



**Royal Spring Hotel Limited & 15 others v Nakuru County Government  
(Civil Case 10 of 2020) [2024] KEHC 8569 (KLR) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8569 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 10 OF 2020  
HM NYAGA, J  
JULY 15, 2024**

**BETWEEN**

- ROYAL SPRING HOTEL LIMITED ..... 1<sup>ST</sup> PLAINTIFF**
  - THE EROS HOTEL ..... 2<sup>ND</sup> PLAINTIFF**
  - GOLDEN PALACE HOTEL NAKURU ..... 3<sup>RD</sup> PLAINTIFF**
  - COOL RIVERS HOTEL LIMITED ..... 4<sup>TH</sup> PLAINTIFF**
  - TOP CLIFF LODGE LIMITED ..... 5<sup>TH</sup> PLAINTIFF**
  - ABBAY RESORT LIMITED ..... 6<sup>TH</sup> PLAINTIFF**
  - HOTEL GENEVIEVE ..... 7<sup>TH</sup> PLAINTIFF**
  - LAKE NAKURU FLAMINGO LODGE ..... 8<sup>TH</sup> PLAINTIFF**
  - HILL COURT RESORT LIMITED ..... 9<sup>TH</sup> PLAINTIFF**
  - EAST MARK HOTEL LIMITED ..... 10<sup>TH</sup> PLAINTIFF**
  - ALPINE HOTEL LIMITED ..... 11<sup>TH</sup> PLAINTIFF**
  - GITUAMBA CLUB ..... 12<sup>TH</sup> PLAINTIFF**
  - EMMA WAIHERA NJUGUNA ..... 13<sup>TH</sup> PLAINTIFF**
  - PETER MAINA NJUGUNA ..... 14<sup>TH</sup> PLAINTIFF**
  - SAMUEL MUGO GITHUNGA ..... 15<sup>TH</sup> PLAINTIFF**
  - WAGON WHEEL HOTEL ..... 16<sup>TH</sup> PLAINTIFF**
- AND**
- NAKURU COUNTY GOVERNMENT ..... DEFENDANT**



## JUDGMENT

### Pleadings

1. The Plaintiffs vide an Amended Plaint dated 29<sup>th</sup> August, 2022 seek for the following reliefs:
  - a. A permanent injunction be issued restraining the defendant either by itself or through its agents, representatives, employees, workers or any other person whatsoever claiming or acting through or under it from harassing or intimidating the plaintiffs or interfering with the plaintiffs' businesses on account of the invoices issued to the plaintiffs in January or February 2020 for trade licence fee or bed occupancy or fire inspection levies;
  - b. A declaration be issued that the fee charged and demanded by the defendant as bed occupancy levy is unconstitutional and unlawful;
  - c. An order be issued cancelling the invoices issued by the defendant to the Plaintiffs in January or February 2020 in respect of trade licence fee and fire inspection levy and directing the defendant to issue proper and accurate ones to the plaintiffs; and
  - d. A declaration be issued that the trade licence fee of between Ksh 100,000/= and Ksh. 200,000/= demanded from the 1<sup>st</sup> to 13<sup>th</sup> plaintiffs are unlawful and unconstitutional on account of being discriminatory oppressive and implemented without public participation or contrary to the outcome of the public participation exercise; and
  - e. Costs and interest at court rates.
2. The Plaintiffs pleaded that on diverse dates during the months of January and February 2020, the defendant issued irregular, unlawful and or unconstitutional invoices to the 1<sup>st</sup> to 13<sup>th</sup> plaintiffs for the payment of the 2020 single business permit or trade licence and demanded that the subject plaintiffs settle the aforesaid wrongful demands prior to being issued with the single business permit or trade licence. The Particulars of wrongfulness of the invoices were enumerated at paragraph 5 (a)-(h) of the Amended Plaint.
3. The Plaintiffs further Plead that on diverse dates during the months of January and February 2020 the defendant served the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, and 16<sup>th</sup> plaintiffs with wrongful invoices for bed occupancy levy which according to the defendant was gazetted by Nakuru County Finance Act, 2019 and was being merely administered by the defendant under the Hotels and Restaurants Act, Chapter 494 of the Laws of Kenya as a devolved function but which levy is not provided for under the aforesaid national legislation and the demands by the defendant in relation thereto are therefore unlawful, unconstitutional and null and void. Particulars of the wrongfulness are listed at paragraph 6(a)- (c) of the Amended plaint.
4. The plaintiffs averred that on diverse dates between the months of January and February 2020 the defendant served the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> plaintiffs with wrongful and thus invalid invoices for fire inspection levy. Particulars thereof were enumerated at paragraph 7 (a) – (i) of the Amended plaint.
5. Upon service, the defendant filed a statement of defence dated 17<sup>th</sup> October, 2022 wherein it denied the Plaintiffs' case. The defendant averred that Article 185(2) of *the Constitution* grants it powers to make laws that are necessary and incidental to the performance of its function and that the *Public Finance*



