



**Kenya Tourism Federation (KTF) v Narok County Government & another (Constitutional Petition E006 of 2023) [2025] KEHC 2440 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2440 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CONSTITUTIONAL PETITION E006 OF 2023  
F GIKONYO, J  
FEBRUARY 14, 2025**

**BETWEEN**

**KENYA TOURISM FEDERATION (KTF) ..... APPLICANT**

**AND**

**NAROK COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**NAROK COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Public participation and equity in tax**

1. Vide a constitutional petition dated 15/12/2023 the petitioner has sought the following reliefs;
  - a. A declaration do issue that the first schedule of the Narok County Finance Act, 2023 purporting to impose inter alia a daily park entry fee to the Maasai Mara National Reserve increment from the current US\$80 per person per day to US\$200 per person per day(for the high season) and from US\$80 per person per day to US\$100 per person per day(for the low season), is in violation of articles 10,27,47,174©, 196(1)(b), 201 and 209 of *the constitution*, as well as section 87 and 115 of the *county governments act*, section 5(1) of the fair administrative actions act and the relevant narok county assembly standing orders for want of any or any credible, and/ or reasonable public participation, stakeholder consultations, and administratively fair procedures.
  - b. A declaration do issue that the first schedule of the Narok County Finance Act, 2023 purporting to impose inter alia a daily park entry fee to the Maasai Mara National Reserve increment from the current US\$80 per person per day to US\$200 per person per day(for the high season) and from US\$80 per person per day to US\$100 per person per day(for the low season), further contravenes Article 199(1) of *the constitution* and the relevant narok county assembly standing orders for want of publication in the narok county gazette.



- c. A declaration do issue that the first schedule of the Narok County Finance Act, 2023 purporting to impose inter alia a daily park entry fee to the Maasai Mara National Reserve increment from the current US\$80 per person per day to US\$200 per person per day(for the high season) and from US\$80 per person per day to US\$100 per person per day(for the low season), is unconstitutional, null and void and it be quashed.
  - d. An order of prohibition do issue, prohibiting the respondents forthwith, or anyone acting under their behest and direction from imposing and/ or purporting to impose a daily park entry fee to the Maasai Mara National Reserve increment from the current US\$80 per person per day to US\$200 per person per day(for the high season) and from US\$80 per person per day to US\$100 per person per day(for the low season), absent a strict adherence to the provisions of articles 10,27,47,174©, 196(1)(b), 201 and 209 of the constitution as well as section 87 and 115 of the county government act, as read together with section5(1) of the fair administrative actions act and the relevant narok county assembly standing orders.
  - e. Any other relief as this court may deem just and expedient to brant in the interests of justice.
  - f. The costs as the petition be borne by the respondents. [sic)
2. The petition is supported by the supporting affidavit of the petitioner’s chairman, Fredrick Odhiambo Odek sworn on 15/12/2023 as well as the supplementary affidavit sworn on 17/05/2024 and relied on the annextures thereto.
  3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application herein. The 1<sup>st</sup> respondent filed a replying affidavit sworn by John Mayani Tuya on 15.01.2024. The 2<sup>nd</sup> respondent filed a replying affidavit sworn by Joseph K. Lengeny on 25.01.2024.

### **Background of the case**

4. The 2<sup>nd</sup> respondent enacted the Narok County Finance Act, 2023 whose date of assent is 12.10.2023. In section I thereof to have come into operation ‘upon publication in the Kenya Gazette’. The said Act was published vide a Kenya gazette supplement No. 7 on 13.10.2023.
5. The said legislation, in the first schedule, purports that the new park fees for non-residents will be levied effective 01.01.2024 for the ‘low season’ up to 30.06.2024 over the same period, at a sum of US\$100 per person per day, valid from 6 a.m. to 6 p.m. This is up from the current US\$80 per person per day for the low season.
6. Similarly, during the ‘high season’ from 01.07.2024 to 31.12.2024 the Maasai Mara National Game Reserve Park entry fees legislated in the first schedule of the impugned Act will be US\$200 per person per day over the same period of 6 a.m. to 6 p.m. up from the current US\$80 per person per day.
7. These new park fees will be effective from 01.01.2024.

### **Directions of the court.**

8. The petition was canvassed by way of written submissions.

### **Petitioner’s averments and submissions**

9. The petitioner made the following arguments in the affidavits filed as well as written submissions.
10. That, the Petitioner is a company limited by guarantee whose key objectives are, to: -



