REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. JUDICIAL REVIEW APPLICATION NO. 15 OF 2020

IN THE MATTER OF: ARTICLES 10, 22, 23, 27, 43, 47, 50, 118, 174, 196, 199, 209, 210, 258 & 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 5, 7, 8 & 9 OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015, SECTION 3(2) AND 4(3) PART ii TAXES, FEES AND CHARGES PAYABLE AND RATES APPLICABLE MOMBASA COUNTY FINANCE ACT, 2019 AND SEVERAL UNGAZETTED LAWS

AND

IN THE MATTER OF : AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION UNDER SECTIONS 8 & 9 OF THE LAW REFORM ACT & ORDER 53 RULES 1,2,& 3 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

AND

1. **THE CLERK COUNTY ASSEMBLY OF MOMBASA**
2. **THE MOMBASA COUNTY INSPECTORATE**
3. **CHIEF MAGISTRATE'S COURT MOMBASA**
4. **INSPECTOR GENERAL NATIONAL POLICE SERVICE**
5. **THE OFFICE OF DIRECTOR PUBLIC PROSECUTION**
6. **THE OFFICE OF THE ATTORNEY GENERAL**
7. **THE MOMBASA LAW SOCIETY.....INTERESTED PARTIES**

EXPARTE

PATRICK KABUNDU ..... 1ST APPLICANT

MOMBASA COUNTY ENTERTAINMENT,

BARS, PUBS, RESTAURANTS, HOTELS,

GUEST HOUSES WINES & SPIRIT,

OWNERS ORGANISATION .....2ND APPLICANT

LYDIA WAMUYU NGARI .....3RD APPLICANT

JUDGMENT

1. The Exparte Applicants hereby **PATRICK KABUNDU** (1ST), **MOMBASA COUNTY ENTERTAINMENT, BARS, PUBS, RESTAURANTS, HOTELS, GUEST HOUSES WINES & SPIRIT OWNERS ORGANISATION (2ND) and LYDIA WAMUYU NGARI (3RD)** sought for Leave of Court to apply for Orders of Judicial Review vide **Chamber Summons** dated **16th March 2020**, which was granted by the court on **27th March, 2020**.

2. Brief facts of the Applicant's case were set out in the Affidavit of the 1st Exparte Applicant sworn on behalf of the others in support of their application. It is averred that the members of the Exparte Applicant's organization and citizens of Mombasa face imminent arrest and criminal prosecution for failure to take out business operation licences bases on illegally imposes fees and charges vide ungazetted Acts of Laws which are a breach of **Article 50(2)(n)** of the **Constitution**. That this is so as to avoid the application not to be convicted for an act or omission that was not an offence in Kenya at the time it was committed.

3. With Leave of the Court the Ex parte Applicants instituted the instant Judicial Review application vide the **Notice of Motion** dated **24th April, 2020**. By the Application the Applicants seek the following orders:-

> ***a) An Order of CERTIORARI do issue to remove to this court and quash the decision by County Government of Mombasa, County Assembly of Mombasa enacting the Mombasa County Finance Act 2019 without following its own legislations in enacting the Mombasa County Finance Act 2019 in contravention of Mombasa County Public Participation Act 2017.***
>
> ***b) An Order of CERTIORARI do issue to remove to this court and quash the decision by the County Government of Mombasa, to charge separately for single business permits and Alcoholic Drinks Licenses in respect of the same business operated by the applicants members in contravention of the Mombasa County Finance Act 2019 and ungazetted laws.***
>
> ***c) An order of PROHIBITION do issue restraining the Respondent from demanding, levying, Charging, collecting, retaining or howsoever impose any taxes double charge for business license upon the applicant members and Mombasa Citizens in contravention of the Mombasa County Finance Act 2019 and founded on ungazetted law.***
>
> ***d) An order of PROHIBITION do issue restraining the Respondent and the Interested Party from instituting and or conducting any criminal prosecutions under the Mombasa County Finance Act 2019 or ungazetted acts or law there under in respect of the issues of licensing, permit fees, county land rate fees until the Respondent puts in place establishment of the department of public participation under Mombasa County Public Participation Act 2017 as per its laws and enact the Finance Act as per the law.***
>
> ***e) An Order PROHIBITION do issue to operate as a stay of implementation and/or execution of the decision by the county Government of Mombasa to Charge Single business permits and Alcholic Drinks Control Licences against the Applicants and the Public in respect of the same in contravention of the Mombasa County Finance Act 2019 and ungazetted law.***
>
> ***f) The costs of the application for Leave and the substantive Motion be provided to the Applicants.***

4. It is averred that the **Mombasa County Finance Act 2019 part II**, seeks to charge taxes, fees and rates based on the ungazetted laws which are in breach of **Articles 199, 174, 184, 196,** and **260** all of the **Constitution of Kenya**.

