



**Kenya Water and Sanitation Civil Society Network & 38 others v Kenya Wildlife Service; County Government of Mombasa & another (Interested Parties) (Constitutional Petition E007 of 2023) [2024] KEHC 1098 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CONSTITUTIONAL PETITION E007 OF 2023**

**M THANDE, J**

**FEBRUARY 9, 2024**

**BETWEEN**

**KENYA WATER AND SANITATION CIVIL SOCIETY NETWORK ..... 1<sup>ST</sup> PETITIONER**

**WATAMU TOURISM ORGANIZATION (WTO) (SUING THROUGH SELECTED OFFICIALS; ROYJAN TAYLOR, ROBERT MWACHENGO & EMILIE VAN AARDT) ..... 2<sup>ND</sup> PETITIONER**

**KENYA COAST TOURISM ASSOCIATION (KCTA) (SUING THROUGH ITS ELECTED OFFICIALS) ..... 3<sup>RD</sup> PETITIONER**

**WATAMU MUUNGANO DEVELOPMENT GROUP (SUING THROUGH ITS ELECTED OFFICIALS) ..... 4<sup>TH</sup> PETITIONER**

**WATAMU COMMUNITY BOAT OWNERS AND OPERATORS (SUING THROUGH ITS ELECTED OFFICIAL) ..... 5<sup>TH</sup> PETITIONER**

**THE MIDA CREEK HOTEL LIMITED ..... 6<sup>TH</sup> PETITIONER**

**GARODA RESORT LIMITED ..... 7<sup>TH</sup> PETITIONER**

**WATAMU VIEW LIMITED ..... 8<sup>TH</sup> PETITIONER**

**TURTLE BAY HOTELS LIMITED ..... 9<sup>TH</sup> PETITIONER**

**MEDINA PALMS LIMITED ..... 10<sup>TH</sup> PETITIONER**

**HEMINGWAYS WATAMU LIMITED ..... 11<sup>TH</sup> PETITIONER**

**OCEAN SPORTS MANAGEMENT LIMITED ..... 12<sup>TH</sup> PETITIONER**

**TRIBE WATER SPORTS LIMITED ..... 13<sup>TH</sup> PETITIONER**

**TURTLE BAY DIVES AND WATER SPORTS CENTRE LIMITED ..... 14<sup>TH</sup> PETITIONER**



SWIMBO MANAGEMENT LIMITED .....	15 <sup>TH</sup> PETITIONER
WATAMU PROPERTIES LIMITED .....	16 <sup>TH</sup> PETITIONER
AQUA VENTURES LIMITED .....	17 <sup>TH</sup> PETITIONER
AFRICA BORN LIMITED .....	18 <sup>TH</sup> PETITIONER
PLELAGIC FISHERIES CONSULTING LIMITED .....	19 <sup>TH</sup> PETITIONER
EIRENE ADVISORY LIMITED .....	20 <sup>TH</sup> PETITIONER
THE CROCODILE RESTAURANT LIMITED .....	21 <sup>ST</sup> PETITIONER
ALEXANDER HUNTER .....	22 <sup>ND</sup> PETITIONER
SIMBA FISHING LIMITED .....	23 <sup>RD</sup> PETITIONER
TUHIFA DISABLED GROUP (SUING THROUGH ITS ELECTED OFFICIALS) .....	24 <sup>TH</sup> PETITIONER
JANE DE VOEST .....	25 <sup>TH</sup> PETITIONER
NICE TO SEE YOU SPA SALON LTD .....	26 <sup>TH</sup> PETITIONER
ANDREW THOMAS .....	27 <sup>TH</sup> PETITIONER
EMMA WICKINSON .....	28 <sup>TH</sup> PETITIONER
SANDRA RICHES .....	29 <sup>TH</sup> PETITIONER
TINA ALLEN .....	30 <sup>TH</sup> PETITIONER
MICHAEL LORD .....	31 <sup>ST</sup> PETITIONER
KHAMISI KOMBE .....	32 <sup>ND</sup> PETITIONER
NIGEL WARREN .....	33 <sup>RD</sup> PETITIONER
TOBY WARREN .....	34 <sup>TH</sup> PETITIONER
ROBBERT BARNES .....	35 <sup>TH</sup> PETITIONER
JANICE BARNES .....	36 <sup>TH</sup> PETITIONER
JOHN ANDREWS .....	37 <sup>TH</sup> PETITIONER
KENTUNA LIMITED .....	38 <sup>TH</sup> PETITIONER
WANYEE KINUTHIA .....	39 <sup>TH</sup> PETITIONER

