



**Odando & another v Kenya Revenue Authority & 6 others; Law Society of Kenya  
(Interested Party) (Constitutional Petition E374 of 2021) [2023] KEHC 22375 (KLR)  
(Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22375 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E374 OF 2021**

**AC MRIMA, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**ISIAH LYYARA ODANDO ..... 1<sup>ST</sup> PETITIONER  
WILSON YATA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
ENERGY AND PETROLEUM REGULATORY AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT  
THE CABINET SECRETARY FOR NATIONAL TREASURY 3<sup>RD</sup> RESPONDENT  
THE CABINET SECRETARY PETROLEUM AND MINING . 4<sup>TH</sup> RESPONDENT  
THE CABINET SECRETARY FOR ENERGY ..... 5<sup>TH</sup> RESPONDENT  
THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 6<sup>TH</sup> RESPONDENT  
THE NATIONAL ASSEMBLY ..... 7<sup>TH</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**

**JUDGMENT**

1. On 10<sup>th</sup> August 2021, Kenya Revenue Authority, 1<sup>st</sup> Respondent herein, issued a public notice stating that the Commissioner General, pursuant to Section 10 of *Excise Duty Act*, will adjust upwards the rates of Excise Duty on excisable goods and services for the Financial Year 2020/2021 by four decimal



nine seven per centum (4.97%), effective 1<sup>st</sup> October 2021 (hereinafter referred to as ‘the impugned notice’).

2. The decision disgruntled Isaiah Luyara Odando and Wilson Yata, the Chairperson and the Secretary respectively of Ufanisi Centre, a community-based Organization operating within Korogocho with the objective of enhancing human rights and economic advancement of its membership.
3. The Interested Party supported the Petition whereas the Respondents vehemently opposed it.

### **The Petition**

4. Through the Petition dated 20<sup>th</sup> September 2021 supported by the Affidavit of and Further Affidavit of Isaiah Luyara Odando deposed to 20<sup>th</sup> September, 2021 and 17<sup>th</sup> March 2022 respectively, the Petitioners claimed that the upward adjustment on petroleum products translated to violation of various constitutional entitlements.
5. The Petitioners averred that pursuant to Article 43(3) of *the Constitution*, it was in the interest of public and that of class of Kenyans who consumed petroleum products and goods and services affected by pricing on petroleum products to have their economic interests protected and information that would enable them to gain full benefit as enshrined in Article 46(1)(b) and (c) of *the Constitution*.
6. The Petitioners pleaded that the taxes constitute more than half of petroleum prices since the landed prices of a litre of Petrol and Diesel as of last month (August 2021) was Kshs.49.84 and 46.82 respectively and Kerosene at Kshs. 42.96 which will be retailing at Kshs. 122.81, KShs.107 and Kshs.97.85 respectively.
7. The Petitioners pleaded that the entire Kenya population was already affected by the hiked fuel process and the decision by the Commissioner General of KRA would further worsen the high cost of living.
8. It was the Petitioners’ case that the membership of Ufanisi Centre, mainly composed of self-employed youth and women who rely heavily on transport sector were experiencing high cost of living and a drastic drop in business.
9. The Petitioners pleaded that as a cardinal principle of social justice provided for under article 10(2) (b) of *the Constitution*, Kenyans ought not to be over burned by heavy taxes that would make basic necessities like food unaffordable.
10. They claimed that the inability to afford basic commodities compromised the economic and social rights of Kenyans guaranteed under Article 43 of *the Constitution* and resulted in a life without dignity.
11. It was the Petitioner’s case that in anticipation of the upward adjustment of 1<sup>st</sup> October 2021 of petroleum products, the transport sector had already increased fare from Kariobangi to town and Babadogo to town by Kshs. 20.
12. The Petitioners averred that various experts in finance and tax including KPMG have authoritatively concluded that the increase in fuel prices will have ripple effects in other sectors of the economy including higher transport costs, general increase in prices of basic goods and costs of agricultural inputs.
13. The Petitioners posited that despite the adverse report by KPMG to the Senate Finance and National Planning Committee to the effect that high fuel process was unsustainable and threatened economic recovery of the country, the said Committee rejected it.



