



**Kenya Chamber of Mines v Cabinet Secretary, Ministry of Mining Blue Economy and Maritime Affairs (Constitutional Petition E549 of 2024) [2025] KEHC 12697 (KLR) (Constitutional and Human Rights) (10 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12697 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**CONSTITUTIONAL PETITION E549 OF 2024**

**AB MWAMUYE, J**

**SEPTEMBER 10, 2025**

**IN THE MATTER OF ARTICLES 1(2), 2(1), 2(2), 2(4), 3(1), 6(2), 10, 19, 20,**

**21(1), 22, 23, 24, 27, 40, 60, 69, 201, 232, 258 AND**

**259(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN MATTER OF THE MINING ACT, NUMBER 12 OF 2016**

**AND**

**IN THE MATTER OF CONTRAVENTION OF**

**ARTICLES 2, 10, 40, 60, 201 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTIONS 5 AND**

**8 OF THE STATUTORY INSTRUMENTS ACTS CAP 2A OF 2013**

**AND**

**IN THE MATTER OF THE MINING (LICENSE AND**

**PERMIT) (AMENDMENTS) REGULATIONS 2024**

**AND**

**IN THE MATTER OF THE MINING (DEALING IN**

**MINERALS) (AMENDMENTS) REGULATIONS 2024**

**AND**

**IN THE MATTER OF THE MINING (GEMSTONE IDENTIFICATION**

**AND VALUE ADDITION FEES) (AMENDMENT) REGULATIONS 2024**

**BETWEEN**



THE KENYA CHAMBER OF MINES ..... PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF MINING BLUE ECONOMY AND  
MARITIME AFFAIRS ..... RESPONDENT

### JUDGMENT

1. The Petitioner approached this court vide Petition dated 9<sup>th</sup> October, 2024 which was amended on 20<sup>th</sup> January 2025 seeking the following orders:
  - i. A declaration that the Respondent's actions are brazen, illegal, egregious, discriminatory and violation Petitioner's Constitutional rights.
  - ii. A declaration that the following regulations do not meet the statutory and constitutional threshold to be a valid law:
    - a. The Mining (Royalty Collection and Management) (Amendment) Regulations 2024;
    - b. The Mining (License and Permit) (Amendment) Regulations 2024;
    - c. The Mining (Dealing in Minerals) (Amendment) Regulations 2024;
    - d. The Mining (Mine Support Services) (Amendment) Regulations 2024;
    - e. The Mining (Gemstones Identification and Value Addition Fees) (Amendment) Regulations 2024' (collectively the Mining Regulations 2024).
  - iii. A declaration that Mining Regulations 2024 do not meet the statutory and constitutional threshold to be a valid law does not meet the statutory and constitutional threshold to be a valid law violates *the Constitution* to the extent that it provides for imposition of unconscionable fees, charges and fees by the Respondent.
  - iv. A declaration that Mining Regulations 2024 Regulations violate *the Constitution* as it is discriminatory and adversely against the Petitioner's members.
  - v. A declaration that the Mining Regulations 2024 are unconstitutional, unlawful, irrational and illegitimate, and therefore invalid and unenforceable in their entirety.
  - vi. A declaration that all the notices issued by the Respondent in respect of the Mining Regulations 2024 are unconstitutional, unlawful, irrational and illegitimate and therefore invalid and unenforceable in their entirety.
  - vii. An order of certiorari bringing to the court the Mining Regulations 2024, for purposes of being quashed in their entirety.
  - viii. An order of prohibition directed at the Respondent against implementation of the Mining Regulations 2024.
  - ix. A permanent injunction to restrain the Respondent, and anyone acting on their behalf, from implementing the provisions of the Mining Regulations 2024.
  - x. An order of mandamus compelling the Respondent to withdraw any demands on fees, royalties or any payment whatsoever arising from the Mining Regulations 2024.



