REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO. 3 OF 2020

IN THE MATTER OF ARTICLES 1, 2(1), 3, (1),10, 20, 21(1), 22(1), (2) & 23(1)& (3) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1,2, 6(2), 10 40, 47,174 190(1) 196, 201, 202, 203, 209(3)(4) and (5), AND 210(1) OF THE CONSTITUTION OF KENYA, 2010

TRUCKERS ASSOCIATION OF KENYA…..……PETITIONER

VERSUS

COUNTY GOVERNMENT OF MACHAKOS…....……RESPONDENT

JUDGEMENT

1. The Petitioner herein, **Truckers Association of Kenya,** is described as an association of truck transporting Saccos, whose membership is Sacco based and is engaged in promoting responsible truck trading policies and highway safety of its individual Sacco members within the Republic of Kenya. According to the Petitioner, it is an organisation formed by self-regulating saccos in the truck transporting industry with its registered office Syokimau along Mombasa road engaged in promoting responsible truck trading policies and highway safety of its individual Sacco members within the Republic of Kenya, who engaged in the transporting and selling of quarry products in most Counties in the Republic of Kenya.

2. The Respondent, the County Government of Machakos, is one of the devolved established under the provisions of Article 176 of the Constitution of Kenya, 2010 (hereinafter referred to as "the County Government").

The Petitioners' Case

3. According to the Petitioner, it is entitled to participate in the legislative and policy formulations on the extraction of natural resources and transporting and selling of quarry products such as sand, stones, ballast and *murram* by the Respondent in accordance with Articles 196 and 201 of the Constitution of Kenya, 2010, Sections 87, 88 and 89 of the ***County Governments Act***, No. 17 of 2012 and Section 127 of the ***Standing Orders***.

4. It was averred that the petitioner and the respondent entered into a Memorandum of Understanding relating to charges on ballast transportation which was to take effect from 19th March, 2019 to 2020. However, when the ***Machakos County Finance Act, 2020*** (hereinafter referred to as "the Act") was legislated and passed, without the participation of the Petitioner, it totally disregarded the said Memorandum of Understanding and without the participation of the Petitioner, whose members have extracted sand from Machakos County for years. As a result, the respondents passed a piece of legislation containing unreasonable provisions which are punitive and amount to double taxation.

5. The Petitioner lamented that the said Act imposes exorbitant fees on the transportation of ballast materials and prejudices national economic policies and economic activities across County Boundaries as it makes it intolerable for the applicants to conduct business with the County Government of Machakos. It was contended that the petitioners have been subjected to discrimination in terms of taxation and hence exposing them to a real risk of closure of business and loss of livelihood thus denying them fundamental right to economic well-being and the right to earn a living contrary to the provisions of the Constitution.

6. It was contended that the said Act is contrary to Article 2(4) of the Constitution and is inconsistent with the Constitution hence void to the extent of the inconsistency. Further, by introducing totally new and substantial amendments to the Act which were not in the Bill, the Assembly not only set out to circumvent the constitutional requirements of public participation but, mischievously short-circuited and circumvented the letter and the spirit of the Constitution hence the said action amounted to a violation of Articles 10 and 196 of the

Constitution. According to the Petitioner, its rights to public participation were. contrary to Articles 1(4), 6(2), 174, 184 (1), 196(1), 232(1) and the Fourth Schedule Part 2(14) of the Constitution, infringed and that the said Act contravenes the Petitioner's members' constitutional right to protection of property as set out in Article 40 of the Constitution by imposing unreasonable and exorbitant fees and charges. In addition, the Act, contravenes the Petitioner's members' constitutional right to fair administrative action as set out in Article 47 of the Constitution by failing to honour the memorandum of understanding executed by the petitioner and the respondent as the petitioners have legitimate expectation that the respondent would not breach their part of the agreement; failing to accord the petitioners adequate time to prepare and participate in meaningful process of the enactment of the Bill as the notice given by the respondent was short; refusing or failing to recognise the need for consulting and engaging with the petitioners in the imposition of fees and charges on transportation of ballast materials; refusing or failing to harmonize and remove double levy of tax fees and resolve the conflict in respect thereof taking into account the provisions of the Constitution; Imposing fees and charges way above those levied for other Counties.

7. It was asserted by the Petitioner that the Respondent curtailed the Petitioner's Constitutional right to participate in the legislation of the ***Finance Act, 2015*** (sic) in contravention of Articles 196 and 201 of the Constitution, Sections 87, 88 and 89 of the ***County Governments Act***, No. 17 of 2012 and Section 127 of the ***Standing Orders***. Further, the Act, 2015 contravenes Article 201, 209(3) & (4) and 210 as the County Government is not vested with the powers to impose quarry extraction fee. To the Petitioner, the tax imposed prejudices national economic policies and economic activities across county boundaries as it makes it intolerable for the petitioner to conduct their business in Machakos County contrary to Article 209(5) of the Constitution of Kenya. The levy of royalty tax charge also amounts to double taxation as the petitioner pays the requisite fee for the extraction to the owner of the land they extract from and also pay the loaders their fees and the owners and the loaders in return pay the fees chargeable by the County Government.

8. The Petitioners therefore urged this Court to grant the following reliefs:

> **1) A declaration does issue that the Machakos County Finance Act, 2020 is unlawful, unconstitutional, null and void *ab initio* in so far as the same were not subjected to public participation in accordance with Articles 196 and 201 of the Constitution of Kenya, 2010, Sections 87, 88 and 89 of the County Governments Act, No. 17 of 2012 and Section 127 of the Standing Orders.**
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> **2) In the alternative, a declaration does issue that Third Schedule Part 17 of the Machakos County Finance Act is unlawful, unconstitutional, null and void *ab initio* in so far as the same was passed in contravention of accordance with Articles 201, 209 and 210 of the Constitution of Kenya, 2010.**
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> **3) A conservatory order be and is hereby issued, staying the enforcement or implementation of Third Schedule Part 17 in so far as the same relate to the to the imposition of fees and charges of transportation of quarry products.**
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> **4) An order of prohibition stopping the operations and/or implementation of the said *Machakos Finance Act 2020***
>
> **5) The Respondent be restrained from enacting any legislation on fees and charges for the extraction of natural resources and the transportation of quarry products without consultation with the Petitioner and compliance with the procedure set out in the Constitution.**
>
> **6) The costs of this Petition be borne by the Respondent.**

9. In support of the petition, the petitioner filed two sworn affidavits in which, apart from reiterating the foregoing, it was deposed that the petitioner is an association duly registered under the Societies Rules (sic) and has a Sacco based membership and currently has over 12,000 individual members country wide who all deal with transporting and selling of quarry products such as sand, stones, ballast and *murram* in most counties in the Republic of Kenya but mostly in Machakos County. Over the years, the society and its members have been dutifully paying charges to the respective County governments.

10. The petitioner and the respondent entered into a Memorandum of Understanding relating to charges on ballast transportation which was to take effect from 19th March, 2019 to 2020. After the execution of the memorandum of understanding, the Petitioner's members have been paying levies as per this agreement.

11. However, when the Act was legislated and passed, the same was done in total disregard of the Memorandum of Understanding and without the participation of the Petitioner, whose members have purchased and transported ballast from Machakos County for years, and as a result thereof the respondents passed a piece of legislation containing unreasonable provisions which are punitive and amounting to double taxation. According to the Petitioner, they did not have adequate time to participate in reasonable public participation as the notice given was too short and that the bill was published on the 19th December, 2019 and was assented to soon thereafter in contravention of the ***Machakos County Public Participation Act*** which provides for realistic timeframe for the consultation, allowing reasonable period for preparation and submission of views.

12. It was reiterated that the Petitioner had the legitimate expectation that County Government of Machakos would adhere to the memorandum of understanding that is still in force. The County Finance Act, has also introduced an extraction fee for the extraction of the ballast, which fee should not be levied by the County Government as it does not fall under the charges that County Government are mandated to charge under the Constitution.

