REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E001 OF 2021

IN THE MATTER OF: ARTICLES 22(1), 48, 50(1) AND 258 (1) & (2) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ALLEGED VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1(1) (2) & (3), 10(2), 27 33,73(1) (B); 174 (C) & (D), 184 (1), 196, 201, 232 (D) & (F), 185(2), FOURTH SCHEDULE PART 2(14) AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED VIOLATION OF THE CONSTITUTION AND THE COUNTY GOVERNMENT ACT 2010 IN PASSING THE CONSTITUTIONAL (AMENDMENT) BILL 2020 POPULARLY KNOWN AS THE BBI BY THE COUNTY ASSEMBLY OF TANA RIVER WITHOUT PUBLIC PARTICIPATION

AND

IN THE MATTER OF: INTERPRETATION, ENFORCEMENT AND PROTECTION OF THE CONSTITUTION UNDER ARTICLE 19, 20, 22, 23, 24, 165, 258 AND 259 OF THE CONSTITUTION

BETWEEN

ABE SEMI BVERE.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF TANA RIVER..... 1ST RESPONDENT

THE SPEAKER OF THE COUNTY ASSEMBLY OF

TANA RIVER ..... 2ND RESPONDENT

AND

THE SPEAKER OF THE NATIONAL ASSEMBLY....1ST INTERESTED PARTY

THE SPEAKER OF THE SENATE.....2ND INTERESTED PARTY

Coram:Hon. Justice R. Nyakundi

Mungatana Advocates for the Petitioners

Kilonzo & Aziz Advocates for the 1st and 2nd respondents

RULING

The petitioner herein filed a petition together with a notice of motion application dated 25.02.2021 under certificate of urgency supported by an Affidavit sworn by the Petitioner on the same day. Their application moved the Court for orders:

(i). Spent

(ii). Pending the hearing and determination of this application, this Court be pleased to issue a temporary conservatory order against the 1st respondent by itself, its servant or agent or anyway howsoever from transmitting, taking or in any way sending the resolution of the County Assembly of the County Assembly of Tana River, the 2nd Respondent for further processing.

(iii). Pending the hearing and determination of this application, this Court be pleased to issue a temporary conservatory order restraining the 2nd Respondent the 2nd Respondent from transmitting, taking or in any way sending the resolution of the County Assembly of Tana River of Tuesday the 23rd February, 2021 to the speaker of the National Assembly to be used and counted as one of the legitimate/constitutional resolutions from the Assemblies of the Counties for further processing of the bill through the National Parliament.

(iv). That pending the hearing and determination of this application, this Court be pleased to issue a temporary conservatory order restraining the Speakers of the National Assembly and the Senate, the 1st and 2nd interested parties, from receiving, accepting any document purporting to be a resolution of Tuesday 23rd February, 2021 of the County Assembly of Tana River approving the passage of the Kenya Constitution (amendment) Bill 2020.

(iv). That costs of this application be in the cause.

The application was grounded upon the grounds espoused therein and by the sworn affidavit of **Abe Semi Bvere** dated 25.02.2021. The Respondents' response was by way of an affidavit sworn by **Abdullahi Husein** dated 04.03.2021.

The crux of the matter is that the 1st respondent failed to carry out enough public participation before deciding to transmit to the Speaker of Tana River County, the 2nd Respondent passed a Resolution of Tuesday 23rd February, 2021 which approved the Kenya Constitution (Amendment) Bill without any public participation. This is despite the fact that the County Assembly having sent out an advertisement on the national dailies and social media that they were to have public hearings and receiving of memoranda on the Thursday 25th February, 2021 on three venues in the three sub counties of Tana River County.