AND

KENYA WILDLIFE SERVICE .....	RESPONDENT
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AND

COUNTY GOVERNMENT OF MOMBASA .....	INTERESTED PARTY
COUNTY GOVERNMENT OF KILIFI .....	INTERESTED PARTY



## **Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 suspended pending determination of a petition challenging its legality**

*The Petition, filed on 7 November 2023, challenged the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023, contending that they were enacted without meaningful public participation and violated socio-economic and consumer rights. The petitioners sought declarations of illegality and orders restraining the Respondent from implementing the Regulations. The Regulations, published under section 116(2)(b) of the Wildlife Conservation and Management Act, 2013, were statutory instruments requiring compliance with the Statutory Instruments Act, including consultation with affected parties. The High Court held that the presumption of constitutionality did not equate to a finding of constitutionality. Subsidiary legislation must respect constitutional values, including public participation under articles 10, 21, and 23 of the Constitution. Given a prima facie case of unconstitutionality, suspension of the Regulations was justified to preserve the substratum of the Petition and uphold the supremacy of the Constitution. The Court granted conservatory orders suspending implementation of the impugned Regulations pending full determination of the Petition.*

Reported by John Wainaina

**Constitutional Law** - constitutionality of statutes - presumption of constitutionality - prima facie case against the constitutionality of a statute - remedies available - suspension of statute/regulations - whether the presumption of constitutionality of a statute could be equated to a finding that the impugned statute was itself constitutional - whether establishing a prima facie case against the constitutionality of statutory regulations was sufficient to justify suspension of the regulations pending the court's determination of the petition - Constitution of Kenya articles 10, 21, 23, 25, 29(d, and 260; Statutory Instruments Act (cap 2A) sections 2, and 5; Wildlife Conservation And Management Act (cap 376) section 13; 116(2)(b) and the eleventh schedule; Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 (cap 376 Sub Leg); Constitution of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 rule 23

**Constitutional Law** - national values and principles of governance - public participation - requirement of public participation in enacting statutes - applicability in subsidiary legislation - whether meaningful public participation was a constitutional and statutory requirement prior to the enactment of subsidiary legislation - Constitution of Kenya article 10

**Statutes** - statutory instruments - suspension of regulations - claim challenging the constitutionality of the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 - whether establishing a prima facie case against the constitutionality of statutory regulations was sufficient to justify suspension of the regulations pending the court's determination of the petition - Constitution of Kenya articles 10, 21, 23, 25, 29(d, and 260; Statutory Instruments Act (cap 2A) sections 2, and 5; Wildlife Conservation And Management Act (cap 376) section 13; 116(2)(b) and the eleventh schedule; Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 (cap 376 Sub Leg); Constitution of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 rule 23

### **Brief facts**

The petition dated 7 November 2023 challenged the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023, published by the Respondent on 11 December 2023. The petitioners sought declarations that the Regulations were unlawful for lack of public participation and violated their socio-economic and consumer rights, alongside orders restraining the respondent from implementing the Conservation Fees. An interim application for conservatory orders was granted on 13 December 2023 to preserve the substratum of the Petition pending determination.

The petitioners contended that the impugned Regulations introduced new activities such as water sports, vlogging, and sundowning, which were not in the 2013 Regulations, without proper public consultation. They further argued that the Respondent lacked jurisdiction to collect fees in certain marine reserves under Section 13 read with the Eleventh Schedule of the Wildlife Conservation and Management Act, 2013.