13. Additionally, the extraction fee amounts to double taxation as the petitioner pay the same to the owner of the quarries and that if the quarry extraction fee for sale of ballast is levied, the same will be passed on to the petitioners, who are the people who purchase and transport ballast from Machakos County.

14. The Petitioner therefore stated that new rates set by the Machakos County Government are both oppressive and draconian and that the residents of the county were not consulted in the implementation thereof and during the formulation of the rates hence the said rates should

be scrapped and any adjustments and or introduction of various levies must be done after consultation with all stakeholders as provided by the Constitution of Kenya, 2010. To the Petitioner, the rates contained in the Bill are substantially different from the rates in the Act.

15. According to the Petitioner, on or about the month of February, 2020 the Machakos County Government, through its officials started implementing said Act, and they were compelled to pay the amount stipulated under Third Schedule Part 17 of the Act, a payment which in the Petitioner's view is not only exorbitant but constitutes over 100% increase from the fees payable to the Machakos County Government the previous year.

16. The Petitioner was apprehensive that there is a risk of the County Government of Machakos becoming a preserve of a certain class as charges and levies imposed is making it intolerable for its members hence forcing them out of Machakos County, against the spirit and objects of devolution and further prejudices economic activities across County Boundaries.

17. The Petitioner lamented that the County Government does not provide any service to it during the extraction process as they pay the loaders for the extraction and also pay the owner of the quarry on whose land the natural resource is situate. The loaders and owner of the parcel of land pay the requisite fee to the County Government of Machakos accruing on the basis of our extraction, and therefore any charge over and above what is paid would amount to double taxation. To it, the royalties imposed by the Act, prejudices economic activities across county boundaries and national economic policies since other counties do not ask for royalties for the extraction of natural resources in their Counties.

18. It was contended that it is illegal and unconstitutional for the County Government of Machakos to impose royalty on the extraction of natural resources yet County Governments may only impose charges for the services they provide and Property Tax, Entertainment Tax and any other Tax authorised by an Act of Parliament.

The Respondent's Case

19. The Respondent, the County Government of Machakos, (the County) opposed the petition.

20. According to the County, there were two other petitions being Machakos High Court Constitutional case number 12 of 2019 and 4 of 2020 listed for hearing before **Hon. Justice Kemei** on 6th May 2020 where the petitioners therein are challenging the ***Machakos County Finance Act of 2019*** and they are raising similar issues of law.

21. In the Respondent's view, there is nothing unconstitutional or illegal with the ***Machakos County Finance Act 2020*** and all the procedures were fully complied with before it was enacted. To the Respondent, the petitioners simply do not want to pay rates as imposed and regulated by the respondent and they have been filing petitions every financial year in an attempt to frustrate the respondent from meeting its core mandate which is to offer services to the people of Machakos County. In fact, it averred, they have previously been taking advantage of injunctive orders not to pay rates and other fees and then drag the matter for entire financial year which has become a trend being repeated vide this petition.

22. While admitting that indeed there was a memorandum of understanding between the parties which was to take effect from 19th March, 2019 to 2020, it was stated that in the year 2020 the parties would revert to the earlier rates as per the Act which is Kshs 3,000/=. However, the petitioner has also not complied with the terms of the memo and the initial case has not been withdrawn as per clause 5. On without prejudice, the Respondent disclosed that it was willing to continue with the terms of the memorandum of understanding if the petitioner is ready to comply with the terms of the memo as agreed.

23. The Respondent asserted that the County Assembly of Machakos is mandated by the constitution to pass laws relating to payment of business permits, taxes, cess and other rates and it is not for the court or the petitioners to dictate which laws on the same issue should be passed as long as they are not unconstitutional which in this case they are not.

24. As regards the allegation that the Draft Bill presented to the public is different from what was enacted, the Respondent averred that no such discrepancies have been highlighted and that in any event, after a bill is prepared and presented to the County Assembly, it goes through public participation after which the County Assembly is required to consider views of the sovereign people of Machakos County before passing a final bill for assent by the governor. Therefore, across the legislative process the initial Bill may mutate before the final one is passed for assent by the governor. In this case however, the Petitioners have not produced Hansard Report of the County Assembly to show that the final Bill it passed for assent by the Governor is different from what the Governor of Machakos County assented.

25. The Respondent maintained that the taxation laws and efforts are meant to benefit the people of Machakos County, protect the environment and land rights as provided for under chapter five of the Constitution and that the allegation that there was no public participation leading to the enactment and passing of the ***Machakos County Finance Act 2020*** is utterly false. It averred that adverts were placed in the ***Daily Nation*** on 16th September, 2019, ***Taifa Leo*** as well as ***The Standard*** indicating public participation forums would be held on 20th September, 2019 at all the listed 40 places within the county and the said notices were exhibited**.** Pursuant thereto, the petitioner's representatives attended the public participation forums and their views taken at all sub counties within Machakos County being Mavoko, Matungulu, Kangundo, Yatta, Mwala, Machakos, Kalama, Kathiani and Masinga. Similarly, the members of the Public including the Petitioners gave their views at all sub counties within Machakos County being Mavoko, Matungulu, Kangundo, Yatta, Mwala, Machakos, Kalama, Kathiani and Masinga during the Public Participation. While acknowledging that the County Assembly should take into account the views put forward by the petitioners while passing relevant Acts the Respondent averred that it is misguided to hold the Assembly is bound by law to agree with any proposals put forward as that argument would not only usurp the role and independence of the 1st respondent (sic) but also make passing of laws impossible and/or lead to establishment of cartels who control what is to be enacted.

26. It was averred that under chapter 12 part 3 of the Constitution **(Revenue-Raising Powers and the Public Debt),** the Counties are mandated to raise revenue by imposing rates, taxes, business licenses/permits and other forms of tax to raise the much needed revenue for

purposes of running the counties and reference was made to Articles 209(3) and 210(1) of the Constitution and it was deposed that the legal basis of the fees the petitioners' members are charged vide the ***Machakos County Finance Act 2020*** is thus Article 210(1) of the Constitution which pegs any decision to impose any tax or licensing fee must be by legislation thus this Act. Reliance was also placed on Article 185. of the Constitution (Legislative Authority of County Assemblies) and it was averred that the Fourth Schedule of the Constitution part 2 provides extensively the functions and various activities to be rendered by the county governments and that part 2 thereof at section 7(b) provides for trade development which includes trade licenses (excluding regulation of professionals. The petitioners are not professionals and thus not excluded from paying license fees to the county governments. In addition, section 3 read together with section 10 of 4th Schedule devolves protection of environment to County government. One of the policies for protection of environment is licensing through business permits.

27. From the above provisions, it was the Respondent's case that the Counties are entitled to pass and approve policies for management and exploitation of the county's resources which policies including payment of rates, license fees. There is thus nothing unconstitutional in protecting the exploitation of the county resources by the uncaring petitioners and other exploitive agencies. In its view, the petitioners are exploiting natural resources in the county and transporting the same through roads constructed and maintained by the county, they also use water and sewerage all being county resources. They should pay for the same like other business people through business permits and other rates. Pursuant to Article 209(3)(c) and (4) of the Constitution, National Assembly of Kenya passed ***County Governments Act 2012*** which authorized County Assemblies to pass money bills which include bills on taxes and rates to be levied by a particular county and reference was made to Section 21 in particular hence there is nothing strange or unconstitutional with the ***Machakos County Finance Act 2020*** and in particular the impugned Third Schedule, part 17 which rightly introduces quarry extraction fees among other charges.

28. According to the Respondent, under the third schedule of the impugned ***Machakos County Finance Act***, it is clearly indicated it is "business" permit to carry their businesses within Machakos County and not Licensing at all. Business permits should be paid by the petitioners so as to carry business within the County. It is also clearly stated in the said impugned schedule that the penalties imposed for failing adhere to payment of permit fees will be used for environmental health pollution (noise and air) and safety management at the quarries. The Respondent insisted that it would be absurd for the petitioners to suggest that they should have a free hand in exploiting resources without any regard to pollution, and restoration of the environment and the related side effects to the county residents which comes at a cost. Business should not override the health and wellbeing of the county residents as guaranteed in the Constitution. In its view, the ***Water Act*** as well as the ***Environmental Management and Coordination Act*** all place a duty on the County Governments to protect pollution of the environment through formulation of policies which include payment of permits to carry various activities such as those involved in by the petitioners herein.