The petitioners' case

The petitioner herein is a citizen of Tana River County residing and working within the said County. The 1st respondent (hereinafter referred to as "the County Assembly of Tana River") is the body constitutionally mandated to debate and pass bills on behalf of the residents of Tana River. The 2nd respondent is the head of the County Assembly of Tana River the body that is constitutionally mandated to debate and pass bills on behalf of the residents of Tana River County. The petitioner alleges that he became aware of the decision by the respondents to hold public hearings and receive memoranda on the Constitution of Kenya (amendment) Bill 2020 through a newspaper advertisement pursuant to the provisions of Article 196 (1) (a) & (b) of the Constitution. He alleges that the notice that was circulated explained that the County Assembly Committee on Public Service Management and Administration was to receive the memoranda and also hear presentations from the public. He alleges that he was surprised to learn of a decision made by the 1st respondent to convene a meeting to debate the said Bill, and in fact the 1st Respondent did not convene the house for debate and the resolution was passed without the input of the residents of Tana River County. He further alleges that upon inquiring from the County Assembly as to why they were rushing the whole process, the answer was that they had intended to pass the resolution then go to for the public hearing later. He was aggrieved by the failure of the respondents to observe the provisions of Article 1(2),10 (2) (a), (b) & (c),174, 174 (d), 196 (1), 201 (a),207 and 232(1) of the Constitution of Kenya 2010, Section 87, 91,94, 95 and 96 of the County Government's Act 2012.

The Respondent's case.

The Respondents opposed the grant of the orders sought and argued that public participation was actually done.

They stated that the orders sought in the Notice of Motion Application dated 25th February, 2021 have been overtaken by events as pursuant to its mandate, the 1st Respondent laid on the table of the House the Constitution of Kenya (Amendment) Bill, 2020 on 9th February, 2021 and that the said motion was put as an order of business on 23rd February, 2021 where members of the 1st Respondent discussed and approved it.

They further argued that despite issuing a notice indicating that they would hold public hearings and receive memoranda on the 25th of February, 2021, the said public gatherings could not happen considering the Covid 19 situation in the county. They opined that with compliance with Article 196 (1) (a) & (b) they did not lock out the members of the public from giving their views and contributions before debating and approving the bill. They argue that they gave the citizens of Tana River a safer alternative by putting up a notice in their website inviting people to give their views through the said website, have the same hand delivered to the office of the Clerk or email the same to the 1st Respondent's official email.

They further argue that Article 1 (2) of the Constitution bestows sovereign power to the people which power may be exercised either directly or through their democratically elected representatives. That in fact, the decision of the 1st Respondent is not final and nothing will prevent the people of Tana River from participating in the said exercise at the national level during referendum and the actions of the 1st Respondent do not amount to passing of the bill into law.

Analysis and Determination

Its well-known traditionally, negotiating a constitution was the province of political leaders and elites in power who claimed it. Further, drafting the Constitutional text became an expert work; and the rest of citizenry at most were only asked to consent to the final version underpinning, the importance of Constitutional as a supreme Law of the land, the obligation to facilitate participation requires such positive action as the provision of public meetings, in every tier of the local administrative units, solicitation of memorandum, use of local dialect FM Radio channels and any other local widely acknowledged mode of communication.

In designing public participation procedures, the claim should be to ensure that the potentially affected part of the citizens are given an opportunity to input into the Constitutional making or amendment process. However, the perceived role of the legislature as elected representative should not be a substitute of the public voice to undermine their authority in Constitutional discourse.

The ultimate role of the Constitutional amendment rests in the hands of the Kenyan people who would decide in a referendum whether it makes legal sense to amend certain provisions. However, notwithstanding that in the steps leading up to the plebiscite, public participation and inclusivity of the grass root masses is indispensable. One of these ways is for the county assembly to strive for the initiation of a constitutional making process in Tana River County of engaging the residents with meaningful enlightening processes on issues covered in the BBI document.

Constitution building is defined as a long-term process. It is not an event and is not equated with the drafting of a Constitution. It includes establishing institutions, procedures and rules for Constitution making or drafting giving, legal effect to the Constitution and implementation.

Public participation in Constitutional building is an effective strategy for enticing democracy. Due to its supremacy, a country's Constitution is of fundamental importance to be left to the political class or elected representative of the people in both the national or county assemblies. One of the most doctrinal principles and values established in the Constitution 2010 under Article 10 taken into consideration are probably the crowning marvel of the wonders and the greatest conception of the Constitution.

In amending the Constitution, the sovereignty of the sovereign people of Kenya should exercise their supremacy within it comes to interrogate the soul of a nation and are better positioned than greater number of their representatives chosen at frequent intervals to set in the chambers of national parliament and county assemblies.

