Laikipia Conservancies Association v County Government of Laikipia & another (Constitutional Petition E001 of 2024) [2025] KEHC 8924 (KLR) (23 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CONSTITUTIONAL PETITION E001 OF 2024

AK NDUNG'U, J

JUNE 23, 2025

BETWEEN

LAIKIPIA CONSERVANCIES ASSOCIATION ..... PETITIONER

AND

COUNTY GOVERNMENT OF LAIKIPIA ..... 1ST RESPONDENT

COUNTY ASSEMBLY OF LAIKIPIA ..... 2ND RESPONDENT

JUDGMENT

1. The Petitioner's case is set out in the Petition dated 14/05/2024. The Petitioner is a registered society and a membership organisation comprising several conservancies within Laikipia County and comprises over 30 conservancies and ecolodges covering conservation and socio-economic activities in over 4,000 square kilometres of land. That it works to promote the sustainable management of natural resources, wildlife conservation and community development among other purposes.

2. That sometimes in 2023, the 1st Respondent issued an invitation to stakeholders and members of the public to submit their views on the proposed *Laikipia County Finance Act, 2024* (hereinafter referred as the Act) and carried a public participation exercise where the Petitioner submitted their views. Consequently, the 1st Respondent developed the Laikipia Finance Bill which was submitted to the 2nd Respondent and it was expected that the 2nd Respondent would invite the stakeholders and public to public participation before the enactment of the Bill. The 2nd Respondent on 18/01/2024, contrary to the law and expectation, published invitation for memoranda regarding the Bill on its website and demanded that the memoranda be received by 31/01/2024 which was a short period and the memoranda was in English and published in a media that was inaccessible to majority of the affected population, mainly pastoralists and farmers with limited access to internet and failed to take into account that majority of targeted population would not understand the content.

3. Additionally, the Bill had not been made available to the public making it impossible for the public and stakeholders to study and give their views. The 2nd Respondent proceeded to debate the Bill and amended it from the proposal submitted by the 1st Respondent without carrying out public meetings and consultations. Further, the 2nd Respondent introduced new tax rates unreasonably higher that those proposed by the 1st Respondent and especially on the land rates by over 300%. That the 2nd respondent action of amending the 1st Respondent's proposal shows that the 2nd Respondent arrogated itself the power of policy making and budgeting and created a drastically new law without public participation. That prior to the enactment of the impugned law, the 1st Respondent had issued County's Fiscal Strategy Paper and therefore the 2nd Respondent was estopped from purporting to act contrary to the express statements in the strategy that the tax rates would remain stable and taxation would comply with the principles of transparency, fairness and equity.

4. The impugned law changes the land rates from Kshs 20/- per acre to Kshs 60/- per acre which is an increase of 300% which is inconsistent with previous increment patterns and amount to unreasonableness and unfairness. Further, the charges apply to conservancies only which amounts to unlawful discrimination under Article 27 of the *Constitution*. That it also introduces land rates on communal conservancies operated on community land which have never been subjected to rates which is a shift in policy without notice and public participation therefore amounting to a limitation of right to property under Article 40 of the *Constitution*. That the requirement for the conservancies to put up electric fence and pay a punitive tax is inconsistent with prevailing government's agenda of encouraging private sector growth and controlling human wildlife conflict and designed to bankrupt Petitioner's members.

5. That the impugned law is subjecting the Petitioner to double taxation by introducing charges that are a preserve of the national government including aircraft landing charges whereas the aerodromes/ airfields operated by conservancies are licensed by Kenya Airports Authority under section 8 and 12(3) of the *Kenya Airports Authority Act* whereby they pay a license fee; The installation of internet charges whereas the function of licensing and regulating such is a preserve of national government; tourism license/conservation charges anchored on a bed capacity where the impugned law introduces taxes/ license fee for tourist facilities whereas this is being exercised by Tourism Regulatory Authority under sections 7 and 98 of the *Tourism Act*; levies for commercial filming and research activities of which the license fees are payable under the *Films and Stage Plays Act*.

6. By the Respondents' action, the Petitioner claimed that the Respondents contravened the following constitutional and statutory provisions;

    a. Article 201 of the *Constitution* that encourages public participation in financial matters. Section 107 of the *Public Finance Management Act* (*PFMA*) that requires county to comply with the principles of fair taxation. That the impugned law violates the provisions of Section 108, 117, 125, 132(1), (2) & (3) and 133 of *PFMA* as it places the burden of taxation on the Petitioner's members without a corresponding burden on other sectors. Further, that contrary to Section 21 of the *County Governments Act* the 2nd Respondent proceeded and mutilated the proposals of the 1st Respondent and enacted law which did not conform to the 1st Respondent's recommendations.

    b. Article 186 and 209 of the *Constitution* and section 161 of *PFMA* in that the taxes overlapping the national government functions in the impugned law were introduced without following Article 209(5) of the *Constitution*. That under Article 209, only the national government can impose income taxes and the charges relating to bed capacity of the conservancies are akin to income tax which are defined as tourism levy under the *Tourism Act* and imposing such

charges by the County amounts to double taxation. This also applies to civil aviation and telecommunication which are functions of the national government under Fourth Schedule of the *Constitution*. Hence, purporting to introduce license for operations of airstrips and wired internet connectivity is not a devolved function.

c. Contravention of Article 174, 196(1) of the *Constitution*, Section 117 of the *PFMA*, sections 87 and 115 of the *County Governments Act* and the Laikipia County Public Participation Act, 2014. In that the 2nd Respondent passed the new law without meaningful public participation. It failed to comply with Laikipia County Public Participation Act which required the 2nd Respondent to ensure that the general public and stakeholders were made aware, in a timely manner, of the upcoming legislation, had ample and reasonable time to comment on it and were accorded opportunities at public meetings of the 2nd Respondents to ventilate their views. That the process of calling for memoranda by the 2nd Respondent was restrictive and designed to deny the stakeholders and the public a reasonable opportunity to give their views. It deviated from the norm where legitimate expectation had been created that a finance bill would be subjected to discussion at public meetings. That the bill having being subjected to extensive public participation by the 1st Respondent, the 2nd Respondent could only pass it without amendments in the event that it did not intend to conduct meaningful public participation.

d. Failure to conduct regulatory impact assessment contrary to section 5 of the *Statutory Instruments Act*. That the Respondents failed to conduct a meaningful assessment to determine the likely impact of the new regulations, taxes, fees and charges on the stakeholders, the public and the economy of the County. That they ought to have known that the new taxes would have adverse effects on the Petitioner's members and ought to have taken step to assess their impact. That section 5(2) requires that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed contents.

e. Contravention of Article 40 of the *Constitution* on the right to property. That the unreasonable taxation is a disguised limitation on their right to property.

