



**Republic v County Government of Mombasa & 2 others; Road Hauliers Association of Kenya (Local Transporters) (Exparte Applicant) (Judicial Review Application E010 of 2024) [2024] KEHC 11096 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E010 OF 2024**

**OA SEWE, J**

**SEPTEMBER 19, 2024**

**IN THE MATTER OF AN APPLICATION FOR ORDERS  
OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLES 23, 47, 50, 118, 201  
AND 209 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2014**

**AND**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**THE KENYA PORTS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**THE OFFICE OF THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ROAD HAULIERS ASSOCIATION OF KENYA (LOCAL  
TRANSPORTERS) ..... EXPARTE APPLICANT**



## JUDGMENT

1. Pursuant to the leave granted herein on 30<sup>th</sup> May 2024, the ex parte. applicant filed its substantive Notice of Motion dated 5<sup>th</sup> June 2024 seeking the following orders:
  - (a) An order of Certiorari to remove and bring to this Court for purposes of quashing the decision of the 1<sup>st</sup> respondent and the implementation notice by the 2<sup>nd</sup> respondent contained in the Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa which commenced on May 15, 2024 issued by the Managing Director of the 2<sup>nd</sup> respondent.
  - (b) An order of Certiorari to quash the decision of the 1<sup>st</sup> respondent and the implementation notice by the 2<sup>nd</sup> respondent contained in the Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa which commenced on May 15, 2024, which designates the 2<sup>nd</sup> respondent as a levy collecting agent on behalf of the 1<sup>st</sup> respondent.
  - (c) An order of Mandamus compelling the respondents to rescind the decision contained in the said Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa which commenced on May 15, 2024 and to provide, within 15 days of delivery of this Judgment books of account for the irregular collection of parking fees for purposes of refund to all the affected parties.
  - (d) An order of Prohibition prohibiting and forbidding the respondents, their servants, agents, junior officers and/or anybody from increasing the parking fees and levy exorbitant penalties and fines payable and changing the mode of collection of parking fees as threatened in the said Customer Notice.
  - (e) An order of Mandamus declaring the parking fees collection inside the Kenya Ports customs zone as unlawful and contrary to the Mombasa County Finance Act 2023.
2. The application was filed pursuant to Articles 23(1), (3), 47, 165(3) of the Constitution of Kenya and Sections 3, 4, 5 and 7 of the *Fair Administrative Action Act*, Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law and was premised on the grounds that the .ex parte. applicant (hereinafter the applicant) is a registered association of truck drivers who deal in transportation of various goods and containers to and from the Kenya Ports Authority facility in Mombasa. The applicant stated that the drivers are not opposed to the implementation of the Mombasa County Finance Act but are against the arbitrary enforcement of illegal parking levy and penalties inside the port facilities.
3. In particular, the .ex parte. applicant complained that the respondents arbitrarily and in a flawed manner changed the rules through an undated Customer Notice issued by the 2<sup>nd</sup> respondent with effect from May 15, 2024 in the following ways:
  - (a) The Notice purports to override already existing statutes governing the port facility, customs zone and operating areas, container freight services (CFS) and warehouses.
  - (b) The collection of the levy would be effected by the 2<sup>nd</sup> respondent instead of the 1<sup>st</sup> respondent.
  - (c) The penalties charged by the agent are both punitive and oppressive and contravene Schedule C of the Mombasa County Finance Act, 2023.