- x. An order of mandamus compelling the Respondent to publicly withdraw all of the public notices that it has issued in respect of the Mining Regulations 2024.
  - xii. An order of mandamus compelling the Respondent to refund all, or any payment made as a result of the Mining Regulations 2024.
  - xiii. Costs of the Petition.
  - xiv. Any other relief that this Honourable Court deems fit to grant in the interest of justice.
2. The Petition was accompanied by a Notice of Motion Application dated 9<sup>th</sup> October, 2024 and an Affidavit in support of even date sworn by Dr. Patrick Kanyoro, the Chairman of the Petitioner's Executive Council on the grounds that sometime in August 2023, the Respondent proposed draft regulations aimed at various aspects of the mining industry. Subsequently, a public participation exercise was carried out where the Petitioner, its members, key stakeholders and members of the public were engaged and submitted their views.
  3. According to the Petitioner, following the said process, on 30<sup>th</sup> January 2024, the Respondent prepared new draft regulations and issued an invitation to stakeholders requesting the public to submit written memoranda to reach the Respondent within (14) days. On 13<sup>th</sup> February 2024, the Petitioner in compliance with the 14-day public notice, submitted its views on the draft regulations via a 51-page memorandum illustrating how its recommendations were not considered. In addition, the Petitioner state that they gave expert, reasoned and clearly understandable explanations as to why the 2024 draft regulations would have a drastic and calamitous effect to the mining industry.
  4. The Petitioner contends that, in accordance with the law and established customary practice, the Respondent was under a legal obligation to conduct meaningful stakeholder and public consultations prior to the enactment of the 2024 regulations. However, the Petitioner avers that the Respondent failed to convene public participation forums and consultations as required, and further neglected to consider or deliberate upon the memorandum submitted by the Petitioner.
  5. The Petitioner further avers that to their utter dismay, the Respondent had already enacted the said regulations on the 23<sup>rd</sup> January 2024, 7 days before inviting members of the public for comments on the regulations which they became aware of via a Facebook post of 24<sup>th</sup> January 2024, where the Cabinet Secretary in charge of the Respondent at the time they had already signed the regulations.
  6. The Petitioner further contends that the Respondent's invitation for public participation was illusory and lacked genuine intent, as the regulations in question had already been signed by the Cabinet Secretary responsible for the Respondent by the time the invitation was published. As such, the process appeared to be a mere formality rather than a bona fide effort to engage the public in the legislative process
  7. They further contend that that the Mining Regulations of January 2024 were published on 1<sup>st</sup> February 2024, merely two days after the Respondent invited the public to submit comments within a fourteen-day period starting 30<sup>th</sup> January 2024. They argue that this premature publication demonstrates that the public participation process was not genuine, but rather an afterthought or a token exercise lacking any meaningful engagement.
  8. The Petitioner further states that the impact of the Mining Regulations 2024 is to disenfranchise Kenyans and just retain them as labourers in mines across Kenya since the Regulations introduce excessive application fees for mining licenses where in some instances there is an 8200% increment



in the application fees which is not only immoderate and punitive but also violates the rights of the Petitioner, its members and the public at large.

9. In response and in opposition to the Petition, the Respondent filed a replying affidavit sworn by Abel Chumba, the Deputy Director of Mines in the State Department for Mining, Ministry of Mining, Blue Economy and Maritime Affairs, dated 31<sup>st</sup> October, 2024 to which they averred that the Regulations were taken through nationwide stakeholder engagements, where comments were received, reviewed, incorporated or taken under advisement. The State Department thereafter appeared before the Delegated Committee for pre-publication scrutiny where their comments were taken into consideration.
10. The Respondent avers that four Regulations were presented before the Committee for delegated Legislation for pre-publication scrutiny and acceded to by the National Assembly on 12<sup>th</sup> June 2024, which include: The Mining (Gemstone Identification and Value Addition) (Fees) Regulations 2024; The Mining (Mine Support Services) (Amendment) Regulations 2024; The Mining (Dealings in Minerals) (Amendment) Regulations 2024 and; The Mining (License and Permit) (Amendment) Regulations 2024.
11. They further aver that it is surprising that the Kenya Chamber of Mines, the Petitioner herein who has actively participated in the regulation-making process is alleging inadequate public participation when the process has been transparent, and inclusive.
12. The Respondent attached documents showing that due process was followed including a notice of publication that was published in MyGov Newspaper on 15<sup>th</sup> August 2023 inviting submissions on memoranda, a public participation report, list of attendance during in-person sessions, comments as were incorporated into the regulations and submitted to the office of the Attorney General, copy of letters from the Attorney General clearing the regulations for publication, a regulatory impact assessment report and the notices gazette in the Kenya Gazette, the Mining (Gemstone Identification and Value Addition) Fees Regulations, the incorporation matrix and the explanatory memorandum, the royalty collection and management regulations, the explanatory memorandum and matrix of incorporated comments, a comparative analysis of the initial rates and the current rates, the Mining (Dealings in Mineral) (Amendment) Regulations, the exemplary memorandum and matrix of incorporated comments, the Mining (Mine Support Services) (Amendment) Regulations, the exemplary memorandum and matrix of incorporated comments and finally the Mining (License and Permit) (Amendment) Regulations, the exemplary memorandum and matrix of incorporated comments.
13. The Respondent states that the regulations above were to collate the fees chargeable in one regulation as was in the previous case, and includes a fee called the Mineral Development Levy which is a preserve of the Cabinet Secretary under Section 223 (2) (a), in support of the functions under Section 20 (1) (b). They further state that the fees chargeable were reviewed taking into account that the rates were gazetted 11 years ago and were subject to the effects of inflation.
14. They further aver that the Petitioner intends to mislead this Court by alluding that the Ministry sought opinion on the draft regulations after incorporation of comments yet they considered all comments and memoranda submitted but not all were taken into consideration in the revised regulations. Further, the Respondent states that they conducted public participation as required by law, stakeholders were invited and their comments were incorporated and those that were not, were taken into advisement.