- a. Provide a single voice for the tourism industry;
  - b. Enhance ethics and standards in the tourism industry;
  - c. Strengthen private sector representation on the various organizations/boards that impact on tourism
  - d. Provide a forum through which the industry can give input to the marketing activities of Kenya Tourism Board;
  - e. Lobby and constructively engage Government on issues critical to the industry.
11. According to the petitioner, the core objective is 'to promote a sustainable tourism sector in Kenya and East African Community through effective representation.'
  12. In the view of the petitioner, the main issues relate to: -
    - a. Jurisdiction of the court;
    - b. Unconstitutionality of the Finance Act, 2023 and the First Schedule thereto;
    - c. Violation of petitioners' rights under art. 10(2)(b) and 27(4) of *the Constitution*.
    - d. Costs
  13. According to the petitioners, the 1<sup>st</sup> respondent published the impugned Finance Act without consulting them.
  14. Yet, the petitioner's members' tourism operators are negatively implicated as the new levies will be applicable to all existing confirmed bookings contracted with all the petitioner's members' guests prior to the enactment of the impugned legislation.
  15. These newly hiked levies will implicate any new reservations of visitors traveling to the Maasai Mara National Game Reserve in 2024 and after that so that the already booked visitors via the petitioner's members could very well be unprepared to have updated invoices outside the US\$ 80 per person per day already contracted and remitted sums.
  16. Further the petitioner contends that currently, entry fees to Maasai Mara National Game Reserve Park are based on the location of the camp or lodge at which any guest lodges in the reserve.
  17. Hence, for guests currently accommodated in any camp/lodge located inside the main Maasai Mara National Reserve, the entrance fee has been US\$70 per adult per day and US\$40 per child aged 12 years and under. In granting the conservatory order sought, this fee was still remitted to the 1<sup>st</sup> respondent.
  18. Such lodges /camps have had tourists from across the world make reservations stretching into the year 2024 based on the subsisting rates of US\$80 for the high season and US\$70 for the low season; hence, it is a loss to them to have this hike complained of herein.
  19. Where a guest is accommodated in a lodge/camp outside the Maasai Mara National Game Reserve the entry fee is US\$80 per adult per day and US\$45 per child over the same period. Any such entry tickets are valid from 6 a.m. to 6 p.m.
  20. For East African community block residents, the 1<sup>st</sup> respondent has legislated lower rates that apply to residents of Kenya, Tanzania, Uganda, Rwanda, and Burundi.



21. For Kenyan citizens visiting the Maasai Mara National Reserve residents' visitors must present their national ID or passport as proof of their resident status. However, any East African community block visitors without a valid passport must pay the entry fee at the non-resident rates.
22. Moreover, where a guest lodging within the Maasai Mara National Game Reserve elects to depart by road, they are required to exit the reserve- not later than 10.00 a.m. otherwise any exit beyond this time is classified by the 1<sup>st</sup> respondent Narok County government as attracting additional entry fee.
23. Further where a guest residing both inside and outside the Maasai Mara National Game Reserve departs by air, the 1<sup>st</sup> respondent demands that they should arrive at the relevant airstrip not later than 10 a.m. so that any guest exceeding this time has to remit an additional day in park fee.
24. The petitioner's members tour operators offering Maasai Mara national game reserve safari packages to local and foreign tourists already include the stated entry fees in their tourism packages and consequently the entire petitioner's tour operator stand directly affected by the impugned increment of the game reserve entry fees which is subject of the petition herein.
25. Where a tourism operator engages in fly-in safaris the park is ordinarily paid upon landing. Again, the petitioner's members are equally and directly affected by the arbitrarily increased sum of US\$200 per person per day (high season) and US\$100 per person (low season).
26. This increment was without consulting the petitioner/applicant which forms the thrust of the applicant's plea for conservatory orders herein made pending determination of the petition herein, to sterner the unconstitutionality precipitated thereby.
27. The petitioner's members will be put under a stringent economic strain by the impugned increment of US\$200 per guest per day up from US\$80 because where such guest campers visit private campsites the 1<sup>st</sup> respondent demands that they have to hire two rangers per night time security.
28. In special instances the petitioner's members have to transport these rangers to and from these campsites and given the already booked 2024 tourism season the impugned increment in US\$200 per guest means that the petitioner's members cannot even afford to meet this demand for rangers.
29. The petitioner contends that the Narok County Finance Act, 2023 was enacted in violation of the principle of public participation in the legislative-making process since allegedly the respondents failed to publish any advertisements/ notice in the press or media inviting membership and the public to give their views on the Narok County Finance Bill, 2023 and thus violating the provisions of articles 10,196(1) of *the constitution* and Section 87 and 115 of the *County Governments Act*.
30. The petitioner further contends that the 1<sup>st</sup> respondent failed to follow due process in enacting the Narok County Finance Act, 2023 as it failed to publish the said act in a recognized gazette thus preventing the petitioners from participating in the process of enacting the bill into law in violation of Article 25(2) of the *County Governments Act*.
31. The petitioner further contends that the Narok County Finance Act 2023 perpetuates an unfair sharing of the burden of taxation within Narok County since a heavier burden was placed on the petitioner and its members in comparison to the business operators and thus violating the principles of equity and fairness on the sharing of the burden of taxation provided for under article 201(b) as read with article 10(2) (a) and (b) of *the Constitution*.
32. The petitioner submitted that the primary and significantly relevant stakeholders in the Maasai Mara Game Reserve tourism businesses sought to be regulated by the impugned schedule of the Narok County Government Finance Act 2023 were not consulted. The petitioner contends that the alleged