- (d) The unlawful levy and penalties were imposed without consideration of any known or customary laws and regulations within the Country.
  - (e) The decision by the respondents usurps the role of the Kenya Revenue Authority's Commissioner of Customs whose responsibility it is to declare charges at the border posts and port areas.
  - (f) The port facilities serve a critical role in the inter counties, national and regional mobility of goods and therefore the decision of the respondents to increase parking charges without the participation of key stakeholders such as the applicant contravenes Article 209(5) of *the Constitution*.
4. The application was supported by the Affidavit of Dennis Okumu Ombok, a member of the applicant association. He averred that the applicant is an association of truck drivers and truck owners that operate to and from the Port of Mombasa and that he is a driver of a truck exceeding 10 tones and a frequent user of the Port from where he collects various goods destined to various counties in Kenya as well as neighbouring countries in the region.
  5. Mr. Ombok reiterated the applicant's position that its members are not averse to the implementation of the Mombasa County Finance Act. He explained that what they are opposed to is the oppressive manner in which the respondents have set about the implementation of the payment of parking fees within the area of the Port of Mombasa including the arbitrary increment of the parking levy and penalties. Thus, the applicant averred that, without prior notice or warning, the 2<sup>nd</sup> respondent published an undated notice titled Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa, indicating that they had been appointed by the 1<sup>st</sup> respondent as their parking fees collector with effect from May 15, 2024. A copy thereof was annexed to the Supporting Affidavit as Annexure "DOO-3".
  6. The applicant further averred that, being the stakeholders who bear the greatest brunt of the impugned notice, they ought to have been consulted or apprised of the development beforehand. The applicant also took issue with the fact that the notice was never published in the Kenya Gazette or in two newspapers of nation-wide circulation before its implementation.
  7. The applicant also adverted to the legitimate expectation that they would continue to pay parking fees and penalties as they had done under the Mombasa County Finance Act 2023 and that any increase in parking charges and attendant penalties would be floated in advance for stakeholder discussion and input before implementation. The applicant further contended that the respondents are applying double standards and are therefore exposing the whole process as an avenue for discrimination and exploitation of members of the applicant by their unscrupulous agents and employees; and should therefore be restrained at the earliest possible opportunity by the Court.
  8. The application was opposed by the respondents. The 1<sup>st</sup> respondent filed a Replying Affidavit sworn on its behalf by its County Secretary, Jeizan Faruk. He averred that the charge of parking fees has been in existence since pre-devolution and is therefore not new. He explained that the 1<sup>st</sup> respondent has been losing revenue over the years from non-payment of parking fees by heavy and commercial vehicles, yet the vehicles strain the road infrastructure within the County due to the immense load handled by such trucks.
  9. The 1<sup>st</sup> respondent further averred that it is its responsibility to repair the roads within the County in addition to the provision of other services such as street lighting and traffic marshalling and therefore depends on own revenue sources, including the collection of parking fees. The County Secretary



- explained that, over the years, the 1<sup>st</sup> respondent has been losing revenue due to non-compliance by the heavy and commercial vehicle drivers and owners; and it was in response to this challenge that the 1<sup>st</sup> respondent enlisted the support of the 2<sup>nd</sup> respondent to ensure a more efficient system for the collection of parking charges.
10. The County Secretary also deposed that, before the impugned notice was issued, the 1<sup>st</sup> and 2<sup>nd</sup> respondents involved the stakeholders including the Kenya Transporters Association Limited. He mentioned that, on the 3<sup>rd</sup> May 2024 for instance, the 2<sup>nd</sup> respondent had its own public engagement with stakeholders in which the 1<sup>st</sup> respondent participated and addressed the concerns raised by stakeholders during the meeting. In proof thereof, the 1<sup>st</sup> respondent annexed copies of the Minutes for the Port Community meeting held on 3<sup>rd</sup> May 2024 and 9<sup>th</sup> May 2024 at the Kenya Port Authority's offices as well as a list of the concerns raised by stakeholders at the two meetings (marked Annexures JF-1 and JF-2).
  11. The 1<sup>st</sup> respondent conceded that it raised parking fees upon the enactment of the Mombasa County Finance Act, 2024; and pointed out that in the course of the enactment of that legislation, the applicant had an opportunity to participate and raise their concerns. At paragraphs 16 to 23, the 1<sup>st</sup> respondent averred that the Mombasa County Finance Act, 2024, was enacted in full compliance with *the Constitution*, including the precept of public participation. The 1<sup>st</sup> respondent therefore prayed for the dismissal of the Petition with costs.
  12. While the 2<sup>nd</sup> respondent opted to file no response, the 3<sup>rd</sup> respondent, filed Grounds of Opposition dated 18<sup>th</sup> June 2024, contending that:
    - (a) Judicial Review application is more concerned with the process and not the outcome of a legal and legitimate process; the applicant is not challenging the process but the result of the process of the enactment of the Mombasa County Finance Act, 2024.
    - (b) The applicant does not challenge the Mombasa County Finance Act, 2024 which is the foundation of the notice dated 15<sup>th</sup> May 2024.
    - (c) By quashing the Notice dated 15<sup>th</sup> May 2024, the Court will not have cured anything as the Mombasa County Finance Act, 2024 remains unchallenged.
    - (d) The application is not supported by adequate evidence to warrant the granting of the prayers sought.
    - (e) By granting the orders sought the Court will be aiding the applicant's ill-informed intention of interfering with the mandate of the 1<sup>st</sup> respondent to collect taxes as enshrined in *the Constitution*.
    - (f) The Notice of Motion dated 5<sup>th</sup> June 2024 is incompetent and an abuse of the court process and ought to be struck out.
  13. The substantive application was canvassed by way of written submissions, pursuant to the directions given herein on 30<sup>th</sup> May 2024. Accordingly, the applicant filed written submissions dated 6<sup>th</sup> June 2024 and reiterated its stance that it is not opposed to the implementation of the Mombasa County Finance Act as such, but the Customer Notice dated 15<sup>th</sup> May 2024 issued by the 2<sup>nd</sup> respondent on behalf of the 1<sup>st</sup> respondent. Hence, the applicant proposed the following issues for determination:
    - (a) Whether the it has the locus standi to bring this action.



