



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**PETITION NO. E016 OF 2021**

**IN THE MATTER OF: ARTICLE 20, 21, 22, 23 & 165(3) (B) & ALLEGED CONTRAVENTION OF ARTICLE 10(2) 33(1) (A), 35, 174, 184, 196, 201 AND 228 (4) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT No. 17 of 2012**

**IN THE MATTER OF: PUBLIC FINANCE MANAGEMENT ACT, 2012 ACCESS TO INFORMATION ACT NO. 13 OF 2016**

**BETWEEN**

**1. COAST LEGAL AID & RESOURCE FOUNDATION (CLARF)  
2. MOMBASA COUNTY BARS, RESTAURANTS,  
HOTELS, AND GUEST HOUSES ASSOCIATION.....PETITIONERS**

**VERSUS**

**1. THE COUNTY GOVERNMENT OF MOMBASA  
2. CLERK OF THE MOMBASA COUNTY ASSEMBLY  
3. THE COUNTY EXECUTIVE COMMITTEE  
FINANCE & ECONOMIC PLANNING COUNTY  
GOVERNMENT OF MOMBASA.....RESPONDENTS**

**JUDGMENT**

**PARTIES**

1. The 1<sup>st</sup> Petitioner is a Human Rights watchdog group that claims to promote human rights awareness amongst citizen of Kenya and purports to keeps both private and Government institutions accountable for the due process of the law. The 2<sup>nd</sup> Petitioner is an association of persons carrying out the business of Bar, Restaurant, Hotels and Guest Houses in Mombasa County.

2. The 1<sup>st</sup> Respondent is the County Government of Mombasa charged with the duty of running the regional government and administrative affairs in Mombasa County. The 2<sup>nd</sup> Respondent is the Clerk of County Assembly of Mombasa charged with the overall management and affairs of the County Assembly established under Article 176(1) of the Constitution of Kenya. The 3<sup>rd</sup> Respondent is an office established under Article 179(2) (b) of the Constitution of Kenya of 2010, and in charge of finance and economic planning within the County Government of Mombasa.

**The Petition**

3. The Petitioners' case is that sometime in 22/02/2021, the County Assembly of Mombasa enacted the Mombasa County Finance Act 2021,

(hereinafter “the Act 2020”) which authorized it to collect levies or impose fees, charges taxes and penalties for the year 2021. However, the 1<sup>st</sup> Respondent included the previous year which made the Act to operate retrospectively, yet the same was never subjected to public participation, which is contrary to the provisions of Articles 37, 46(c), 174(c), 184(1) (c) and Section 21, 22, 23, 24 & 25 of the County Government Act, and the same offends Article 209 (5) of the Constitution, yet the Respondents are insisting and coercing the 2<sup>nd</sup> Petitioner to pay for licenses taxes, fees, charges, levies and penalties for the previous year when they were closed down due to Covid-19 pandemic and since the National Government had ordered immediate closure of all the 2<sup>nd</sup> Petitioners’ businesses and the said businesses are yet to fully resume normal operations.

4. The Petitioners aver that the Respondents did not provide a public forum for public participation before enactment of the Act, which is contrary to Section 87 of the County Government Act. Further, it is averred that the 1<sup>st</sup> Respondent violated Article 10 (2) of the Constitution and Section 21, 22, 23, 24 & 25 of the County Government Act by failing to publish the Bill creating the Act 2021 in the National Gazette or any recognized gazette on time, thereby preventing the public from participating in the process of enacting the Bill into law.

5. The Petitioners aver that the Respondents have violated the duty bestowed upon them under Article 35 of the Constitution and Section 4 of the Access to Information Act by failing to provide the people of Mombasa access to information in their custody, which information include vital data and documents required for the exercise or protection of their fundamental rights and freedom.

6. It is the Petitioners’ case that any consultation on the creating and or enacting the Act 2021 should be conducted at ward level to ensure maximum reach of the County’s population, and the Respondents should ensure equality and equity for all residents of Mombasa as contemplated under Articles 10 and 174 of the Constitution.