- engagement by the 1<sup>st</sup> respondent with an isolated number of operators cannot meet the threshold and legitimate expectation. The petitioner relied on Mohamed Ali Baadi And Others V Attorney General & 11others [2018] eKLR, Dominic [3 Others V County Government Of Narok & Another \(Constitutional Petition E002 Of 2023\)](#) [2023] KEHC 17908(KLR) (17 April 2023)(Ruling)
33. The petitioner submitted that there was no public participation of any sort and no media/press advertisements were published by the respondents requiring the public to give their views or submit memoranda on the impugned aspects of the bill prior to the enactment thereof. The petitioner relied on Okiya Omtatah Okiiti & 3 Others Vs Nairobi City County & N 5 Others [2014] eKLR, Benson Riitho Mureithi Vs J.W.Wakhungu And 2 Others Pet. No. 19 Of 2014, Migori County Government & Another V Migori County Transport Sacco (Civil Appeal 110 Of 2017)[2021] KECA 7(KLR) (23 September 2021)(Judgment), Article 10 And 196(1)(B), 201 (1), 209(3) And 210 (1)Of [The Constitution](#), Section 87,95(1) And (2) Of The [County Governments Act](#), 2012, Republic V County Government Of Mombasa Ex Parte Outdoor Advertising Association Of Kenya[2014] eKLR, Coal Basin Local Community & 15 Others V Permanent Secretary Ministry Of Energy & 17 Others [2015] eKLR, Legal Advice Centre & 2 Others V County Government Of Mombasa & 4 Others [2018] eKLR, David Kariuki Muigua Vs Attorney General & Another [2012] Eklr, Robert N. Gakuru & Others Vs Governor, Kiambu County[2014] eKLR, Wambua Maithya V Pharmacy, And Poisons Board; Pharmaceutical Society Of Kenya & 2 Others(Interested Parties) [2019 eKLR.
  34. The petitioner submitted that the impugned legislation seeks to place a disproportionately heavier taxation burden on the petitioner and its members and other similarly placed tourism operators at the expense of other similarly placed tourism operators at the expense of other similar obligated business operators in Narok County hence violating the principles of equity and fairness. The petitioner contends that some of the tour operators have experienced cancellations of the bookings arising directly from the increased cost of the tour packages already booked before the increment was made. The petitioner relied on article10(2)(a)(b) 27(1)(4), 210(1)(b),209(5), 259 of [the Constitution](#), Kenya Bankers Association V Kenya Revenue Authority [2018] eKLR, R V Inland Revenue Commissioners Exp National Federation Of Self-Employed And Small Business Limited [1981] UKHL 2 At Page 22, Centre For Rights Education & Awareness (CREAW) V Attorney General & Another [2011] Eklr, Attorney General Vs Kituo Cha Sharia & 7 Others [2017] eKLR,
  35. The petitioner submitted that a tax, levy, or charge can only be charged if it is provided for under the law which must itself be constitutionally incepted. The petitioner contends there was no publication of the impugned act in the narok county gazette. The petitioner relied on Raiply Woods (k) Ltd & another v Baringo County & 3 others [2017] eKLR, Baringo county Government & Another V Raiply Woods (K) Limited & 3 Others (Civil Appeal 66 of 2018) [2023] KECA 196(KLR) (17 February 2023(judgment), section 25(1)(2) of the County Government Act

### **Respondents' arguments and submissions**

36. The core arguments by the respondents were that; there was public participation in the formulation and passage of the Finance Bill into law; that the Narok County government bill was passed, assented to by the governor into law, and published in the Kenya Gazette following all relevant laws. Thus, lawful and constitutional.
37. But the specific arguments and submissions made by each defendant are set out below.



## **The 1<sup>st</sup> Respondent's Arguments and submissions**

38. The onset of what culminated into the Narok County Finance Act, 2023 was the Maasai Mara National Reserve Management Plan 2023-2032, the Greater Maasai Mara Ecosystem Management Plan 2023-2032, and the Narok County Physical and Land Use Development Plan 2022-2032 which were approved by the members of the 2<sup>nd</sup> respondent sometime in the month of February 2023 after conducting sufficient public participation and were signed into law by the governor of Narok county on 21.02.2023.
39. The 1<sup>st</sup> respondent conducted stakeholders mapping and brought on board all the stakeholders, camp and lodge owners of all the lodges and campsites situated within Maasai Mara National Reserve and the community to collect their views.
40. Vide letters dated 19.07.2023 various stakeholders were invited to a meeting held at Sarova Panafric in Nairobi on 01.08.2023. the purpose of the meeting was to delve into the implementation actions as per the management plans that would guide the next steps for the Maasai Mara landscape.
41. The petitioner herein being a major stakeholder of the Maasai Mara National Reserve was also invited to the meeting through their chief executive officer (CEO) Ms. Ongalo Susan M.
42. The directors and/or proprietors of all the lodges, camps, and hotels situated within the Maasai Mara National Reserve were also invited to the aforementioned meeting vide letters dated 19.07.2023.
43. On 01.08.2023 the Maasai Mara landscape stakeholders meeting was attended majorly by all the stakeholders and camps/lodges owners invited.
44. The petitioner was represented by their CEO Ms. Ongalo Susan M who signed in as the 24<sup>th</sup> attendee and Odek Fred who signed in as the 56<sup>TH</sup> Attendee as per the annexed list of attendees. The petitioner's representatives took part in the deliberations and presented their views without any limitations or reservations.
45. The 1<sup>st</sup> respondent convened another meeting on 10.08.2023 at Sarova Mara with the Maasai Mara National Reserve community and camp beneficiaries.
46. Upon conclusion of the meetings of 01.08.2023 and 10.08.2023 the executive of the 1<sup>st</sup> respondent met to consider the views submitted by all the parties concerned. They formulated a legislative proposal in consideration of the views accumulated from the stakeholders concerning variations of levies, fees, rents, and reserves in the various business sectors within Narok County and the tourism sector.
47. The 1<sup>st</sup> respondent contends that the proposed variations were necessitated by among other factors the change in the current state of affairs, the need to expand reserve collection and realize and actualize the objectives of the Maasai Mara National Reserve Management Plan 2023-2032, and the Greater Maasai Mara Ecosystem Management Plan 2023-2032.
48. The 1<sup>st</sup> respondent forwarded the formulated legislative proposal to the 2<sup>nd</sup> respondent for consideration. The 2<sup>nd</sup> respondent took into consideration the proposal by the 1<sup>st</sup> respondent and drafted the Narok Finance Bill, 2023 which was then tabled before the 2<sup>nd</sup> respondent.
49. The 1<sup>st</sup> respondent contends that the 2<sup>nd</sup> respondent sufficiently conducted public participation by inviting the public through a notice published in the standard newspaper on 19.09.2023 to various meetings to be held on 26.09.2023 in different venues within Narok county. Invitations to attend the meetings scheduled for 26.09.2023 were also done through the local radio stations; Sidai FM and Kass FM on 25.09.2023.