The respondent opposed the application, asserting compliance with the Statutory Instruments Act and adequate public participation. They contended that the petition lacked bona fide public interest, and that suspension of the Regulations would disrupt wildlife conservation operations. The dispute primarily revolved around the legality, public participation, and constitutional compliance of the impugned Regulations.

#### Issues

- i. Whether the presumption of constitutionality of a statute could be equated to a finding that the impugned statute was itself constitutional.
- ii. Whether establishing a *prima facie* case against the constitutionality of statutory regulations was sufficient to justify suspension of the regulations pending the court's determination of the petition.
- iii. Whether meaningful public participation was a constitutional and statutory requirement prior to the enactment of subsidiary legislation.

#### Held

1. Under article 21 of the Constitution, the State and all State organs were obliged to observe, respect, protect, promote, and fulfil the rights and freedoms in the Bill of Rights, take legislative and policy measures to progressively realize rights under article 43, address the needs of vulnerable groups, and enact legislation to fulfill international human rights obligations. The respondent, as a State entity, was therefore constitutionally required to discharge those duties.
2. The Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 (impugned Regulations) were published by the Cabinet Secretary for Tourism and Wildlife on the recommendation of the respondent pursuant to section 116(2)(b) of the Wildlife Conservation and Management Act, 2013. The Regulations constituted statutory instruments within the meaning of section 2 of the Statutory Instruments Act, which defined such instruments as rules, orders, regulations, or other subsidiary legislation made under powers conferred by an Act of Parliament. The Statutory Instruments Act provided for the making, scrutiny, publication, and disallowance of statutory instruments and required consultation with persons likely to be affected, particularly where instruments may affect business or restrict competition. Section 5 of the Statutory Instruments Act required that the regulation-making authority undertake appropriate consultations, including notification of affected bodies, inviting submissions, and considering expertise relevant to the instrument.
3. Statutory instruments must comply with constitutional values and procedures. Public participation was central to the law-making and policy formulation process and must be meaningfully conducted. Failure to undertake proper consultations prior to enacting a statutory instrument undermined its validity. There was a need to ensure adherence to procedural fairness in legislative and regulatory processes.
4. The impugned Regulations, being subordinate legislation, were therefore required to respect the constitutional mandate for public involvement and consultation, and any failure to do so would render them susceptible to challenge for contravening both the Statutory Instruments Act and the Constitution.
5. All legislation, including subsidiary legislation enjoyed the presumption of constitutionality. Suspension of legislation would not be taken lightly. Suspending the operation of a statute or regulations had serious implications. However, where there was *prima facie* unconstitutionality, the court should not shy away from granting conservatory orders.
6. Presumption of constitutionality, was not a finding of constitutionality. Protection of the supremacy of the Constitution was critical and there could be no greater public interest than upholding the Constitution and the law.
7. The contentious issues could only be determined after the full hearing of the petition. The petitioners had established a *prima facie* case with a probability of success. If the substratum of the petition was not preserved and implementation of the impugned Regulations continued, there was a likelihood that



the petition would be rendered nugatory and a mere academic exercise. That would militate against the public interest that requires that the court must discharge its constitutional mandate of protecting the supremacy of the Constitution by ensuring that all laws, including the impugned Regulations, conformed to the Constitution.

8. It was in the public interest that the legality and constitutionality of the impugned Regulations be determined, before implementation was resumed. Further, the prejudice that would be suffered by the petitioners and the public by being subjected to regulations that may ultimately be determined to be unconstitutional, far outweighed the prejudice to be suffered by the respondent if the petition were to fail, noting that the respondent could still charge and collect fees under the 2013 Regulations.