7. The Petition is supported by an undated Affidavit of **Mr. Joseph Juma Mukewa**. The Petition prays for the following ORDERS:

*i. A declaration that the actions of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents above have violated rights of the Petitioner under Articles 1, 10, 27,28, 40, 48, 196, 199 and 209 of the Constitution as read together with section 132 and 137(1,(2), (3) and (4) of the Public Finance Management Act, 2012 and Sections 116 -121 of the County Government Act 2021 and hence violates the provision of he Constitution to the extent that there was no proper public participation in the process of the making, and enactment of the said Mombasa County Finance Act 2021.*

*ii. A Declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents action to impose payment or collection or fees charges levies taxes and penalties for the year 2020 before receiving payment and issuing licenses to Petitioner is illegal.*

*iii. A Declaration do issue that the Petitioners and members of the public are entitled to enjoy the exercise of their right to fully participate in the legislative process leading up to and enactment of the Mombasa County Finance Act 2021.*

*iv. An Order of Permanent Injunction be issued to suspend or prohibit the implementation of Mombasa County Finance Act 2021.*

*v. An Order of certiorari to remove into this Honourable court for the purpose of quashing the decision by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondent to levy or increase service fee on the Mombasa County by 100% and to declare the implementation or the enactment of the Mombasa County Finance Act 2021 unconstitutional.*

*vi. An Order for compensation of the Petitioners by way of damages for violation of their rights under Articles 27, 40 and 47 of the Constitution.*

*vii. The Petitioner be paid costs of the petition and interlocutory proceedings.*

### **The Response**

8. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents opposed the Petition vide Replying Affidavit sworn on 30/04/2021 by **Maryam Mbaruk** who is the County Executive Member Committee in charge of finance and economic planning within the County Government of Mombasa. The deponent avers that under Article 209(2) and (4) of the Constitution, County Governments have an obligation to impose property rates, entertainment taxes, and any other tax that is authorized to be imposed by an Act of parliament and to impose charges for services they provide. Therefore, the due process was followed in the enactment of the Act 2020 from its inception as a Bill up to conclusion including public participation being conducted to collect views from the general public and relevant stakeholders as follows:

*i. The public and all stakeholders concerned were notified and invited to give their view on the Draft Finance Bill 2020 via the Newspaper and the Mombasa County website “ [www.mombasa.go.ke](http://www.mombasa.go.ke) and the public was able to access the draft bill, pursuant to sections 87 and 91 of the County Government Act.*

*ii. That on 24/08/2020 & 26/08/2020, sub-county administrators and ward representatives went to their respective wards creating awareness and informing resident to participate in the public forum and to send their written memoranda. Further, announcements were made in Swahili via public speakers mounted on the Respondents’ vehicles informing the public how to access the draft Finance Bill 2020/2021.*

*iii. That on 24/08/2020 through twitter handle of the Department of Finance Mombasa County, the Respondents informed and invited the public to share their views over the Mombasa Finance Bill 2020/2021.*

***iv. Due to the current Covid-19 pandemic, the physical public participation could not be conducted. The public participation was conducted on 15/09/2020. The County Assembly also conducted its own public participation.***

9. The deponent avers that the County Assembly passed the Mombasa Finance Bill 2020 and after being assented to, it gave birth to the Act 2020, which was duly gazetted in fulfilment of part XI, Section (1) (d) of the County Government Act which tasks the Respondents with effective resource mobilization for sustainable development.

10. The deponent avers that the Petitioners have failed to prove that there is a precondition set by the Respondents for payment of the year 2021 licences. Nevertheless, the year 2020 tax, charges or fees were all due by end of March 2020 and that the Covid-19 pandemic came in towards the end of March, 2020, and therefore, the Country or the county were not yet fully locked down. Therefore, any revenue tax, charge, or fees that are due ought to be paid to enable the Respondents to provide Mombasa residents with services.

11. The deponent avers that the Finance Act is an annual Act which requires individuals and entities to pay annually, and failure to pay taxes attracts a penalty, which is not in the form of an increase in the annual payment, but in the form of prosecution and an invoice is usually automatically generated if the individual or entity conducted business the previous year.

12. It is the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's case that the Petitioners are guilty of laches as the Mombasa County Finance Act 2020/2021 was assented on 28/1/2021 and commenced on 22/2/2021. The Petitioners moved this court after almost three months, roughly 80 days to challenge the legality of the Act 2020. Therefore, the sole reason for this Petition is to defeat the Respondents revenue collection and/or to use the back door means to seek a waiver from paying what is due to the Respondents.

13. It is the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' case that the Petitioners being members of organisation/associations lack the *locus standi* to institute the present petition since no authority has been annexed to the petition to show that their members authorized the filling of the Petition.

14. The 2<sup>nd</sup> Respondent opposed the petition vide Replying Affidavit sworn on 03/04/2021. The deponent avers that under Article 185 of the Constitution, the legislative authority vests on the County Assembly of Mombasa. Therefore, it will be a dereliction from the principles of separation of powers if the court was to enter the arena of deciding what fee is reasonable, convenient, or proper to be levied in a legislation duly passed by the Mombasa County Assembly especially where public participation was carried out.