50. The 2<sup>nd</sup> respondent conducted public participation and subjected the bill through the process provided for by the law and duly passed it sometime in October 2023.
51. In anticipation that the bill will be passed by the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent invited the Maasai Mara National Reserve investors and stakeholders via letters dated 04.10.2023 to a meeting scheduled for 14.10.2023 at Nairobi Serena hotel to discuss the due process of implementation of narok finance act 2023 and standardization of the leases to meet its requirements.
52. The meeting of 14.10.2023 was not to seek the attendees' input.
53. Upon publication of the Narok County Finance Act 2023 on 13.10.2023 the same became operational and tourists have since complied.
54. The 1<sup>st</sup> respondent contends no complaints have been received by the 1<sup>st</sup> respondent complaints desk at Maasai Mara National Reserve from lodges/camps owners or tourists in respect of any previous bookings that have had to be subjected to these current rates.
55. The 1<sup>st</sup> respondent contends that no evidence has been tabled of booking cancellations by any of the petitioner's members as a result of the upward variation of the levies and park fees.
56. The 1<sup>st</sup> respondent contends that the petitioner was included and participated in the enactment of the act. Further extensive and comprehensive views and input of stakeholders' community and investors within narok county were incorporated by both respondents.
57. The 1<sup>st</sup> respondent contends that the by-laws that have been governing Maasai Mara National Reserve with respect to the levies, revenue, fees, and licences date back to the year 1994 when the same was brought into place pursuant to section 201 of the local government act. The variations introduced by the first schedule of narok county finance act 2023 in respect to the levies and park fees were long overdue.
58. The 1<sup>st</sup> respondent contends that in consideration of the current economic demands and implementation of the objectives of Maasai Mara National Reserve Management Plan 2023-2032, the Greater Maasai Mara Ecosystem Management Plan 2023-2032 by the 1<sup>st</sup> respondent the levies, revenues, and fees introduced by the first schedule of the Narok County Finance Act, 2023 are reasonable.
59. The 1<sup>st</sup> respondent contends that issuance of an order prohibiting the respondents from imposing the provisions of the first schedule of Narok county government finance act 2023 which is already operational would disorganize, cripple and frustrate the 1<sup>st</sup> respondent's financial activities and impede them from meeting its obligations of devolution which are running smoothly.
60. The 1<sup>st</sup> respondent contends that the Maasai Mara National Reserve is the number one source of revenue for the 1<sup>st</sup> respondent and which the 1<sup>st</sup> respondent heavily relies on to meet its financial activities and any such prohibitory orders will be detrimental to them in achieving their constitutional mandate.

### **The 1<sup>st</sup> respondent's submissions**

61. The 1<sup>st</sup> respondent submitted that it has demonstrated that public participation was reasonably conducted with respect to the Narok County Government Finance Act, 2023. The 1<sup>st</sup> respondent made efforts to involve the petitioner in the initial stages of formulating what became the Narok Finance Act, 2023. The views of the petitioner were considered in formulating the legislative proposal. The 1<sup>st</sup> respondent relied on sections 87,91, and 115 of the [County Governments Act](#), the case of



Nairobi Metropolitan PSV Saccos Union Limited & 25 Others Vs County Of Nairobi Government & 3 Others [2013] eKLR, Minister Of Health Vs New Clicks South Africa (PTY) Ltd And Others [2006] (2) SA 311, Simeon Kioko Kitheka & 18 Others Vs County Government Of Machakos & 2others [2018] eKLR, Article 10,183(2), 196, and 201(2) of *the Constitution* 2010, and Diani Business Welfare Association And Others Vs County Government Of Kwale [2015] eKLR.

62. The 1<sup>st</sup> respondent submitted that the Narok County Government Finance Act, 2023 was published in the Kenya Gazette; a recognized gazette as per article 199(1) of *the Constitution*. The 1<sup>st</sup> respondent relied on section 260 of *the constitution*.
63. The 1<sup>st</sup> respondent submitted that the charges /fees imposed by the first schedule of Narok County Government Finance Act, 2023 are not exorbitant or unfair towards the petitioner as the respondents considered the public views, their policies, and the revenue they ought to raise to meet their budget. The 1<sup>st</sup> respondent relied on articles 185(2) and 209(4) of *the Constitution*, Nairobi Metropolitan PSV Saccos Union Limited & 25 Others Vs County of Nairobi Government & 3 Others [2013] eKLR, and Mount Kenya Bottlers Ltd & Others V Attorney General & Others Petition No. 72 of 2011.
64. The 1<sup>st</sup> respondent submitted that the Narok County Government Finance Act, 2023 does not offend Article 209(5) of *the Constitution*. The 1<sup>st</sup> respondent has relied on the case of Ndynabo V Attorney General of Tanzania [2001] EA 495, Centre For Rights Education And Awareness& Another V John Harun Mwau & 6 Others [2012] eKLR, The Queen V Big M. Drug Mart Ltd, 1986 LRC9Const.) 332
65. The 1<sup>st</sup> respondent submitted that the Narok County Government Finance Act, 2023, and specifically the first schedule of it is constitutional. The 1<sup>st</sup> respondent contends that the purpose of the enactment of the act and the impact towards the people of narok in respect of the developments and to be done is purely constitutional. Further, the 1<sup>st</sup> respondent adhered to all the provisions of the law while enacting the act.