*Application allowed.*

#### **Orders**

- i. *Pending the hearing and determination of the petition, the court suspended the implementation of the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 gazetted on 11 November 2023. vide Legal Notice No 215.*
- ii. *The respondent was restrained from charging or demanding payment of the conservation fees prescribed under the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023.*

#### **Citations**

##### **Cases**

1. 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 Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017; [2019] KESC 15 (KLR)) — Explained
2. Kaguru, Susan Wambui & 4 others v Attorney General & another (Petition 545 of 2012; [2012] KEHC 551 (KLR)) — Explained
3. Mohammed v Ministry of Education & another; Registered Trustees of the Baptist Convention of Kenya (Interested Party) (Constitutional Petition 043 of 2021; [2022] KEHC 115 (KLR)) — Explained
4. Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Petition 2B of 2014; [2014] KESC 38 (KLR)) — Explained
5. Ngaywa, Kizito Mark v Provincial Administration & another (Petition 4 of 2011; [2011] KEHC 3870 (KLR)) — Explained
6. Okoiti, Okiya Omtatah v Commissioner General, Kenya Revenue Authority & 2 others (Petition 532 of 2017; [2018] KEHC 8263 (KLR)) — Explained
7. Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others (Petition 3 of 2016; [2016] KEHC 373 (KLR)) — Explained
8. Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others (CCT 86/08; [2010] ZACC 5) — Explained
9. Giella v Cassman Brown & Co. Ltd. ([1975] EA 358) — Mentioned

##### **Statutes**

1. Constitution of Kenya — article 10; 21; 23; 25; 29(d); 260 — Cited
2. Constitution of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 — rule 23 — Cited
3. Statutory Instruments Act (cap 2A) — section 2; 5 — Cited
4. Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 (cap 376 Sub Leg) — In general — Cited
5. Wildlife Conservation And Management Act (cap 376) — section 13; 116(2)(b); Schedule Eleventh — Cited



## Advocates

None mentioned

## RULING

1. The Petition before me dated 7.11.23 was triggered by the Conservation Fees (January 2024 to December 2025) prescribed and published by the Respondent. The Petitioners seek declarations inter alia that the said Regulations are illegal for want of participation and violate their socio-economic rights and consumer rights. The Petitioners also sought orders prohibiting the Respondent from implementing the Conservation Fees. Together with the Petition was filed an application of even date, seeking relief in the interim, by way of a restraining order against the Respondent from implementing the Conservation Fees pending the hearing and determination of the application and Petition. After hearing the parties on 13.12.23, the Court did grant the conservatory orders as sought, pending the hearing and determination of the Petition. Directions on the hearing of the Petition were also issued.
2. On 29.12.23, the Petitioners filed an application of even date seeking the following:
  1. Spent.
  2. Spent.
3. That pending the hearing and determination of the Petition herein, the Honourable Court be pleased to suspend the implementation of the *Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023* gazetted on 11<sup>th</sup> December, 2023 via Legal Notice No 215 and issue and order restraining the Respondent from charging or demanding payment of the Conservation Fees prescribed under the said Regulations.
  4. Spent.
  5. Spent.
  6. That costs be provided for.
3. The present Application was provoked by the *Wildlife Conservation and Management (access and Conservation) (Fees) Regulations* (impugned Regulations) which were gazetted on 11.12.23. The Petitioners' case is that there was no proper public participation carried out. Further that the Respondent has no jurisdiction to administer or collect conservation fees in Malindi, Mombasa and Watamu Marine Reserves which fall under the respective county governments, by virtue of Section 13 as read with the Eleventh Schedule of the *Wildlife Conservation and Management Act, 2013*. They contend that the impugned Regulations were published in defiance of the Court order of 11.12.23. It was asserted that during the meetings held in respect of the previous conservation fees, issues were raised. The Respondent's officers asked for time to consult and revert, but they never did, and correspondence to that effect has been filed. Further that at no time were the impugned Regulations, which go beyond fees and prescribe and define activities, subjected to public participation. The said activities are not in the 2013 Regulations and were introduced for the first time in the impugned Regulations. It is the Petitioners' contention that if the orders are not extended, then the substratum of the Petition will be destroyed in the event the Petition succeeds.
4. In opposition to the Application, the Respondent filed grounds of opposition dated 1.7.24. The grounds are that the Petition has not met the threshold in *Giella v Cassman Brown & Co. Ltd.* [1975] E. A. 358 to warrant the grant of the orders sought. Further that it is against public interest to grant



the orders sought as public resources used in public participation and implementation of conservation fees will be wasted away. Additionally, that the Petitioners have not demonstrated with precision contravention of their rights under the Constitution or any other law.