15. It is the 2<sup>nd</sup> Respondent's case that the petition does not meet the threshold required, and that he who alleges must prove. The Petition is therefore bereft of relevant particulars and should be dismissed.

#### **Submissions**

16. Both the Petitioners and Respondents filed their submissions on 02/06/2021 and the submissions were highlighted on 02/06/2021.

#### **Determination**

17. From the pleadings and submissions filed before this Court by the parties, in my view, the issues for the determination are:

- a) Whether the Petitioners have locus standi to institute the present petition.***
- b) Whether county legislation must be published in the Kenya Gazette and in the County Gazette for legitimacy.***
- c) Whether the Petitioners' right under Article 35 was abrogated.***
- d) Whether there was public participation in the making of Mombasa County Finance Act 2021.***
- e) Whether the Petitioners have proved payment of fee for the last financial year is a precondition for payment of this year's licences.***

**(a) Whether the Petitioners have locus standi to institute the present petition.**

18. **Mr. Tajbhai** learned counsel for the Respondents submitted that the Respondents have contested the 2<sup>nd</sup> Petitioner's *locus standi* to institute the legal proceedings since there is no proof that the 2<sup>nd</sup> Petitioner has obtained authority from its members. **Mr. Mkhani** learned counsel for the Petitioners on the other hand placed reliance on the provisions of Article 258 of the Constitution of Kenya, 2010 and submitted that the instant petition is a public interest litigation and therefore, the Petitioners are clothed with the requisite *locus standi* to institute these proceedings.

19. Article 22(1) and (2) of Constitution states as follows: -

***(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

20. Article 258 provides as follows –

**258. Enforcement of this Constitution.**

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - (a) a person acting on behalf of another person who cannot act in their own name;
  - (b) a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members.

21. In light of the above, it is evident that “every person” has the right to institute Court proceedings in the public interest claiming that a right or a fundamental freedom in the bill of rights has been denied or that the Constitution has been contravened or is threatened with contravention.

22. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**, the Court of Appeal stated:

*“Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in public interest.”*

23. This Court is therefore satisfied that the 2<sup>nd</sup> Petitioner herein has the requisite *locus standi* to institute these proceedings.

**(b) Whether county legislation must be published in the Kenya Gazette and in the County Gazette for legitimacy.**

24. **Mr. Mkhan** submitted that the Respondents failed to follow due process in enacting the Act 2020, as the bill creating the said Act was not published in the Kenya Gazette or any recognized gazette thereby impeding on public participation. The Respondents on their part gave the issue of publication of the Mombasa County Finance Bill 2021 a wide berth.

25. **Article 199(1)** of the **Constitution**, provides as follows:

*“County legislation does not take effect unless published in the Gazette.”*

26. **Article 260** goes ahead to define a ‘Gazette’ as:

*“the Kenya Gazette published by authority of the National Government or a supplement to the Kenya Gazette.”*

27. It is evident that **Article 199(1)** of the **Constitution** imposes a mandatory obligation for publication of all County legislations in the Kenya Gazette or a supplement to the Kenya Gazette and it is only through such publication that a county legislation can gain legitimacy.

28. The issue relating to finance bills not being gazetted in the Kenya gazette is not novel. In **Kaps Parking Limited & another v County Government of Nairobi & another [2021] eKLR Mrima J** stated:

*“There is no doubt that the Finance Bill, 2018 was not published in either the Kenya Gazette or the County Gazette. As a result, the legislation cannot legally stand.”*

29. In light of the above, it is evident that the Mombasa County Finance Bill 2021 was published in the Kenya Gazette vide Kenya Gazette Supplement Mombasa County Bills, 2020 Nairobi, 30/11/2020. Consequently, the said bill was valid and in compliance with Article 199(1) of the Constitution

**(c) Whether the Petitioners' right under Article 35 was abrogated.**

30. The Petitioners have averred that the 1<sup>st</sup> respondent failed to provide vital information and relevant information to the general public regarding the item they intended to increase or decrease in the Mombasa County finance Bill. Therefore, they aver that Section 87 of the County Government Act was violated.