7. That the following provisions are unconstitutional, unlawful, irrational and illegitimate;

a. Eighth schedule Part IV(B) on annual land rates which is discriminatory.

b. Eighth Schedule Part XI on building plan approval (electric fence) is punitive and restricts Petitioner's ability to protect themselves against encroachment.

c. Second Schedule Part XVII on commercial filming activities which constitutes double taxation.

d. Second Schedule Part XVIII on sticker for research activities which is excessive.

e. Third Schedule Section N on education, commercial research activities which amounts to double taxation.

f. Third Schedule Part III Section H Part II on special accommodation and food service activities which amounts to double taxation.

g. Third Schedule Part III Section M Part IV on airstrips annual permit which constitutes double taxation.

8. That the Petitioner and its members supports thousands of livelihoods through employment hence, the impugned provisions risks collapsing their business and rendering these dependent populations without dependable livelihood.

9. Because of the said violation, the reliefs sought are as follows;

   i. A declaration that *Laikipia County Finance Act, 2024* does not meet the statutory and Constitutional threshold to be a valid law.

   ii. A declaration that the Act violates the *Constitution* to the extent that it provides for imposition of taxes, charges and fees by the county government which overlap with the functions of the national government.

   iii. A declaration that the Act violates the *Constitution* to the extent that it increased the land rates multiple times in respect of conservancies.

   iv. A declaration that the Act violates the *Constitution* as it is discriminatory adversely against the Petitioner's members.

   v. A declaration that the Act is unconstitutional, unlawful, irrational and illegitimate, and therefore invalid and unenforceable and especially taxes, levies, fees or charges mentioned earlier.

   vi. An order of *certiorari* bringing to the court the Act and any instrument made thereunder, for purposes of being quashed, and specifically an order quashing eight Schedule Part IV(B), Eighth Schedule Part XI, Second Schedule Part XVII, Second Schedule Part XVIII, Third Schedule Section N, Third Schedule Part III Section H Part II, Third Schedule Part III Section M Part IV.

   vii. An order of prohibition directed at the 1st and 2nd Respondents against implementation of the Act.

   viii. A permanent injunction to the 1st and 2nd Respondents and anyone acting on their behalf, from implementing the provisions of the Act specifically a prohibition against the 1st Respondent from collecting or charging fees, levies and or/taxes earlier stated.

   ix. An order of *mandamus* compelling the Respondents to withdraw any demands on rates, rent or any payment whatsoever arising from the impugned Act.

   x. An order of *mandamus* compelling the Respondents to refund all, or any payment made as a result of the impugned Act.

   xi. Costs of the petition.

   xii. Any other relief that this court deems fit to grant in the interest of justice.

10. The petition is supported by an affidavit of Peter Matunge, Chief Executive Officer of the Petitioner. He affirmed the contents as contained in the petition and averred that they learnt about the invitation for memoranda that was published by the 2nd Respondent way after the impugned law had already been enacted. That when the enacted Bill was presented to the Governor for assent, it was noted there were material differences between the Bill the 1st Respondent submitted and the enacted Bill and the Governor invited the 2nd Respondent to reconsider the Bill and specifically the increased land rates for conservancies. By amending the 1st Respondent's proposal, the 2nd Respondent created a new finance policy and allocated itself the power of policy making and budgeting and created new law without public participation without adhering to principle of taxation and public finance management.

11. In opposing the petition, the 1st Respondent filed a replying affidavit dated 29/05/2024 sworn by Samuel Gachigi, the county executive member in charge of finance, economic planning and county

development for the 1st Respondent. He averred that Article 175 of the *Constitution* mandates the county governments to create reliable source of income whereas Article 209(4) and 210 empowers the 1st Respondent to charge fees and taxes and provides for legislation to impose such charges. Article 185 also bestows the 2nd Respondent with the mandate to legislate and define the fees and charges to be administered which is an independent function not subject to supervision by the court. That even if H.E the Governor had submitted a memorandum of reservations and returned the bill back to the Assembly for reconsideration, this did not bar the assembly from administering its mandate to pass the bill with or without amendments. That the role of legislation is with the 2nd Respondent and it has the mandate of passing the bill as it is or amending it without further reference to the 1st Respondent.

12. He averred that the Petitioner is misdirecting the court by intimating that only conservancies are charged rates whereas the eighth schedule charges land rates generally. The said schedule also charges land rates to community land where commercial activities take place contrary to Petitioner's claim. That the annual rates have been Kshs 20/- per acre and economic times have changed and the law needed to change to be economically viable and to ensure that the 1st Respondent is able to maintain the infrastructure used by the Petitioner for its economic activities. Therefore, the raise of land rates is reasonable and adheres to the fiscal principles enshrined in Article 201 of the *Constitution*.

13. Further, the requirement to pay fees for putting up fences is a mandatory requirement set up in *Physical Land Use Planning Act, 2019*. That according to 2nd Schedule Part XVII, the Respondents are not mandated to regulate commercial filming but have the mandate to levy fees for economic activities undertaken within the county boundaries. Additionally, local tourism is a devolved function and therefore, the county has a mandate to levy license fees for accommodation and food services and the same does not amount to double taxation. On the airstrip annual permit, he averred that the conservancies ferry tourists by use of airplanes and it is just for the Respondents to charge annual permits as a source of revenue generating platform. Further, the Respondents do not charge fees for education but for institutions and conservancies undertaking research as a commercial activity. That contrary to the petitioner's assertions, double taxation is taxing of the same income twice and the Respondents are charging the trade levy whilst payment to the national government is a regulatory license.

14. He averred that the 2nd Respondent has the discretion to create charges and legislate for their administration and the Petitioners are inviting the court to usurp the role of the 2nd Respondent. That the county strategy fiscal paper is a guideline that provides for targets which if not met may cripple the operations of the 1st Respondent and therefore it is reasonable for the Respondent to increase tax rates and the Act cannot be invalidated by the Petitioner's argument that the fiscal paper was not followed.

15. That the Respondent and people of Laikipia stand to be greatly prejudiced if the Act is invalidated. The public interest outweighs the interests of the Petitioner as no irreparable harm will be suffered by the Petitioner whereas if the court determines in Petitioner's favour, it shall cause adverse effects that go against public interest. The Respondents stand to lose in revenue collection, discharge of its mandate and services to the people which cannot be quantified or compensated by way of damages. That the grant of the orders sought would be an affront to the doctrine of separation of powers as the court is being invited to encroach on the mandate of county government and therefore the petition is devoid of merit.