Management Act 2012 gives it powers to set up revenue raising measures and to also collect and receive revenue.

6. The defendant pleaded that if at all some of the invoices that were issued had anomalies, which it denied, the same were duly amended and the plaintiffs paid the amount due for the single business permit and fire inspection levy for the year 2020.
7. It further pleaded that the amount charged for bed occupancy levy are clearly stipulated in the Finance Act 2019. That the plaintiffs were greatly involved in several discussions over the bed occupancy levy during the budget making process and through their representatives they requested to commence payment of the same in the year 2018.
8. The defendant further averred that the bed occupancy levy has been in its Finance Act from the year 2015 and the hotels within Nakuru County have been paying for the same.
9. It is also averred that the implementation of the said levy was subjected to public participation before being passed by the County Assembly.
10. The defendant further averred that any errors or omissions that may arise in the computation of any invoice are usually addressed by it on an individual basis.
11. The defendant thus prayed that the Plaintiffs' suit be dismissed with costs.
12. Before hearing of the matter the parties filed a consent dated 13<sup>th</sup> October 2022 on 14<sup>th</sup> October, 2022 partially compromising this suit in the following terms: -
  - a. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 15<sup>th</sup> plaintiffs have each severally made the requisite payments of all applicable fees and charges for trade licence and fire inspection levy to the Defendant for the period up to and including 31<sup>st</sup> December, 2021 and the Defendant shall not raise any new demands in respect thereof.
  - b. The 2<sup>nd</sup>, 7<sup>th</sup>, 14<sup>th</sup> and 16<sup>th</sup> Plaintiffs have not yet made the requisite payments of all applicable fees and charges for trade licence and fire inspection levy to the Defendant for the period up to and including 31<sup>st</sup> December, 2021 and will only benefit from this consent upon doing so.
  - c. All the Plaintiffs shall continue to make the payments referred to in 1 and 2 above for the year 2022 and thereafter at the same rate for the year 2021 unless and until the rates are adjusted or altered by a new Nakuru County Finance Act.
  - d. The Court to determine whether the bed occupancy levy charged by the defendant is constitutional and legal.
13. The above consent was adopted as an order of this court on 20<sup>th</sup> March 2023.
14. On 17<sup>th</sup> May, 2023, the parties took directions for matter to proceed by way of viva voce evidence.

#### **Plaintiff's Case**

15. Benson Mwangi Wangai a director of the 1<sup>st</sup> Plaintiff testified on behalf of the Plaintiffs. He testified that the plaintiffs are in the business of hotels, restaurants and bars. That the plaintiffs make substantial payments to operate e.g. Business permit, Fire levy, Public Health Licence, Canopy Licences, liquor licence to the County Government where applicable.
16. It was his testimony that they pay to the National Government a levy at 2% of the sales to the Tourism Regulatory Authority Fund based on bed occupancy.