15. The Respondent equally avers that it is worth noting that government offices and agencies work differently since they sent out notices to the Government Printer and newspaper agencies however, the newspaper agencies uploaded the notice later than the Kenya Gazette. Nonetheless, the Respondent proceeded knowing that it had issued the requisite notice office delays notwithstanding.
16. They contend that before the gazette of the above regulations, the State Department submitted the Notices for the Regulatory Impact Assessment to run concurrently in the myGov newspaper and the Kenya Gazette. Unfortunately, the Notice in the myGov was not expeditiously published as anticipated but that should not take away from the fact that the Notice in the Kenya Gazette was already in circulation. According to the Respondent, it is misleading for the Petitioner to aver that the regulations were published 2 days after the request for comments when the gazette notice ran for 14 days and the Regulatory Impact Assessment is and has always been on the website of the Respondent.
17. The Petitioner filed a Supplementary Affidavit sworn by Patrick Kanyoro and dated 11<sup>th</sup> November 2024 to which he averred that on 14<sup>th</sup> October 2024, the Respondent issued a public notice formally notifying all mineral dealers and mineral rights holders to remit the Mineral Development Levy to the State Department for Mining which was introduced by the Mining Regulations 2024. Further, on 15<sup>th</sup> October, 2024 the Respondent published a notification detailing the new royalty rates which were to take effect from 1<sup>st</sup> October 2024 and further stating that the failure to remit the royalties within 60 days is grounds for revocation of a mining license.
18. The Petitioner contends that the Mining Regulations introduce excessive application fees for mining licenses in certain instances there was an 8200% increment which is not only immoderate but also punitive. According to the Petitioner, many miners are now considering redeploying their funds away from their mining ventures and opting for other business investments while others are severely prejudiced as they do not have the latitude to opt out of the mining space.
19. They also filed a further Affidavit sworn by Patrick Kanyoro dated 6<sup>th</sup> March, 2025 where he averred that that public participation is an entire process and must be followed to the end. In addition, the Respondent has not shown that the Public comments on the regulatory impact assessment were submitted before the committee of the National Assembly on Delegated Legislation.
20. They contend that the Respondent ought to have waited until both the Gazette Notice and My-Gov notice (inviting the public to comment on the Regulatory impact assessment) was published before gazetting the Regulations into law. It cannot purport to blame other government offices for its failure to wait till the 14 day timeline expired and that illustrates that it was not prepared to consider the public's comments on the regulatory impact assessment report.
21. The Petitioner further states that the reason there is no reduction in the number of the mineral right applications on the online mining cadastre is because there was a moratorium on mineral right applications imposed by the Cabinet Secretary in December 2019 and was then lifted in September 2023.
22. They went further to contend that the Gazette Notice was published on 19<sup>th</sup> January 2024 and the myGov notice was published on 30<sup>th</sup> January 2024. They further state that the Respondent signed the regulations into law on 24<sup>th</sup> January 2024 and that the regulations were published into law on 2<sup>nd</sup> February 2024. The Petitioner avers that none of the notices allowed the Petitioner or other members of the mining industry to respond within 14 days as required.
23. The Petitioner states that members of the mining industry including themselves were unable to submit comments on the impact assessment report and if anyone submitted comments, they were unable to be



considered because the regulations were passed before deadline of either notice. They equally state that the regulatory impact assessment report was never published on the website indicated in the myGov notice by 11<sup>th</sup> February 2025, but was uploaded on the website on 30<sup>th</sup> January 2024, 6 days after the Respondent signed the regulation into law.

24. The Petition was canvassed by way of written submissions, and in compliance both parties filed and served their submissions.