### **The 2<sup>nd</sup> Respondent Arguments and submissions**

66. The 2<sup>nd</sup> respondent contends that the charges indicated in the first schedule of the Narok County Finance Act 2023 are lawful and proper. The 2<sup>nd</sup> respondent stated that the 2<sup>nd</sup> respondent discharged its mandate under the law and followed the due process in the approval of the narok county finance act.
67. On 27.06.2023 at 9:30 a.m. narok county finance bill for the year 2023/2024 was tabled and read for the first time in the county assembly of Narok.
68. In September 2023 the 2<sup>nd</sup> respondent conducted public participation prior to enactment of the Narok County Finance Bill 2023 in media and press advertisements.
69. On 25.09.2023, the general public stakeholders were invited through local radio stations inter alia Siadi FM and Kass FM using local dialects to attend the public participation forums on 26.09.2023.
70. On 19.09.2023, the 2<sup>nd</sup> respondent placed an advertisement in a nationwide circulating newspaper. The standard on 19.09.2023 invited members of the public and other stakeholders to submit views and memoranda on the Narok County Finance Bill 2023.
71. The 2<sup>nd</sup> respondent contends that the people of narok county were duly invited and they participated in public participation.
  - i. Transmara West Sub County: Shankee Ward at Kilgoris Trading Centre.
  - ii. Narok South Sub County: Narosura/Majimoto Ward at Narosura Trading Centre.



- iii. Transmara South Sub County: Kimintet Ward at Esoit Naibor Trading Centre.
  - iv. Narok East Sub-county: Ildamat Ward at Eor Ekule Trading Centre.
  - v. Emurua Dikirr Sub Couny: Mogondo Ward: Mogondo Trading Centre.
  - vi. Narok West Sub County: Mara Ward at Salabwet Trading Centre.
  - vii. Narok West Sub County: Siana Ward at Talek Trading Centre.
72. The 2<sup>nd</sup> respondent contends that all the stakeholders including the petitioner herein were invited to give their submissions and memoranda on the Narok County Finance Bill through the newspaper advertisements made on 19.09.2023 local FM radio station announcements and public forums.
  73. On 04.10.2023, the Narok County Finance Bill was read for the second time and the assembly adopted the fourth report of the finance and economic planning committee on the Narok County Finance Bill 2023/2023. Thereafter, the bill was read for the third time.
  74. Narok County considered the Narok County Finance Bill 2023 approved it and forwarded it to the county governor of narok for assent.
  75. The 2<sup>nd</sup> respondent contends that it is not mandatory for the act to be published in the county gazette if it is already published in the Kenya gazette as has been reaffirmed by the courts in Kenya.
  76. The 2<sup>nd</sup> respondent contends that the law does not prohibit the governor from assenting to the bill after its approval from the county assembly of narok.
  77. The 2<sup>nd</sup> respondent contends that this petition is frivolous and vexatious and is being used as a scheme meant to coerce the county government of Narok into lowering levies payable to Maasai Mara National Reserve which is a public park which belongs to the people and not the petitioner.
  78. The 2<sup>nd</sup> respondent contends that granting the orders sought by the petitioner will greatly affect the operations of the Narok County government as the county government will be deprived of revenue relevant to the running of operations of narok county contrary to article 175(b) of *the Constitution*.
  79. The 2<sup>nd</sup> respondent contends that the Narok County Finance Bill went through the requisite legislative process having been preceded by the public consultation and engagement following *the Constitution*, the *Public Finance Management Act*, 2012 and the County Government Act, 2012 hence its provisions are lawful and valid. Both the stakeholders and the public were invited to participate and did participate in the process leading to the enactment of the act and the same- neither infringes upon the constitutional rights of the petitioners nor does it impose exorbitant permit fees as alleged by the petitioner.
  80. The 2<sup>nd</sup> respondent contends that the county governor of narok invited Maasai Mara National Reserve investors for a meeting to focus on the implementation actions and the same was not public participation as alleged by the petitioners.
  81. The 2<sup>nd</sup> respondent argued that the petitioner has not met the requisite threshold for obtaining conservatory orders at an interlocutory stage or in the petition as set out in petition 32 of 2017: Kenya Association of Manufacturers & 2 Others Versus Cabinet Secretary Ministry Of Environment And Resources & 3 Others [2017] eKLR.
  82. On prima facie case with probability of success. The 2<sup>nd</sup> respondent contends there was public participation.



83. On prejudice suffered, the 2<sup>nd</sup> respondent contends that the petitioner has not attached any proof of bookings for 2024. the 2<sup>nd</sup> respondent argued that the petitioner had time from 13.10.2023 to 01.01.2024 to communicate the changes of the new Narok Finance Act 2023 to the affected parties to pay the difference.
84. On enhancing constitutional values and objects of the constitutional rights orders sought. They are against the county assembly which is bestowed with the legislative authority of the county and enacted the act after due process was followed.
85. On public interest, the 2<sup>nd</sup> respondent contends that the petitioner has not demonstrated how the reliefs sought are in the public interest. The petitioner has also not shown how the first schedule of the County Government of Narok Finance Act is prejudicial to the national economic policy. Further granting the orders sought in the application and the petition will be prejudicial, negatively and heavily impacting the respondents for the following reasons;
- i. It will disrupt the operational continuity of the Narok County government as it relies on revenue generated through the Narok County Finance Act for effective service delivery as emphasized in Article 175(b) of *the Constitution*.
  - ii. The act is already operational. Staying implementation will interfere with ongoing financial mechanisms plans under the act.
  - iii. There is an interconnectedness of the Narok County Finance Bill with critical planning documents such as the Annual Development Plan (ADP), County Fiscal Strategy Paper (CFSP), and County Budget Outlook Paper (CBOP) provided under Article 220 of *the constitution*, section 108 of the county government act and section 117 and 118 of the *Public Finance Management Act*, 2012.
  - iv. It will prejudice the payment of salaries and funding of key infrastructure projects that the county has already committed to through contracts. The national government funds the county up to 9 Billion and 6 Billion is collected from various revenue sources.
  - v. Narok County is currently in the middle of its financial year. Substantial allocation of national government funds is already utilized as of January 2023. The county is heavily reliant on its own revenue resources.
  - vi. Potential harm to the public interest outweighs the concerns raised by the petitioner.
86. The 2<sup>nd</sup> respondent contends that it has the power to impose and vary the levy which is founded in law in relies on the principle of legality.