17. He stated that when the defendant issued Bed Occupancy Levy, they sought a meeting with it to resolve the issue. However, the County started harassing their members.
18. The witness stated that according to the plaintiffs the business permit that they were paying and other levies are based on bed occupancy.
19. He further stated that the new levy is unfair, considering that it is based on number of beds and not actual occupancy. They also argued that the Defendant has not offered any extra services to warrant the new levy. He believed charging of the said levy would amount to double taxation.
20. It was his further testimony that Finance Act was not subjected to public participation before its enactment and urged this court quash the levy in issue.
21. He produced the bed occupancy levy invoices as PEX.1 (a1) to (a5) and a copy of the Demand Letter as PEX.2.
22. In cross examination, he testified that the levy was introduced in 2020. He stated that the 2019 Finance Act did not have the levy in issue. He reiterated that there was no public participation conducted prior enactment of the said Act. He admitted that Top Cliff Lodge Ltd, Wagon Hotel and Cool Rivers are already paying the bed occupancy levy but he believed they may have decided to do so after being harassed by the defendant.

### **Defence Case**

23. Philip Mbalwa, the Deputy County Receiver of Revenue of the Defendant testified on behalf of the Defendant.
24. He stated that the bed occupancy levy was contained in the Finance Act of 2015. He said the Act was subjected to public participation and hotel owners made their proposals prior its enactment. It was his testimony that the projection of the levy for each hotel is based on the classification of hotel by the Tourism Board Fund and actual records in the hotel in question based on the bed occupied for the last year. He said the Plaintiffs' bed occupancy levy appear under class C & D and as per the Act Ksh.120/= is charged per room per month as provided in the records. He said the defendant looks at the rooms occupied for the past year as a base for charging the fee and the hotel owners provide that information. He referred the court to page 20 of their bundle to show that as per their records of 2018, Top Cliff Lodge Ltd provided them with information of 16 rooms.
25. It was his further evidence that the Applicants proposed to pay Ksh.60/= per month per room after public participation had been conducted and the Act passed. He said other hotels within Nakuru have been paying for the same. To support this, he referred this court to pages 24,25 and 27 of their bundle dated 5<sup>th</sup> July,2023 to show that, for instance, Hill Court paid Ksh. 36,000/= in 2018.
26. The witness produced a Notice on Public Participation, The Nakuru County Finance Act, Local Authority Integrated Financial Operations Management System payment of Bed Occupancy Charges for the year 2018 and 2020 and the County Integrated Financial Operations Management System Payment of Bed Occupancy Charges for the year 2021,2022 and 2023 as defence exhibits 1 to 5 respectively.
27. In cross examination, he confirmed he did not have evidence to show that the Finance Bill was sent to the Plaintiffs prior its enactment. He disputed that some hotels e.g. Hill Court were coerced to pay the bed occupancy levy. He said the function of the County Government is to promote local tourism. He clarified that bed occupancy levy is not for establishments without bed and that this is not discriminatory since other sectors e.g. transport sector benefit indirectly. He said each sector has



a specific levy tailored for them. He confirmed that the Plaintiffs pay for trade licences in addition to the levy. He disputed that the levy discourages hotel industry players. It was his testimony that many hotels have complied, including some of the plaintiffs herein. He added that the payments are made in January to March of every year. He reiterated that the levy is pegged on the number of rooms not beds and that hotels give their room projections which they use for billing and thus the payments made cannot be uniform.

### **Plaintiffs' Submissions**

28. On whether the bed occupancy levy is constitutional, the plaintiffs cited the provisions of Article 209 (3) and (4) of *the Constitution*. They argued that the defendant would only be able to charge for bed occupancy levy if it is authorized to do so by an Act of Parliament or it is a levy for services being rendered to them by the defendant.
29. The Plaintiffs posited that the defendant has not pointed out the Act of Parliament that authorizes it to charge the said levy and that the Defendant's Finance Act 2019 is not and does not constitute an Act of Parliament.
30. The plaintiffs further submitted that from the evidence on record, the aforesaid levy is only charged upon businesses in the hotel and lodging industry for absolutely no commensurate services in return. That as such, the said levy is unconstitutional as it contravenes Article 27(1) of *the Constitution*.
31. In conclusion and relying on Article 2(4) of *the constitution* the plaintiffs submitted that the defendant's bed occupancy levy is unlawful.
32. They prayed that their claim be allowed with costs.