5. The Applicants also assert that the manner in which public participation was conducted in unprocedural and in breach of the Legislation Procedure of **Mombasa County Public Participation Act 2017**, hence the **Mombasa County Finance Act 2019** is no good law as no offence can be founded on it to warrant the Interested Parties charge the Applicants.

6. It is the Applicants' contention that in the absence of legislation, the Respondent has no power to impose taxes or to exercise its power and duty to impose taxes or exercise its powers and duty to tax under **Articles 209** and **210** both of the **Constitution**, contrary to what the Respondent holds.

7. With the Leave of Court, the Exparte Applicants instituted the instant Judicial Review application vide a **Notice of Motion dated 24th April, 2020**, which was listed for hearing on **26th May, 2020**.

8. The office of the **County Attorney General** entered appearance on **13th May, 2020** for the 1st & 2nd Interested Parties, while the office of the **National Attorney General** entered appearance for the 3rd, 4th & 6th Interested Parties on **5th June, 2020**. The 3rd Exparte Applicant appointed the **Firm of M/S Mwanzia & Co. Advocates** who filed a **Notice of Appointment** on **11th June, 2020**.

9. The 1st & 2nd Interested Parties filed their **Notice of Preliminary Objection** on **5th June, 2020** which was based on six(6) grounds.

The 3rd, 4th & 6th Interested Parties filed their Grounds **of Opposition** dated **4th June, 2020** on **5th June, 2020** relying on six(6) pillars.

On **15th July, 2020** the Respondent (County Government of Mombasa) filed a **Replying Affidavit** sworn by **Maryam Mbaruk** (County Executive Committee Member) dated **15th July, 2020**.

10. The Exparte Applicant then filed another **Notice of Motion** application dated **25th June 2020** seeking for:-

> ***a) Spent.***
>
> ***b) That pending the hearing and determination of the application interparties, an interim order prohibition do issue of implementation and/or execution of the decision of the county government of Mombasa, the Chief Magistrate Courts in Mombasa, the Inspector General National Police Service, ODPP Mombasa County Inspectorate from instituting and or conducting any criminal prosecutions under the Mombasa County Finance Act 2019 or ungazetted laws or Act thereunder in respect of issues of licensing, permits fees, county land rates and the Respondent puts in place the establishment of a department of public participation under Mombasa County Public Participation Act 2017as per its laws and enact the Finance Act as per the law.***
>
> ***c) That pending the hearing and determination of the substantive Motion, an interim order prohibition do issue of implementation and/or execution of the decision of the county government of Mombasa, the Chief Magistrate Courts in Mombasa, the Inspector General National Police Service, ODPP Mombasa County Inspectorate from instituting and or conducting any criminal prosecutions under the Mombasa County Finance Act 2019 or ungazetted laws or Act thereunder in respect of issues of licensing, permits fees, county land rates and the Respondent puts in place the establishment of a department of public participation under Mombasa County Public Participation Act 2017as per its laws and enact the Finance Act as per the law.***
>
> ***d) That the exparte court proceedings held on 11th June, 2020, exparte order given on 11th June, 2020 before Justice Eric Ogola be set aside.***
>
> ***e) That the Notice of the Preliminary objection dated 5th June, 2020 by Mr. Murtaza K. Tajbahi for County Attorney office of the County Attorney be struck out.***
>
> ***f) That the Grounds of Opposition filed on 5th June, 2020 by Mr. Mwadeje M. Mnoongo for Attorney General be struck out.***
>
> ***g) Without prejudice that the Notice of the Preliminary Objection dated 5th June, 2020 and the Notice of Appointment dated 5th June, 2020 and the submissions dated 16th June, 2020 filed by Mr. Murtaza K. Tajbhai for County Attorney office of the County Attorney be struck out.***
>
> ***h) That the substantive motion dated 24th April, 2020 proceed for full hearing.***
>
> ***i) That costs of this motion be provided for.***

11. The parties were directed by the court to canvass their respective cases by written submissions, so that the disputed matter is dealt with once and for all. Some parties complied by filing their submissions while others did not. The exparte Petitioner, **Mr. Kabundu** filed submissions on behalf of the 1st & 2nd Applicants, the 3rd Applicant filed her submissions and so did the 3rd, 4th and 6th Respondents.