14. The Petitioners averred that the National Assembly acted contrary to Article 1(3) of *the Constitution* by appropriating funds for expenditure by national government and other agencies without considering that the source of funds is high taxation of the populace.
15. It further was their case that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ignored proper public participation before adjusting the rates of Excise Duty in violation of Article 10(2)(a), 2(2) and 201 of *the Constitution*.
16. The Petitioner also claimed that the failure by the Respondents to be accountable and transparent to Kenyans on information as to why Kenya fuel prices retails higher as compared to its landlocked neighbours and has tax of fuel higher than the landed prices was contrary to the provisions of Article 10(2)(c), 2(2), 46(1)(b) and 201 of *the Constitution*.
17. It was the Petitioners' case that in carrying out its duties, The Cabinet Secretary Treasury and National Planning, 3<sup>rd</sup> Respondent herein, pursuant to section 5(1) of the *Kenya Revenue Authority Act*, failed in its obligation to supervise KRA by ensuring that it inculcates transparency, accountability and integrity in running its affairs.
18. On the foregoing factual and legal backdrop, the Petitioners prayed for the following reliefs: -
  - a. That this Court be pleased to issue permanent conservatory orders quashing the decision by the Commissioner General of Kenya Revenue Authority to adjust excise duty rates for Petroleum products effective 1<sup>st</sup> October, 2021 subject to approval by the Cabinet Secretary Treasury and National Planning.
  - b. That this Court be pleased to issue declaratory Orders that Parliament has failed to exercise its mandate to cushion Kenyans against the spiral effect of fuel tax by deliberately sanctioning taxes on petroleum products which now constitute more than half of the price.
  - c. That this Court be pleased to issue orders directing the Respondents to come up with clear regulations on the management and application of moneys received by the Petroleum Subsidy Fund from the Petroleum Levy.
  - d. That this Court be pleased to issue Orders directing the Respondents to account for moneys received from the Petroleum Development Levy in favour of the Petroleum Subsidy Fund.
  - e. Costs of this Petition.

### **The Submissions:**

19. The Petitioners filed written submissions dated 18<sup>th</sup> March, 2022.
20. In addition to reiterating the averments in the Petition, the Petitioners asserted that the 1<sup>st</sup> Respondent's public notice dated 10<sup>th</sup> August 2021 was shrouded in illegalities and did not qualify as Gazette Notice as envisaged under section 10 of the *Excise Duty Act*.
21. The Petitioners illustrated the illegality by stating that the gazette notice purported to take effect on 1<sup>st</sup> October 2021 without the approval of the National Assembly and the Cabinet Secretary for Treasury and National Planning a requirement under the Finance Act.
22. While relying on the decision of the High Court in Matter of Mui Coal Basin Local Community on the parameters of public participation, as a basic tenet of governance, the Petitioners submitted that



there was lack of proper public participation since the impugned notice was not communicated to the general public through mass media.

23. The Petitioners further submitted that the Respondents had not demonstrated existence of regulations on administration of the Petroleum stabilization fund.
24. To that end, it was submitted that court ought to take judicial notice of the mystery surrounding the diversion of about Kshs. 18 Billion from the fund captured during parliamentary deliberations on 28<sup>th</sup> September 2021 with calls for accountability.
25. On the issue of costs, the Petitioners urged that they were entitled since the 1<sup>st</sup> Respondent irregularly issued the notice intending to illegally enforce adjustment of Excise Duty on petroleum products.

#### **The Interested Party's case:**

26. The Law Society of Kenya urged its case through written submissions dated 5<sup>th</sup> April 2022.
27. It centered its case primarily on the constitutional edict of public participation and its role in taxation and fiscal policy and the question whether Kenyans got a proper platform to express views on the effects and dangers of increasing the petroleum tax.
28. It was the Interested Party's position that the Respondents failed to provide a platform for effective participation as demanded by the seriousness of the subject of Petition.
29. It embellished the foregoing by submitting that the Public Notice dated 10<sup>th</sup> August, 2021 by the 1<sup>st</sup> Respondent did not meet the threshold of, "a Notice in the Gazette" as demanded by Finance Act No. 8 of 2020 that amended the [Excise Duty Act](#), 2015.
30. It was its case further that the Respondents failed to consider the magnitude and effect of the intended increase on taxes on the general populace and to formulate and provide a structure to reach a wider section of the population on the subject of the increment.
31. In emphasizing what constitutes a proper and effective public participation, the decision in Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR was relied upon where it was observed;

.... In my view 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. 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.