#### **The 2<sup>nd</sup> respondent's submissions.**

87. The 2<sup>nd</sup> respondent submitted that the 2<sup>nd</sup> respondent adhered to the constitutional process in enacting the impugned act. The 2<sup>nd</sup> respondent contends that there was public participation and all the requisite procedures were followed. The impugned act was passed on 12/10/2023 and came into effect in January 2024; which provides the petitioners with over two months to notify and adjust the bookings for tourists arriving in 2024 to comply with new rates. The 2<sup>nd</sup> respondent relied on the case of *Tata Chemicals Magadi Limited Vs County Government Of Kajido & 2 Others* [2019] eKLR, *The Supreme Court Of India In Lombardia Wakhana Vs Union Of India* Air[1960] Air 554 Article 185(1) Of *The Constitution*, *Law Society Of Kenya Vs Attorney General Nairobi* Petition No. 318 Of 2012[2013] Eklr.



88. The 2<sup>nd</sup> respondent submitted that the act does not need to be published in the county gazette if it is already published in the Kenya gazette. The 2<sup>nd</sup> respondent contends that the narok county finance act 2023 was published in the Kenya Gazette Supplement and thus exists properly as a county law. The 2<sup>nd</sup> respondent relied on the case of County Government Of Kiambu Versus Kariuki & 3 Others [2021] eKLR, James Gacheru & 3 Others Versus The Attorney General And 11 Others [2017] eKLR, and Kariuki & Another V CEC Nyandarua County & 7 Others (Constitutional Petition E012 Of 2021) [2022] KEHC 16665 (KLR)( 21 December 2022)(Judgment).
89. The 2<sup>nd</sup> respondent submitted that the mere difference in the tourism sector does not amount to discrimination per se. The increase in park entry fees applies uniformly to all persons and is backed by a legitimate aim of enhancing county revenue for sustainable development. Therefore, the claim that the tourism industry has been discriminated against is unfounded and should be dismissed. The 2<sup>nd</sup> respondent relied on the case of the black's law dictionary, article 27(4) of *the Constitution*, Mohammed Abdaba Dida V Debate Media Limited & Another [2018] eKLR.
90. The 2<sup>nd</sup> respondent submitted that the public interest in this matter tilts dismissing the petition dated 15/12/2023 for the reasons that the increment was for a legitimate purpose and is in the interest of the people of Narok County. The act is already being implemented and declaring the first schedule unconstitutional will cripple the operations of the county. The 2<sup>nd</sup> respondent relied on the case of Patrick Musimba v National Land Commission & 4 others [2015] eKLR, article 175(b) of *the constitution*.
91. The 2<sup>nd</sup> respondent submitted that the petitioner is not entitled to costs in a constitutional, matter which relates to the interest of the people of narok. The 2<sup>nd</sup> respondent relied on Olsiri &/ 2 others v attorney general & 14 others (petition(application) 2 (e092) of 2021 [2023] KESC 31 (KLR) (21 April 2023) (ruling).

### **Analysis And Determination.**

92. This court has considered the Petition, the Affidavits on record, and the submissions by both parties.

### **Issues**

93. The main issues for determination are: -
- i. Jurisdiction of the court;
  - ii. Whether there was public participation in the formulation and enactment of the Narok County Finance Act.
  - iii. Whether tax or charges in the law in question discriminates some of the members of the petitioner
  - iv. Whether costs are payable herein

### **Jurisdiction**

94. Jurisdiction is sine qua non adjudication of any dispute by a court of law. This must always be established and affirmed by the court before delving into the issues in controversy.
95. Under article 165(3) of *the Constitution*: -  
Subject to clause (5), the High Court shall have—



- a. unlimited original jurisdiction in criminal and civil matters;
  - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - i. the question whether any law is inconsistent with or in contravention of this Constitution;
    - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - iv. a question relating to conflict of laws under Article 191; and
  - e. any other jurisdiction, original or appellate, conferred on it by legislation.
96. See also article 22 of the Constitution on enforcement of the Bill of Rights
97. This court, therefore, has jurisdiction to adjudicate upon this petition.

### **Of Public participation**

98. Public participation is the big idea, and a constitutional tenet and practice in public decision making, coming to us as one of the National Values and Principles of Governance. Art. 10 of *the Constitution*. It stems from article 1 of *the Constitution*-sovereign authority of the people. Prompting a robust argument that, it is one of the ways the people exercise their sovereign authority in public decision-making. It is involved in the procedural as well as substantive components of the decision-making process, and its core pronouncements must be manifested in the decision made. Any decision which ignores the core pronouncements of public participation process risks being struck down.
99. Hence: the designs meant to engage and facilitate public participation should be able to reach all stakeholders and the residents concerned and enable their active and meaningful participation in the decision-making process.
100. The petitioner submitted that the primary and significantly relevant stakeholders in the Maasai Mara Game Reserve tourism businesses sought to be regulated by the impugned schedule of the Narok County Government Finance Act 2023 were not consulted. The petitioner contends that the alleged engagement by the 1<sup>st</sup> respondent with an isolated number of operators cannot meet the threshold and legitimate expectation. The petitioner relied on Mohamed Ali Baadi and Others V Attorney General & 11others [2018] eKLR, Dominic *Et 3 Others V County Government of Narok Et Another (Constitutional Petition E002 Of 2023)* [2023] KEHC 17908(KLR) (17 April 2023) (Ruling)