29. The Respondent therefore prayed that the petition be dismissed with costs.

The Petitioner's Rejoinder

30. In response to the reply by the Respondent, the Petitioners field a supplementary affidavit in which it reiterated the contents of the supporting affidavit and denied the allegation that that they did not comply with the memorandum of understanding between the parties herein as the matter was withdrawn and that all their vehicles have been paying as per the memorandum of understanding.

31. They reiterated that as per the draft bill attached to the petition and resultant Act as attached to the petition, the charges in the draft bill and the final Act are different yet the respondent has neither denied that the draft bill attached is what was presented for public participation nor have they denied that the Bill as attached to the petition is the resultant Act. They stated that what they produced was the bill that was provided by the respondent for public participation and that they were unaware of any other bill, which bill if existed should have been taken through the same mandatory process. According to hem, the Bill is not supposed to mutate as alleged as it renders the whole process of public participation an exercise in futility which would be unconstitutional.

32. While conceding that they participated in public participation called by the respondent and since the charges proposed in the bill, they knew that since we had an agreement with the respondent, they would honour the terms of their memorandum of understanding. Further the charges in the bill were not substantially different from the charges in the memorandum of understanding, therefore they would not be prejudiced. According to them, it is utterly unjust for the respondent to enter into a memorandum then disregard the same.

33. It was contended that though the bill referred to as royalties for sale of ballast/ quarry extraction fees for sale of ballast /crushed materials, in the resultant Act, the charges are referred to as quarry extraction fees for sale of ballast hence shows the discrepancies in the bill and the Act. It was however noted that the same is being paid on site which means on the quarry owner's land and not on County Roads. Further, there is no service that the respondent offers inside the site as the loading is done by the owner of the quarry. It therefore unjust for the respondent to impose charges on the quarry owners for the sale of the ballast, which they have extracted using their machinery and yet the same quarry owners have paid for quarry extraction of Kenya Shillings 1,000,000/= and an additional Kenya Shillings 5,000/= for the quarry permit. This clearly amounts to double taxation.

34. It was disclosed that subsequent to the coming into force of the ***Finance Act, 2020,*** the quarry owners have adjusted their prices upwards immediately the respondent started implementing the charges as per the Act. Therefore, the ballast transporters are the persons who pay for these charges albeit indirectly. Thus the ballast transporters not only pay for the quarry cess per lorry they also for the extraction charges for sale of ballast and extraction materials.

35. The Respondent was accused for repeatedly failing to comply with court orders issued in the past to ensure that they follow the laid down procedures before enacting a financial Act. In fact, the respondents have continued to disregard the court orders issued by this court and have proceeded to charge the petitioners the charges in the impugned Act. The respondents have resorted to impounding the petitioners' vehicles in the cases where the members insist on the observance of the court orders.

Petitioner's Submissions

36. It was submitted on behalf of the Petitioner in the said Memorandum of Understanding relating to the charges on ballast transportation which was to take effect from 19th March, 2019 to 2020, it was decided that, the Respondent would charge the petitioner Semi Permanent Trailer Kshs. 4,000/=, Three Axle, Four Axle over 8 tons at Kshs. 2000/= and Two Axle Kshs. 1500/= and after the execution of the memorandum of understanding the petitioner paid levies as per the agreement. Though the respondent, while admitting the existence of the agreement, contended that, the agreement was to take effect from 19th March, 2019 to 2020 and that in the year 2020 the parties would revert to the earlier rates as per the act which is Kshs. 3000/=, there is no such clause in the memorandum. Accordingly, the Petitioner submitted that as the memorandum still being in force, the petitioners had a legitimate expectation that the respondent would adhere to the memorandum of understanding which is still in force and any changes to the contrary would be communicated to the petitioners as stakeholders. Contrary to the terms of the memorandum of understanding, the respondent published the Machakos County Finance Bill on 19th December, 2019 whose Third Schedule Part 17, indicates that the respondent would charge Semi Permanent Trailer per trip at Kshs. 4,300/=, Triple axle per trip 2,400, above 8 tons lorry at Kshs. 2,300/= and 8 tons lorry and below per trip Kshs. 1500/=. However, the Machakos Finance Act, 2020, Third Schedule Part 17, states that, the respondent would charge Semi Permanent Trailer per trip at Kshs. 5,000/=, Three Axle per trip at Kshs. 4000/=, above 8 tons at Kshs. 3,000/= and 8 tons lorry and below per trip Kshs. 2,000/=.

37. The above rates and charges, it was submitted prove that there are discrepancies as between the published bill and the enacted Act. In the Petitioner's view, the said new rates are both oppressive and exorbitant in that the residents of the county were not consulted in the implementation thereof. Therefore, what was presented for public participation was different from the act that was eventually passed thus no public participation was carried on in respect of the Act. No evidence is produced before this Honourable Court by the respondents indicating why the rates in the act are substantially different or why the rates increased over 100% from the fees payable to the respondent in the previous year.

38. While the Petitioner concedes that the Respondents are not necessarily bound by law to agree with proposals put forward during public participation, it is the petitioner's position that Public Participation ought not to be a checklist to be ticked off by the Respondents but ought to be inclusive, wholesome and participatory. The respondent should take due consideration into proposals before they are dismissed. In this case, the process leading to the enactment of the act was not open and inclusive to the stakeholders.

39. While the petitioner appreciates that the respondent has a mandate to offer services through collection of revenue, the rates and levies provided should not be oppressive for stakeholders making it intolerable to conduct business with the respondent.

40. The Petitioner noted that whereas respondents aver that there were adverts placed in the ***Daily Nation***, ***Taifa Leo*** and ***The Standard*** on 16th September, 2019 indicating public participation forums would be held on 20th September, 2019, these forums would be held in four days time after the announcement contrary to the provisions of Sections 87, 88, 115 of the ***County Government Act***, 2012 ***and*** Articles 196 and 201 of the Constitution. The Petitioner also referred to **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR,** and **Simeon Kioko Kitheka & 18 Others vs. County Government of Machakos & 2 Others [2018] eKLR.**

41. It was submitted that this position has been underpinned in legislation vide section 88 of the ***County Government Act***. In the Petitioner's view, what the Courts are saying was that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed. In other words, public participation ought not to be taken as a mere formality for the purposes of meeting the constitutional dictate. This position is appreciated in section 4 of the ***Machakos County Public Participation Act 2014*** which provides the guiding principles for public participation in Machakos County Government to include:

> ***(a) The communities, organizations and citizens affected by any policy decision of the government shall have the right to be consulted and shall be accorded an opportunity to participate in the process of formulating policy;***
>
> ***(b) Availing participants access to the information necessary to ensure meaningful participation; and***
>
> ***(c) Feedback to the public on how their input is included in the policy decision.***

42. Therefore, it was submitted, by introducing totally new and substantial amendments to the Act which were not in the Bill, the Assembly not only set out to circumvent the constitutional requirements of public participation but mischievously short-circuited and circumvented the letter and the spirit of the Constitution and its action amounted to a violation of Articles 10 and 196 of the Constitution hence the substitution of the sum of Kshs 1,300.00 as indicated in the Bill with that of Kshs 5,000.00 in respect of the sand permit per 7 tonne Lorry per trip was improper and unlawful.

43. It was contended that from the above legal provisions and case law, a one day newspaper advertisement by the Respondent**,** four days to the forum organized by the respondents would not adequately inform a citizen of the county and or give them enough reasonable time to participate in the forums. It is probable that a lot of residents and stakeholders were not reached by the said advertisement contrary to the ***Machakos County Publication Act,*** which envisages more inclusive mode of reaching to the citizens and a reasonable time to allow public input and comment on any proposals as provided under Section 5(2)(F). Further it was unlawful and unconstitutional for the respondent, to introduce substantial amendments relating to the rates and levies in the Act contrary to what was in the bill, without public participation and consulting with the stakeholders. The Respondent has a constitutional mandate under Article 10 of The Constitution to be transparent, open and accountable, but failed to do so. For the above reasons it was submitted that there was no public involvement in the enactment of the Act and that mere consultations do not amount to public participation.