- (b) Whether the decision to charge fees and the penalties was arrived at in a manner that conforms with Article 47 of the Constitution as read with Sections 5 and 7 of the Fair Administrative Action Act.
- (c) Whether the Court can grant the judicial review orders sought.
14. On *locus standi*, the applicant relied on Articles 22 and 258 of the Constitution to buttress the argument that judicial review is both a constitutional and common law remedy; and therefore any aggrieved person is at liberty to approach the Court for relief. The applicant also pointed out that the 2<sup>nd</sup> respondent's Preliminary Objection dated 21<sup>st</sup> May 2024 in this regard cannot stand in the face of the decision of the Supreme Court in *Mumo Matemu*.
15. The applicant further submitted that the nub of its case is the manner in which the decision to charge parking fees, the fees payable and the rationale for the hefty penalties. In the applicant's view, the respondents did not address this aspect and so it was the applicant's contention that, while it is true that the 1<sup>st</sup> respondent has the mandate, by virtue of Article 185 of the Constitution to formulate policies and pass laws in the best interest of the occupants of Mombasa County, the same should be done in conformity with the Constitution and the relevant statutes put in place. It faulted the 1<sup>st</sup> respondent in this instance on the grounds of discrimination and lack of public participation and made elaborate submissions in this regard which I will revert to shortly.
16. On its part, the 1<sup>st</sup> respondent proposed the following issues for determination vide its written submissions dated 19<sup>th</sup> June 2024:
- (a) Whether there was public participation and stakeholder engagements in the decision to charge the parking fees and whether it is supported by the law.
- (b) Whether the *ex parte* applicant ought to be granted the orders prayed for.
17. The 1<sup>st</sup> respondent made reference to Sections 87 and 91 of the County Government Act to underscore the submission that, as a constitutional tenet, public participation has been entrenched in the laws governing its operations. It then proceeded to reiterate its assertion that public participation was undertaken, not only by way of access to information but also by way of opportunity to be heard. The 1<sup>st</sup> respondent relied on *Doctors for Life International v The Speaker of the National Assembly & others*, CCT 12/05 and *Milly Glass Works Limited & 3 others v County Government of Mombasa & 2 others* PARA 2016. eKLR to buttress its submissions.
18. On whether the applicants ought to be granted the reliefs sought by it, the 1<sup>st</sup> respondent relied on *Pastoli v Kabale District Government Council & others* PARA 2008. 2 EA 300 and *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* PARA 2002. eKLR as to the elements that needed to be proved for those orders to issue, namely illegality, irrationality and procedural impropriety. It submitted that none of these elements were proved by the applicant and urged the Court to invoke Section 108 of the Evidence Act and dismiss the suit.
19. Counsel for the 3<sup>rd</sup> respondent relied on the 3<sup>rd</sup> respondent's written submissions dated 18<sup>th</sup> June 2024. The 3<sup>rd</sup> respondent considered it anomalous for the applicant to state that it is not challenging the Mombasa County Finance Act, 2024, and yet proceed to challenge the implementation notice dated 15<sup>th</sup> May 2024 on the ground that there was no public participation before it was issued. The 3<sup>rd</sup> respondent pointed out that the impugned notice does not bring into force the parking levy; for the same is provided for in the Mombasa County Finance Act, 2024. Hence, the 3<sup>rd</sup> respondent was of the firm view that cancelling the notice will amount to nothing.