31. Article 35 of the Constitution guarantees citizens right to access public information. Before that however, there is a clear procedure to be followed by anybody who seeks information under Article 35 of the Constitution. The relevant provisions are as follows:

**“35(1) Every Citizen has a right of access to:**

**(a) Information held by the state,**

**(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.”**

32. Pursuant to this Article there was enacted the Access to Information Act, No. 31 of 2016 whose preamble is in these terms:

***“An Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”***

33. Clearly, the Access to Information Act was enacted for the purpose of conferring upon the “Commission on Administrative Justice” the oversight authority and responsibility in the enforcement and eventual fulfilment of those matters envisaged as falling within the purview of Article 35 of the Constitution. Owing to the above enactment, PART III of that Act makes provision for ACCESS TO INFORMATION, and then, at Section 7 (1) thereof provides as follows:

**“(1) a chief executive officer of a public entity shall be an information access officer for purposes of this Act.”**

**Then, sub-section (2) provides:**

**“(2) A chief executive officer of a public entity may delegate the performance of his or her duties as an information access officer under this Act to any officer of the public entity.”**

34. In this respect, there is established in every Public body, a designation of an Information Access Officer. Such an office as stated above having been established, Section 8 makes provision for the Application for access to such information as follows:

***“(1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.***

***(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in a manner that meets their needs.***

***(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.”***

35. To buttress the necessity of the framing and making of an application in the manner prescribed, sub-section (4) thereof provides as follows:

**“(4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.”**

36. Once such an application has been made, Section 9 provides the manner in which this information is to be processed. That Section 9 provides as follows:

**“(1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application.**

**(2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.**

**(3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—**

**(a) the request is for a large amount of information or requires a search through a large amount of information and**

meeting the stipulated time would unreasonably interfere with the activities of the information holder; or

(b) Consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.

(4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—

(a) whether or not the public entity or private body holds the information sought;

(b) whether the request for information is approved:

(c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and

(d) if the request is declined, a statement about how the requester may appeal to the Commission"; (Emphasis given)

(5) A public officer referred to in subsection (1) may seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance."

37. Of great significance in this enactment is sub-section (6) which provides as follows:

**"(6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected."**

38. It is therefore the view of this Court that the Access to Information Act has provided a full mechanism of the manner in which a citizen should apply for and obtain information from the state or other public body. Where any such information is denied, then the public body is duty bound, by the provisions of Section 9 (d) to provide the applicant, in that Section called "the requester" with a comprehensive Statement on how such "requester" will make an appeal "to the Commission."

39. Section 2 of the Access to information Act interprets the term Commission to mean:

***"the Commission on Administrative Justice established by Section 3 of the Commission on Administrative Justice Act, No. 23 of 2011."***

40. Apart from complaints to the Commission, which are provided for in Part III of the Act, Part IV of that Act provides for Review of Decisions by the Commission. Section 14 of that Part makes provision made as follows:

***(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—***

***(a) a decision refusing to grant access to the information applied for;***

***(b) a decision granting access to information in edited form;***

***(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;***

***(d) a decision to defer providing the access to information;***

***(e) a decision relating to imposition of a fee or the amount of the fee;***

***(f) a decision relating to the remission of a prescribed application fee;***

***(g) a decision to grant access to information only to a specified person; or***

***(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.***

***(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.***

***(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.***

Again to underscore the necessity of meticulously following this enactment, sub-section (4) of that Section provides as follow:

***(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.***

41. In the light of the foregoing, it is evident that this Access to Information Act has a comprehensive procedure to be followed by any citizen in need of any information from a public body. The mode of applying for such information has been set out. The manner of complaining against any unfavourable decision of the Commission has been given. The manner of applying for Review of a decision of the Commission has also been provided for. These procedural requirements have all been flouted, if not forgotten by the Petitioners herein, and they cannot now purport that their rights to information under Article 35 of the Constitution has been denied.

**(d) Whether there was public participation in the making of Mombasa County Finance Act 2021.**

42. Public participation is provided under in Article 174 of the Constitution as one of objects of devolution. It provides:

***Article 174, “The objects of the devolution of government are:***

***(a)...***

***(c) To give power of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;***

***(d) .....***”

43. 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”**

44. Article 201 of the Constitution also provides for public participation in financial matters. It reads:

***“The following principles shall guide all aspects of public finance in the Republic: -***

***(a) There shall be openness and accountability, including public participation in financial matters.***

***(b) ...”***

45. 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”.***

46. Courts have 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 vs. 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.”***

47. 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 10th Edition** defines ‘consultation’ as follows: -

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

48. The Petitioners have alleged that there was no public participation since the Respondents failed to provide the residents of Mombasa with a public forum at ward level in order to ensure maximum reach of the County population.