44. It was the Petitioner's case that the Third Schedule, Part 17 of ***Machakos Finance Act, 2020*** introduces quarry extraction fee for sale of ballast/crushed materials per tonne (on site) which provision is unconstitutional as it offends Article 209 and 210 of the Constitution as county governments are not empowered to impose such charges and there is no legislation that provides for such fees. It is illegal and unconstitutional for the respondent to impose royalty on the extraction of natural resources yet county governments may only impose charges for the services they provide, property tax, entertainment tax and any other tax authorized by an act of parliament. Extraction fee for sale of ballast, which fees are payable on someone quarry's not only amounts to trespassing into a person land but cannot be classified as property tax and entertainment tax. Further there is no Act that has been authorized by an Act of Parliament providing that County Government can

enter into someone land and every time the owner of the quarry sales a tonne of the material he has extracted, he pays an amount to the County Government. Therefore, and for illustration purposes if the petitioner's 18 tonne lorry purchases 18 tonnes of ballast, the petitioner pays the owner of the quarry for the purchase of the ballast which ballast belongs to the owner of the land and or quarry. The respondent doesn't provide any service as the only service involved here is loading into the lorry. Thereafter the quarry owner surrenders 2,700 (150 by 18 tonnes) to the County Government per a single lorry. In addition, the same amounts to double taxation as the quarry owners pay a pay 1,000,000/= to the same County Government as quarry extraction fee per quarry.

45. While the Respondent states that it is not unconstitutional or strange for the ***Machakos County Finance Act, 2020*** and in particular the impugned Third Schedule, Part 17 to introduces quarry extraction fees for sale of ballast, the Petitioner submitted that the The third schedule clearly indicates it is "business" permit to carry their business within Machakos County and not Licensing, and the penalties imposed are meant to be used for environmental health pollution.

46. The Fourth Schedule of the Constitution Part 2 provides extensively the functions and various activities to be rendered by the county governments. According to the Petitioner, since Articles 209 and 210 of the Constitution are very clear that the County Government has powers to; only impose property rates and entertainment taxes and any other tax provided for by an act of parliament, imposing quarry extraction charges is not among the powers given to the county government, and no act of parliament has so far been implemented to give such mandate to the county government.

47. Fees on extraction of natural resources is not in any way classified as property rates, entertainment taxes or charges for services provided for by the county government under Part 2 of Fourth Schedule to the Constitution. It was disclosed that the ***Natural Resources (Benefit Sharing) Bill 2014***, is a bill still pending at the national assembly. If implemented, it will establish a system of benefit sharing in resource exploitation between natural resource exploiters, the national government, county governments and local communities. The bill further mandates the Kenya revenue authority to collect royalties and fees from natural resource exploitation. The monies collected are to be deposited into natural resources royalties and fees fund to be established under the proposed law and which shall vest in the authority.

48. It was contended that the said provision falls outside the ambit of the Article 209 and Schedule Four of the Constitution hence it is unconstitutional and illegal for the County Government of Machakos to impose tax on extraction of natural resources yet county governments may only impose charges for the services they provide, property tax, entertainment tax and any other tax authorized by an Act of Parliament.

49. While acknowledging that for the county government to efficiently deliver their services to the people within the county they need sources to get their revenue as provided for by Article 175(b) of the Constitution, it was contended that if sources for revenue as provided for by the constitution, are not sufficient then the national assembly may through legislation ensure that county governments have adequate support, as provided for by Article 190 (1) of The Constitution.

50. It was contended that a look at Page 111 of the ***Machakos County Finance Act, 2020***, the Respondent introduces extraction fees per annum at Kshs. 1,000,000/= plus application for quarry permit at Kshs. 5,000/=. Further the respondent introduces charges for transportation of the ballast and other crushed materials per lorry per trip. The charges depend on the size of the lorry, ranging from Kshs. 5,000/= for a semi trailer to Kshs. 2,000 for 8 tons lorry and below. However, the Respondent does not provide any service to petitioner during the extraction process as they pay the loaders for the extraction and also pay the owner of the quarry on whose land the natural resource is situate. The loaders and owner of the parcel of land pay the requisite fee to The County Government of Machakos accruing on the basis of the petitioner's extraction which amounts to double taxation.

51. To the petitioner, the constitution has clearly provided for ways in which the county governments should raise their revenues and alternative ways in case the same is not sufficient. In this instance case, The Machakos County Government imposed taxes disguising the same as a charge for a service provided by the county, yet there is no act of parliament in place authorizing for the same. The levy and taxation on extraction of natural resources does not amount constitute a service. The fact that the Respondent provides services such as the maintenance of infrastructure in the county cannot be the basis of imposing a tax that is clearly outside the ambits of the Respondent's constitutional authority.

52. Imposing such exorbitant charges, it was submitted prejudices national economic policies and activities across the county boundaries as it makes it intolerable for the petitioners to conduct business with County Government of Machakos contrary to Article 209(5) of the Constitution that taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. In this respect, the Petitioner relied on the case of **Bumasutra Savings and Credit Co-operative Society Ltd vs. County Government of Nakuru [2016] eKLR and *Black's Law Dictionary 5th Edition, 1979***.

53. It relied on **Kenya Pharmaceutical Association & another v Nairobi City County and the 46 Other County Governments & another [2017] eKLR** in which **Justice Mativo held that a double tax** is the taxing of the same income twice.

54. According to the Petitioner, the ***Machakos County Finance Act***, in its Third Schedule, part 17 under the heading Quarrying introduces charges for quarry extraction per quarry annually. Further the same Act imposes quarry extraction fees for sale of ballast / crushed materials per tonne on site. The same are payable the one the quarry owners to the County Government on Machakos for the same taxing period that is the year 2020. This, the Petitioner submitted, is double taxation as its taxation imposed for quarry extraction by the same taxing body for the same taxing purpose which is quarry extraction.

55. It was the Petitioner's position that it had established that, the ***Machakos Finance Act, 2020*** was unconstitutional as it was not subjected to public participation in accordance with Articles 196 and 201 of the Constitution of Kenya, 2010, Sections 87, 88 and 89 of the ***County Governments Act***, No. 17 of 2012 and Section 127 of the ***Standing Orders*** and Articles 201, 209 and 210 of the Constitution of Kenya, 2010, Articles 201, 209 and 210 of the Constitution of Kenya, 2010, which stipulate the services which the county can charge and levy of royalty tax charge does not fall within the ambit of the county government. It was therefore prayed that this honourable court finds that the

applicant's application and petition dated 10th March, 2020 has merit and allows the same.

Respondent's Submissions

56. According to the Respondent, the petitioners charge that the Machakos County Finance Act 2020 is unlawful, unconstitutional, null and void *ab initio* in so far as the same were not subjected to public participation in accordance with articles 196 and 201 of the constitution, section 87, 88 and 89 of the ***County Governments Act*** No. 17 of 2012 and section 127 of the Standing Orders. However, the respondent in its reply outlines how public participation was conducted to meet the required threshold as provided in law hence the allegation that there was no public participation leading to the enactment and passing of the ***Machakos County Finance Act 2020*** is utterly false.

57. While appreciating that the County Assembly should take into account the views put forward by the petitioners while passing relevant Acts, it contended that the Petitioners are misguided to hold the Assembly is bound by law to agree with any proposals by they put forward. That argument would not only usurp the role and independence of the 1st respondent but also make passing of laws impossible and/or lead to establishment of cartels who would control what is to be enacted.

58. The Court was invited to note that the petitioners file a petition every financial year, not that they are not entitled to if they have a genuine concern, but such petitions has become a tool of protecting businesses from cartels, frustrating and/or arm twisting county governments. They are also using such petitions to buy time and ensure that a financial years end without counties collecting any meaningful rates from them which is totally unacceptable.