20. The 3<sup>rd</sup> respondent also submitted that the applicant has not satisfied the necessary ingredients for the grant of the judicial review orders sought. Counsel relied on *Republic v Ministry of Agriculture, Livestock, Fisheries and Irrigation; Agriculture and Food Authority & another (Interested Parties), Ex Parte Susan Wanjiku & 80 others* PARA 2021. eKLR in which it was held that public participation in the process of enacting a bill was sufficient for the resulting notices and regulations. Thus, the 3<sup>rd</sup> respondent similarly prayed for the dismissal of this suit with costs.
21. From the foregoing summary, it is common ground that the County Assembly of Mombasa enacted the Mombasa County Finance Act, 2024 and caused it to be published in the Kenya Gazette Supplement on the 6<sup>th</sup> May 2024 as a special issue. Although copious submissions were made herein by the 1<sup>st</sup> respondent to demonstrate that the Act was passed in full compliance with the dictates of *the Constitution*, including the provisions of Article 10(2)(a) as to the participation of the people, the applicant was explicit that it is not here to challenge and is not challenging the constitutionality of the Mombasa County Finance Act 2024 or the right of the 1<sup>st</sup> respondent to impose parking charges.
22. There is further no dispute that, pursuant to that statute, the 1<sup>st</sup> respondent engaged the 2<sup>nd</sup> respondent to facilitate the collection of parking fees for heavy and commercial vehicles who use port terminal without accessing port premises. Hence, the undated Customer Notice issued by the 2<sup>nd</sup> respondent on behalf of the 1<sup>st</sup> respondent, reads:

"...the County Government of Mombasa has designated the Kenya Ports Authority as the principal facilitator for the collection of parking fees for heavy and commercial vehicles used by port users within the precincts of the County of Mombasa.

This is applicable to Grain Bulk Handling Limited, AGOL Limited, Empty Container Depots, Refineries and other port users who utilize port terminals without accessing port premises.

In light of this designation, the Kenya Ports Authority will ensure the efficient and effective collection of parking fees from heavy and commercial vehicles operated within these areas with effect from 15<sup>th</sup> May 2024.

All port users are advised to note and cooperate with the Kenya Ports Authority in this endeavor and adhere to the prescribed parking fee regulations.

For further inquiries or clarification regarding the collection of parking fees for heavy and commercial vehicles within the County of Mombasa, please contact Mr. Affan Mohamed – Director Revenue, County Department of Finance and Economic Planning via email [director.revenue@mombasa.go.ke](mailto:director.revenue@mombasa.go.ke)..."

23. Needless to say that judicial review is essentially concerned, not with the merit of an impugned decision, but the process leading up to the decision. Hence, in *Municipal Council of Mombasa v Republic & Umoja Consultants Limited* PARA 2002. eKLR the Court of Appeal held that:

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into



the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

24. Needless to add that, in the course of a process review, the Court is at liberty to engage in some measure of analysis of the merits of the impugned decision to enable it ascertain whether or not the decision was procedurally fair for purposes of Article 47 of the Constitution and its derivative legislations. In *Saisi & 7 Others v Director of Public Prosecutions & 2 Others* PARA 2023. KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), the Supreme Court made this point as follows:

“For the court to get through an extensive examination of section 7 of the FAAA, there had to be some measure of merit analysis. That was not to say that the court had to embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly in the circumstances of the case without examining those circumstances and measuring them against what was reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. It was not to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of *the Constitution* which required the courts to interpret it in a manner that inter alia advanced the rule of law, permits the development of the law and contributes to good governance.”

25. Flowing from the foregoing summary, the issues for determination are:

- (a) Whether the impugned notice is tainted with illegality, irrationality or procedural impropriety.
- (b) Whether the ex parte applicant ought to be granted the orders prayed for.