### **Petitioner's Submissions**

25. In their written submissions dated 10<sup>th</sup> March 2024, the Petitioner asserts that under Section 5 of the [Statutory Instruments Act](#), a statutory instrument ought to be accompanied by an exemplary memorandum yet there is no such document on the Respondent's website nor has it been produced in Court.
26. The Petitioner further submits that the Respondent has violated Sections 6, 7 and 8 of the Statutory Instrument Act especially Section 8 (1) which requires publication in both the Kenya Gazette and a newspaper likely to be read by persons likely to be affected by the legislation. The Petitioner however avers that My-Gov which is the Respondent's choice of newspaper is not a newspaper and only remains a government advertisement publication which is published and circulated once a week through a newspaper dubbed 'The Star' pursuant to an internal government circular from the State Department of Broadcasting and Telecommunications dated 23<sup>rd</sup> January 2024. According to the Petitioner most miners do not have access to My-Gov (through The Star) which was the Respondent's newspaper of choice in publishing the regulatory impact assessment therefore breaching Section 8 (1) of the [Statutory Instruments Act](#).
27. The Petitioner submits that the Respondent signed the Mining Regulations into law on 24<sup>th</sup> January 2024, this was five(5) days after the Gazette Notice was published and 6 days before My-Gov notice was published similarly, the Regulations were gazetted as law on 2<sup>nd</sup> February 2024 which is thirteen (13) days after the Gazette notice was published and two (2) days after the My-Gov notice was published in violation of Section 8(4) of the [Statutory Instruments Act](#).
28. The Petitioner states that the Respondent also violated Section 8(5) of the [Statutory Instruments Act](#) which requires that the regulatory impact assessment be available at the place stipulated in the notice which was indicated as [www.mibema.go.ke](http://www.mibema.go.ke) however, the same was not uploaded and is not available on the said website. They contend that according to the Respondent, they admit that they had actually published the regulatory impact assessment in a different website which is [www.mining.go.ke](http://www.mining.go.ke) which is in contravention of Section 8(5) and (6) of the [Statutory Instruments Act](#), depriving the Petitioner and the public at large from commenting on the regulatory impact assessment.
29. Reliance was placed on the case of Timothy M Njoya & 6 others v Attorney General & 3 others [2004] where the Court held that any infringement of statutory timelines is in itself a fundamental breach of the will of the people who in themselves are supreme. Further reliance was placed on the case of Nuri v Kombe & 2 others (Petition (Application) 38 of 2018) [2019] and the case of Arprim Consultants v Parliamentary Service Commission & Another (Civil Appeal No. E039 of 2021).
30. The Petitioner contends that the Mining Regulations, 2024 in their formulation and enactment did not comply with Section 5(1) of the [Statutory Instruments Act](#) for lack of appropriate consultation yet Section 5(1) is a clear reflection of the provision of Articles 10(2)(a) of [the Constitution](#). They relied on the case of the Matter of Peter Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits – Constitutional Petition Nos 305 of 2012; [2015] eKLR, Mui Coal Basin



Local Community & 15 others v Permanent Secretary Ministr of Energy & 17 others (2015) eKLR and KAPS Parking Limited & Another v County Government of Nairobi & Another (2021).

31. The Petitioner submitted that the introduction of a mineral development levy is not within the scope of the *Mining Act* and as such is ultra vires to the parent Act. Therefore, the Respondent acted ultra vires in introducing the mineral development levy by way of Mining Regulations 2024, since levies in Kenya are introduced through Acts of Parliament. They relied on the following cases in support; *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner- General, Kenya Revenue Authority & 3 others (Interested Parties) (Petition E181, E211, E217, E219, E221, E227, E228, E232, E237 & E254 OF 2023 (Consolidated)) [2023] KEHC 25872 (KLR) (Constitutional and Human Rights) (28 November 2023) (Judgment)*, *Vestey v Inland Revenue Commissioners [1979] 3 All ER at 984* and *Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] KLR 240* and prayed that the Petition be allowed as prayed.

### Respondent's Submissions

32. On the other hand, in the Respondent's written submissions dated 18<sup>th</sup> March 2025, the Respondent asserted that in compliance with the Constitutional principle of public participation, they conducted meaningful public participation upon the impugned regulations and regulatory impact assessment report. They relied on the case of *British American Tobacco Kenya, PLC formally Britis 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 (Affected Party) (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment)* which outlined the components of meaningful public participation. They also relied on the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015]*.
33. The Respondent further submitted that it is incorrect to premise an argument on the constitutionality of Regulations based on a statutory timeline as *the Constitution* does not prescribe a time frame within which to conduct public participation. They further state that procedural timelines do not negate the impugned regulations only to the extent that the purpose which was sought to be achieved is realized. Reliance was placed on the case of *Biosystems Consultants v Nyalı Links Arcade (Civil Appeal 185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling) (Biosystems case)* where the court categorized timelines into three namely; timelines relating to the procedural aspects, timelines touching on the substance and Constitutional timelines.
34. The Respondent contends that the statutory timelines were not meant to negate the impugned Regulations but is informed by a purposive reading of *the Constitution* and Statute.
35. According to the Respondent, it is imperative to underscore that the purpose of the timeframe was to ensure meaningful public participation was realized. Reliance was placed on the Supreme Court case *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinions Application 2 of 2012 [2012] KESC 5 (KLR)* and the case of *Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) (Petition E031, E032 & E033 of 2024 (Consolidated)) [2024] KESC 63 (KLR) (29 October 2024) (Judgment)*.
36. As regards to introduction of development levy through impugned regulation without legislation, the Respondent contends that under Article 210(1) of *the Constitution*, no tax or licensing fee may be imposed, waived or varied except as provided by legislation however, although Article 94(1) of *the Constitution* vests upon Parliament as the primary authority in legislation, exercisable through Bills which upon passage and assent becomes Acts of Parliament, there is recognition under clause (5) that



legislation can be enacted beyond Parliament where there is express authorization by statute which is the basis of subsidiary legislation.