59. Based on legal provisions, it was submitted that the respondent clearly outlined how public participation was conducted. It is thus satisfactory unlike the allegations raised by the petitioners. According to the Respondent, the county is not expected to advertise such invitations for public participation for unreasonable periods to satisfy the interests of the petitioners only. It is indeed very expensive to advertise and public money is involved. The petitioners having been invited, being personally present in the public participation forums and having given their views cannot be heard complaining. In support of is position the Respondent relied on **Nairobi Metropolitan PSV Sacco Union Limited & 25 Others -vs- County of Nairobi Government [2013] eKLR**.

60. The Respondent submitted that the petitioners are not involved in mining minerals but quarrying and transportation of stones and *murram* which is not within the definition of minerals within the ***Mining Act***. Accordingly, the Third schedule of part 17 of the ***Machakos Finance Act 2020*** is not unlawful and/or unconstitutional.

61. Therefore, the legal basis of the fees the petitioners' members are charged vide the ***Machakos County Finance Act 2020*** is thus Article 210(1) of the Constitution and Section 21 of the ***County Governments Act*** which pegs any decision to impose any tax or licensing fee must be by legislation thus this Act and he Counties are entitled to pass and approve policies for management and exploitation of the county's resources which policies including payment of rates, license fees. There is thus nothing unconstitutional in protecting the exploitation of the county resources by the uncaring petitioners and other exploitive agencies. In its view, the petitioners are exploiting natural resources in the county and transporting the same through roads constructed and maintained by the county, they also use water and sewerage all being county resources. They should pay for the same like other business people through business permits and other rates. Therefore, it would be a travesty of justice for the petitioner to argue and insist that the counties are not by law allowed to be taxed in terms of business permits and other taxes as imposed under the third Schedule, part 17 of the ***Machakos County Finance Act 2020***. The business permits are compulsory for every trader who does business in any part of the country not just within Machakos County.

62. It was argued that the petitioners also should pay for road transportation charges maintained by the county, sewerage, garbage collection and other services provided for by the county.

63. It was submitted that the County Assembly of Machakos is mandated by the constitution to pass laws relating to payment of business permits, taxes, cess and other rates and it is not for the court or the petitioners to dictate which laws on the same issue should be passed as long as they are not unconstitutional which in this case they are not. In any event, after a bill is prepared and presented to the County Assembly, it goes through public participation after which the County Assembly is required to consider views of the sovereign people of Machakos County before passing a final bill for assent by the governor. Therefore, across the legislative process the initial Bill may mutate before the final one is passed for assent by the governor. It was submitted that the proposed figures can be amended because the legislative process is not a one man's affair but different stake holders have to give their views. In fact the members of public other than the business entities comprised of the petitioners were of strong view the petitioners should be taxed heavily because they are damaging the environment, roads and the same has to be rehabilitated and they have left the quarries. Therefore, that variation is insignificant and cannot the basis for invalidating the entire Act.

64. It was therefore the Respondent's case that the petition has no merit and pray the same be dismissed with costs.

Determination

65. I have considered the petition the subject of this Judgement, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

66. Since the matter before me is a petition seeking a declaration that the ***Machakos Finance Act, 2020*** or part of it is unconstitutional or did not adhere to the constitutional provisions in the process of its passage, the general rule or principle guiding such matters was restated by the Supreme Court of India in **Hambardda Wakhana vs. Union of India Air [1960] AIR 554** as follows:

> **"In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they**

are enacted. Presumption is therefore in favour of the constitutionality of an enactment."

67. Therefore, the presumption of constitutionality of statutes is not in doubt. This position was affirmed by the Court of Appeal of Tanzania in the celebrated case of **Ndyanabo vs. Attorney General [2001] EA 495** which was a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. In the former, the Court held that:

> **"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative"**

68. This was clearly appreciated in **Ndyanabo vs. Attorney General [2001] 2 EA 485** where it was held *inter alia* that in interpreting the Constitution, the Court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction.

69. Though under Article 1 of the Constitution sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals; the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution otherwise Article 2 of the Constitution allows for the recall of any law, including customary law that is inconsistent with the Constitution, or any act or omission in contravention of the Constitution for the purposes of being voided and or invalidated.

70. This position is supported by **Coleman vs. Mitnick, etc. No. 19,955. 137 Ind. App. 125 (1964) 202 N.E.2d 577** where it was state that:

> **"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."**

71. Similarly, in **Carr, Auditor v. State ex rel. Coetlosquet, 127 Ind. 204, 215**, as approvingly quoted in **Frost v. Corporate Commission of Oklahoma - 278 U.S. 515 (1929)**, the Supreme Court of the State of Indiana (USA) held that:

> **"An act which violates the Constitution has no power and can, of course, neither build up or tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality."**

72. That an unconstitutional statute is to be considered as though it had never been enacted by the legislature is also the view of the United States Supreme Court, which in **Chicago, Indianapolis, & Louisville Railway Company, Plff. In Error, v. Haynes l. Hackett. No. 889**, said:

> **"That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."**

73. In **Norton v. Shelby County**, **Justice Field** said:

> **"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been."**

74. I associate myself with this Court's decision in **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004** where it was held that:

> **"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."**

75. In my view this holding is even more appropriate in cases where the Court is called upon to uphold the provisions of the Constitution.

76. What are the issues raised by the petitioners in this petition? It is contended that the process of enactment of the Act was itself unconstitutional since it was not in accordance with various constitutional and statutory provisions which require that there be public participation in the enactment of legislation. That there is such a requirement is clearly not in doubt and the Courts have nullified legislation which do not comply with such constitutional edicts.

77. It may be argued that where the action taken is in consonance with the Constitution in its formal aspects then the mere fact that there was

no public participation ought not to nullify such otherwise legal action. However, I agree with the manner in which **Ngcobo, J** dealt with the issue in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2),** (supra) when he stated:

> **"The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected."**

78. It is similarly my view that this Court not only has the power but the obligation to determine whether a particular legislation was in fact and in substance enacted in accordance with the Constitution and not to just satisfy itself as to the formalities or the motions of doing so.

79. However, public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by ***Black's Law Dictionary*** 9th Edn. at page 358 as "*the act of asking the advice or opinion of someone*", "participation" on the other hand is defined at page 1229 thereof as "*the act of taking part in something, such as partnership…*" Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words, the end product ought to be owned by the public. This position was appreciated 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)** as hereunder:

> **"If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."**

80. This view is reinforced by the decision 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),** where **Ngcobo, J** held *inter alia* as follows:

> **"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."**

81. This issue calls into question what amounts to public participation facilitation. As was held by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra):

> **"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."

82. In our case, the definition of "public participation" is to be found in section 2 of the ***Machakos County Public Participation Act,*** an Act whose Preamble states that it is:

AN ACT of the Machakos County Assembly to give effect to Articles 1,10 (2) (a), 118, 119, 174, 232 (l) (d) and paragraph 14 of Part 2 of the Fourth Schedule of the Constitution to establish modalities and platform for public participation in the governance of the County and for connected purposes.

83. Section 2 of the said Act defines "public participation" as:

means an open, democratic and accountable process of engaging a representative sector of the public in formulating policies and developing laws that affect them.

84. Therefore, public participation must be inculcate the principles of openness, democracy, accountability and representation.

85. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations.

86. Therefore, the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by **Lenaola, J** in **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013**, public participation is not the same as saying that public views must prevail.

87. As this Court held in **Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another [2016]** at page 12 paragraph 48:

"48. This issue calls into question what amounts to public participation facilitation. As was held by Ngcobo, J in Doctors for Life International vs. Speaker of the National Assembly and Others (supra):

"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."

88. Further the court stated:

"50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that 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."