<u>Analysis and Determination</u>

12. I have thoroughly read through and considered the **Judicial Review** application dated **24th April, 2020**, the various responses thereto, submissions by respective parties herein together with the authorities and laws cited.

13. It is noteworthy to state that the Respondent filed a **Notice of Preliminary Objection** but did not submit on the grounds therein to highlight on the points of law pointed therein. In the circumstances, this court takes the view that the **Preliminary Objection** has not been prosecuted and the same is thus overlooked.

14. I will then proceed to determine the substantive **Motion** which is dated **24th April, 2020** in which the Applicants have sought for basically two **Orders of Judicial Review**, being;

> ***a) An Order of Certiorari to remove into court and quash,***
>
> > ***i. County government of Mombasa decision to enact Finance Bill 2019, without following its own Public participation Act 2017.***
> >
> > ***ii. To charge separately for single business permits and Alcoholics drinks in respect of the same business operated by the same members in contravention of Mombasa County Finance act, 2019 (the impugned Act).***
>
> ***b) An Order of Prohibition do issue;***

i. Restraining the respondent from demanding, levying, charging, collecting, imposing of taxes or double charging for business licences in contravention of the ungazetted Mombasa County Finance Act, 2019 and,

ii. Prohibit the Respondent and Interested Party from instituting and or conducting any Criminal Prosecution under the Mombasa County Finance act 2019, or ungazetted Acts or the law as regards licences and or until mechanisms for Public participation is created/established.

15. The Applicants have set out in an elaborate manner the very acts that according to him violated **Article 199** of the **Constitution of Kenya**, **2010** and Mombasa County that according to them, **Article 199** of the **Constitution of Kenya, 2010** and **Mombasa County Public Participation Act, 2017**.

Article 199 of the **Constitution** enacts laws as follows:-

199. (1)" County legislation does not take effect unless published in the Gazette".

199 (2)"National and county legislation may prescribe additional requirements in respect of publication of County Legislation".

With regard to Public Participation, action 3 of the **Mombasa Public Participation Act, 2017** states as follows:-

"The object of the Act is to;

a) Give effect to the provisions of Chapter Eleven of the Constitution.

b) Give effect to the principles as set out in Articles 1(2) and 10, Chapter Four, Articles 35, 61, 69, 118, 119, 174, 184, 196, 201 and 232 the Four in the Constitution.

c) To give effect o Part III of the County Government Act, 2012.

d) Provide a framework for participation of the public in affairs of the County through actively informing the content and form of legislation, policy, development plans formulated by the County Government.

e) Provide a framework for informed, effective, efficient and sustainable engagement of the public in the County in the formulation of policy legislation and development plans and programmes by the County Government.

16. The Law on Judicial Review has changed over time and especially after the **Promulgation** of the Constitution 2010. The traditional approach before the Promulgation of the Constitution, 2010 was the procedure provided for under **Order 53** of the **Civil Procedure Rules**, **2010**. This is a restrictive procedure whereby the questions to be determined are limited to procedural lapses of the Constitution the orders apply to.

17. The Constitution of Kenya, 2010 relaxed the strictures and empowered the Constitutional court to grant Orders of Judicial Review without undue technicalities. Under **Article 23(3)(f)** of the said **Constitution**, a party is allowed to seek for Judicial Review Orders. Then the **Fair Administrative Action Act No.4 of 2015** was enacted and it has also laid down procedures where a party is not interested in Constitutional remedies. The relevant part of this Act is **Part III** which sets out the matters especially those that result from Administrative lapses. **Section 10(2)** of the said Act mandated the Chief Justice to make rules of procedure.

18. The method to be followed is selected depending on the remedy a party desires a court to pronounce itself upon. It is very important to distinguish what is complained of. Where it is a procedural lapse, a party has to follow the procedure laid out under **Order 53** of **the Civil Procedure Rules, 2010.** And where the lapse has a Constitutional violation then one has to adopt the procedure under the now popular rules enacted ***"The Mutunga Rules".*** Where it is the exercise of an officer impacting negatively on the life of a citizen, the procedure under the **Fair Administrative Actions Act, 2015** applies.