32. It was the Interested Party's case that, unlike other laws, tax laws have both a direct pecuniary and compliance burden on citizens and as such, the importance of public participation cannot be understated.
33. The Interested Party fortified the foregoing requirement for public participation by referring to the South African decision 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) where the court set out the meaning of public facilitation and involvement in the following terms: -

..... 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.

34. In conclusion, the Interested Party submitted that the Respondents failed to meet the constitutional requirement of the right to public participation. It was its position that the taxes must fail.

**The 1st Respondent’s case:**

35. Kenya Revenue Authority opposed the Petition through the Replying Affidavit of Josephine Mugure, the Chief Manager, Strategy Innovation and Risk Management Department, deposed to on 4<sup>th</sup> March, 2022.
36. It was her deposition that the Commissioner General, pursuant to Section 10 of the [Excise Duty Act](#) as read with paragraph 2 of the First Schedule to the Act, has the power to adjust excise duty rates of products to take into account the rate of inflation, subject to the approval of the Cabinet Secretary Treasury and Planning.
37. She deposed that contrary to the Petitioners’ assertion; all the Commissioner General did was limited to implementation of the formula provided for under paragraph 2 of the First Schedule to the Excise Act.
38. It was her case that the Commissioner General has no mandate under law to adjust any rates outside of the figures provided by the Kenya National Bureau of Standards.
39. She deposed that the Commissioner General only inputs the rate of Excise Duty and the rate of inflation into the formula already provided by the National Assembly and implements the outcome of the formula.
40. It was her case that the Finance Act amended Section 10 of the [Excise Duty Act](#) making the requirement that the Commissioner General had to seek the approval of the 3<sup>rd</sup> Respondent prior to effecting the adjustment on excise rates.
41. Further to the foregoing, it was her case that Section 8 of the [Excise Duty Act](#) 2015, provides that the Cabinet Secretary Treasury and National Planning by Order in the Gazette amend the First Schedule by increasing or decreasing any rate of Excise Duty on excisable goods and services by an amount not exceeding ten per centum of the rate set out in respect of those goods or services in the First Schedule.
42. She deposed that under Section 10 of [Excise Duty Act](#), the Commissioner General may exercise discretion depending on the circumstances in order to meet the revenue requirements as anticipated and factored in the revenue projections.
43. It was her case that Excise Duty which is charged as a percentage on the value of the goods (ad valorem) will automatically increase as the price of goods increases and maintains the real value of tax.
44. She deposed however that the forgoing is not true for specific rates of tax which is charged per unit measure. In that case, when the price of goods increases, the excise duty rate remains constant and hence erodes the real value of the taxes hence enactment of section 10 of the [Excise Duty Act](#) and paragraph 2 of the First Schedule to the Act the protect the value of duty from erosion by inflation.
45. On the foregoing, the 1<sup>st</sup>Ms. Mugure deposed that the 1<sup>st</sup> Respondent developed a draft legal Notice on the adjustment of Excise Duty and as per the requirement of Statutory Instrument Act, informed



public and relevant stakeholders of the intention to review the rates vide Notice published on 10<sup>th</sup> August 2021.

46. She deposed that, in compliance with the public participation requirement, the 1<sup>st</sup> Respondent received feedback from, British American Tobacco (BAT), Kenya Association of Manufacturers (KAM), Kenya Wine Agencies Limited (KWAL), Alcohol Beverages Association of Kenya (ABAK) Petroleum Institute of East Africa (PIEA), Total Energies Marketing (TEM), Price Waterhouse Coopers (PWC), and Kenya Breweries Limited/ UDV Distributors and carried out virtual stakeholder engagements on inflation on 9<sup>th</sup> September 2021, 20<sup>th</sup> September 2021 and 23<sup>rd</sup> September 2021.
47. She deposed that the Petition seeks to curtail the 1<sup>st</sup> Respondent's mandate of collecting revenue from petroleum and petroleum products.
48. In urging the Court to dismiss the Petition, Ms. Mugure deposed that the Petitioners had not disclosed a reasonable cause of action.