89. The court went on to observe that:

"51. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by Lenaola, J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013, public participation is not the same as saying that public views must prevail"

"52. The Respondent has however adduced evidence showing that not only was the Bill leading to the said Act widely advertised but that the applicants themselves participated by giving their views thereon. Whereas the views of the applicants may not have been swallowed hook, line and sinker, that does not necessarily mean that there was no public participation. However the caution expressed 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) must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:

> **"The passages from the Doctors for Life majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But 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. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of 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…Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication…There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat."**

53. This position was adopted by Majanja J's decision in Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others (supra) 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."**

54. What the Courts are saying was that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed.

90. At page 17 paragraph 58 it was stated that:

58. As Ngcobo, J rightly appreciated:

'Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings.'"

91. Similar views were expressed in **Diani Business Welfare Association and Others vs. The County Government of Kwale [2015] eKLR** where the Court held that:

"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…"

92. In this case, it was submitted on behalf of the Petitioner in the said Memorandum of Understanding relating to the charges on ballast transportation which was to take effect from 19th March, 2019 to 2020, it was decided that, the Respondent would charge the petitioner Semi Permanent Trailer Kshs. 4,000/=, Three Axle, Four Axle over 8 tons at Kshs. 2000/= and Two Axle Kshs. 1500/= and after the execution of the memorandum of understanding the petitioner paid levies as per the agreement. Though the respondent, while admitting the existence of the agreement, contended that, the agreement was to take effect from 19th March, 2019 to 2020 and that in the year 2020 the parties would revert to the earlier rates as per the act which is Kshs. 3000/=, there is no such clause in the memorandum. Accordingly, the Petitioner submitted that as the memorandum still being in force, the petitioners had a legitimate expectation that the respondent would adhere to the memorandum of understanding which is still in force and any changes to the contrary would be communicated to the petitioners as stakeholders. Contrary to the terms of the memorandum of understanding, the respondent published the Machakos County Finance Bill on 19th December, 2019 whose Third Schedule Part 17, indicates that the respondent would charge Semi Permanent Trailer per trip at Kshs. 4,300/=, Triple axle per trip 2,400, above 8 tons lorry at Kshs. 2,300/= and 8 tons lorry and below per trip Kshs. 1500/=. However, the Machakos Finance Act, 2020, Third Schedule Part 17, states that, the respondent would charge Semi Permanent Trailer per trip at Kshs. 5,000/=, Three Axle per trip at Kshs. 4000/=, above 8 tons at Kshs. 3,000/= and 8 tons lorry and below per trip Kshs. 2,000/=.

93. The above rates and charges, it was submitted prove that there are discrepancies as between the published bill and the enacted Act. In the Petitioner's view, the said new rates are both oppressive and exorbitant in that the residents of the county were not consulted in the implementation thereof.

94. On its part, the Respondent, while admitting that indeed there was a memorandum of understanding between the parties which was to take effect from 19th March, 2019 to 2020, it was stated that in the year 2020 the parties would revert to the earlier rates as per the Act which is Kshs 3,000/=. However, the petitioner has also not complied with the terms of the memo and the initial case has not been withdrawn as per clause 5. On without prejudice, the Respondent disclosed that it was willing to continue with the terms of the memorandum of understanding if the petitioner is ready to comply with the terms of the memo as agreed.

95. The issue of memorandum of understanding has been taken as a ground for contending that the Respondent has thwarted the Petitioner's legitimate expectation. This issue brings us to what constitutes legitimate expectation.

96. The three basic questions were identified in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]** as follows:

"In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself to; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

97. It was further held in **R vs. Jockey Club ex p RAM Racecourses [1993] 2 All ER 225, 236h-237b** that the basic hallmarks of an unqualified representation are:

"(1) A clear and unambiguous representation. (2) That since the [claimant] was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the [claimant] to rely upon it without more…(3) That it did so rely upon it.(4) That it did so to its detriment…(5) That there is no overriding interest arising from [the defendant's] duties and responsibilities."

98. According to **De Smith, Woolf & Jowell,"*Judicial Review of Administrative Action*"** 6thEdn. Sweet & Maxwell page 609:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

99. See also **Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67]**.

100. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** it was held:

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public

law courts to weigh and determine."

101. In this case the fact of the existence of the said memorandum of understanding between the parties herein is not disputed. The Respondent however contends that the Petitioner has not complied with the terms of the memo and the initial case has not been withdrawn as per clause 5 of the said understanding. This allegation is however denied by the Petitioner whose position is that the matter was withdrawn and that all their vehicles have been paying as per the memorandum of understanding.

102. The first issue that arises here is: with whom was the said memorandum of understanding entered? It is clear under Article 179(1) of the Constitution that:

The executive authority of the county is vested in, and exercised by, a county executive committee.

103. Under Article 185(1) and (2) of the Constitution:

(1) The legislative authority of a county is vested in, and exercised by, its county assembly.

(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

104. Clearly legislative authority in a county vest in its County Assembly and not its Executive. However, it was held in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** that:

"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

105. I have perused the subject Memorandum of Understanding and though it is indicated that it was entered into between the Petitioners and the Respondent, the signatories are clearly officers of the Executive and the Petitioners. Does the executive in a county has the authority to enter into an understanding whose effect is to tie the hands of the legislative assembly in the conduct of its constitutional mandate? In my view any such understanding if it purports to restrict the assembly in the conduct of its constitutional mandate would unlawful and that being so, the said expectation would not be legitimate and as was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012** it was held that:

""According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of DE SMITH'S JUDICIAL REVIEW, 'Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)'. It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law. In the case before me there is no evidence of a written or verbal promise made to the Applicant that its goods would be allowed in Kenya once he obtained the necessary licenses. One may argue that the legitimate expectation was based on the understanding that goods from Uganda would be admitted into Kenya at a duty rate of 0%. However, that argument cannot hold when one considers the fact that the Respondent has a statutory duty to ensure that all the necessary taxes for goods entering Kenya have been paid. The Applicant's argument that its legitimate expectation was breached therefore fails."

106. The Petitioner noted that whereas respondents aver that there were adverts placed in the ***Daily Nation***, ***Taifa Leo*** and ***The Standard*** on 16th September, 2019 indicating public participation forums would be held on 20th September, 2019, these forums would be held in four days time after the announcement contrary to the provisions of Sections 87, 88, 115 of the ***County Government Act***, 2012 ***and*** Articles 196 and 201 of the Constitution.

107. In **Robert N. Gakuru & Ors vs. The Governor Kiambu County & Ors [2014] eKLR** this Court cited with approval the decision in **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC)**, where it was held *inter alia* that held that:

"For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case."

108. In determining the reasonableness of the conduct of public participation process, as held hereinabove, the nature and importance of the legislation and the intensity of its impact on the public are especially relevant. In my view a Bill that has financial ramifications on the members of public is a very crucial Bill and ought not to be treated lightly. Sufficient time must therefore be afforded to the public to air their views thereon. In this case the Respondents gave the Petitioners four days within which to present their views. It is contended and the contention is not denied, that the Petitioners did in fact present their views. 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) it was held that:

> **"The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process… In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."**

109. However even if the period is short but it is shown that the petitioner did in fact participate in the enactment of the Bill, the Court would be reluctant to nullify the enactment in the absence of any evidence that a member of the public was as a result of the short notice locked out from presenting his views. In this case the Petitioner admits that the bill was brought to its attention and it does not contend that as a result of the short notice it was not possible for it to participate in the process. It in fact did participate therein. Therefore, in the absence of any evidence to the effect that any person was thereby locked from being afforded an opportunity to present his or her views, the Petitioners, who were themselves afforded that opportunity cannot succeed in this petition. It was incumbent upon the Petitioners to satisfy the Court that not only was the notice given too short, but that as a result thereof they were unable to adequately prepare and meaningfully participate in the process of the enactment of the Bill. Whereas I am satisfied that the notice in question was no doubt short, there is no satisfactory material placed before me to convince me that as a result, the Petitioners were deprived of an opportunity to participate in the process.