5. The Respondent further opposed the application vide a replying affidavit sworn on even date by Gladys Kosgey, its Senior Assistant Director Business Development & Marketing. It was averred that following the approval from the Parliamentary Committee on delegated legislation the Cabinet Secretary Ministry of Tourism and Wildlife published the impugned Regulations, thereby concluding the process which began in January 2023. The Impugned Regulations are necessary for the Respondent to effectively discharge its mandate, which is conservation and management of wildlife and its habitat for posterity. It is the Respondent's case that adequate public participation was undertaken prior to the publishing of the impugned Regulations. Further that the provisions of the Statutory Instruments Act were complied with. It is thus the Respondent's contention that the Application and Petition have not been filed in good faith or in furtherance of a genuine public interest but of personal pecuniary interest. It is intended to sabotage public policies and the Respondent's efforts to conserve and manage wildlife under the guise of seeking protection for infringement of their rights by the Respondent.
6. It was further argued that the Petitioners have not demonstrated that they have a prima facie case with a probability of success or that they suffer irreparable injury or prejudice. As such, the Court should decide the application on the balance of convenience. In contrast, the Respondent shall suffer irreparable loss and damage should the order sought be granted as they continue to operate using fees that do not meet the cost of discharging their mandate.
7. Article 23 of the Constitution has conferred upon this Court, the authority to uphold and enforce the Bill of Rights and provide remedies as follows:
  1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
  2. ...
  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 law 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.
8. Among the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights is a conservatory order. Rule 23 of the Mutunga Rules provides that despite any provision to the contrary, a Judge before whom a petition is presented shall hear and determine an application for conservatory or interim orders. The purpose of a conservatory order is to preserve the substratum of the petition before court, pending the hearing and determination of the same.



9. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Supreme Court set out the threshold for the grant of conservatory orders as follows:

“(86) Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the *Constitution*.

10. In accordance with test established by the Supreme Court, a party seeking conservatory orders must demonstrate to the Court that first, the petition is arguable and not frivolous. Second that unless the orders sought are granted, the suit were it to succeed, would be rendered nugatory. Thirdly, that it is in the public interest that the orders sought are granted. The Supreme Court clarified that the public interest test is informed by the expanded scope of the Bill of Rights and the public-spiritedness that run through the *Constitution*.

11. On his part, Mativo, J. (as he then was) in *Mohammed v Ministry of Education & another; Registered Trustees of the Baptist Convention of Kenya (Interested Party)* (Constitutional Petition 043 of 2021) [2022] KEHC 115 (KLR) (21 February 2022) (Ruling) stated:

An applicant seeking a conservatory order is mandated to demonstrate that should the court fail to grant a conservatory order, there is a high probability of him/her suffering prejudice as a result of the violation or threatened violation of the *Constitution*. However, this must be weighed against public interest. From the foregoing, it is evident that conservatory orders



are a unique instrument in the protection of the Bill of Rights. They may only be granted by courts of law upon being satisfied that several pre-requisite conditions exist. Conservatory orders are distinct from remedies almost similar in nature such as injunctions.