### **The Submissions:**

49. The 1<sup>st</sup> Respondent filed written submissions dated 5<sup>th</sup> April 2022 and supplementary written submissions 11<sup>th</sup> May 2022
50. It was its case that 1<sup>st</sup> Respondent drafted the legal notice on the adjustment of excise duty rates for the year 2020/2021 at 4.97% based on the Advice of Kenya National Bureau of Statistics.
51. On the foregoing, the 1<sup>st</sup> Respondent identified the issues for determination as; whether the public notice violated *the Constitution*; whether there was public participation and whether the Petitioners are entitled to the reliefs sought.
52. On the first issue, the 1<sup>st</sup> Respondent submitted that the Commissioner General adjusted excise duty within the powers of section 10 of the *Excise duty Act* as read with paragraph 2 of First Schedule to the *Excise Duty Act* not to make the lives of the Petitioners difficult but, in the long term, reduce the rate of inflation which is important to economic growth of the country.
53. It was its case further that the Commissioner General followed the laid down provisions of the law and the Petitioners had not demonstrated how the 1<sup>st</sup> Respondent acted ultra-vires.
54. It was its case that it duly complied with the checklist provided for in Section 17 of the *Statutory Instruments Act* on delegated legislation.
55. In making its case on public participation, the 1<sup>st</sup> Respondent submitted that it extensively involved the public in the adjustment of the excise duty rates and held stakeholder engagement with the players in the petroleum industry.
56. The 1<sup>st</sup> Respondent relied on various decisions among them the South African decision in Poverty Alleviation Network -vs- President of the Republic of South Africa & 19 Others CCT 86/08 (2010) ZACC where it was observed: -

Engagement 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 make demands. In any democratic state, participation is integral to its legitimacy. When a decision made without consulting the public the result can never be an informed decision.

57. It was its case that the invitation of the public by the Respondent did not exclude the participation of the Petitioners and the members of Ufanisi Centre.



58. In arguing that the Petitioners were not entitled to the reliefs sought, it was submitted that a permanent order will adversely affect revenue collections in the financial year and affect Government operations and its duty to provide services and social responsibility.
59. It was urged that this Court ought to uphold the principle of separation of powers by not interfering with other institution's powers and or functions.
60. In conclusion, it was submitted that the Petitioners had not discharged the burden of proof that the inflation rate will adversely affect the economic rights of the Petitioners.

**The 2nd Respondent's case:**

61. Energy and Petroleum Regulatory Authority challenged the Petition through the Replying Affidavit of Eng. Edward Kinyua, its Director, deposed to on 8<sup>th</sup> October 2021.
62. It was its case that in setting petroleum pump prices, a mandate under Energy (Petroleum Pricing) Regulations, 2010, the 2<sup>nd</sup> Respondent takes into consideration the landed cost of petroleum products, storage and distribution costs, allowable wholesale margin and applicable taxes.
63. It was his deposition that under the *Energy Act* 2019, the *Petroleum Act*, 2019 and the Regulations, EPRA's role is limited to incorporating the taxes in the monthly price calculations as required by Regulation 5 of Legal Notice 196/2010.
64. It was its case that the determination of pump price of petroleum is based on a cost-plus model that runs every month and is based on the prices of petroleum products in the international markets, storage, distribution and suppliers' margins, taxes and levies.
65. He deposed that EPRA has consistently published and informed the public on the various components of the petroleum price build-up vide press releases.
66. On the foregoing, the 2<sup>nd</sup> Respondent maintained that the Petitioners had misapprehended the process of determination, application and collection of taxes.
67. It was urged that the Petition be dismissed.