110. Whereas the views of the Petitioners may not have been swallowed hook, line and sinker by the Respondents, that does not necessarily mean that there was no public participation. As was appreciated 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)**:

> **"…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. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of 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…Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication…There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat."**

111. This position was adopted by **Majanja J's** decision in **Commission for the Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others** (supra) 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."**

112. What the Courts are saying was that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed. In other words, public participation ought not to be taken as a mere formality for the purposes of meeting the constitutional dictate. This position is appreciated in section 4 of the ***Machakos County Public Participation Act 2014*** which provides the guiding principles for public participation in Machakos County Government to include:

(a) The communities, organizations and citizens affected by any policy decision of the government shall have the right to be consulted and shall be accorded an opportunity to participate in the process of formulating policy;

(b) Availing participants access to the information necessary to ensure meaningful participation; and

(c) Feedback to the public on how their input is included in the policy decision.

113. The issue of who and to what extent the issue of public participation ought to be determined was dealt with in **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others** (supra) as follows:

"Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

> **"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 standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government's fulfilment of positive obligations to realise social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that "reasonable measures may be taken" to regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if 'it is reasonable and justifiable to do so in an open and democratic society.' Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. "In dealing with the issue of reasonableness," this Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. 'In dealing with the issue of reasonableness,' this Court has explained, 'context is all important.' Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately 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 realised. 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 beginning with the broader duty to take steps to ensure that people have the capacity to participate…"

114. This was the view expressed by **Lenaola, J** (as he then was) in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others –vs- County Government of Nairobi & 3 Others [2013] eKLR.**

115. It must however be made clear that not all persons must be heard. In **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

116. As **Ngcobo, J** rightly appreciated:

"Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does

not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings.

117. In this case, there was an opportunity for public participation and I do not have evidence that any member of the public, through the shortness of the notice was deprived of an opportunity to participate in the law making process.

118. It was the Petitioner's case that the Third Schedule, Part 17 of ***Machakos Finance Act, 2020*** introduces quarry extraction fee for sale of ballast/crushed materials per tonne (on site) which provision is unconstitutional as it offends Article 209 and 210 of the Constitution as county governments are not empowered to impose such charges and there is no legislation that provides for such fees. It is illegal and unconstitutional for the respondent to impose royalty on the extraction of natural resources yet county governments may only impose charges for the services they provide, property tax, entertainment tax and any other tax authorized by an act of parliament. Extraction fee for sale of ballast, which fees are payable on someone quarry's not only amounts to trespassing into a person land but cannot be classified as property tax and entertainment tax. Further there is no Act that has been authorized by an Act of Parliament providing that County Government can enter into someone land and every time the owner of the quarry sales a tonne of the material he has extracted, he pays an amount to the County Government. Therefore, and for illustration purposes if the petitioner's 18 tonne lorry purchases 18 tonnes of ballast, the petitioner pays the owner of the quarry for the purchase of the ballast which ballast belongs to the owner of the land and or quarry. The respondent doesn't provide any service as the only service involved here is loading into the lorry. Thereafter the quarry owner surrenders 2,700 (150 by 18 tonnes) to the County Government per a single lorry. In addition, the same amounts to double taxation as the quarry owners pay a pay 1,000,000/= to the same County Government as quarry extraction fee per quarry.

119. The above issue calls for determination of the scope of Article 209(3) and (4) of the Constitution. The said Article provides as follows:

(3) A county may impose—

(a) property rates;

(b) entertainment taxes; and

(c) any other tax that it is authorised to impose by an Act of Parliament.

(4) The national and county governments may impose charges for the services they provide.

120. The Respondent urged the court to re-examine the said provisions of the constitution versus those of the ***County Governments Act 2012*** as regards taxation on the disputed area of quarrying and to apply a purposive interpretation approach in the interpretation of the said provisions. According to the Respondent, the county therefore is within the law to pass money bills which are also about taxes on other areas other than taxation on property, entertainment or services offered and the court should examine the effect of section 21 of the ***County Governments Act*** and rightly find that taxes imposed on quarrying activities are well. According to the Respondent, the legislature gave counties the powers to impose taxes which are not prohibited or amount to double taxation e.g. the counties cannot regulate professionals or minerals which are prohibited by law.

121. If I understand the Respondent, the power to levy taxes on the quarrying activities in question is by necessary implication since it is not prohibited. With due respect to the Respondent a power to levy taxes cannot be implied. The said principle was restated in **Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR** where the learned judge held:

"The approach to this case is that stated in the oft cited case of *Cape Brandy Syndicate v Inland Revenue Commissioners* [1920] 1 KB 64 as applied in *T.M. Bell v Commissioner of Income Tax* [1960] EALR 224 where Roland J. stated, *" …in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used… If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."* As this case concerns the interpretation of the *Income Tax Act*, I am also guided by the dictum of Lord Simonds in *Russell v Scott* [1948] 2 ALL ER 5 where he stated, *"My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him"* adopted in *Stanbic Bank Kenya Limited v Kenya Revenue Authority* CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR per Nyamu JA (See also *Jafferali Alibhai v Commissioner of Income Tax* [1961] EA 610, *Kanjee Naranjee v Income Tax Commissioner* [1964] EA 257). Any tax imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute. In *Adamson v Attorney General* (1933) AC 257 at p 275 it was held that, *"The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect-if it be in view of the Crown a defect can only be remedied by legislation."*

122. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in

order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See **London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

123. As was held in **Vestey vs. Inland Revenue Commissioners [1979] 3 All ER at 984**:

> **"Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined."**

124. In the same vein, it was held in **Russell (Inspector of Taxes) vs. Scott [1943] AC 422 at 433**:

> **"I must add that the language of the rule is so obscure and so difficult to expound with confidence that – without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind I feel that the tax payer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected...my Lords, there is a maxim of income tax law, which though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion."**

125. In these kinds of cases the Court is not entitled to attempt a discovery at the intention of the Legislature but is restricted to the clear words of the statute. In a taxing Act one has to merely look at what is clearly said since there is no room for any intendment. There is no equity about tax and there is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only fairly look at the language used. See **H vs. The Commissioner of Income Tax [1958] EA 303.**

126. Similarly, in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 240** it was held:

> **"taxation can only be done on clear words and cannot be on intendment."**

127. The Constitution is very clear that a county is only empowered to impose property rates; entertainment taxes; and any other tax that it is authorised to impose by an Act of Parliament. The ambit of property rates cannot in my respectful view be expanded to encompass mere purchase and transportation of quarried stones. Property rates is a levy that is imposed on the property itself rather than the services appurtenant to the property such as the transportation of its products. The Petitioner contends that the Respondent is already levying charges on the property against the quarry owners who load the same onto the Petitioners. To also levy taxes on the Petitioners amount to double taxation. With due respect I agree. Once the tax is levied upon the property owners, it cannot similarly be levied against the purchasers of its products without an Act of Parliament authorising the same. In this case the Respondent has not pointed out any such Act of Parliament. ***Black's Law Dictionary 5th Edition, 1979***, defines double taxation in the following terms:

> ***To constitute 'double taxation', that tax must be imposed on the same property by same governing body during same taxing period and for same taxing purpose.***

128. Whereas both the national and county governments may impose charges for the services they provide, in this case the Respondent has not identified any services it is rendering in the activities in question.

129. I reiterate what this Court held in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR** that:

> **"It is therefore clear that the County Assembly may only impose property rates and entertainment taxes unless otherwise authorised by an Act of Parliament and this position is emphasised by the provisions of Article 210(1) of the Constitution which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. County Governments are however empowered to impose charges on services they provide. Such service would include parking and market fees. However to levy charges on the stones quarried unless authorised by an Act of Parliament or any services rendered by the County Governments towards that end would be clearly illegal. Further the levying of such taxes ought not to be such as to prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Tariffs and pricing of services must however comply with the provisions of section 120 of the *County Government Act*. The Court however is not entitled to interfere with the Tariffs and pricing of services simply on the ground that the Court would have decided otherwise since the Court ought not to substitute its opinion for that the County Government. As long as the provisions of the Constitution and the relevant legal provisions are complied with and the applicable principles are taken into the Court ought not to interfere."**

130. In my view, what the Respondent is doing under the guise of having reliable sources of revenue to enable them to govern and deliver services effectively under Article 175(b) of the Constitution in performance of its functions and exercise of its powers under the Fourth Schedule, is expressly prohibited. This is since Article 209(5) of the Constitution which provides that:

> ***The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.***

131. As was stated in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR:**

> **"County Governments are under Article 175(b) of the Constitution entitled to have reliable sources of revenue to enable**

them to govern and deliver services effectively. However this entitlement must be exercised in accordance with the Constitution and the law and where the existing legislation is not adequate for the purposes of ensuring the efficient governance and delivery of services the County Government ought to petition the National Government to increase allocation to them or enact appropriate legislation to enable them carry out their constitutional mandate as required under Articles 190(1), 202 and 203 of the Constitution."