16. The 2nd Respondent filed a replying affidavit dated 08/06/2024 sworn by Peter Hinga Ndirangu, Clerk of the County Assembly of Laikipia and the chief accounting officer of the Assembly. He averred that Article 209(3) of the *Constitution* gives county governments authority to impose levies, property rates, entertainment charges and other taxes or fees authorised by the Finance Act and the *Constitution*

gives county government the discretion to impose such taxes in a manner they deem reasonable. That the Petitioner admitted that public participation occurred save for modalities and scope of public participation. That public participation is two tiers in that, the public gives its views and the county assembly gives its recommendations thus where a member of the public has not participated, his/her representative will have the floor to contribute and enhance the budgetary and financial policy. That the 2nd Respondent followed the due process in debating and approval of the Bill. Further, there are no parameters for measuring the effectiveness of public participation.

17. He deposed that the Petitioner has not demonstrated that its members have been paying other taxes or levies to the national government and even if they have been paying, the same must constitute levies from other national government agencies and departments which regulate activities within the conservancies and therefore, this cannot amount to double taxation as double taxation occurs where a tax is levied on a person bearing the same names and for the same activity. That Petitioners are not targeted or discriminated as all properties within municipalities, township and urban centres have been paying land rates. Additionally, the charge on erection of electric fences is for purposes of compliance with the regulator, ensuring safety and maintain standards as per the County Physical Planning Act and is not targeted at the conservancies and does not target the already fenced properties.

18. That the charge on commercial filming activities is targeted at those doing filming for commercial activities whereas the levy under the Stage Plays Act is purely for regulation purposes by Kenya Films Classification Board and this cannot therefore amount to double taxation. Further, that the Act cannot be unconstitutional or invalidated merely because it has not met the desire of the Petitioner and the increase on the land rates is not excessive given the acreage covered and the time when the rates are payable. That the Petitioner has not sought any tax exemption and that the law should not be applied selectively.

19. The petition was canvassed by way of written submissions. The Petitioner's counsel submitted that the Act has introduced charges that contravene the constitutional principles of equity and fairness and duplicate taxes and levies already imposed by the national government and it was enacted without meaningful public participation. That the impugned Act and especially the provisions on the increase on the land rates will cripple the operations of the Petitioner's members.

20. As to whether the enactment adhered to public participation requirement, he submitted that public participation is enshrined in Article 10, 174, 196, 201 and 232 of the *Constitution* and mandates meaningful engagement, accessibility and transparency in decision making. That the invitation to memoranda on the Bill by the 2nd Respondent was published in its website and was an afterthought, short lived and available to privileged few and only provided for 13 days which was inadequate for meaningful engagement. Further, the notice was inaccessible to majority of Laikipia residents like Pastoralists, farmers and laborers who lack access to the internet or the media the 2nd Respondent relied upon and it was drafted in English disregarding the linguistic and educational realities of the people and it was never made publicly available to allow the stakeholders an opportunity to scrutinise its provisions and respond.

21. Additionally, Article 10(2) of the *Constitution* emphasises on participation of the people and its spirit is that decisions should not be made affecting the people without recourse to them. That this is affirmed in section 87 of *PFMA* and Section 115 of *County Governments Act* which mandate counties to foster inclusive and substantive participation in legislative process. Reliance was placed on the case of *David Ndii and others v Attorney General and others* (2021) eKLR where the court stated that public participation must include dissemination of information, invitation to participate in the process and consultation on the legislation and must be effective to meet the constitutional standard. That the

2nd Respondent failed to convene any public consultations forums and proceeded to debate the Bill in a manner that was opaque and arbitrary and departed from the draft that was subjected to public participation. The Respondents' actions reduced public participation to an empty formality rendering the enactment process fatally flawed and did not meet the qualitative nor quantitative components required under the law as was held in *British American Tobacco Kenya PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* (2019) eKLR. Further, the burden shifted on the Respondents to demonstrate that public participation met constitutional standards as was held in *Kenya Human Rights Commission v Attorney General & another* (2018) eKLR.

22. On whether the impugned Act contravenes the principles of taxation and *PFMA* as set out in Article 201 of the *Constitution*, it is submitted that the Act introduces 300% increase in land rates from Kshs 20 to 60 per acre whereas the 1st Respondent's proposal in the Bill was Kshs 35/- per acre. That this is only applicable to conservancies which is inequitable and discriminatory taxation which violates Article 201(b)(i) which requires taxation burden to be shared fairly and Article 27 which prohibits discrimination. The Act further violates the principles of predictability and transparency as enshrined in Article 201(a) and *PFMA* in that the 2nd Respondent introduced the exorbitant 300% increase in land rates contrary to the assurance in the 2023 Fiscal Strategy Paper by the 1st Respondent. That the increment deviated from previous tax increment patterns thereby undermining the predictability and fairness of fiscal policies. That the Act introduces excessive levies on critical functions such as sticker for research vehicles, electric fencing thereby threatening the financial viability of the conservancies. The imposition of higher land rates on communal conservancies which has been exempt from such taxes is an interference with property rights under Article 40 of the *Constitution*. That this violates Article 201(b)(iii) which requires fiscal policies to promote development and make provisions for marginalised groups. Further, this is against the government's aims of fostering private sector growth and managing human-wildlife conflict and will lead to significant prejudice. Imposition of filming and aerodromes charges which are regulated by the national government burden the Petitioner and the members of the public and the risk of prejudice was highlighted by the 1st Respondent reference memorandum to the 2nd Respondent which concerns were not taken into account.

23. As to whether Petitioner's legitimate expectation was violated, he submitted that the Petitioner had a legitimate expectation that the tax policy would be consistent with the law and the increase on taxes violates this expectation. That the 1st Respondent's Fiscal Strategy Paper assured stakeholders, including the Petitioner and its members of stable and equitable tax polices which led the Petitioners and others to reasonably anticipate the continuation of a fair and predictable taxation measures but the 2nd Respondent's actions which introduced drastic tax increase were inconsistent with these assurances. Additionally, the Petitioner reasonably expected robust public participation consistent with the previous practices and departure from the procedure violated the Petitioner's legitimate expectations and detracted from the sanctity of participatory democracy. That the increment on the land rates, and levies on electric fencing undermines the Petitioner's legitimate expectation of fair treatment under the law.

24. Regarding the question whether the impugned act is inconsistent with the principle of devolution under the *Constitution*, it is submitted that the imposition of airstrips annual permit, special accommodation and food service activities (conservancies and ecolodges), commercial filming activities in private conservancies, education and commercial research activities (private conservancies) falls within the exclusive mandate of the national government and this constitute an encroachment on the power granted to the national government and amounts to double taxation. That the amendments to

the Bill was a violation of Section 132 of *PFMA* which grants the 1st Respondent exclusive authority in setting fiscal policy. That the levies on erecting electric fence and sticker for research vehicles assessed using irrational parameters is inconsistent with the government agenda of promoting private sector growth and undermine the objectives of devolution. Further, the imposition of taxes on communal conservancies is a drastic shift in policy and lack of notice, public participation and justification and this policy change shows abuse of devolved powers and failure to uphold constitutional principles of equity and transparency.