**The 4th Respondent's case:**

68. The Cabinet Secretary Mining & Petroleum challenged the Petition through the Replying Affidavit of Joseph Wafula, the Chief Economist in-charge of Mid and Downstream Petroleum, Petroleum Directorate, deposed to on 8<sup>th</sup> October, 2021.
69. He deposed the Petitioners' allegation that the Petroleum levy is shrouded in secrecy is unfounded and without proof. He stated that paragraph 4 of the Legal Notice No. 124 of 2020 Petroleum Development Levy established a price stabilization mechanism whereby a portion of the Petroleum Development Levy is used to stabilize local petroleum pump prices in instances of spikes occasioned by high landed cost.
70. He deposed that the Petitioners have misrepresented facts and law relating to the matters raised in the Petition in a bid to obtain the orders sought.
71. He deposed the newspaper cuttings used as evidence by the Petitioners fail to meet the evidentiary threshold.



72. It further was his case that the Petition fails to meet the precision threshold required of Constitutional Petitions and ought to be dismissed.

**The 2nd 3rd, 4th and 5th Respondents' submissions:**

73. Energy and Petroleum Regulatory Authority, The Cabinet Secretary Treasury and National Planning, the Cabinet Secretary Petroleum and Mining and Cabinet Secretary for Energy submitted that the Petitioners have misunderstood the role of the Respondents and misapprehended the process and procedure through which taxes are reviewed.

74. They stated that the impugned excise duty enjoys presumption of constitutionality which the Petitioners have not rebutted.

75. It was their case that the Petitioners had failed to initiate to use available channels to have their grievances addressed. To that end, it was their case that the Petitioners ought to have pursued Parliament as the right avenue.

76. It was their case further that the Petition was lacking in evidence on specific instances of violation of *the Constitution*.

77. In conclusion, it was urged the Petition was pleaded without specificity and did not raise any constitutional issue and ought to be struck out with costs.

**The 6th and 7th Respondents' case:**

78. The Speaker of the National Assembly and the National Assembly opposed the Petition through Grounds of Opposition dated 26<sup>th</sup> September, 2021.

79. It was their case that the Petition is misconceived and without any basis in law as the orders sought violate the constitutional and statutory mandate of the National Assembly.

80. It was pleaded that the rate of taxation is a policy decision solely within the exclusive mandate of the Executive and as such this Court lacks the necessary tools and jurisdiction to delve into policy decisions.

81. It further was urged that laws enacted by Parliament are presumed constitutional and fair and the Petitioners had failed to discharge the burden of constitutionality.

82. It was urged further that the purpose and effect of the impugned statute did not infringe on any right guaranteed by *the Constitution* and as such ought not to be declared unconstitutional.

83. In urging the Court not to suspend the impugned taxes, it was submitted that public interest militates against such suspension since the taxes had already been factored in the budget for the financial year.

84. The 6<sup>th</sup> and 7<sup>th</sup> Respondents did not file written submissions.

**Analysis:**

85. From the reading of the Court documents filed and consideration of the submissions of the parties, the following issues for determination have been deciphered: -

- a. Whether the impugned notice was in violation of Articles 10 and 47 of *the Constitution* for want of public participation, stakeholder consultations and administratively fair procedures.



- b. Whether Parliament failed in its mandate to cushion Kenyans against the spiralling effect of the fuel tax.
- c. Whether there is need for Regulations on the moneys received by the Petroleum Subsidy Fund from the Petroleum Development Levy.
- d. Whether this Court should order the Respondents to account for the moneys received from the Petroleum Development Levy in favour of the Petroleum Subsidy Fund.
- e. What remedies, if any, should be granted.

86. The Court will now address each of the identified issues in seriatim.

- a. Whether the impugned notice was in violation of Articles 10 and 47 of *the Constitution* for want of public participation, stakeholder consultations and administratively fair procedures:

87. The Petitioners contended that there was no adequate public participation that was undertaken prior to the issuance of the impugned notice.

88. Responding to the contention, the Respondents argued that adequate public engagement was undertaken by both the Parliament and the 1<sup>st</sup> Respondent.

89. To ascertain if the Respondents position is holding, this Court will look at Article 47 of *the Constitution* in discussing the constitutional doctrine of public participation.

90. The High Court in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR comprehensively dealt with the issue of public participation and in light of Article 10 of *the Constitution*. The Court stated as follows: -

116. Article 10 provides for the national values and principles of governance which bind 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 any public policy decisions.