26. It is a cardinal principle that the burden of proof is on he who alleges. In this case, the legal burden of proof rests on the applicant, notwithstanding that the 2<sup>nd</sup> respondent opted to file no response or written submissions. The Supreme Court underscored this position in *Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated))* PARA 2023. KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) as follows:

66. The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See *Deynes Muriithi & 4 others v Law Society of Kenya & another.*, SC Application *No 12 of 2015*; PARA 2016. eKLR.
67. In this case, the onus of proof was on the 1<sup>st</sup> appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the *Evidence Act*, on the burden of proof. The provision stipulates:

107. 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In addition, section 109 of the [Evidence Act](#), elaborates on the onus of proof by stipulating that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

27. The Supreme Court further held:

69. It is also imperative to take note of the fact that even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred. See [Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others](#), SC Petition [No 12 of 2019](#); PARA 2020. eKLR.

28. The .ex parte. applicant complained that the respondents arbitrarily and in a flawed manner changed the rules through an undated Customer Notice issued by the 2<sup>nd</sup> respondent with effect from May 15, 2024 in the following ways:

- (a) The Notice purports to override already existing statutes governing the port facility, customs zone and operating areas, container freight services (CFS) and warehouses.
- (b) The collection of the levy would be effected by the 2<sup>nd</sup> respondent instead of the 1<sup>st</sup> respondent.
- (c) The penalties charged by the agent are both punitive and oppressive and contravene Schedule C of the Mombasa County Finance Act, 2023.
- (d) The unlawful levy and penalties were imposed without consideration of any known or customary laws and regulations within the Country.
- (e) The decision by the respondents usurps the role of the Kenya Revenue Authority's Commissioner of Customs whose responsibility it is to declare charges at the border posts and port areas.
- (f) The port facilities serve a critical role in the inter counties, national and regional mobility of goods and therefore the decision of the respondents to increase parking charges without the participation of key stakeholders such as the applicant contravenes Article 209(5) of [the Constitution](#).

29. Upon a careful perusal of the applicant's Supporting Affidavit and its annexures, I see no proof that the impugned notice purports to override already existing statutes governing the port facility, customs zone and operating areas, container freight services (CFS) and warehouses; or that the levy and penalties were imposed without consideration of any known or customary laws and regulations within the Country. To the contrary, the 1<sup>st</sup> respondent presented proof to demonstrate that the levies are anchored on the Mombasa County Finance Act, 2024. A copy of the Act was annexed to the 1<sup>st</sup> respondent's Replying Affidavit to confirm that the impost is properly grounded in law. And, as pointed out herein above, the applicant made it clear that they are not challenging the lawfulness of the levy.

30. In terms of public participation, again the 1<sup>st</sup> respondent presented cogent evidence to show, not only that the Mombasa County Finance Act, 2024, was passed in accordance with [the Constitution](#) and all the attendant requirements but that before the impugned notice was issued, the respondents



engaged the affected stakeholders. They exhibited Minutes of the stakeholder meetings held as well as correspondence exchanged over the intention to engage the 2<sup>nd</sup> respondent to collect parking fees on behalf of the 1<sup>st</sup> respondent. Among the documents is a letter dated 9<sup>th</sup> May 2024 from the Kenya Transporters Association Ltd seeking clarification before the implementation of the new parking fee collection procedure.

31. The Minutes of the meeting dated 9<sup>th</sup> May 2024 also confirm that the 1<sup>st</sup> respondent immediately convened a meeting to respond to the concerns raised by the Kenya Transporters Association Ltd; and that it reiterated its commitment to continuous dialogue with all stakeholders to enhance economic growth and operational efficiency. As was pointed out in *Doctors for Life International v The Speaker of the National Assembly* (supra) the question is whether reasonable steps were taken by the respondents to bring the changes to the attention of its stakeholders. As Sachs J. noted in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) PARA 2005. ZACC 14; [2006 \(2\) SA 311 \(CC\)](#); 2006 (1) BCLR 1 (CC):

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

32. No provision of the law was brought to the attention of the Court for the submission that the notice ought to have been published in the Kenya Gazette or in two newspapers with nationwide circulation before its implementation. It was itself premised on the Mombasa County Finance Act which was duly gazetted. For purposes of implementation, it cannot be validly argued that meetings, as were held by the respondents were deficient. In *Kioko v Clerk, Nairobi City County Assembly & 11 others* (Civil Appeal E425 of 2021) PARA 2022. KECA 405 (KLR) (4 March 2022) (Judgment), the Court of Appeal held:

In principle, facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. With regard to the threshold and means of public participation, this Court in [Legal Advice Centre & 2 others v County Government of Mombasa & 4 others](#). PARA 2018. eKLR cited with approval the High Court decision in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*. PARA 2017. eKLR where the learned Judges stated:

"the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structured questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party."