37. They further contend that Section 223 (2) (a) of the *Mining Act* calls for making of regulations to provide for fees, royalties, rent and other charges that are payable under the Act or the manner in which they are calculated.
38. It is the Respondent's submission regarding the amount of fees payable, that it is not within the jurisdictional remit of the Court to question the rate payable since it is a question of policy consideration beyond the competence of the Court. Reliance was placed on the case of State of MP v Rakesh Kohli & another AIR 2012 SCC 2351 (11 May, 2012), Institute of Certified Public Accountants of Kenya (ICCPAK) & 2 Others (Interested Parties) [2021] KEHC 9748 (KLR), Justus Kariuki Mate & another v Martin Nyaga Wambora & another (2017) eKLR, Civil Appeal No. 11 of 2018 Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board and 7 others (2013) eKLR and the South African case of International Trade Administration Commission v SCAW South Africa (Pty) Limited 2012 (4) SA 618 (CC).

### **Analysis and Determination**

39. Having carefully considered the Petition, the responses, the affidavits and submissions, the following key issues arise for determination: -
  - a. Whether there was breach of Articles 10 and 118 of *the Constitution* of Kenya on Public Participation in the enactment of the impugned legislation;
  - b. Whether the mineral development levy can be introduced by way of Mining Regulations 2024; and
  - c. Whether the Petitioner is entitled to the reliefs sought.

### **Whether there was breach of Articles 10 and 118 of *the Constitution* of Kenya on Public Participation in the enactment of the impugned legislation.**

40. Public participation stands as a fundamental national value and governance principle prominently enshrined in *the Constitution* of Kenya and highlighted in Articles 10, 118 and 232. Article 10 (2) (a) specifically emphasizes "participation of the people" as a cornerstone of Kenya's governance spirit. It reinforces Article 1 of *the Constitution* on the sovereignty of the people. Its spirit is that the decisions should not be made affecting the people of Kenya without recourse to them.
41. Article 118 of *the Constitution* requires Parliament to ensure public participation in the process of legislation. Parliament is required to conduct its business transparently and in the open and hold its sittings and those of the Committees in a place open and accessible to the public. The importance of this requirement is that participation of the people in their own affairs gives impetus to good governance, improves service delivery and responsiveness of the government and its agencies.
42. Article 118 (1) provides thus;

"Parliament shall;

  - a. ...
  - b. Facilitate public participation and involvement in the legislative and other business of Parliament and its committees."



43. The principle of public participation extends beyond Parliament. Article 10 and 232 binds all state organs, state officers, public officers and all persons when applying, interpreting, enacting *the Constitution* or implementing public policy directions.

44. In *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & Others* [2019] KESC 15 (KLR), the Supreme Court articulated the minimum thresholds of public participation, holding that the obligation lies with the public authority to ensure participation is meaningful, real, and not illusory. The Court set out the following guidelines on public participation;

“As a Constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.

- i. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- ii. 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.
- iii. Public participation must be real and not illusory. It is not a mere formality to be undertaken as a matter of course just to ‘fulfil’ a Constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- iv. Public participation is not an abstract notion; it must be purposive and meaningful.
- v. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.
- vi. 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.
- vii. Allegations 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.
- viii. 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.”

45. In view of the foregoing, I opine that public participation requires the following: -

- i. Proper sensitization on the nature of legislation to be enacted or policy to be effected;
- ii. Adequate notice depending on the circumstances which must however be reasonable;
- iii. Facilitation of the public to ensure that members of the public are able to access the information required in a convenient and practical manner, understand the same, have a meaningful opportunity to attend, contribute and provide their views;
- iv. The views of the public should be considered and where they are to be rejected or declined, reason for such rejection and dismissal should be stated; this will obviate the public participation being a cosmetic or a public relations act;
- v. Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;
- vi. There must be integrity and transparency of the process.

46. With these legal standards in mind, I now turn to the Petition before this Court, in which the Petitioner challenges four sets of Mining Regulations on the grounds that they were enacted without adequate public participation. The Petitioner avers that the Respondent prepared new draft regulations and, on 30<sup>th</sup> January 2024, invited stakeholders to submit memoranda within 14 days. It further submits that it filed a 51-page memorandum on 13<sup>th</sup> February 2024. However, the Petitioner contends that it subsequently discovered that the Mining Regulations had already been signed into law on 24<sup>th</sup> January 2024, prior to the purported invitation for public comment. This discovery, it says, was made through the Respondent’s Facebook page. Moreover, the Petitioner argues that the Regulatory Impact Assessment was uploaded to an incorrect website [www.mining.go.ke](http://www.mining.go.ke), instead of the official [www.mibema.go.ke](http://www.mibema.go.ke) and that this was done after the Regulations had already been signed and only two days before their publication.

47. The Petitioner is also aggrieved by the gazettelement and publication of the Mining (Royalty Collection and Management) (Amendment) Regulations, 2024 which were published and Gazetted on 3<sup>rd</sup> July 2024, whereas no regulatory impact assessment was availed to the public through any means or form.