25. Petitioner maintains that it is entitled to the reliefs sought, as it has been demonstrated that the Act is unconstitutional, procedurally defective, and discriminatory and its implementation would devastate Petitioner's members triggering financial collapse, mass unemployment and irreparable harm to conservation efforts. He urged the court to exercise its jurisdiction decisively not only to protect the rights of conservancies but also to uphold the rule of law.

26. In rejoinder, the 1st Respondent counsel argued that one of the factors to consider when looking into public participation are the stakeholders who are affected by such legislation. That the Petitioner contended that the impugned notice was not intended for the populace of the conservancies like pastoralists, subsistence farmers and labourers whereas the Petitioner comprises of a section of land owners whose activities are affected by the impugned provisions hence, they formed the representation of stakeholder membership and reliance was placed on the case of *Commissioner General Kenya Revenue Authority v Okoiti & 2 others* (Civil Appeal 100 of 2018) [2023] KECA 1278(KLR) where the court was of the view that the fact that there was representation of key stakeholders, a consultative meeting in every county was not necessary to pass the test of public participation.

27. Counsel submitted that the notice issued by the 2nd Respondent contained the notice to the public, investors, civil society organisations, non-governmental organisations, faith-based group, any interested persons and special groups. It also had notice on access to the Finance Bill by obtaining copies from community libraries, the Assembly's website and all sub county offices within the county and a two weeks notice to submit the memoranda. Counsel relied on the case of *Minister of health v New Click South Africa (PTY) Ltd* where the court stated that it does not matter how public participation was effected and that it cannot be expected that a personal hearing will be given to every individual and what is necessary is that the nature of the concerns ought to be communicated to the law maker and taken into account and reliance was placed on the decision in *BAT v Cabinet Secretary for Health*(*supra*) where the court held that the concerned agency should give reasonable opportunity for public participation and any person affected by legislation should be given an opportunity to be heard and that the stakeholder meetings, discussions and communications, constituted adequate public participation. The Petitioner took an active role in consulting on the provisions of the Bill before it was tabled to the 2nd Respondent hence the public was aware of the Finance Bill before and after it was tabled before the assembly and its provisions did not come as a shock to them as they actively participated. That the Petitioner refused to participate in the process by the 2nd Respondent by not submitting their memoranda or comments within the 14 days given.

28. Regarding the change of land rates from Kshs 20 to Kshs 60, the counsel submitted that the public participation that was done by the 1st Respondent had already incorporated the increase from Kshs 20 to Kshs 60 and the 2nd Respondent calling for comments on Kshs 60/- instead of proposed Kshs 35 was not a substantive change introduced as to warrant fresh public participation and relied on Supreme court decision in Petition no E031 consolidated with E032 & E033 where the court discussed in length as to what amounted to a substantive amendment. That the 2nd Respondent is obligated to legislate and the 1st Respondent only makes legislative proposals to the county assembly hence the memorandum of

reservation that was submitted by the governor was not binding upon the 2nd Respondent to comply with its contents but to consider. Otherwise, the principle of separation of powers would be lost.

29. Addressing the issue of double taxation, counsel submitted that Article 209(3) of the *Constitution* allows counties to impose any taxes authorised to impose by an Act of Parliament hence, the Petitioner's contention is misguided and contrary to the *Constitution*. That the imperative on the impugned provision was the term commercial which translates to making profit and the 1st Respondent's Mandate begins in trade development through regulating trade licenses. That the purpose of *Tourism Act*, *Kenya Airports Authority Act* and Kenya *Films and Stage Plays Act* are different from the Finance Act, 2024.

30. With respect to commercial filming activities in private conservancies, counsel argued that the Act mandates the Respondents to levy fees for trade development hence the Petitioner while undertaking commercial filming activities are obligated to pay fees for the commercial activity, being a business as opposed to the national obligation to get a regulatory license to film a specific classification of film meant for a specific audience upon attainment of the approval from the classification board hence, it does not amount to duplication of levy. Further, the Petitioner has not proved payment of a trade license to undertake commercial filming activity from the national government.

31. With respect to special accommodation and food services activities (conservancies and ecolodges), counsel argued that Fourth Schedule, part 2 of the *Constitution* provides for local tourism as part of devolved functions therefore, this allows the Respondents to regulate trade development in this sector and reliance was placed on the case of *Red roof Inn Hotel v the Attorney General & another* (2022)eKLR where the court held that tourism function is shared by both levels of government.

32. As to airstrips annual permit, it is submitted that the role of the Kenya Airport authority in private airstrips under the Airports Authority Act is to approve establishment of private airstrips and control the operations thereof and impose charges for any services performed by the authority and grant license and permit. That the licenses issued by the authority regulate operations of aerodromes and landing fees charged by the national government on government aerodromes and not private airstrips. That the county regulates development through trade licenses whereas the authority does not regulate the trade but control for other purposes than trade.

33. On education and commercial research activities (private conservancies), counsel submits that a research institute is registrable under the *Science, Technology and Innovation Act*, 2013 and the *Science, Technology and Innovation (Research Licensing) Regulations, 2014*) and therefore, to be considered as a research institute, petitioner's members must be registered as such under the aforementioned Act. Therefore, where petitioner's members are not registered, they ought to apply for a research license and the owner of the license has to inform the governor the area of research before commencement and failure to which will lead to cancellation of the license. That the Authority does not control or regulate the trade or business behind the use of conservancy for research activities. Further, commercial research activities in public game reserves have also been charged.

34. With respect to telecommunication installation charges, it is submitted that the fees charged is for installation of masts which is not regulatory neither a licence and therefore does not fall under the ambit of Kenya Information and Communications (Amendment) Act, 2013 and it is not provided for. In regard to research stickers on the vehicles, it is urged that this is considered that as an advertisement and any advertisement has a levy and Section 15 of the Act states that no other government entity shall regulate and levy fees on outdoor advertising.

35. On claim of discrimination due to increase of land rates, counsel submitted that other land rates are charged between 0.5 to 4% depending on the area. Plots are charged Kshs 100/- per acre and this land

rate is for properties that are not conservancies. As to building plan approvals on electric fence, counsel submitted that the *Physical and Land Use Planning Act*, 2019 and *Physical and Land Use Planning (General Development Permissions and Control) Regulations, 2021* govern electric fences the objective being to promote public safety and health. Further, the levy cut across all development applications and is not restricted to the Petitioner alone and this is not a punitive fee.