101. The petitioner submitted that there was no public participation of any sort and no media/press advertisements were published by the respondents requiring the public to give their views or submit memoranda on the impugned aspects of the bill prior to the enactment thereof.
102. According to the 1<sup>st</sup> respondent, they conducted stakeholders mapping and brought on board all the stakeholders, camp and lodge owners of all the lodges and campsites situated within Maasai Mara National Reserve and the community to collect their views.
103. They invited various stakeholders vide letters dated 19.07.2023 to a meeting held at Sarova Panafric in Nairobi on 01.08.2023. The purpose of the meeting was to delve into the implementation actions as per the management plans that would guide the next steps for the Maasai Mara landscape.
104. The 1<sup>st</sup> respondent stated categorically that, the petitioner herein being a major stakeholder of the Maasai Mara National Reserve was also invited to the meeting through their chief executive officer (CEO) Ms. Ongalo Susan M. Nothing was placed before the court to controvert or make the court not to believe this assertion by the 1<sup>st</sup> respondent.
105. The 1<sup>st</sup> respondent also stated that, the directors and/or proprietors of all the lodges, camps, and hotels situated within the Maasai Mara National Reserve were also invited to the aforementioned meeting vide letters dated 19.07.2023.
106. According to the 1<sup>st</sup> respondent, on 01.08.2023 the Maasai Mara landscape stakeholders meeting was attended majorly by all the stakeholders and camps/lodges owners invited.
107. Of importance, the petitioner was invited and represented by their CEO Ms. Ongalo Susan M who signed in as the 24<sup>th</sup> attendee and Odek Fred who signed in as the 56<sup>TH</sup> Attendee as per the annexed list of attendees. The 1<sup>st</sup> respondent averred that, the petitioner's representatives took part in the deliberations and presented their views without any limitations or reservations.
108. The evidence presented show that, the 1<sup>st</sup> respondent convened another meeting on 10.08.2023 at Sarova Mara with the Maasai Mara National Reserve community and camp beneficiaries.
109. The 1<sup>st</sup> respondent stated that, upon conclusion of the meetings of 01.08.2023 and 10.08.2023 the executive of the 1<sup>st</sup> respondent met to consider the views submitted by all the parties concerned. They formulated a legislative proposal in consideration of the views accumulated from the stakeholders concerning variations of levies, fees, rents, and reserves in the various business sectors within Narok County and the tourism sector.
110. From the material presented to the court, the petitioner was aware and was involved in the process of the formulation and conception of the proposed changes in rates for maasai mara.
111. The 1<sup>st</sup> respondent contends that the proposed variations were necessitated by among other factors the change in the current state of affairs, the need to expand reserve collection and realize and actualize the objectives of the Maasai Mara National Reserve Management Plan 2023-2032, and the Greater Maasai Mara Ecosystem Management Plan 2023-2032.
112. The 1<sup>st</sup> respondent forwarded the formulated legislative proposal to the 2<sup>nd</sup> respondent for consideration. The 2<sup>nd</sup> respondent took into consideration the proposal by the 1<sup>st</sup> respondent and drafted the Narok Finance Bill, 2023 which was then tabled before the 2<sup>nd</sup> respondent.
113. The 2<sup>nd</sup> respondent also outlined the steps taken and mechanisms which they engaged for purposes of, and conducted public participation as by law required. They invited the public through a notice published in the standard newspaper on 19.09.2023 to various meetings to be held on 26.09.2023 at



different venues within Narok county at ward level. Invitations to attend the meetings scheduled for 26.09.2023 were also done through the local radio stations; Sidai FM and Kass FM on 25.09.2023.

114. Accordingly, it is incorrect for the petitioner to state that there was no or any sort of public participation in the formulation and enactment of the finance Act in issue.

### **Heavier taxation burden and discrimination**

115. The petitioner submitted that the impugned legislation seeks to place a disproportionately heavier taxation burden on the petitioner and its members and other similarly placed tourism operators at the expense of other similarly placed tourism operators at the expense of other similar obligated business operators in Narok County; hence, violating the principles of equity and fairness.

### **Equity in tax**

116. These arguments by the petitioner are profound; and bring the discussion of equity in tax into contemporary relevance.
117. Equity in tax occupies important space within a tax policy framework for the National as well as County governments. Equity in tax is seen in two senses; a) neutrality approach; that, taxpayers in similar circumstances should bear a similar tax burden; and b) pareto approach; that, taxpayers in better circumstances should bear a larger part of the tax burden as a proportion of their income.
118. Discrimination in tax should be seen within the context stated below<sup>1</sup>: -
119. Discrimination in taxation should, therefore, establish that taxpayers in similar circumstances do not bear a similar tax burden. But, care should be taken not to confuse having different forms or categories of tax payers or business, with the focus of taxation; equal and neutral application of the principles of taxation to all forms of business.
120. The 2<sup>nd</sup> respondent submitted that the mere difference in the tourism sector does not amount to discrimination per se. The increase in park entry fees applies uniformly to all persons and is backed by a legitimate aim of enhancing county revenue for sustainable development. Therefore, the claim that the tourism industry has been discriminated against is unfounded and should be dismissed. The 2<sup>nd</sup> respondent relied on the case of the black's law dictionary, article 27(4) of *the Constitution*, Mohammed Abdaba Dida V Debate Media Limited & Another [2018] eKLR.
121. Other than claiming that the legislation in question seeks to place a disproportionately heavier taxation burden on the petitioner and its members, the petitioner did not prove through evidence, any discrimination in tax in favor of, or against any particular economic choice or its members in similar circumstances or category.