12. I have considered all the issues raised by the Petitioners concerning the impugned Regulations as well as the contentions by the Respondents. It is with these principles in mind that I no proceed to consider the Application before me. I am keenly aware I cannot at this stage delve into the merits of the case
13. It is the Petitioners' contention that the Respondent did not carry out any or adequate public participation on the impugned Regulations. Only one meeting was held and the same concerned fees, namely the July 2023-December 2025 fees and not the impugned Regulations, which go beyond fees. The impugned Regulations prescribe and define activities such as water sports, vlogging, sundowning, etc. These activities which the public now have to pay for, were not defined in the 2013 Regulations and were introduced for the first time, in the impugned Regulations. The Petitioners thus argue that if the orders are not extended, the substratum of the Petition will be destroyed should they succeed.
14. The Respondent argued that should the orders granted herein be extended, the Respondent's operations will be paralyzed as they will not be able to have sufficient revenue to discharge its mandate. The Respondent proceeded to submit on the principles to be considered for grant of an injunction as set out in *Giella v Cassman Brown and Co Ltd* [1973] EA 358. It is well settled that that Conservatory orders are distinct from remedies almost similar in nature such as injunctions.
15. What is before the Court for determination is the constitutionality of the impugned Regulations. The right to collect any tax or levy is founded on the principle of legality and constitutionality. As such, no State agency can justify violation of fundamental rights or of the Constitution on the grounds that its operations will be adversely affected.
16. Article 21 of the Constitution provides as follows:
  1. It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
  2. The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.
  3. All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.
  4. The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.
17. As can readily be seen from the above provision, the State and all State organs are enjoined to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43. The State is defined under Article 260 as the collectivity of offices, organs and other entities comprising the government of the Republic under the Constitution. The Respondent herein, all falls under the definition of State. As such the constitutional obligation to make every effort to ensure the realization of the rights guaranteed under Article 43, is placed upon it.
18. The Petitioners' contention is that the impugned Regulations were promulgated in contravention of Article 10 of the Constitution in that there was no public participation. This is refuted by the



Respondent which argued that there was adequate public participation and that the provisions of the Statutory Instruments Act were complied with.

19. The impugned Regulations, were published by the Cabinet Secretary for Tourism and Wildlife on the recommendation of the Respondent pursuant to the powers conferred by Section 116(2)(b) of the Wildlife Conservation and Management Act, 2013. The Regulations are statutory instruments within the definition set out in Section 2 of the Statutory Instruments Act which provides as follows:

“statutory instrument” means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

20. The Statutory Instruments Act was enacted for the purpose of providing for the making, scrutiny, publication and operation of statutory instruments and for matters connected therewith. In particular, the Act facilitates the scrutiny by Parliament of statutory instruments and to set out the circumstances and manner in which the statutory instruments, or provisions of the statutory instruments, may be disallowed, as well as the consequences of the disallowance.

21. The Statutory Instruments Act requires that prior to the making of any statutory instrument appropriate consultations be made with persons likely to be affected by the intended statutory instrument. Section 5 provides as follows:

1. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
  - a. have a direct, or a substantial indirect effect on business; or
  - b. restrict competition;the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.
2. In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
  - a. drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
    - a. ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
3. Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—
  - (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
  - b. invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.



22. It is trite that the content and the manner in which legislation is adopted and passed must conform to the *Constitution*. The requirement for consultation in Section 5 of the *Statutory Instruments Act* accords with Article 10 of the *Constitution* which provides:

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

23. National values and principles of governance are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law, or makes or implements public policy decisions. Public participation is a constitutional imperative, which plays a central role in legislative, policy and executive functions of Government. It informs stakeholders and the public of what is intended and affords them an opportunity to express, and have their views taken into account. In the oft cited South African case of *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* CCT 86/08 [2010] ZACC 5, the Court captured the essence of public participation thus:

[E]ngagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

24. Public participation has been entrenched in our Constitution as one of the national values and principles of governance that binds all state organs including the Respondent, when, inter alia recommending the enactment of law and formulation and implementation of public policy decisions. In *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR, Mativo, J. (as he then was) stated:

49. In a recent decision of this court, I observed that "my analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government." Both local and foreign jurisprudence are awash with decisions holding that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.