36. Counsel submitted that the Act was guided by Article 201 of the *Constitution* and the conundrum of legitimate expectation. That there is need for public interest to prevail over that of a select few. That the 2nd respondent is mandated under section 133 of *PFMA* to enact Finance Act to ensure revenue is raised. Additionally, the Finance Act is not a subsidiary legislation under the *PFMA*, as asserted by the Petitioner and therefore, the Act did not necessitate the development of a regulatory impact assessment and reliance was placed on the case of *Robert N. Gakuru & others v County Government of Kiambu* (*supra*). That in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. That issuing permanent injunctive orders from enforcing the impugned provisions would be akin to court acting contrary to constitutional provisions on separation of powers. That any levies that have been voluntarily paid cannot be assumed as null therefore, an order for *mandamus* compelling the Respondent to refund cannot stand.

37. I have had occasion to consider the Petition, the responses and learned submissions made. Under challenge in the petition is the constitutionality of the *Laikipia County Finance Act, 2024* and specifically Eighth Schedule Part IV(B), Eighth Schedule Part XI, Second Schedule Part XVII, Second Schedule Part XVIII, Third Schedule Section N, Third Schedule Part III Section H Part II, Third Schedule Part III Section M Part IV.

38. On the material before court, the issues for determination can be sieved and listed follows;

    i. Whether the constitutional and statutory threshold for public participation were met in the enactment of the Laikipia County Finance Act 2024.

    ii. Whether the Act violates the *Constitution* by imposition of taxes, charges and fees by the county government which overlap with the those of the national government leading to double taxation.

    iii. Whether the act is unconstitutional for imposing a substantive and punitive increase in land rates in respect of conservancies.

    iv. Whether the Act is discriminatory adversely against the Petitioner's members.

39. When considering the constitutionality of an Act, the court has to bear in mind the principle of constitutionality of a statute such that a statute should be presumed to be constitutional until the contrary was proved.

40. Further, while in deference to the time honoured doctrine of separation of powers in a constitutional democracy, this court must assume its jurisdiction to protect constitutionalism to ensure that anything done by the other arms of Government including the passing of legislation by parliament (and in our case by the County Assembly of Laikipia) conforms to the *Constitution*.

41. The Supreme Court addressed this duty and power in *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* (Advisory Opinion Reference 2

of 2013) [2013] KESC 7 (KLR) (1 November 2013) (Advisory Opinion) (with dissent - NS Ndungu, SCJ) where quoting from comparative jurisprudence the court stated;

> "Such a perception is vindicated in comparative experience. The Supreme Court of Zimbabwe, in *Biti & another v Minister of Justice, Legal and Parliamentary Affairs and another* (46/02) (2002) ZWSC10, was called upon to determine the constitutional validity of the General Laws Act, 2002 (Act No 2 of 2002). It had been claimed that the passing of the said statute was characterized by irregularities that constituted a breach of the Standing Orders as well as the Constitution of Zimbabwe and that, consequently, the statute was unconstitutional. The Court thus held:
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> > "In a constitutional democracy it is the Courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament....In *Smith v Mutasa* it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens...."

42. The position is not different in the case of Canada, as emerges from *Amax Potash Ltd. v government of Saskatchewan* [1977] 2 S.C.R. 576 [at p.590]:

> "A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the *Constitution* in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."

43. It is within this background and context that I now proceed to examine the issues raised in this petition.

Whether the constitutional and statutory threshold for public participation were met in the enactment of the Laikipia County Finance Act 2024.

44. It is the petitioner's case that in 2023 the Ist Respondent issued an invitation to stakeholders and members of the public to submit their views on the proposed *Laikipia County Finance Act*. A comprehensive public participation exercise was conducted where the petitioner, its members, stakeholders and members of the public submitted their views.

45. The 1st respondent then prepared the Laikipia County Finance Bill which Bill was submitted to the 2nd Respondent for debate and enactment. It is averred that the 2nd Respondent failed to convene any public consultations forums and only published a an invitation for memoranda regarding the Bill on its website around 18th of January 2024 demanding that the memoranda be received by 31st January 2024. This period is considered by the Petitioner as short and inadequate.

46. Further, that the invite was in the English language and the publication was in a media that was not accessible to a majority of the affected population who are pastoralists and other subsistence farmers and workers with limited access to internet or the media used by the 2nd Respondent. The 2nd Respondent is accused of failure to make copies of the Bill available to the public denying them the opportunity to study it and give views.

47. The petitioner adds that the 2nd Respondent proceeded to debate the Bill and in the process introduced higher tax rates than those proposed by the 1st Respondent.

48. The 2nd Respondents case is that the Petitioner admitted that public participation occurred save for modalities and scope of public participation. That public participation is two tiers in that, the public gives its views and the county assembly gives its recommendations thus where a member of the public has not participated, his/her representative will have the floor to contribute and enhance the budgetary and financial policy.

49. Public participation, a core national value and governance principle prominently enshrined in the *Constitution* of Kenya as provided in Articles 10, 118 and 232. Article 10 (2) (a) as well as Section 87 and 115 of the *County Governments Act* specifically, emphasizes on participation of the people in governance. The requirement entrenches the sovereignty of the people allowing the people to shape their destiny in matters that affect them.

50. The importance of that requirement was that the participation of the people in their affairs gave impetus to good governance, improved service delivery and responsiveness of government and its agencies.

51. The guiding principles regarding public participation have not found legislative compass yet but the same have now crystalized following numerous pronouncements by our courts.

52. The Supreme Court in *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* [2019] KESC 15 (KLR) particularised the principles as follows;

    i. a constitutional principle under article 10(2) of the *Constitution*, public participation applies to all aspects of governance.

    ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

    iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

    iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

    v. Public participation is not an abstract notion; it must be purposive and meaningful.

    vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

    vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

    viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

    ix. Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

53. Juxtaposing these principles with the facts in this petition, it is clear, and indeed it is admitted as much, that the public participation that ensued before the subject Bill was debated was a request for memoranda within about 13 days that was posted in the 2nd Respondent's website. In rejoinder, the 2nd Respondent appears to wish this weighty matter away by stating that public participation is in two tiers where the public give their views and Representatives in the 2nd Respondent give their recommendation and when a member of the public has not given views, then his Representative takes the floor on behalf.

54. The position taken by the 2nd Respondent debases a constitutional requirement. The people in the referendum giving life to the *Constitution* of Kenya provided for the exercise of power by the people directly and through elected representatives. The deliberate requirement under the *Constitution* of public participation in matters governance and legislative processes was made while the people were well aware that there would be elected representatives.

55. In my considered view, the mode of public participation employed was very limiting for several reasons. Firstly, the media chosen was one that was not accessible to a wide spectrum of the public in terms of the nature of the media which is internet based and the language of communication used.

56. Secondly there was no adequate notice and opportunity for the petitioner, stakeholders and the public to present views. They had only 13 clear working days to access the website, interrogate the bill and provide what was supposed to be meaningful comments on the Bill.