33. There being no dispute that the 1<sup>st</sup> respondent has the constitutional mandate to impose taxes for its services, the question to pose, for purposes of Article 209 of the Constitution is whether the action of the respondent is in violation of Sub-Article (5) thereof. Article 209 states:

- (1) Only the national government may impose—
- (a) income tax;
  - (b) value-added tax;



- (c) customs duties and other duties on import and export goods; and (d) excise tax.
- (2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).
- (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 governments may impose charges for the services they provide.
- (5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

34. Indeed, in *Base Titanium v County Government of Mombasa & another (Petition 22 of 2018)* PARA 2021. KESC 33 (KLR) (16 July 2021) (Judgment), the Supreme Court made it clear at paragraphs 25 and 29 that:

"Under the provisions of article 209, a county is empowered to raise revenue and levy taxes, rates, or other charges. Additionally, under sub article (4), the 1st respondent is authorized to impose charges for services provided...Consequently, we agree with the High Court and the Court of Appeal, only to the extent that County Governments have the mandate to charge levies for services rendered."

35. Nevertheless, the Supreme Court underscored the aspect of Sub Article (4) that such charges can only be imposed for services rendered by the respondent. Thus, the Supreme Court held:

"So then, what is the meaning of the word 'services' for purposes of application within the meaning of article 209(4) of *the Constitution*.? The word 'service' as provided in the *Oxford Dictionary of English*. 3rd Edition 2015 is "a system that provides something that the public needs, organized by the government or a private company". This may include for County transport which entails County roads; street lighting; traffic and parking; public roads transport; and ferries and harbors, excluding the regulation of international and national shipping and matters related thereto comprise some of the functions and powers of County Governments under Schedule four part 2, section 5.

26. Taking that definition into account, a plain reading of that article reveals that the intention of article 209(4) of *the Constitution*, is to confer County Governments the discretionary powers to impose charges for services, more specifically, that they can charge or impose a payment in exchange of a public need or amenity.

27. To our minds, the insertion of the words 'for services' in article 209(4), are a qualification to the charge of the services. Whereas a County can levy charges, it must do so in exchange for an amenity. Put differently, a County does not have the authority to charge a cess, levy or tax where they do not offer anything in return.



28. Undoubtedly, Constitution permits County Governments to impose charges for the realization of its powers under the Fourth schedule. But that power does not go unchecked, in the spirit of harmonious interpretation of *the Constitution*, in enacting the law, County Governments must heed the provisions of article 209 (5) and ensure that the charges invoked will not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor.
36. The 1<sup>st</sup> respondent explained, at paragraphs 4 to 7 of its Replying Affidavit that it had been losing revenue over the years from non-payment of parking fees by heavy and commercial vehicles; yet such vehicles strained the infrastructure within the County. It further averred that, in addition to road maintenance within the County, it provides street lighting and traffic marshalling services to all motorists. Hence a clear distinction was made by the 1<sup>st</sup> respondent between the new charges and the charges imposed by the 2<sup>nd</sup> respondent for its services; and therefore that there is no duplication of levies. At paragraph 25 of its Replying Affidavit, the 1<sup>st</sup> respondent averred:
- "...most of the heavy and commercial vehicle owners and/or their agents park their motor vehicles on the road either leading to the 2<sup>nd</sup> Respondent's premises or to a port terminal thus straining the road infrastructure and blocking access to other road users to access those particular roads, thus the charge for parking as the vehicles are parked and the engines turned off to enable them access those premises."
37. In the light of the foregoing, it is my finding that the applicant failed to discharge the burden of proving its allegations to the requisite standard. It has failed to demonstrate that the impugned notice was issued in contravention of either *the Constitution* or the applicable law. In particular, the applicant failed to demonstrate illegality, irrationality or procedural impropriety in the steps taken by the respondents leading up to the issuance of the impugned notice. Consequently, the Notice of Motion dated 5<sup>th</sup> June 2024 lacks merit and is hereby dismissed with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024**

**OLGA SEWE  
JUDGE**