25. Similarly, in the case of *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 the Supreme Court stated:

(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.

26. Having said the foregoing, the Court appreciates the well settled principle that all legislation, including subsidiary legislation enjoys the presumption of constitutionality. This was reiterated by Majanja, J. in the case of *Susan Wambui Kaguru & 4 others v Attorney General & another* [2012] eKLR. The learned Judge stated:

I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with our delegated sovereign authority.

27. With the presumption of constitutionality therefore, suspension of the operation of a statute or statutory provisions is a very serious matter that ought not to be taken lightly. In the case of *Kizito Mark Ngaywa v Provincial Administration & another* [2011] eKLR, Ibrahim, J. (as he then was) stated:

I am still persuaded by the above-mentioned principles of Constitutional interpretation. In the Bishop Joseph Kimani case, the court observed as follows:-

“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stay actually show that the operation of the legislative provision are a danger to life and limb at that very moment.”

28. The Court appreciates that suspending the operation of a statute or regulations has serious implications. However, where there is prima facie unconstitutionality, the Court should not shy away from granting conservatory orders. It has been stated repeatedly that presumption of constitutionality, is not a finding of constitutionality. Protection of the supremacy of the *Constitution* is critical and there can be no greater public interest than upholding the *Constitution* and the law.

29. In this regard, I associate with the holding in *Simeon Kioko Kitbeka & 18 others v County Government of Machakos & 2 others* [2018] eKLR, where Odunga, J. (as he then was) stated:

42. In my view, if the Court has power to declare an enactment void and invalid, likewise the Court must have jurisdiction in deserving cases to suspend provisions of an enactment if to do otherwise is likely to render whatever decision the Court may arrive at a mirage. Our Constitution for example in Article 29(d) outlaws torture and freedom from torture is one of the fundamental freedoms which by virtue of Article 25 of the *Constitution* cannot be limited. If Parliament was to purport to pass an Act which introduces torture, it would be illogical for the Court to stand back and say that it has no jurisdiction to grant conservatory orders. To do



so would amount to the Court ceding not only its powers but failing to protect the Constitution as envisaged in Article 21(a) of the Constitution. What use would a favourable determination of the petition be to the victim of torture if by the time of the determination, the torture has taken place and freedom lost beyond recall. I therefore do not subscribe to the notion that under no circumstances can conservatory orders be granted where a piece of legislation is under challenge.

30. All the contentious issues raised herein, can only be determined after the full the hearing of the Petition. Suffice it to say however, that upon evaluation of the rival submissions, I have no difficulty in finding that the Petitioners have established a prima facie case with a probability of success. If the substratum of the Petition is not preserved and implementation of the impugned Regulations continues, there is a likelihood that the Petition will be rendered nugatory and a mere academic exercise. This will militate against the public interest that requires that the Court must discharge its constitutional mandate of protecting the supremacy of the Constitution by ensuring that all laws, including the impugned Regulations, conform to the Constitution. It is thus in the public interest that the legality and constitutionality of the impugned Regulations be determined, before implementation is resumed. Further, the prejudice that will be suffered by the Petitioners and the public by being subjected to regulations that may ultimately be determined to be unconstitutional, far outweighs the prejudice to be suffered by the Respondent if the Petition were to fail, noting that the Respondent can still charge and collect fees under the 2013 Regulations.
31. In light of the foregoing, I am satisfied that the Petitioners have met the threshold for the grant of conservatory orders. Accordingly, I make the following orders:
1. Pending the hearing and determination of the Petition herein, this Court suspends the implementation of the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023 gazetted on 11.11.23. vide Legal Notice No 215.
  2. The Respondent is hereby restrained from charging or demanding payment of the conservation fees prescribed under the Wildlife Conservation and Management (Access and Conservation) (Fees) Regulations, 2023.
  3. Costs shall abide the outcome of the Petition.

**DATED AND DELIVERED IN MALINDI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2024**

**M. THANDE**

**JUDGE**