57. The court in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*,Civil Appeal No 224 of 2017; [2017] eKLR addressing this aspect of public participation held;

> " What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is reasonable notice, a realistic time frame for public participation should be given. In addition, the purposes and level of public participation should be indicated. Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public. The length of consultation during public participation should be given and the issues for consultation. Mechanisms to enable the widest reach to members of public should be put in place; and if the matter is urgent the urgency should be explained."

58. Before I depart from this issue, another important aspect for consideration was whether there was the necessity for public participation post amendment of the Bill. It is noted that the members of the Petitioner had participated in an earlier public participation organized by the 1st Respondent.

59. Useful guidance on the matter is found in the decision of the Supreme Court in *Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae)* [2024] KESC 63 (KLR) where the court pronounced itself on the matter as follows;

> " In addressing a similar question, the High Court in *Kenya Bankers Association v Attorney General & another; Central Bank of Kenya (Interested Party)*, HC Petition No 427 of 2018; [2019] eKLR addressed the need to distinguish between minor (narrow) amendments and substantive amendments to determine whether a provision introduced post-public participation ought to undergo a fresh round of public participation. The High Court took the position that unlike minor amendments, substantive amendments to a Bill post public participation required further public participation. It held thus at paragraph 71:
>
> > "The averment that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. However, where major amendment is introduced and where is contrary to the purpose of the Bill the position may be different."
>
> We agree with the above persuasive decision of the High Court. We are also persuaded by the comparative decision of the Constitutional Court of South Africa in *South African Veterinary Association v Speaker of the National Assembly and others* (CCT27/18) [2018] ZACC 49 which appreciated a distinction between what it considered 'material' amendments that would require further public participation, and what it called 'technical or semantic' amendments that would not require further public participation.....

60. The court cited H. Khurana and S. Vasudevan, in *Clarificatory Amendments to Indian Tax Laws* (2022, International Tax Review), who describe 'substantive amendments' as those that"modify existing rights, impose new obligations, or impose new duties, or attach a new disability". Additionally, the Supreme Court of Canada, in *Bathurst Paper Limited v Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471, held that an amendment is presumed to be substantive unless it is shown that only language improvements, meant solely to enhance drafting, were intended. Therefore, a substantive amendment is to be understood as one that changes the substance or meaning of an existing provision, particularly by addressing policy questions, altering the purpose, scope, or content of a provision, by adding new provisions or removing old ones.....

61. As to whether substantive amendments should be subjected to a fresh round of public participation, the Apex court went ahead and observed that;

> The fact that the new provisions introduced into the Bill after the process of public participation are substantive amendments is not the end of the question as to whether they should be subjected to a fresh round of public participation. A second consideration comes to the fore, in this aspect we draw from the Constitutional Court of South Africa which held in the case of *South African Iron and Steel Institute and others v Speaker of the National Assembly and others* [2023] ZACC 18 at paragraph 2 as follows:
>
> > "The central issue in this case is whether material amendments to a Bill without further public involvement passes constitutional muster. There are two aspects that must be addressed: first, whether the amendments are material, and second, whether these amendments triggered the need for further public involvement." [Emphasis added]

We are persuaded that a court has a duty to consider whether the subject substantive amendments triggered the need for further public participation. It is with this in mind that we need to answer the question whether substantive amendments consequent to the process of public participation, and intended to give effect to views and suggestions from the public participation process, ought to be subjected to a fresh round of public participation. Our starting point, once again, must be the principles articulated in the BAT Case. This Court, in that case, established as a guiding principle the requirement that:

> "Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation."

This means that there is an obligation on Parliament to consider and give effect to the proposals, views, suggestions, and input from the process of public participation. Therefore, it is our considered opinion that it would be circuitous and not amount to prudent use of public resources to expect the National Assembly to subject proposals, views, suggestions, and input from the public participation exercise to a fresh round of public participation. We are also persuaded by the position taken by the High Court in *Law Society of Kenya v Attorney General & another*, HC Petition No 3 of 2016; [2016] eKLR, where the Court stated thus at paragraph 245:

> "Whereas it is true that what were introduced on the floor of the House were amendments as opposed to a fresh Bill, it is our view that for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input." [Emphasis added]

In that regard, we agree with the submissions by the amicus curiae that amendments which have been made in response to the results of public participation do not need to be subjected to another round of public participation."

62. In our instant case the amendment was obviously material, it altered the payable land rates significantly, it was introduced on the floor of the House subsequent to public participation and the amendment was not a product of the public participation. The amendment ought to have been subjected to public participation.

63. The purported public participation that was put in place by the 2nd Respondent was, in view of the foregoing, illusory, cosmetic, a public relations act and a mere formality undertaken as a matter of course just to give a semblance of fulfilling a constitutional requirement. The enactment process was fatally flawed and did not meet the qualitative nor quantitative components required under the law.

64. The 2nd Respondent went ahead to enact a law that elicited this legal challenge and one may make the logical inference that it was not by accident that when the Bill was presented to the Governor for assent he raised concerns over the provisions thereat and as mandated of him by law, submitted it back with a memoranda to the 2nd Respondent inviting it to reconsider the bill, a fact that gives credence to the fact that there were no adequate consultations over the same.

Whether the Act violates the *Constitution* by imposition of taxes, charges and fees by the county government which overlap with the those of the national government leading to double taxation.

65. The petitioner contends that the Act contains taxes that are a preserve of the national government in the process subjecting the Petitioner and its members to and the public to double taxation. The specific concerns are as listed below;

    i. Aircraft landing charges at the conservancies -the aerodromes/airfields operated and maintained by the conservancies are licensed aerodromes by the Kenya Airports Authority under Section 8 and 12 (3) of the *Kenya Airports Act*, Cap 395. They pay license fees to the KAA, and subjecting them to new taxation and regulation by the County Government amounts to double taxation.

    ii. Telecommunication installation charges – the impugned law purports to charge fees for installation of wired internet services whereas the function of licensing and regulating such, is a preserve of the national government. This amounts to double taxation.

    iii. Tourism license/conservancy charges anchored on bed capacity – the impugned law introduces and/or purports to charge taxes/license fee for tourist facilities while this function is already being exercised by the Tourism Regulatory Authority under Section 7 and 98 of the *Tourism Act*, Cap 381. The tourism levy payable by conservancies and other tourism facilities under the Act is assessed based on the same parameters as the impugned law, thus amounting to double taxation.

    iv. Levies for commercial filming and research activities in private conservancie3s are unconstitutional and constitute double-taxation and unlawful for duplication the filming license fees payable under the *Films and Stage Plays Act*, Cap 222.

66. The salient consideration that readily comes to the fore is whether the County Government has constitutional authority to levy any taxation on the spheres of Aircraft landing at conservancies, telecommunication installation charges, tourism license/conservancy charges anchored on bed capacity, commercial filming and research charges and research activities by the reason of constitutional allocation of functions under Article 186 and the Fourth Schedule of the *Constitution*.