This matter though framed to be decided at an interlocutory stage, it behooves on one to invoke the inherent jurisdiction of the Court with the sole intention being to meet the ends of justice in this given situation. The modern account of the inherent jurisdiction begins with **Sir Jack Jacob's** seminal piece ***"The Inherent Jurisdiction of the Court."*** Jacob defines inherent jurisdiction as the:

> ***"[……] residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of Law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them. Jacob summarized the fundamentals of the inherent jurisdiction as follows:***
>
> > ***(1). The inherent jurisdiction is exercised as part of the administration of justice and in relation to the process of litigation; it is procedural, not substantive;***
> >
> > ***(2). Its distinctive and basic feature is that it exercised by way of summary process rather than normal trial;***
> >
> > ***(3). Its nature as part of the machinery of justice means that a Court can exercise it against anyone, whether a party to proceedings at issue or not;***
> >
> > ***(4). It is distinguishable from the exercise of judicial discretion; and***
> >
> > ***(5). Rules of Court provide powers in addition to – not as a substitute for – the powers arising from the inherent jurisdiction.*** **(See I H Jacob "The Court's Inherent Jurisdiction" (1970) 23 CLP 23)**

The answer to this issue is whether the county assembly in passing the resolution derived its power from the people of Tana through effective public participation.

This petition has two parts. The first where the applicant is seeking interlocutory conservatory orders. The second part is the formulation of the petition itself. It draws on the same principles and grounds as set out in the notice of motion for conservatory orders. Its therefore important and possible to define the purpose of conservatory orders and the commonality of the ultimate orders of the relief applied for by the petitioner.

Although the parties argued their case on half time seeking conservatory orders as openly expressed, their disagreement is on the level of public participation before the debate and passing a resolution to give effect to the BBI Constitution framework. This entailed a rigorous scrutiny of the channels of communication established by the speaker of the County Assembly to inform, educate and ultimately enable the residents to make informed choices.

As has previously been noted from the replying affidavit and paragraphs deposed by the 1st respondent, the margin of appreciation on public participation is to be found on the website and the newspaper advert of 25.2.2021. Putting all those arguments together, with regard to the scope of the petition and the interim orders, the exigency of the time requires the Court to delve into the merits of the petition. In an unprecedented discourse it is probable to draw from the fact alleged that the proof of facts and circumstances as they stand would certainly not change in relation to the petition. It is therefore artificial to presume that the weight of facts given by the petitioner and opposed by the

1st respondent would sometime in the future produce additional evidence from what is already on record. My answer is that the applicant wants this Court to strike out the resolution annexed to the affidavit which was illegally procured on the basis of its unconstitutionality for want of public participation. In short the issue before Court had crystallized after the conclusion of the County Assembly resolution.

I therefore think that by considering this issue cumulatively, relying on the attached affidavits which may remain central at this stage and at a later adjudication of the petition I will not be committing judicial suicide. In my understanding, it is necessary to secure the rights of the parties now than in the future.

I have considered the application which is the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. I am duly guided that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165 (3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

The Law on Whether the conservatory orders should be issued pending the determination of the main petition.

The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are now fully settled. The Law is that, in considering an application for conservatory orders, the Court is not called upon and is indeed not required to make any definitive finding either of fact or Law as that is the province of the Court that will ultimately hear the petition.

The jurisdiction of the Court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders.

The Court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant as was stated in the case of the **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No. 16 of 2011; {2011} eKLR**:

> ***"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

Similarly, the issue in contention in this application is whether the applicant has established a strong prima facie case that warrants the grant of conservatory orders. As it has been held in various decisions, a prima facie case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses serious and arguable constitutional issues to be tried or a case alleging violation of rights. In this regard, I am comforted that the Judgment of **Odunga J** in **Kevin K. Mwiti & Others v Kenya School of Law & Others stated:**

> ***"the first issue for determination is whether the petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which discloses arguable issues and in this case arguable constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the Court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success."*** *(emphasis is mine)*

Furthermore, the Court in **Kenya Association of Manufacturers & 2 others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 others {2017} eKLR** had this to say about the grant of conservatory orders:

> ***"in an application for a conservatory order, the Court is not invited to make any definite or conclusive findings of fact or Law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The Court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public Law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest."*** *(emphasis is mine)*

Case commentary on public participation and why it is important.