### **Defendant's Submissions**

33. The Defendant framed three issues for determination, namely;
  - a. Whether the bed occupancy levy is unconstitutional and unlawful;
  - b. Whether the Plaintiffs were involved in the public participation process for enactment of the Finance Act;
  - c. Whether the Defendant acted legally by demanding for charges as required by the 2010 Constitution of Kenya and the Nakuru County Finance Act, 2019.
34. On the first issue, the defendant submitted that the mandate to charge Bed Occupancy Levy is derived from Article 209 of *the Constitution*. That under the Fourth Schedule Part 2 of *the Constitution*, Local Tourism is a devolved function and the defendant is thus expected to set up mechanisms to promote the thriving of local tourism.
35. The defendant argued that the *Public Finance Management Act*, 2012 was enacted to ensure effective management of public finances by the National and County Governments.
36. Citing Section 125 of the *Public Finance Management Act*, 2012 and the cases of Kenya Pharmaceutical Association vs City Council of Nairobi & 2 other [2015] eKLR & Base Titanium Limited v County Government of Mombasa & another [2021] eKLR, the defendant argued that county governments have been empowered to demand for licence fees as long as it is provided for in the legislation.
37. The defendant thus argued that it promotes domestic tourism through advertisements and engagements of various stakeholders to encourage local tourism. It posited that many hotels within the



County are paying for the said levy including some of the plaintiffs herein. That as such the said levy is constitutional and should continue to be charged.

38. On the second issue, the defendant submitted that pursuant to Article 201(a) of *the Constitution*, Section 87 of the County Government Act, 2012 and Section 125(2) of the *Public Finance Management Act*, 2012, public participation is one of the principles of governance and it is expected to undertake the same in various stages of budget making process.
39. Citing the case of Republic vs County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR, the defendant argued that it is expected to demonstrate that it undertook the requisite measures to ensure reasonable public participation in line with *the Constitution* and County Government Act.
40. The defendant argued that a notice on public participation inviting the members of the public to submit their views on the budget was shared with the public and they were given reasonable time within which to submit the written memoranda to the clerk to the County Assembly. The defendant also submitted that the Finance Bill 2019 was distributed during public participation meetings and also advance copies were sent to various stakeholders including the plaintiffs but the plaintiffs did not submit any memorandum.
41. The defendant contended that it had several meetings with the stakeholders in the hotel industry and the issue of bed occupancy was adequately discussed and a consensus arrived at on the amount to be charged.
42. Regarding the third issue, the Defendant referred this court to Article 209(3) & (4) of *the Constitution*, Section 42 and the Third Schedule of the Nakuru County Finance Act and the case of James Gacheru Kariuki t/a Constituyen Traders & 536 others v County Government of Kiambu & others [2017] eKLR for the proposition that Article 210 of *the Constitution* is quite explicit in that it envisages that both the National as well as County Governments may impose licencing fees provided that it was contained in legislation. It submitted that it acted legally in demanding for the charges .
43. The Defendant thus prayed for the dismissal of the Plaintiffs’ suit with costs.

#### **Issues for Determination.**

44. From the pleadings, evidence on record and parties’ respective submissions, only two issues in my view stand out for determination. These are;
  - a. Whether the bed occupancy levy is unconstitutional and unlawful.
  - b. Whether the Defendant’s Finance Act 2019 was subjected to public participation prior its enactment.

#### **Analysis**

45. Article 210 of *the Constitution* contemplates that the National Government and County Governments can impose licencing fees as long as the imposition of such licencing fees are provided for in either an Act of Parliament or a County Legislation.
46. Article 260 of *the Constitution*, on the other hand, defines “legislation” to include “an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or a law made by an assembly of a County Government, or under authority conferred by such law.”



47. Article 209 of *the Constitution* provides for the charges that may be imposed by the County Government. The relevant parts are as follows;

- “(3) A County may impose—
- a. property rates
  - b. entertainment taxes; and
  - c. any other tax that it is authorised to impose by an Act of Parliament.
- (4) The National and County Government may impose charges for the services they provide.”