67. The different powers and functions of the County and National Governments are found under Article 186 of the *Constitution* as read together with the Fourth Schedule of the *Constitution*. Article 186(3) specifically provides that:

> 'a function or power not assigned by the *Constitution* or national legislation to a county is a function or power of the national government.'

68. the *Constitution* in the Fourth Schedule assigns the National Government the functions inter alia of transport and communications including civil aviation and telecommunications, tourism policy and development and institutions of research.

69. Article 209(3) specifically gives County Governments power to impose various charges and taxes. The provision reads as follows:

    '209(3)A county may impose:

    a. Property taxes;

b. Entertainment taxes: and

c. Any other tax that is authorized to impose by an Act of Parliament.'

70. Such authority is to be exercised within the confines of Article 210(1) of the *Constitution* which provides that: -

'No tax or licensing fee may be imposed, waived or varied except as provided by legislation.'

71. It follows then that under Article 209 of the *Constitution*, taxation is not the preserve of the National Government. The County Government may, too, impose taxes but within the confines of Article 209.

72. Where a County Government legislates to collect taxes from a function not assigned to it, it must demonstrate an Act of Parliament envisaged under Article 209(3)(c) of the *Constitution* that authorized the imposition of the levy/charge/tax.

73. The Respondents have not demonstrated such an Act of parliament authorizing imposition of landing charges at aerodromes, telecommunication installation charges, commercial filming and research levies and motor vehicle sticker charges for motor vehicles used in research. This did not only go against the provisions of Article 209(3)(c) but also offended the provisions of Article 210(1) of the *Constitution*.

74. Odunga J (as he then was) in *Truckers Association of Kenya v County Government of Machakos* [2020] eKLR held that;

> " *The Constitution* is very clear that a county is only empowered to impose property rates; entertainment taxes; and any other tax that it is authorised to impose by an Act of Parliament. The ambit of property rates cannot in my respectful view be expanded to encompass mere purchase and transportation of quarried stones. Property rates is a levy that is imposed on the property itself rather than the services appurtenant to the property such as the transportation of its products. The Petitioner contends that the Respondent is already levying charges on the property against the quarry owners who load the same onto the Petitioners. To also levy taxes on the Petitioners amount to double taxation. With due respect I agree. Once the tax is levied upon the property owners, it cannot similarly be levied against the purchasers of its products without an Act of Parliament authorising the same. (Emphasis added). In this case the Respondent has not pointed out any such Act of Parliament. .....
>
> 128. Whereas both the national and county governments may impose charges for the services they provide, in this case the Respondent has not identified any services it is rendering in the activities in question.
>
> 129. I reiterate what this Court held in *Robert N. Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR that:
>
> "It is therefore clear that the County Assembly may only impose property rates and entertainment taxes unless otherwise authorised by an Act of Parliament and this position is emphasised by the provisions of Article 210(1) of the *Constitution* which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. County Governments are however empowered to impose charges on services they provide. Such service would include parking and market fees. However to levy charges on the stones quarried unless authorised by an Act of Parliament or

any services rendered by the County Governments towards that end would be clearly illegal. Further the levying of such taxes ought not to be such as to prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Tariffs and pricing of services must however comply with the provisions of section 120 of the *County Governments Act*. The Court however is not entitled to interfere with the Tariffs and pricing of services simply on the ground that the Court would have decided otherwise since the Court ought not to substitute its opinion for that the County Government. As long as the provisions of the *Constitution* and the relevant legal provisions are complied with and the applicable principles are taken into the Court ought not to interfere."

75. Under Article 209 (4) of the *Constitution*, the National and County Governments may impose charges for services. In this particular case if the impugned charges/levies were pegged on any services rendered by the County Government, then it behoved the Respondents to demonstrate by way of evidence such services.

76. The Supreme Court in *Base Titanium Limited v County Government of Mombasa & another* (Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment) stated:

> 25. Under the provisions of article 209, a county is empowered to raise revenue and levy taxes, rates, or other charges. Additionally, under sub article (4), the 1st respondent is authorized to impose charges for services provided. So then, what is the meaning of the word 'services' for purposes of application within the meaning of article 209(4) of the *Constitution*? The word 'service' as provided in the Oxford Dictionary of English 3rd Edition 2015 is "a system that provides something that the public needs, organized by the government or a private company". This may include for County transport which entails County roads; street lighting; traffic and parking; public roads transport; and ferries and harbors, excluding the regulation of international and national shipping and matters related thereto comprise some of the functions and powers of County Governments under Schedule four part 2, section 5.
>
> 26. Taking that definition into account, a plain reading of that article reveals that the intention of article 209(4) of the *Constitution*, is to confer County Governments the discretionary powers to impose charges for services, more specifically, that they can charge or impose a payment in exchange of a public need or amenity.
>
> 27. To our minds, the insertion of the words 'for services' in article 209(4), are a qualification to the charge of the services. Whereas a County can levy charges, it must do so in exchange for an amenity. Put differently, a County does not have the authority to charge a cess, levy or tax where they do not offer anything in return.
>
> 28. Undoubtedly, the *Constitution* permits County Governments to impose charges for the realization of its powers under the Fourth schedule. But that power does not go unchecked, in the spirit of harmonious interpretation of the *Constitution*, in enacting the law, County Governments must heed the provisions of article 209 (5) and ensure that the charges invoked will

not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor."

77. There is no evidence in support of services the County provides at Aerodromes, in telecommunications or in commercial filming and research. These are activities under the functions of the National Government with levies imposed by the relevant agencies of National Government.

78. The cumulative effect of the above is that the the impugned provisions in the *Laikipia County Finance Act 2024* relating to Aircraft landing charges, Telecommunication installation charges and levies for commercial filming and research activities in private conservancies are rendered illegal and unconstitutional.

79. As regards tourism, this is a shared function between County and National Government. The 1st Respondents would be spot on in so far as the charges proposed in the Act relate to development of tourism trade and not policy. The distinction was well laid out by Ong'undi J in *Red Roof Inn Hotel Limited v Attorney General & another* [2022] eKLR where she stated;

> "……
>
> 56. Owing to the foregoing analysis, it is clear that the tourism function is shared by both levels of government. Based on the material placed before this Court, the petitioner has failed to sufficiently show that in collecting the tourism levy the 2nd respondent acted outside the confines of its mandate as provided for in the Act. In addition it has failed to show how paying the various charges permitted by the *Constitution* constitutes double taxation. Failure to charge the tourism levy would render the objects and purposes of the *Tourism Act* ineffective and would also go against the principles and values of the *Constitution*. I find no unconstitutionality in section 66 as read with section 69(1) (a) of the *Tourism Act*, No 28

Whether the Act is discriminatory adversely against the Petitioner's members.