<sup>1</sup> OECD (2014), "Fundamental principles of taxation", in *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/9789264218789-5-en>

Neutrality: Taxation should seek to be neutral and equitable between forms of business activities. A neutral tax will contribute to efficiency by ensuring that optimal allocation of the means of production is achieved. A distortion, and the corresponding deadweight loss, will occur when changes in price trigger different changes in supply and demand than would occur in the absence of tax. In this sense, neutrality also entails that the tax system raises revenue while minimising discrimination in favour of, or against, any particular economic choice. This implies that the same principles of taxation should apply to all forms of business, while addressing specific features that may otherwise undermine an equal and neutral application of those principles.



## **Cancellation of bookings**

122. The petitioner contends that some of the tour operators have experienced cancellations of the bookings arising directly from the increased cost of the tour packages already booked before the increment was made. The petitioner relied on article 10(2)(a)(b) 27(1)(4), 210(1)(b), 209(5), 259 of *the Constitution*.
123. The 1<sup>st</sup> respondent submitted that the charges /fees imposed by the first schedule of Narok County Government Finance Act, 2023 are not exorbitant or unfair towards the petitioner as the respondents considered the public views, their policies, and the revenue they ought to raise to meet their budget. The 1<sup>st</sup> respondent relied on articles 185(2) and 209(4) of *the Constitution*.
124. The 1<sup>st</sup> respondent submitted that the Narok County Government Finance Act, 2023 does not offend Article 209(5) of *the Constitution*.
125. Article 209(5) of *the Constitution* provides that: -
- The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.
126. The petitioner claimed that its members have been prejudiced by the tax changes; and have had bookings cancelled. But, the list on cancellations provided by the petitioner does not identify the cancellations to any particular tour operator. It does not also state the reason for the cancellation. An attempt to provide the reason for cancellations of booking through some of the letters provided failed to connect to the specific cancellation in the list of cancellations on bookings. The relationship amongst the letters, the list of cancellations, the particular tour operators and the allegations of discrimination in tax and disproportionately heavier tax burden as the cause for the cancellation of bookings was not established.
127. Whereas cancellations of bookings may have occurred, it was not proved that there was discrimination in tax against the petitioner's members or that they suffered a heavier or disproportionately heavier tax burden as a result of which they suffered cancellation of bookings. The nexus amongst these allegations was necessary. It was not established.
128. There is also nothing to show that the taxation and other revenue-raising powers of a county have been 'exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour'. Article 209(5) of *the Constitution* has not been offended.

## **Of Gazettement of the Act**

129. The petitioner submitted that a tax, levy, or charge can only be charged if it is provided for under the law which must itself be constitutionally incepted. The petitioner contends there was no publication of the impugned Act in the Narok County Gazette.
130. In response to this issue, the 1<sup>st</sup> respondent submitted that the Narok County Government Finance Act, 2023 was published in the Kenya Gazette; a recognized gazette as per article 199(1) of *the Constitution*. The 1<sup>st</sup> respondent relied on section 260 of *the constitution*.
131. The 2<sup>nd</sup> respondent submitted that the act does not need to be published in the county gazette if it is already published in the Kenya gazette. The 2<sup>nd</sup> respondent contends that the narok county finance act 2023 was published in the Kenya Gazette Supplement and thus exists properly as a county law. The 2<sup>nd</sup>



respondent relied on the case of County Government Of Kiambu Versus Kariuki & 3 Others [2021] eKLR, James Gacheru & 3 Others Versus The Attorney General And 11 Others [2017] eKLR, and Kariuki & Another V CEC Nyandarua County & 7 Others (Constitutional Petition E012 Of 2021) [2022] KEHC 16665 (KLR)( 21 December 2022)(Judgment).

132. Of publication of county legislation, Article 199 provides that: -
1. County legislation does not take effect unless published in the Gazette.
  2. National and county legislation may prescribe additional requirements in respect of the publication of county legislation.

133. Under article 260 of *the Constitution*: -

“Gazette” means the Kenya Gazette published by authority of the national government, or a supplement to the Kenya Gazette

134. Article 199(1) of *the Constitution* makes it mandatory for County legislation to be published in the Kenya Gazette or supplement to the Kenya Gazette in order to take effect. Sub-article (2) thereof, is directory. Therefore, as the Narok County Act was published in the Kenya Gazette, it takes effect as and is county legislation for all purposes. There is no dearth of judicial authorities in respect to this subject which it is needless to multiply.

### **Conclusions and orders**

135. The petition was not proved as required in law. Whereas cancellations may have occurred, it was not proved that there was discrimination against the petitioner’s members or that they suffered a heavier or disproportionately heavier tax burden as a result of which they suffered cancellation of bookings. The nexus amongst these allegations was necessary. It was not established.

### **Costs**

136. The 2<sup>nd</sup> respondent submitted that the petitioner is not entitled to costs in a constitutional matter which relates to the interest of the people of Narok.
137. In the same breath, the proceedings are in public interest litigation and there is no special reason to award anyone costs.
138. In the upshot, the petition is dismissed. Each party shall bear own costs.
139. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH TEAMS APPLICATION, THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2025**

**F. GIKONYO M**

**JUDGE**

In the presence of: -

Makori C/A

Harrison for petitioner

Ms. Cheruto for 1<sup>st</sup> respondent

N/A for 2<sup>nd</sup> respondent