The phrase as what constitutes public participation since the promulgation of our Constitution 2010 has been considered by our courts and in other jurisdictions. In South Africa, the Constitutional Court in the landmark case of **Doctors for Life International v the Speaker of the National Assembly [2006] 12 BCLR 1399** determined the following issues:

> ***i. What the nature of the duty to facilitate public participation is.***
>
> ***ii. Whether the legislature had discharged its duty to facilitate public involvement in the legislature process of certain health related legislations.***

iii. What the impact on the validity of such legislature if the facilitation of public involvement was flawed is.

The court said and emphasized as to the special meaning of public participation and its effect in the following passage:

> ***"All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful decision. The objective is both symbolical and practical. The persons concerned must be manifestly shown the respect due to their concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."***

In addition to the above, in the case of **Doctors for Life International v The Speaker of the National Assembly & Others CCT 12 of 2005 [2006] ZACC 11** the court held that there are at least two aspects of the duty for facilitate public participation and stated thus:

> ***"What is intimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as a continuum that ranges from providing information and building awareness to partnering in decision making. This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the state to facilitate public participation in the conduct of public affairs by ensuring that this right can be realized it will be convenient here to consider each of these aspects beginning with the broader duty to take steps to ensure that people have the capacity to participate."***

Article 196 of the Constitution provides:

> ***"(1) A County Assembly shall:***
>
> ***(a) Conduct its business in an open manner, and hold its sittings and those of its committees, in public and***
>
> ***(b) Facilitate public participation and involvement in the legislative and other business of the Assembly and its committees.***
>
> ***(2) A County Assembly may not exclude the public, or any media from any sitting unless in exceptional circumstances. The speaker has determined that there is a justifiable reason for doing so***

Article 201 (a) of the Constitution similarly provides interalia

> ***"The following principles shall guide all aspects of public finance in the Republic: (a) There shall be openness and accountability, including public participation in finance matters."***

Article 10 of the Constitution provides as follows:

> ***10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.***
>
> ***(2) The national values and principles of governance include— (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.***

The above article envisages public participation as one of the national values and principles of good governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution, enacts, applies any law or makes or implements public policy decisions.

In the same respect, Justice Sachs observed

> ***"... 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"***

The essence of public participation was also powerfully enunciated in the case of ***Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others,*** [5] in the following terms: -

> ***"…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."

Section 115 of the County Government Act 2012 provides:

"(a) Public participation in the county planning processes shall be mandatory and be facilitated through mechanisms provided form part VIII of this Act."

From the above constitutional and statutory provisions, it is clear that public participation plays an integral role in both legislation and policy functions of the government whether at the national or county level. Article 196 (b) requires the county assembly to facilitate public participation and involvement in the legislation and other business of the assembly and its committees. The County Assembly therefore has a constitutional obligation to facilitate public participation on policy formulation, legislative process and any other decision affecting residents of the county.

On the issue of public participation, I stand guided by **Odunga J** in **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR** where he opined thus;

" 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. 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 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. Dealing with the issue I wish to reiterate what was held in Doctors for Life International vs. Speaker of the National Assembly and Others (supra)to the effect that: "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."

The respondents aver that in compliance with Article 196 (1) (a) & (b), they did not lock the members of the public from giving their views and contributions, that they gave them a safer alternative by putting up a notice in their website inviting people to give their views through their website. This assertion leaves a lot of questions in the mind of this court. The position of Tana River County in the geographical terrain means that the majority of the populations are disadvantaged in terms of knowledge, ICT Skills and internet hardware and software connectivity making it impossible for any practical accessibility to the alleged website put in place by the county government. To demand of the citizens to present the memorandum or submissions through the website was an uphill task even to the leaders of that assembly themselves in view of inadequate optic fiber or internet facilities. In this county one is not able to access a website at the touch of a button. To this court, the action taken by the Respondent only means that the people of Tana River were locked out of in the involvement in the crafting of the constitution which is a lifetime opportunity lost to contribute to the constitutional amendment process.

