further finds and holds that the Petitioner is entitled to take proactive actions to prevent abrogation of a right or a fundamental freedom as stipulated in Article 22 and 258 of *the Constitution*, and that the Petitioner did not have to wait for the threatened violations to take place before taking a legal action herein to restrain the same.

**Issue No. d). Who will bear the costs of the Petition**

122. It is not well established that and from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost.



123. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms. The Proviso of the Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of Jasbir Rai Singh Rai – Versus- Tarhochan Singh (2014) eKLR and Mary Wambui Munene –Versus-Ihururu Dairy Cooperative Societies eKLR (2014)
124. In the instant case the Petitioner has succeeded in protecting its case and gotten the orders sought. They are entitled to costs. However, taking that this is a matter of great public importance it is in the interest of natural justice, equity and conscience that each party bears its own costs.

### **VIII. Conclusion and disposition**

125. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner has succeeded in all the prayers sought from their filed Petition. For avoidance of doubt, I allow the Petition dated 3<sup>rd</sup> February, 2022 these are the orders of the Court:-
- a. That Judgement herein be and is hereby entered in favour of the Petitioners to the extent as stated herein below.
  - b. That an order be made that the Petitioner’s aforesaid members have a right to carry out their said businesses of selling imported used motor vehicles in their car showrooms that they currently operate from situated in the Central Business District of Mombasa Town and that the Respondent has no right to force the said members to relocate to Jomvu area on Plot No.MN/V/290 as demanded by the Respondent.
  - c. That prayer 2 of the Prayers sought by the Petitioner has been overtaken by events being that the Respondent has withdrawn their directives on the relocation of the Petitioner’s members.
  - d. That a declaration that the Petitioner’s members have a right to be involved in the decision-making process leading to their intended relocation from the Mombasa Central Business District to Jomvu area.
  - e. That the above notwithstanding, the orders of this Court do not debar the Respondent to further engage the Petitioner on any aspects so long as it is undertaken within the perviews and confines of the laid - down provisions and the principles of *the Constitution* of Kenya, 2010.
  - f. That each party to bear own costs of the Petition.

It is so ordered accordingly.

**JUDGMENT IS DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 2<sup>ND</sup> DAY OF OCTOBER 2023.**

.....

**HON. JUSTICE L.L NAIKUNI (JUDGE)**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Yumna – the Court Assistant.



- b. M/s. Randa Advocates holding brief for Mr. Gikandi Advocate for the Petitioner.
- c. Mr. Ng'an'ga Advocate holding brief for Mr. Amakobe Advocate for the Respondent