117. *The Constitution* also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

118. Expounding on Article 10 of *the Constitution*, the Court of Appeal in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR held that:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are



not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR while referring to the South African decision in Doctors for Life International v Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

According to their plain and ordinary meaning, the words public involvement or public participation refers 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.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10<sup>th</sup> Edition defines 'consultation' as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR quoted with approval Ngcobo J in Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....



122. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR the Court addressed the concept of consultation in the following manner: -

.... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

(emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra) while dealing with the aspect of public participation in lawmaking process stated as followed: -

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

125. In Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A), the South African Constitutional Court stated as follows: -

A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...

126. The South African Constitutional Court in Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5 discussed the importance of public participation as follows: -



...engagement 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.

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)* referred to *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR* stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures 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 1<sup>st</sup> 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.

128. In *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others (supra)* the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

- a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.
- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)*. In relevant portion, the Court stated:  
“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”
- d. Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining



inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

- e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
- f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

- 91. There is no dispute that the Respondents variously undertook public engagement. The issue is the adequacy or sufficiency thereof. The Respondents averred that it held forums with stakeholders and the public where it collected views on the issue at hand. The Parliament also averred that it carried out the required public participation prior to passing the legislation that resulted to the impugned notice.
- 92. From the Petitioners' perspective, it appears that the main complaint is that the majority of the views collected from the public were not for the impugned notice, but they were all ignored or not sufficiently considered in coming up with the impugned notice. In other words, the impugned notice did not find favour with the public. That may be the truism, however, the Court in *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* case (supra) affirmed the position that 'public participation does guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive.'
- 93. This Court, therefore, finds and hold that the Respondents variously undertook sufficient public engagement prior to the issuance of the impugned notice.
- 94. The first issue is, therefore, answered in the negative.
  - b. Whether Parliament failed in its mandate to cushion Kenyans against the spiralling effect of the fuel tax:
- 95. Parliament is an equal arm of Government among the three arms. The Parliament is created under Chapter 8 of *the Constitution*. It consists of the National Assembly and the Senate. It exercises legislative authority on behalf of Kenyans alongside the County Assemblies under the devolved units.
- 96. The role of Parliament is provided for in Article 94 of *the Constitution* whereas the roles of the National Assembly and Senate are provided for in Articles 95 and 96 respectively.
- 97. Article 104 of *the Constitution* cushions the public against Members of Parliament who do not stand up to their calling as follows: -
  - 104. Right of recall:
    - (1) The electorate under Articles 97 and 98 have the right to recall the member of Parliament representing their constituency before the end of the term of the relevant House of Parliament.



(2) Parliament shall enact legislation to provide for the grounds on which a member may be recalled and the procedure to be followed.

98. In this matter, therefore, it is not for the Court to declare that Parliament failed in its duty to represent the views of the majority of Kenyans especially on the issue of the fuel tax. If Kenyans are of such a position, then they have the right to recall their representatives accordingly.
99. This Court cannot, therefore, make a finding on this issue.
- c. Whether there is need for Regulations on the moneys received by the Petroleum Subsidy Fund from the Petroleum Development Levy:
100. There are various legislations on the diverse energy sector.
101. For instance, the *Energy Act*, No. 1 of 2019 is an Act of Parliament to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes.
102. The Act provides for various sector entities including the Nuclear Power and Energy Agency established under Section 54 of the Act, the Energy and Petroleum Regulatory Authority established under Section 9 of the Act, among others.
103. The functions of the Energy and Petroleum Regulatory Authority (hereinafter referred to as ‘the 1<sup>st</sup> Respondent’ or ‘EPR’) are elaborately provided for in Section 10 of the *Energy Act*. Its powers are rendered in Section 11 of the *Energy Act*.
104. Among the powers and functions of EPR includes consumer protection. EPR may also recommend to the Cabinet Secretary to make regulations for carrying out the provisions of the *Energy Act*.
105. There is also the *Petroleum Development Fund Act*, No. 1 of 1991 (hereinafter referred to as ‘the PDF’) which is an Act of Parliament to provide for the establishment of a Petroleum Development Fund and the imposition of a petroleum development levy and for connected purposes.
106. Section 4 of the PDF provides for the establishment of a fund to be known as the Petroleum Development Fund which consists of moneys appropriated by Parliament for that purpose. The Fund is administered by the Principal Secretary to the Treasury or any person appointed by him in writing for that purpose. All moneys received in respect of the petroleum development levy is paid into the Fund.
107. The Petroleum Development Levy is provided for in Section 3 of the PDF. It is a tax levied by the Cabinet Secretary on all petroleum fuels consumed in Kenya. It is collected by the Commissioner-General of the Kenya Revenue Authority. As said, such moneys collected are paid into the Petroleum Development Fund.
108. The concept of ‘fuel subsidy’ generally means that a fraction of the price that consumers are supposed to pay to enjoy the use of petroleum products is paid by Government so as to ease the price burden. The fuel subsidy is, therefore, a scheme and it is normally administered under the Petroleum Development Levy Fund by the Principal Secretary to the Treasury or an appointee.
109. The Petitioners, however, referred to the Fuel Subsidy Fund. In Kenya, such a fund does not exist. As said, fuel subsidy is only a scheme administered under the Petroleum Development Levy Fund.