Public participation ensures that when an individual actively takes part in forming the constitution, she/he learns its content more fully and she/he is also more likely to defend the provisions enshrined in it. Similarly, involvement and participation in constitutional building assert that involvement creates trust, which contributes to the growth of social capital, it bolsters democratic attitudes, the people become more open to listening to and respecting the views of others. The Respondents' action of relying on the website to get views from the citizens leave one to wonder what percentage of the population of the county of Tana River are able to access the said website.

What amounts to public participation is a subject that has been exhaustively discussed over years. In the South African case of **Borbet South Africa Ply Ltd & Others v Nelson Mandela Bay Municipality 3751 of 2011 [2014] ZA EA PEHC 35 [2014] 5 SA 256** the court held:

"The obligation to encourage public participation at local government level goes beyond a mere formulation in which public meetings are convened and information shared. The concept of participating democracy as envisaged by the constitution requires that the interplay between the affected representatives' structures and the participating community is addressed by means of appropriate mechanisms. It is this relationship to which the constitution court speaks when it states that there must not only be meaningful opportunities for participation, but that steps must be taken to ensure that people have the ability and capacity to take advantage of those opportunities."

The learned judge also proceeded to state:

> ***"In the contexts of local government, more is required than public meetings and the publication of information. A local council is required to put in place mechanisms that create conditions for public participation and that build the capacity of communities to participate. It is required to allocate resources to the task and to ensure that the political and other structures established by the legislation are employed to meet the objectives of effective participation."***

In the case of **King v Attorneys Fidelity Fund Board of Control & Another [2006] 1 SA 474** the Supreme Court expressed the following view:

> ***"Public involvement is necessary on in exact concept with many possible facets, and the duty to facilitate it can be fulfilled not in one, but in many different ways: public involvement might include public participation through the submission of commentary and representations; but that is neither definitive nor exhaustive of its content. The public may become involved in the business of the national assembly as much by understanding and being informed what it is doing as by participating directly in those processes. It is plain that by imposing on parliament the obligation to facilitate public involvement in its processes, the constitution sets of base standard, but then leaves parliamentarians significant leeway in fulfilling it. Whether or not the national assembly has fulfilled its obligation cannot be assessed by examining only one aspect of public involvement in isolation of others, as the appellants have sought to do here" Nor are the various obligations Section 59 (1) imposes to be viewed as if they are independent of one another, with the result that the failure of one necessarily divests the national assembly of its legislative authority."***

This court is of the opinion that public participation ought to be real and ought not to be illusory. This position resonates with that taken in the **Gakuru Case** where the court stated that it is not just enough to simply ***"tweet"*** messages as it were and leave it to those who care to scavenge for it.

It is important to note that the Petitioner's bone of contention is that the Respondents did not give the residents of Tana River County a reasonable opportunity to give their views before purporting to pass the resolution. This court is informed by the holding in **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County Government of Nairobi & 3 Others [2014]** where the court held that

> ***"public participation does not imply that each of the county residents must give their oral views in the public forums or otherwise write their memoranda, respecting that views on a Bill. But simple acts of say conducting random public forums posting programmes, on popular radio stations and publishing the bill in the dailies with wide circulation would do."***

I resonate entirely with the opinion rendered by **Sachs, J** in **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)** where it was stated**:**

> ***"…being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind..."***

A similar position was adopted by **Majanja J** in **Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others** when he expressed himself as follows:

> ***"The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, "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."***

The framers of our Constitution 2010 prophesized and as overseers balanced the interests of the state and county governments, and built in checks and balances to prevent any arm or unit of government from becoming too powerful or tyrannical. For various reasons, it has served us well but viewed from the political class, monumental time of now has arisen for the re-look and amendment of certain Articles suggestively to adapt to a changing political, social, central and economic environment to guide and inspire future generations.

The right to be protected of the constitution is broad and is afforded to the citizens of Kenya and any infringement is met by the same wrath in its scope and multi laid regulatory framework.

At the outset, it is important to note that Article 257 (a) (b) requires the County Assembly to approve the draft but three months after the date it was submitted by the commission. Further, if a draft but has been approved by a majority of the County Assembly, it shall be introduced in parliament.