48. Article 210 (1) of *the Constitution* provides: -

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

49. There is no dispute that County Governments are vested with the powers to make legislation under Article 185 (2) of *the Constitution* which states: -

“A County assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County government under the Fourth Schedule.”

50. Section 5(2) (a) of the County Government *Act No. 17 of 2012* gives effect to Article 185 (2) of *the Constitution* as it provides:

“5

- (1) A county government shall be responsible for any function assigned to it under *the Constitution* or by an Act of Parliament.
- (2) Without prejudice to the generality of subsection (1), a county Government shall be responsible for—
  - (a) county legislation in accordance with Article 185 of *the Constitution*;

51. There is also no dispute that under the Fourth Schedule of *the Constitution*, local tourism is a devolved function. Clause 7 thereof lists the following devolved functions;

- “Trade development and regulation, including—
- (a) markets;
  - (b) trade licences (excluding regulation of professions);
  - (c) fair trading practices;
  - (d) local tourism; and
  - (e) cooperative societies.



51. Pursuant to Article 185 of *the Constitution*, the defendant enacted Nakuru County Finance Act 2019 whereby under Section 42 the bed occupancy levy and the requisite rates of fees chargeable are provided.
52. It is the plaintiff's case that this levy is unlawful for the reason that the defendant has not pointed out an Act of Parliament that authorises it to charge it and that it is a levy for services provided by it to the plaintiffs. It was pointed out that the only legislation that is known to them is the Hotels and Restaurants Act Cap 494 and it has no provision for such a levy. Their argument is that the Finance Act 2019 does not constitute an Act of Parliament as envisaged by the law.
53. It was conceded by the plaintiffs that even without an Act of Parliament, the defendant would still be able to charge the levy but only if it is for a service provided to the plaintiffs and in this case, the defendant has not shown the service it is to provide. Therefore, it was argued, the levy is being charged for absolutely no commensurate service to the plaintiffs.
54. The defendant is constitutionally mandated to charge and levy taxes under *the Constitution* but the same are limited by *the Constitution* itself. It has to be for services rendered by the County entity.
55. The defendant acknowledges that it can only impose any levy if allowed as above. It argues that local tourism being a devolved function, it is required to set up mechanisms to promote the thriving of the same.
56. The defendant has stated that in levying the charges, it is executing its mandate to ensure that domestic tourism thrives. In my view, having been mandated by *the Constitution* to deal with local tourism then the defendant was entitled to introduce the levy in question but subject to the Constitutional imperatives set out above.
57. It is also my view that no county or authority in the country is allowed to impose any tax without a basis of the law as set out under Article 209 of *the Constitution* and subject to the ideals set out therein.
58. This is what now brings me to the next issue.
59. The plaintiffs also contend that there was no public participation by the Defendant before it enacted the Finance Act.
60. Black's Law Dictionary 9<sup>th</sup> Edn. at page 1229 defines participation as "the act of taking part in something, such as partnership..."
61. Public views ought to be considered in the decision making process and the legislative process. Public participation is one of the national values and principles in our constitution which must be observed by all persons; state organs and public officers in the exercise of their responsibilities.
62. Article 10(1) of *the Constitution* states that 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 applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or makes or implements public policy decisions.
63. According to Article 10(2), the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and "participation of the people".
64. Nationally, Article 118 of *the Constitution* is clear that Parliament should conduct its business in an open manner, and its sittings and those of its committees should be open to the public and it should



facilitate public participation and peoples' involvement in its legislative and other business including those of its committees.