48. The Respondent, on the other hand, maintains that it undertook meaningful public participation. It submits that the draft regulations and the accompanying regulatory impact assessment were subjected to broad-based stakeholder engagement, with public notices issued through the My Gov newspaper on 15<sup>th</sup> August 2023 and 30<sup>th</sup> January 2024. The first notice invited members of the public to attend public hearings held in September 2023 in several counties including Machakos, Eldoret, Mombasa, Kisumu, Garissa, Narok, and Embu. The second invited submission of written memoranda within 14 days. The Respondent asserts that the State Department appeared before the Delegated Legislation Committee for pre-publication scrutiny, and that the regulations were duly gazetted and tabled before Parliament on 1<sup>st</sup> July 2024 and 1<sup>st</sup> October 2024 in accordance with the *Statutory Instruments Act*. They further assert that they responded to all comments received, and argue that while there was a delay in newspaper publication, this did not vitiate the process, since the Gazette Notice complied with the 14-day notice requirement.



49. The Respondent also contends that they indicated how every comment was considered and incorporated and that the Constitution does not prescribe time frame within which to conduct public participation. Further, they stated that it is uncontroverted that the Notices were published in the Kenya Gazette on 19<sup>th</sup> January 2024 and in My Gov newspaper on 30<sup>th</sup> January 2024. According to the Respondent, since the impugned regulations were published into law on 2<sup>nd</sup> February 2024, there was compliance with the 14-days timeline with regard to the Gazette Notice but non-compliance with regard to the newspaper pullout. They argue that failure to comply with the timelines with regard to publication of the notices in the newspaper do not negate the impugned regulations since the purpose of the timeframe to ensure meaningful public participation was realized.
50. In exercising its constitutional duty, this Court must ensure that any legislative process adheres to the dictates of the Constitution and does not result in a violation of fundamental constitutional principles. In the case of *Doctors for life International v Speaker of the National Assembly and others* (CCT 12/05)BU which relied in the case of *Robert N. Gakuru & Others v Governor Kiambu County and 3 others* [2014] eKLR it was held that:
- “...when it is appropriate to do so, courts may and if need be must-use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and duty of this court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.”
51. I have considered the evidence on record and established that indeed there were two sets of newspaper adverts carried out in the My Gov newspaper of 15<sup>th</sup> August 2023 and 30<sup>th</sup> January 2024. The first advert called for public hearings on 6 draft Bills. They invited the public for physical hearings on specific days being, 4<sup>th</sup>, 6<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> September 2023 in Machakos, Eldoret, Mombasa, Kisumu, Garissa, Narok and Embu counties respectively. The second advert notified the public to submit written memoranda to the 6 draft bills on the impact of the regulations on the community and businesses and the same was to be submitted within 14 days from publication of the notice.
52. The mandatory obligation of consultation and public participation is not met by merely taking the perfunctory step of involving the public and any affected persons. In the case of *Doctors for life International v Speaker of the National Assembly and others* (supra) it was urged that for Public participation and effective consultation to be said to have occurred,
- “all parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion.”
53. Similarly, in the case of *Samuel Thinguri Waruathe & 2 others v Kiambu County Government & 2 others* [2015] eKLR the court urged that public participation and effective consultation are not a mere cosmetic venture. The product of the legislative process ought to be the true reflection of the public participation so that the end product bears the seal of approval by the public.



54. In the case of Robert N. Gakuru & others v Governor Kiambu County & 3 others [2014] eKLR, Odunga J emphasized on the seriousness with which public participation should be undertaken and held as follows:

“75. In my view public participation ought to be real and not illusory and ought not be treated as mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

55. According to the evidence on record, it is my finding that the 14 days provided for submissions would not have been sufficient for submission by the public as it concerned 6 bills that were highly technical and far-reaching consequences on the environment. Additionally, for the Respondent to indicate that the public has 14 days for submission then turn around and publish the said regulations 7 days prior to the lapse of the time-period indicates that the public participation was not merely limited in time but was also not completed. The action taken also leaves a strong impression of a predetermined decision, where public participation was a mere act of procedural box-ticking rather than a substantive and meaningful engagement of the public.

56. While I am alive to the Supreme Court’s decision in the British American Tobacco case, on the fact that someone not being heard does not vitiate the process, we must also consider that public participation must be both qualitative and quantitative. The Respondent did not produce any evidence to show that ordinary members of the public submitted any comments. The Respondent also did not dispute the fact that the Regulations were published before taking comments from the public, arguing that the same was occasioned by the newspaper delayed in publishing the notice. It is also not in dispute that the Respondent did not give the public access to the bills since the website indicated is not the government’s website and I am therefore satisfied that the same cannot be properly described as having been published for the access of the public.