The requirement of Article 257 (b) of the Constitution is underpinned on the public participatory process provided for under Article 10 and 196 (b) of the Constitution. In order to achieve its goal of a people driven constitution, building processes, the County Assembly had the

evidential burden. The number of activities and approaches designed and implemented in a county wide scale for the residents to grasps the ideas of in the draft bill before a resolution to adopt the draft but was passed in the assembly. To this end, the only favorable forum created to ensure public participation was an establishment of a website. According to the affidavit evidence none of the residents' views were received through that forum.

Based on the higher threshold of constitutional evolving the concept of Protection of the Law, the Court in **Maya Leaders Alliance v Attorney General of Belize (2015) CCJ 15 (AJ)** the Court held that:

> ***"…. is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of Law. The right to protection of the Law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the Courts and other judicial bodies established by Law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."***

The second object relates to the fact that the Tana River County residents were never informed of any details of the draft but being debated against an amendment of the Constitution and the alleged objective and purpose of which they are enjoined under Article 2 of the Constitution. In **Kioa (1985) 159 CLR 550 Mason J** observed as follows on the requirements of fairness:

> ***"A point where it may be accepted that there is a common Law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions, which affects rights, interests and legitimate expectations, subject only to clear manifestations of a contrary statutory intention."***

It is the view of this Court that the requirement for the respondent to serve adequate notice on public participation was never observed as demonstrated by the annexures of the Daily Nation newspaper extract of 25th February, 2021. It is impossible to disregard in retrospect, this strict constitutional requirement of due process and natural justice as a precursor to the notion of legality of the character of County assembly proceedings to debate and consider the draft bill. At the very least, the assumption by the Assembly adopting the bill as representatives of the people without any public participation derogated from the fundamental principles of governance and national values on public participation and inclusivity of the people of Tana River under Article 10 of the Constitution.

There is nothing in the language of the respondent affidavit to indicate an intention to create a high standard of proof on the legislative attempts to truly manifest public participation in the making of the constitution at that tier level of administration unit. The petitioner who bears the ultimate burden of proof on a fact in issue has met the standard of proof on the balance of probabilities. That the general principles governing public participation for the purpose of adopting the draft amendment but were never followed by the 1st respondent. The relevant legal point on this issue are the principles enunciated by **Ngcobo J in Matatiele Municipality & Others v President of the Republic of South Africa & Others (2) (CCT73/05A) (2006) ZACC 12; 2007 (1) BCLR 47 (CC):**

> ***"Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the Law-making process in certain circumstances. The Law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. 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 ….. To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of Section 118 (1) (a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected …… Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values {and} social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of Laws by legislative bodies. Consistent with our Constitutional commitment to human dignity and self-respect, Section 118 (1) (a) contemplates that members of the public will often be given an opportunity to participate in the making of Laws that affect them. As has been observed, 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."***

Further in **Kenya Human Rights Commission v Attorney General & Another (2018) eKLR:**

> ***"Once a petitioner attacks the legislative process on grounds that the Law making process did not meet the Constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation ….. there was no attempt on the part of the respondent to show that there***

was any semblance of public participation in the legislative process leading to the enactment of the impugned contempt of Court Act. That being the state of affairs, the Court has no option but to agree with the petitioner that there was violation of an important constitutional step in the form of public participation and the Act fails this constitutional compliance step."

I take the view that the draft bill failed to give sufficient notice to the public and discriminately enforcement of it by the County Assembly mistakenly was a misrepresentation and a violation of the Constitution. The statutes with a Constitutional foundation must be drawn, debated, understood and passed by the Kenya people to operate as a balance between the state and the governed. There can be no rational governance for a man to be governed by a Constitution that was kept secret from him in complete violation of the rules of natural justice.

That arbitrary and haste action by the speaker of the County Assembly to close the debate on the draft bill in microwave time but before receipt of any written memorandum or engaging the public to gather views was an act in violation of Article 1, 2, 10, 27, 33, 73, 174 (c), 184, 196, 201, 259 and fourth schedule of the Constitution.

The initial burden in this constitutional petition lies on the complaining party, which has established a prima facie case against the respondents who were expected to refute the claimed infringement or violation of the constitution within the settled principles on public participation.