65. As regards County Governments, the same requirement is found at Section 87 of the [County Governments Act](#),

87. Principles of citizen participation in counties Citizen participation in county governments shall be based upon the following principles— (a) (b) (c) (d) (e) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation; reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards; protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information; legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight; 47 [Issue 1]No. 17 of 2012 County Governments [Rev. 2012] (f) (g) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

66. Section 91 of the said Act compels the County Governments to facilitate the establishment of platforms for citizen participation. The section provides as follows;

“The county government shall facilitate the establishment of structures for citizen participation including—

- a. information communication technology based platforms;
- b. town hall meetings;
- c. budget preparation and validation fora;
- d. notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;
- e. development project sites;
- f. avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or
- g. establishment of citizen fora at county and decentralized units”

67. In the South African case of *Matatiele Municipality & Others vs The President of South Africa & Others (2) (CCT 73/05 A [2006] ZACC 12; [2007 \(1\) BCLR 47 \(CC\)](#)*, the Constitutional court stated that;

“The representative and participative elements of our democracy should not be seen as being in tension with each other...What our constitutional scheme requires is “the achievement of a balanced relationship between representative and participatory elements



in our democracy.” The public involvement provisions of *the Constitution* address this symbolic relationship, and they lie at the heart of the legislative function. *The Constitution* contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process”

68. In *Minister for Health vs New Chicks South Africa Pty Ltd CCT 59/04*, the same court observed that;

“The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation and that what matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

69. In *Robert N. Gakuru & others v Kiambu County Government & 3 others [2014] eKLR* the Court observed;

“[P]ublic 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. 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. Article 196(1) (b) just like the South African position requires just that.”

70. On appeal against the above decision, the Court of Appeal affirmed the decision in *Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR* stating;

[20] “...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. *The Constitution* in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation...”

71. The principle of public participation was also interpreted in the South African Constitutional Court in *Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)*, Ngcobo, J who delivered the leading majority judgement expressed himself as follows:

“The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected.... Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take



part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalisation of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.....”

72. The Judge dealt with the issue of what amounts to facilitation of public participation as follows: -

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in [the Constitution](#) is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.....”

73. It is a constitutional requirement that the County Assembly conducts its affairs in compliance with the said Constitution and once the legislative process is attacked on grounds that the law making process did not meet the constitutional standard of public participation, the defendant is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation.

74. It is patent from the record, that at the time this matter was instituted, the Finance Act in place was the one for the year 2019.

75. So did the Defendant herein satisfactorily demonstrate that Finance Act 2019 was subjected to public participation prior its enactment?

76. From the onset, I would like to point out that just because some people or entities may have already complied with the dictates /requirements of the same is not a proof of public participation. Thus, I do not agree with this proposition by the Defendant that the fact that some of the Hotels within Nakuru County have started paying the bed occupancy levy is a demonstration that it was subjected to public participation.



77. The defendant also stated that this Finance Bill was sent to all stakeholders including the plaintiffs herein and their views taken into account but did not expressly or specifically divulge how that was done. There is no evidence on record to buttress this position. The defendant further stated that they distributed the bill in issue during its meetings with the public and deliberation undertaken led to consensus on the amount to be charged. No minutes of the alleged meetings or lists of persons who attended the public participation meetings held throughout the county in various dates was adduced before this court to establish this position.
78. During the hearing, the defendant's witness stated that the plaintiffs herein submitted their proposal on bed occupancy charges after public participation had been conducted and the Act passed. However, no documentary evidence was produced before the court to substantiate this position.
79. The only document that the Defendant produced to back up their assertion that public participation was conducted was a Notice on Public Participation. The mode of dissemination of the same is however unclear and this court cannot authoritatively find that the said notice was received by all the requisite stakeholders within Nakuru County. If the stakeholders' input was sought as alleged, why is it that the defendant did not adduce the memoranda if any, or minutes of the engagement, to prove the same?
80. The reason for public participation in respect to the charges in question cannot be overemphasized. The plaintiffs averred that the annual business permit that they were already paying was based on bed occupancy and thus the introduction of the new charges resulted in double taxation by the defendant. They have also clearly stated that the amounts demanded by the Defendant were in excess of what is already provided for under 2<sup>nd</sup> schedule to the Hotels and Restaurants Regulations.
81. It is noted that the defendant was not forthcoming with an explanation as to how the business permits issued by it to the plaintiffs are based on. Its witness testified that it had evidence of the public participation by the plaintiffs but did not avail them. The defendant did not even seek time to file further documents to prove this assertion. I find that this was a very nonchalant manner of defending a very serious issue that affects the revenue of the county. It was upon the defendant to come out clearly and show how the relevant stakeholders were involved before the county imposed the charges. It does not matter that the said charges were introduced by the Finance Act of the County in 2015, as alluded to by the defendant's witness. Even if that is so, the onus lay on the defendant to show that as at that time there was adequate public participation.
82. It is also not clear how the defendant resolved the issue of payments done by the plaintiffs in respect to bed occupancy under the existing Hotels and Restaurants Regulations. These are issues that would have been brought out had there been adequate public participation.
83. In *Diani Business Welfare Association and others v County Government of Kwale* [2015] eKLR, the court emphasized the principle that public participation is attained when the members of the public and the interested parties are given reasonable opportunity to know about the issue at hand and to have an adequate say.
84. Public participation is not a cosmetic expression. It is a fundamental ideal deliberately provided for by *the Constitution*. This is drawn from the realisation that all sovereign power belongs to the people. Any state entity must therefore involve the people in its exercise of any authority over them.
85. Looking at the evidence adduced herein, I find that the defendant has not successfully proved that it effected proper public participation prior the enactment of Finance Act 2019 in respect to the Bed Occupancy Charges. It follows that the said charges cannot be justified. They are unconstitutional and null and void for that reason.