57. It is my finding that the Respondent by enacting the impugned regulations before allowing adequate time and access for public submissions and by failing to provide a credible platform for public review of the documents, violated the Constitutional thresholds of public participation. These actions amounted to a circumvention of the participatory process and cast doubts on the bona fides of the exercise. The process was not only rushed but also lacked transparency and integrity. It gave the impression that the outcome was pre-determined and that the public was invited to comment merely to satisfy procedural formalities.

58. This Court must underscore that the extent of required public participation is commensurate with the gravity and reach of the measure being undertaken. The nature and importance of the Mining



Regulations and the breadth of their impact on the public are very relevant factors for the Respondent not to have considered in structuring the nature and scope of the public participation to be undertaken. The more impact and consequence a measure has, the higher the standard for public participation will be required for it. Public participation is not an inconvenience to be reluctantly or partially undertaken. It is the process of enriching proposals by subjecting them to public comment. Even if those views are ultimately not incorporated, their consideration serves to allow the concerned authority to double-check and reassess, in addition to breathing life into a vital part of the citizen-centric Constitution ushered into our legal order in 2010.

59. Accordingly, and having reviewed the totality of evidence it is my conclusion that the public participation undertaken in respect of the impugned Mining Regulations was insufficient, non-inclusive and procedurally flawed. The Respondent's process fell short of the constitutional requirements under articles 10 and 118, rendering the resulting regulations constitutionally infirm.

#### **Whether the mineral development levy can be introduced by way of Mining Regulations 2024**

60. The present petition was equally triggered by the Respondent's introduction of the Mineral Development Levy through the Mining Regulations 2024. The Petitioner argues that the introduction of a Mineral Development Levy is not within the scope of the *Mining Act* and is therefore ultra vires to the parent Act. They contend that levies can only be introduced by an Act of Parliament or through the amendment of an existing Act of Parliament. Further, unless there is express authorization in an Act, a Cabinet Secretary cannot create a levy by way of Regulations.
61. According to the Petitioner unless there is express statutory authority, a Cabinet Secretary cannot purport to create a levy by way of subsidiary legislation, and any such attempt would contravene article 210(1) of *the Constitution* which prohibits the imposition of any tax or licensing fee except as provided by legislation.
62. The Respondent on the other hand argues that while under Article 94(1) of *the Constitution* vests upon Parliament the primary authority in legislation, it is exercisable through Bills which upon passage and assent becomes Acts of Parliament and there is recognition under Article 94(5) that legislation can be enacted beyond Parliament where there is express authorization by Statute. According to the Respondent, they have been granted authority to introduce a mineral development levy under Sections 20(1)(b) and 223(2)(a) of the *Mining Act*.
63. In evaluating this contention it is necessary to first consider the constitutional and statutory framework. Article 210(1) of *the Constitution* is categorical: no tax or license fee may be imposed, waived or varied except as provided by legislation. Turning to the *Mining Act*, Section 20 (1) (b) provides that the Director of mines shall through the Principal Secretary be responsible to the Cabinet Secretary for promoting the effective and efficient management and development of mineral resources and the mining sector. More directly section 223(2) (a) empowers the Cabinet Secretary to make regulations for the administration and implementation of the Act, including regulations prescribing fees, royalties, rent and other charges payable under the Act and how they are to be calculated.
64. From a statutory standpoint the authority to impose fees and other charges is indeed conferred by section 223. However, the Petitioner's argument is not without merit. The thrust of the contention is that the Mining Regulations 2024 being a form of subsidiary legislation issued by legal notice in the Kenya Gazette, do not constitute legislation within the meaning of Article 210 of *the Constitution*. They rightly point out that where Parliament delegates legislative authority, it must do so expressly and any such delegation must be exercised strictly within the parameters and limits of the enabling statute.



65. The Petitioner pointed out that the parent Act can contain provisions that authorize imposition of tax but must expressly allow the Cabinet Secretary to levy taxes under certain perimeters. There are certain Acts that authorize the Cabinet Secretary to amend the tax rate to be imposed under that Act but lays out a specific procedure requiring such amendment to be laid before the National Assembly for approval.
66. Article 94(6) of *the Constitution* states as follows: -
- “ An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.”
67. From the foregoing, it is not in doubt that Section 223(2) (a) of the *Mining Act*, empowers the Cabinet Secretary, Ministry of Mining, Blue Economy and Maritime Affairs, to impose fees, royalties, rent and other charges that are payable under the Act which in this instance includes the mineral development levy as mandated by the parent Act.
68. In support of this proposition article 94(6) of *the Constitution* provides that any act of Parliament or legislation of a county that delegates authority to make law must expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and Scope of the law to be made and the applicable principles and standards. In this regard it is common for certain acts, such as the *Energy Act*, *Tourism Act* or *Mining Act* to include express provisions permitting the Cabinet Secretary to impose levies, taxes or other charges often subject to parliamentary scrutiny or approval mechanisms.
69. In the present instance, while Section 223(2)(a) of the *Mining Act* permits the Cabinet Secretary to prescribe “fees, royalties, rent, and other charges,” the inclusion of a levy which has both revenue-generating and policy effects arguably falls into a category closer to taxation. The question then becomes whether the “Mineral Development Levy” is in substance a tax, and if so, whether its creation by regulation complies with Article 210(1).
70. While there may be legitimate debate as to whether the mineral development Levy constitutes a charge authorized under section 223(2)(a), this court need not determine that question conclusively in the circumstances of this case at this point. Having already found that the Mining Regulations 2024 were promulgated in violation of *the Constitution* due to lack of meaningful lawful public participation, it follows that all elements of those regulations including the Mineral Development Levy must fall with them.
71. As a matter of principle if a process by which the piece of legislation or subsidiary legislation is enacted is constitutionally flawed then the entire instrument is tainted regardless of whether individual provisions may have been substantively valid. In this case, the promulgation of the Mining Regulations without proper public participation renders the entire set of regulation unconstitutional. Consequently, any provision introduced therein including the Mineral Development Levy is equally unconstitutional. It is as it were the fruit of a poison tree deriving its legal life from an invalid process and therefore in capable of standing on its own.