Given these features it arises in the petitioner's basic case he qualifies for grant of conservatory orders to restrain the Respondent to adopt the resolution on the constitutional amendment draft bill as a bonafide resolution from the people and residents of Tana River County. On the other hand, faced with these formulation, one may justifiably ask, once the burden shifts to the respondent and he fails to discharge it what remains for the Court to determine at the main trial of the petition. This is a case where the crux of the matter is an infringement of the obligations provided for in the Constitution. That an infringement has been demonstrated to constitute a case of nullifications or impairment of the process, culminating into the assembly resolution presented to the speaker of the national assembly. This means there is normally nothing left for the respondents to answer on their failure to conduct public participation. Therefore, that constitutes prima facie breach of fundamental constitutional principles on public participation and inclusivity in the constitutional making process.

On reflection, it seems unlikely that the respondents intend to offer anything radical in its evidential burden to controvert the petitioner's case. From this discussion, the litigating risks of waiting for an overwhelming counter claim by the respondent to rebut the petitioners case remains largely non-existent. Of particular importance in the pre-debate stage is the prejudice suffered by the residents of Tana River for strikingly being issued with a notice for various public participation sessions scheduled on 25th February, 2021. Notwithstanding the public notice an ashamedly to the county assembly under the leaders of the speaker profoundly purported to adopt a resolution to adopt the constitutional amendment draft bill on 22nd February, 2021.

A constitution marries power with justice, upholds the rule of law and places limits on the arbitrariness of exercise of that power. Indeed, one of the legal master piece ever drafted, promulgated is the Kenya Constitution 2010. It provides a collective vision of what is considered a good society based on the common values and aspirations of the citizens of this great Republic. That constitutional supremacy cannot be abused at will by any of the arms of Government. To borrow inspirational words from the Supreme court of India in Indira Nehru Gandhi V Raj Narain (1976) 2 S C.R.347 in which the court stated as follows on the supremacy of the constitution. That:

"Neither of the three Constitutional organs of State (i.e. the Executive, the Legislature and the Judiciary) can, according to the basic scheme of our Constitution today, leap outside the boundaries of its own constitutionally assigned sphere or orbit of authority into that of the other. This is the logical and natural meaning of the principles of Supreme of the Constitution".

In this instance the 1st Respondent leap doubt the scope of the constitution without blinking to pass the validity of the draft bill though with jurisdiction assigned by the same constitution it acted ultra-vires.

Given the above principles I have tested the legality of the County Assembly proceedings with reference to the Constitution it is undoubtedly clear it operated outside the spirit and letter of the Supreme Law that a healthy democratic nation depends for its sustenance. Thus as a time like this it may seem in retrospect, nevertheless under Article 23 and 163 (3) of the Constitution third judicial review jurisdiction ought to be exercised by this court to enforce the constitution that the same adoption of an amendment to the constitution by the County Assembly was against the said Constitution. The question of unconstitutionality of the assembly action admittedly controversial as it may look, the resolution enacted on amendment of the Constitution without approval or involvement of the people of Tana River cannot be left to stand. Legislation is exercise of sovereign authority under Article 2 of the Constitution. The Assembly as a creature of the Constitution does owe the existence to the Constitution and therefore their acts must be inconformity with the Constitution or else they will be void.

Decision

(a) The upshot then is that a declaration be and is hereby issued declaring Tana River County Assembly, Resolution to adopt the constitutional amendment draft bill 2021 to be tainted with procedural illegality and due process and for being fatally defective and unconstitutional.

(b) That by this declaration, the listing of Tana River County by the speaker of the national assembly as a bonafide legislative assembly resolution validly debated, adopted and obtained thereto in compliance with the cannons of the constitution is hereby rescinded and recalled for being void abnitio.

(c) That upon declaration of the process by the County Assembly being unconstitutional, the Speaker of the National Assembly and the Speaker of the Senate shall move to delete the name of Tana River County Assembly adoption of the draft bill, for failure to fulfill the basic tenets embodied in the set of principles contained under Article 10 of the Constitution on public participation and inclusivity.

(d) Accordingly, the petitioner succeeds in both interlocutory and at the main petition. Costs to be in the cause. Those are the orders of the court.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 15TH DAY OF MARCH 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Komora appearing together with Mr. Mungatana for the petitioner

2. Ms. Thuku advocate for the respondent