86. Having found as above, should this court find that the Finance Act, as a whole, is null and void and or unconstitutional? I think not.
87. Odunga J (as he then was) in Judicial Review Misc. App. No.335 of 2014 held that: -
- “The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. It can therefore withhold the gravity of the order where among other reasons there has been delay and where the public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized.”
88. The Finance Act in question relates to the financial year 2019/2020 and the Act not only provides for the bed occupancy charges but also other levies e.g. County park fees, House Rent, Market Fees, Building Plan Approval, Education and Social Facilities charges etc. A declaration that the whole Act was unconstitutional would be unreasonable. In any case the plaintiffs are not concerned with other sections of the said Act.
89. Also as pointed out by the defendant’s witness during hearing including some of the plaintiffs herein e.g. the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> plaintiffs have already complied by paying the bed occupancy levy and there is no evidence that they were forced to do so.
90. Due to passage of time, other interests must have accrued under the said Act and finding the entire Act unconstitutional or unlawful at this stage would not only cause hardship and chaos in the budgeted services and County financial management pursuant to the Act, but would also not serve the public interest.
91. Therefore, any declaration by the court will only be in respect to the bed occupancy charges, which are the subject of the determination by this court.
92. Having considered the matter at length, I come to the conclusion that while the County was entitled by law to enact legislation to raise revenue, to levying of the Bed Occupancy Charges, was not subjected to adequate public participation as required by *the Constitution*. Therefore, the said charges are hereby declared null and void.
93. Consequently, the orders issued by the court are as follows;
- i. A declaration is hereby issued that the fee charged and demanded by the defendant as Bed Occupancy Levy/Charge is unconstitutional for want of public participation.
  - ii. I allow prayer (a) of the Plaint but only in respect to any future invoices containing the bed occupancy charges.
  - iii. The plaintiffs shall henceforth pay for their requisite licences less the impugned bed occupancy charge, until such a time that it shall be lawfully passed after being subjected to the requisite public participation.
  - iv. Due to effluxion of time and the reasons I have given hereinabove, I find that prayer(b) as sought by the plaintiffs would be in vain since the same were already issued. The court cannot cancel the invoices retrospectively.
  - v. As regards prayer (c) of the plaint I hold that the same is allowed, but only applicable to future licence fees in respect to the impugned bed occupancy charge and not any other charges therein.



94. This was a matter involving the plaintiffs but the issues raised are of public interest. Accordingly, I order that each party bears its own costs.

95. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

Court Assistant Jeniffer

Mr. Okeke for plaintiffs

Ms Litunda for defendant