### Whether the Petitioner is entitled to the relief sought

72. Where a legislation is found to be unconstitutional, the High Court has power under Article 165 and Article 259 to declare it invalid to the extent of inconsistency and grant appropriate remedies. Remedies includes declarations of invalidity, others of certiorari, injunctions to prevent enforcement, mandamus to compel compliance, and shaping orders to mitigate disruptions.
73. The relief that can availed by this Court in a Constitutional Petition is provided for Article 23(3) of *the Constitution* as follows:
- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including –
    - (a) a declaration of rights;
    - (b) an injunction
    - (c) a conservatory order;
    - (d) a declaration of invalidity of any that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
    - (e) an order for compensation; and
    - (f) an order of judicial review.”
74. The right to public participation is a fundamental human right based on provisions of Article 33 of the Bill of Rights concerning the freedom of expression, which includes a general right to take part in the conduct of public affairs. The infringement of these rights has been demonstrated in the foregoing, in terms of the lack of opportunity availed to the Petitioner and other residents to exercise their rights in the enactment of the impugned Regulations.
75. Having found that the orders sought can apply, I am in addition guided by the scope of the judicial review remedies of mandamus and prohibition as held in the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR in which the said Court held inter alia as follows:
- “Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform.



Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way... These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done....”

76. In the circumstances, I find that the orders of Prohibition and Mandamus may not be appropriate. While the Respondent’s execution of its constitutional obligation to facilitate public participation was flawed, and ultimately fell short of the constitutional threshold, there is evidence that an attempt albeit inadequate was made to comply. Accordingly, this is not a case where the Respondent wholly abdicated its duty. Moreover, it’s not within the province of this court to direct the Respondent on the precise manner in which to undertake public participation. *The Constitution* entrusts that responsibility to the relevant authority, and it must be exercised with regard to their administrative capacities and budgetary constraints. What the law requires is meaningful, not uniform participation, tailored to context, but compliant with constitutional standards.
77. While upholding constitutional governance is paramount, remedies must balance enforcement of constitutional standards with preservation of continuity in service delivery and the wider public interest.
78. Ordinarily, upon quashing the impugned regulations, this Court would be inclined to order a refund of the levies collected under the impugned Regulations. However, in the present case, I decline to issue such an order as I am persuaded that directing a refund of the levies so collected would not be in the public interest, would perhaps be extremely difficult to comply with, and it may very well result in a paralysis of the Respondent’s operations and also impose a substantial financial burden on the taxpayer.
79. Consequently, I find that the present petition is meritorious and allow it in the following terms: -
  - a. Declarations be and are hereby issued that:
    - i. The Mining (Royalty Collection and Management) (Amendment) Regulations 2024;
    - ii. The Mining (License and Permit) (Amendment) Regulations 2024;
    - iii. The Mining (Dealing in Minerals) (Amendment) Regulations 2024;
    - iv. The Mining (Mine Support Services) (Amendment) Regulations 2024 and;
    - v. The Mining (Gemstones Identification and Value Addition Fees) (Amendment) Regulations 2024’ (collectively the Mining Regulations 2024) are were individually and collectively promulgated contrary to the provisions of Articles 10 and 118 of *the Constitution*;



- b. A declaration be and is hereby issued that the Mining Regulations 2024 are null and void and therefore invalid and unenforceable individually and collectively;
- c. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the Mining Regulations 2024, and the same are individually and collectively quashed; and
- d. There shall be no orders as to costs as this Petition involves a public interest issue.

Orders Accordingly. File Closed Accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF SEPTEMBER 2025.**

.....

**BAHATI MWAMUYE**

**JUDGE**

In the presence of: -

Counsel for the Petitioner – Mr. Torotwa

Counsel for the Respondent – Mr. Weche h/b Mr. Kaumba

Court Assistant – Ms. Neema