110. Section 6 of the PDFFA provides for the making of regulations. The Act accords the Cabinet Secretary the power to make regulations as necessary or expedient for the proper carrying out of the intent and provisions of the PDFFA.
111. Pursuant to the provision, regulations have been enacted including the Petroleum Development Levy Order, 1992 which regulations have been amended over time.
112. The prevailing statutory architecture in place is, hence, that there exists a legislation (the PDFFA) which regulates the aspect of fuel subsidy. The legislation also provides for regulations.
113. What the Petitioners, therefore, ought to do is to seek information on the specific regulations on fuel subsidy, if any. In the event none exist or in case the Petitioners are of the view that the regulations in place do not adequately provide for the said fuel subsidy, then they remain at liberty to petition Parliament under Article 119 of *the Constitution* or to bring the lacuna to the attention of the Cabinet Secretary.
114. Deriving from the foregoing, this Court will again not make any finding on this issue.
- d. Whether this Court should order the Respondents to account for the moneys received from the Petroleum Development Levy in favour of the Petroleum Subsidy Fund:
115. Article 248 of *the Constitution* establishes the Constitutional Commissions and Independent offices. One of the independent offices is that of the Auditor General. It is Article 229 of *the Constitution* that substantively provides for the Auditor-General.
116. Article 229(4), (5) and (6) of *the Constitution* provides for the duties of the Auditor-General as follows:
- 
- (4) Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on—
- (a) the accounts of the national and county governments;
  - (b) the accounts of all funds and authorities of the national and county governments;
  - (c) the accounts of all courts;
  - (d) the accounts of every commission and independent office established by this Constitution;
  - (e) the accounts of the National Assembly, the Senate and the county assemblies;
  - (f) the accounts of political parties funded from public funds;
  - (g) the public debt; and
  - (h) the accounts of any other entity that legislation requires the Auditor-General to audit.
- (5) The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.



(6) An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.

117. There is no allegation that the Auditor-General did not discharge the duties of the office as required.
118. Since by the operation of the law, the Auditor-General is supposed to prepare an audit report which includes the National Treasury, being the entity that administers the Petroleum Development Fund, the Petitioners' concerns must have been taken care of. They are at liberty to look at the relevant audit reports.
119. In such a case, as the Auditor-General is not impugned in any way, this Court cannot issue the orders sought.
120. This Court now finds and hold that the issue cannot legally stand and is hereby dismissed.

**Disposition:**

121. Having dealt with all the issues raised in the Petition and none seems to be settled in favour of the Petitioners, the Petition is hereby dismissed with each party bearing its costs being a public interest litigation.
122. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Oreno, Learned Counsel for the Petitioners.**

**Miss. Chelang'at, Learned Counsel for the 1<sup>st</sup> Respondent.**

**Miss. Makori, Learned Counsel for the 2<sup>nd</sup> - 5<sup>th</sup> Respondents.**

**Miss Mawins for Mr. Mbarak, Learned Counsel for the 6<sup>th</sup> & 7<sup>th</sup> Respondents.**

**Miss. Kinyua, Learned Counsel for the Interested Party.**

**Regina/Chemutai – Court Assistants.**