132. To my mind, it is important to understand the principles of devolution. That the principle of devolution entrenched in our Constitution has a historical genesis was appreciated by the Supreme Court in **Speaker of the Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where **Mutunga, CJ** expressed himself as follows:

"The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state..."

133. The learned President of the Supreme Court continued:

"Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents the *raison d'être* of the Senate as "to protect" devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities…..National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya's social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act.*"

134. However, Article 4(2) of the Constitution provides that:

The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.

135. In other words, Kenya is one State and under Article 6(1) and (2) of the Constitution, its territory is divided into the specified counties and the governments at the national and county levels though distinct and inter-dependent, conduct their mutual relations on the basis of consultation and cooperation. Therefore, as was appreciated in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR:**

"…the spirit of the devolved system of governance in this country was meant to bring services to the people and to ensure equitable sharing of the resources by the people of the Republic of Kenya. It was meant to bring to end the hitherto existing centralised system of governance which was geared towards rewarding the cronies, supporters and court jesters. However, the drafters of the Constitution were well aware of the risk of the country being compartmentalised into semi-states with god fathers or war lords as the chief executives. Accordingly, proper safeguards were put into place to ensure that in spite of the devolved system of governance the country remained a one unitary State and was not transformed into a confederacy. Accordingly, in legislating the County Assemblies in the devolved governments must take into account the fact that their devolved units must co-exist with other units and that their actions do not unduly infringe upon the rights of residents of other units as enshrined under the Constitution. Unless this restriction and limitation on the powers of the devolved units is observed there is a risk of some counties being a preserve of a certain class by making life intolerable for certain classes of people hence forcing them out of those counties to other counties where less stringent legislation prevail. In other words, devolution was not meant to balkanise the country into fiefdoms. These principles are clearly enumerated in the objects of devolution in Article 174 of the Constitution..."

136. Therefore, attempts to formulate policies or enact legislation whose effect is to lock out Kenyans from other counties from accessing one county from another county cannot be countenanced unless such actions are supported by a law which must meet the threshold in Article 24 of the Constitution. In other words, devolution is not an avenue for balkanisation of the country into miniature kingdoms under the tutelage of Governors. In this petition, however, I have not found such evidence.

137. The Petitioners have however contended that the draft bill availed by the 2nd Respondent for the alleged public participation was markedly different from the Act. According to the Petitioner, Third Schedule Part 17, on Page 146 of The Bill, indicates that the respondent would charge as following on ballast and other crushed materials:

(i) Semi Permanent Trailer per trip at Kshs. 4,300/=

(ii) Triple axle per trip 2,400

(iii) above 8 tons lorry at Kshs. 2,300/=

(iv) 8 tons lorry and below per trip Kshs. 1500/=

138. In the Machakos Finance Act, 2020, Third Schedule Part 17, on Page 111 of the act, states that the respondent would charge as following on ballast and other crushed materials,

(i) Semi Permanent Trailer per trip at Kshs. 5,000/=

(ii) Three Axle per trip at Kshs, 4000/=

(iii) Above 8 tons at Kshs. 3,000/=

(iv) 8 tons lorry and below per trip Kshs. 2,000/=

139. This contention is not disputed by the Respondent. The Respondent however takes the view that the County Assembly of Machakos is mandated by the Constitution to pass laws relating to payment of business permits, taxes, cess and other rates and it is not for the court or the petitioners to dictate which laws on the same issue should be passed as long as they are not unconstitutional which in this case they are not. That in any event, after a bill is prepared and presented to the County Assembly, it goes through public participation after which the County Assembly is required to consider views of the sovereign people of Machakos County before passing a final bill for assent by the governor. Therefore, across the legislative process the initial Bill may mutate before the final one is passed for assent by the governor. The proposed figures can be amended because the legislative process is not a one man's affair but different stake holders have to give their views. In fact, the members of public other than the business entities comprised of the petitioners were of strong view the petitioners should be taxed heavily because they are damaging the environment, roads and the same has to be rehabilitated and they have left the quarries. Therefore, that variation is insignificant and cannot the basis for invalidating the entire Act.

140. To the Respondent, it would not mean that even those changes require public participation as the petitioners put it; otherwise legislation would become untenable in terms of time and resources.

141. I agree with the broad position in the case of **Cereal Growers Association & Another vs. County Government of Narok & 10 Others [2014] eKLR** where **Justice Lenaola** (as he was then) held that:-

> **"…this Court cannot direct the 1st – 8th Respondents County Assemblies on how to exercise their mandate of levying agriculture produce cess and how to administer the same. In their wisdom as the law making bodies of each County, they must legislate having taken into consideration public views, their policies as well as the revenue intended to be raised. It is not the place of this Court to direct them on how to carry out any of those administrative or legislative functions."**

142. It is my view however that the onus is on the law making authority to show that there was public participation in the process and that the end product reflects that process. Where there is a break in the process and the end product is a monster that is completely strange to what was presented to the public, in the absence of any reasonable justification, the Court must find that the product is not result of the public participation and must proceed to declare it to be so. In my view, for any amendments to be introduced on the floor of the Assembly subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input. This position is supported by the views expressed in ***Merafong Case*** (supra) to the effect that:

> **"Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve…I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid."**

143. Therefore, an introduction of totally new and substantial amendments to the Act which were not in the Bill, may well lead to the conclusion that the Assembly not only set out to circumvent the constitutional requirements of public participation but, mischievously short-

circuited and circumvented the letter and the spirit of the Constitution and its action would amount to a violation of Articles 10 and 196 of the Constitution.

144. I must however state that if the members of the public air their views that they wish to have some proposals varied, then the County Government cannot be faulted for incorporating those views in the final Bill tabled before the Assembly. However, considering the conclusion I have arrived at in this petition as regards the power of the Respondent to levy taxes on the transport activities of the Petitioner, the subject of this petition, nothing turns on that issue. In any event, a perusal of the material placed before me reveals that sentiments were expressed on the need to enhance the levies on quarrying in order to preserve the environment. Whether or not the such sentiments were credible is a matter wholly within the domain of the Assembly.

145. The Respondents have taken issue with the fact that the Petitioners challenge each ***Finance Act*** passed year in year out. In my view, the fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant so as to bar him from being heard by a Court of law. To my mind every Finance Act passed by a County Government may properly be made the subject of constitutional challenge and no offence ought to be taken simply because a petitioner challenges each action taken by the County Government. As was held by **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243**:

> **"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."**

146. To my mind, the fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant. See **Moses Kipkolum Kogo vs. Nyamogo & Nyamogo Advocates Civil Appeal No. 53 of 2003 [2004] 1 KLR 367.**

147. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000**, the same court expressed itself thus:

> **"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success."**

Order

148. In the result, I find that and hold that the Third Schedule Part 17 of the ***Machakos County Finance Act***, in so far as the same relate to the to the imposition of fees and charges of transportation of quarry products is unlawful, unconstitutional, null and void *ab initio.*

149. Having said that, nothing stops the Respondent from entering into an understanding with the petitioner with respect to raising of revenue just like it did with the Petitioner herein and once that is done, just like the Petitioner contends that the Respondent is thwarting its legitimate expectation by reneging on that understanding, the Petitioners would similarly be reneging on the same if they failed to honour the same. Since the parties herein are ready and willing to abide by the terms of the said understanding, I find nothing wrong with its compliance.

150. As none of the parties was fully successful, each party will bear own costs of these proceedings.

151. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 9th day of June, 2020

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muumbi for the Respondent

CA Geoffrey