49. In this case, the Respondents' position is that it undertook public participation in respect to the Finance Bill, 2020/2021. The Respondents posit that it placed an advertisement in a newspaper of national circulation inviting the public to give their view through written memoranda on the Finance Bill 2020/2021. Further, copies of the said Bill were to be obtained from the County website and hard copies of the Bill could be obtained at the County Assembly library. The Respondents aver that the public was invited to air their views on the Finance Bill 2020/2021 through mounting of public speakers on the County's vehicles and the general public was educated on the importance and the need to participate in the consultative forum by the sub- County administrators and ward representatives who went to their respective wards creating awareness. Furthermore, the Respondents aver that they took an initiative and sought the services of two-radio station, i.e. *Radio Salama* and *Pwani Fm* to air and inform the general public of the Finance Bill 2020/2021 and how they could share their views.

50. The Respondents also aver that public participation to air views on the finance Bill was conducted on 15/09/2020 and the public were required to have sent their views. Due to the current Covid 19 pandemic, physical public participation could not be conducted.

51. In **Diani Business Welfare Association and Others vs. The County Government of Kwale [2015] eKLR**, the Court at Paragraphs 45, 46 and 51 found and held:

***“it does not matter how public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation.....it is an indictment against the Petitioners that they would chose to ignore an important civic and Constitutional duty to shape the financial and budgetary policy, the implementation of which would affect them in terms of revenue measures and the utilization of that revenue...For all these reasons, I am satisfied that there was public participation, and the Petitioners ignored to present their views during public participation stage of the budget proposals. They were granted opportunity and they failed to take advantage thereof:”***

52. From the foregoing, it is evident that while the Petitioners may not have been very happy with the level of public participation, which the Respondents undertook, this Court is satisfied that in the circumstances there was adequate public participation in the promulgation of the said legislation. There is evidence that Memoranda on the Finance Bill 2020 were received from various associations which include: Cereal Millers Association; Coast Business Coalition, Kenya Association of Tour Operators; Kenya Association of Manufactures (KAM), Kenya Association of Hotelkeepers & Caterers (KAHC); Pubs, Entertainment and Restaurants Association of Kenya. More fundamentally, however, County Finance Act 2020 has only a functional period or validity of one year. Soon another Finance Act will come into force. The Petitioners should seek to participate in the next Finance Act to have their views considered by the Respondents rather than seeking to suspend or prohibit the implementation of Mombasa County Finance Act, which is about to be outdated. For avoidance of doubt, however, this court finds and holds that there was adequate public participation in the promulgation of the statute under reference.

***(e) Whether the Petitioners have proved payment of fee for the last financial year is a precondition for payment of this year's licences***

53. It is trite law that he who alleges must prove. Section 107 of the Evidence Act provides:

***“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.***

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

54. The Petitioners would want this Court to believe that the Respondents have denied them the right to pay for licences for the current financial year by requiring them to settle the charges that were due for the last financial year which financial year they allege they were not able to trade since they remained closed as a result of a presidential directive intended to curb the spread of the Covid-19 pandemic. The burden of proving the allegations lay squarely upon the Petitioners. In **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR**, the High Court stated at paragraph 55 and we agree:

***“It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the Evidence Act (Cap 80) provides that “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.” It is therefore the duty of the person who asserts that there is a breach of section 44 of the Banking Act to prove by evidence that that indeed is the case. That is why section 109 of the Evidence Act again provides that “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”***

55. Similarly, in **Christian Juma Wabwire vs. Attorney General [2019] eKLR**, the Judge relied on the decision in **Lt. Col Peter Ngari Kagume and 7 others vs. AG, Constitutional Application No. 128 of 2006** where it was held that: -

***“23 ... [I]t is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The Petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses...the court is dead to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation...”***

56. In order to discharge their burden of proof, the Petitioners produced a recent bill from the Respondents relating to an entity known as “*otherwise wines and Spirits*” which showed that the said entity had arrears of Kshs 37,000 which was due as at 7/05/2020 and an arrears of Kshs. 55,250 which was due as at 3/01/2021. The Respondents in reply stated that once an entity is confirmed to be trading, an invoice is automatically generated and failure to pay the annual tax attracts penalties in form of prosecution and not in the form of an increase in the

annual payment. This shifted the burden of proof to the Petitioners, who had no further response.

57. In the circumstances, I find and hold that the Petitioners have failed to discharge the burden of proof placed upon them by Section 107(2) of the Evidence Act, and the Petition therefore lacks in merit. The same is dismissed with parties to bear own costs.

Orders accordingly.

**Dated, Signed and Delivered at Mombasa this 20<sup>th</sup> day of September 2021.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Mr. Tajbhai for Respondent

No appearance for Petitioner

Ms. Peris Court Assistant