80. The Petitioner claimed that the increment of the land rates for the conservancies from Kshs 20/- to Kshs 60/- is discriminatory as the same does not apply to other properties within Laikipia County.

81. I take the view that this grouse is not founded on firm ground. In taxation there will be many variables that would determine the tax in respective sectors, properties or to individuals. That determination must be left to policy makers, of course subject to it being done within the law.

82. For a definition of discrimination, the court's summation of the same *Peter K Waweru v Republic* [2006] eKLR would suffice. The court stated:

> " Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and thosnot favoured.

83. The court In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR extrapolates the matter further as follows:

> " Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.""...at the same time it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation, (*Nelson Andayi Havi v Law Society of Kenya & 3 others-* (supra), And that equality must not be confused with uniformity lest uniformity becomes the enemy of equality. (*National Coalition for Gay and Lesbian Equality v Minister for Justice-*)."

84. The Supreme Court weighed in on the matter in the *BAT Case* (*supra*) where it stated;

> We are in agreement that not all forms of discrimination are unfair. Each case where discrimination is alleged has to be evaluated on its own peculiar facts. It is worth noting that the rights under article 27 of the *Constitution*, equality and freedom from discrimination are not non-derogable rights under article 25 of the *Constitution*. They are subject to the limitation clause under article 24 of the *Constitution*. To this end, we agree with the appellant that in limiting their rights under article 27, the same can only be done if the principles in article 24 have been met.....We are persuaded that it is not enough for the appellant to generally state that the requirements in article 24 have not been met in limiting the rights under article 27. Those factors are not exhaustive but are mutually inclusive. They have to be evaluated from within the society within which the Regulations are meant to operate. We disagree with the appellant that the Superior Courts were wrong in taking into consideration 'extraneous factors' such as the effects and ills of the Tobacco use on the health of the users in justifying the discrimination, that is, the limitation of the contact between Tobacco manufacturers and public officers..."

85. Thus there could be justification for discrimination in taxes based on the use, value and location of the land and the element of discrimination raised has not been effectively substantiated.

Whether the act is unconstitutional for imposing a substantive and punitive increase in land rates in respect of conservancies.

86. The petitioners are aggrieved by the action of the 2nd Respondent of enacting legislation that increased land rates from Kshs 20 to Kshs 60, an increase of 300%. The increase is challenged on the basis of being unjustified, irrational and discriminately places a burden of taxation on conservancies. As noted earlier, the court must defer to the doctrine of separation of powers allowing the 2nd Respondent to carry out its constitutional mandate to make the law and to intervene only when the process or the product of the process contravenes the *Constitution* and the law, this court being much alive to the general rule or principle guiding such matters as restated by the Supreme Court of India in *Hambardda Wakhana v Union of India Air* [1960] AIR 554 in the following terms;

> " In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for

which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."

87. From the evidence tabled, there is no dispute that the increase in the rates as contained in the Bill sent to the 2nd Respondent (Kshs 35 per acre) vary from the final rate passed in the enacted Act (Kshs 60 per acre). While the said rates appear to the Petitioner both oppressive and exorbitant, it is not within the province of the court to determine what constitutes fair amount of taxation so long as the process and the outcome meets constitutional muster.

88. The rate of taxation is a policy decision solely within the mandate of the Executive and enacted by Parliament (in this case the 2nd Respondent) and so this Court ought to decline to make policy decisions which are solely within the realm of the other arms of Government. A valid concern may arise, though, whether the 2nd Respondent may enact laws that are contrary to the policy decisions of the County Executive Committee and I would take the view that, that would be inimical to the ethos of separation of powers and the 2nd Respondent's role should, in my understanding, be confined to rejecting any policy decision from the 1st Respondent that it may disagree with and not to substitute it with its own. I have already made a finding that the residents of the county were not consulted through meaningful public participation in regard to the amendments to the initial Bill. For this reason alone, the said increase and which was not subjected to public participation is rendered unconstitutional.

89. For emphasis, I associate myself with the holding of Lenaola J (as he then was) In the Case of *Cereal Growers Association & another v County Government of Narok & 10 others* [2014] eKLR where he held that:-

> "...this Court cannot direct the 1st – 8th Respondents County Assemblies on how to exercise their mandate of levying agriculture produce cess and how to administer the same. In their wisdom as the law making bodies of each County, they must legislate having taken into consideration public views, their policies as well as the revenue intended to be raised. It is not the place of this Court to direct them on how to carry out any of those administrative or legislative functions."
>
> 142. It is my view however that the onus is on the law making authority to show that there was public participation in the process and that the end product reflects that process. Where there is a break in the process and the end product is a monster that is completely strange to what was presented to the public, in the absence of any reasonable justification, the Court must find that the product is not result of the public participation and must proceed to declare it to be so. In my view, for any amendments to be introduced on the floor of the Assembly subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input....."

90. The introduction of totally new land rates was a substantial amendment that was not a product of public participation and ought to have been subjected to fresh public participation.

91. For this reason alone, the said increase is rendered unconstitutional.

92. With the result that the Petition herein succeeds and is allowed to the extent as particularized here below;

1. A declaration be and is hereby made that the Laikipia County Finance Act, 2024 does not meet the statutory and constitutional threshold to be a valid law for lack of the constitutional requirement for public participation in respect of the impugned Sections set out hereinafter.

2. A declaration be and is hereby made that the Laikipia County Finance Act, 2024 violates the *Constitution* to the extent that it provides for imposition of taxes, charges and fees by the County Government which overlap with the functions of the national government.

3. A declaration be and is hereby made that the Laikipia County Finance Act, 2024 is unconstitutional and therefore unlawful and invalid specifically in respect of the taxes, levies, fees or charges styled as; Eighth Schedule, Part IV (B), Eighth Schedule, Part XI, Second schedule, part XVII, Second schedule, part XVIII, Third schedule, Section N, Part II and Third Schedule, Part III, Section M, Part IV.

4. An order of *certiorari* be and is hereby made bringing to the court the Laikipia County Finance Act, 2024 and any instrument made thereunder, for purposes of being quashed, and specifically an order quashing the following provisions:

    a. Eighth schedule, part IV (B) – Annual land rates on conservancies.

    b. Eighth schedule, part XI – Building Plan Approval (electric fence)

    c. Eighth schedule, part XVII, - Commercial Filming Activities in private conservancies.

    d. Second schedule, part XVII – sticker for research vehicles.

    e. Third schedule, Section N – Education, Commercial research activities (private conservancies)

    f. Third schedule, part II, Section M, part IV – Airstrips annual permit.

5. This being a public interest litigation, each party to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JUNE 2025.

A.K. NDUNG'U

JUDGE