19. **Article 159(2)(d)** of the **Constitution** then restrains court from delivering matters in regard to technicalities, whose effect would be to drive away an aggrieved litigant and leave the dispute persisting.

There is need to determine the entire case.

20. From the **Motion** as it appears to this court, Applicants seek for a declaration that the **Mombasa County Finance Act, 2019** is unconstitutional for failing to adhere to the Constitutional provisions in the process of its passage, since public participation was not properly undertaken. The Applicants also contend that the said Act is perpetuating an illegality in double taxing the Applicants as well as the general public by taxing on single business permit and at the same time charging for the liquor licences with regard to the same business. Further, the applicants contend that the Respondent should be compelled to establish a Public Participation Board under the Mombasa Public Participation Act so that it can be possible to subsequently enact the Finance act legally.

21. An **Affidavit** sworn by **Maryam Mbaruk**, the **County Executive Committee Member**, **Finance and Economic Planning** has displayed **Notices** marked as **MMI-3(a)** & **(b)** together with a list of participants at Pages 14-114 thereof indicating the regions they come from and the final report. The Interested Parties were concerned with procedural technicalities and so did not delve into the issue.

In the view of this court, it is sufficient to determine the issue of public participation first because neither the responses that were filed by the

Applicants and their submissions have challenged the said fact.

22. The general rule or principle guiding such matters was restated by the Supreme Court of India in the case of **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."***

23. The presumption of constitutionality of statutes is thus 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"***

24. This was clearly appreciated in the case of **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.

25. 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 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 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.

26. In the case of **Carr, Auditor v. State ex rel. Coetlosquet, 127 Ind. 204, 215**, as approvingly quoted the case of **Frost…Vs…. 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."***

27. 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 the case of **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."***

28. What are the issues raised by the Applicants in this Judicial Review Motion? It is contended that the process of enactment of the Act was itself unconstitutional since it was not done in accordance with various constitutional and statutory provisions which require that there be public participation in the enactment of legislation and more specifically the **Mombasa Public Participation Act, 2017**.

29. 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, this Court agrees with the manner in which **Ngcobo, J.** dealt with the issue in the case of **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2),** (supra), where 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."***

30. Similarly, it is the court's view that it 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.

31. I must say that 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 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 a true reflection of the said 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 the case of

Doctors for Life International… Vs… Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) as hereunder:

> ***"If legislation is infused with a degree of openness and participation, this will minimize 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."***

32. The question that calls for consideration is what amounts to public participation?

In the instant case, the definition of ***"Public Participation"*** is to be found in **Section 2** of the **Mombasa County Public Participation Act, 2017**, an Act whose preamble states that it is:-

> ***"…An act of the County Assembly of Mombasa to provide for the establishment of a legal framework for facilitating public participation in the County Government Processes; and for connected purposes"***

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

> ***"Includes the processes and methods designed to consult, involve and inform the public or stakeholders in order to allow those who would potentially be affected by a decision, any policy, legislation, program, project to have input into the process".***

34. 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.

35. 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 the case of **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.

36. In the case of **Republic vs. County Government of Kiambu ExParte Robert Gakuru & Another [2016]** at page 12 paragraph 48 the court expressed itself as follows:

> **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."***

37. Similar views were expressed in the case of **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…"***

38. In the instant case, I have perused the Respondent's **Replying Affidavit** and the **Affidavit** of **Maryam Mbaruk**, **the County Executive Committee member** of the **Finance and Economic Planning**, I have established that there were Notices issued to the general public notifying and inviting them to give their views on the draft **Finance Bill 2019/2020**. I have perused the annexed **Notices** marked as **MM-1-3(a)** & **(b)** and a List of Participants indicating the regions they come from. A meeting was then conducted on **25th September, 2019** at **Tononoka Social Hall** and the general public attended and aired their views. It is worth noting that the Interested Parties did not delve into this issue. They were only concerned with procedural technicalities.

39. In my view, this court is convinced that the involvement by **Mombasa County Government** passed the test in the case of **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, where the court stated among other things that; the measures that are required to be taken to facilitate public participation in the law-making process include ***provision of notice of and information about the legislation under consideration*** and the opportunities for participation that are available.

40. This Court would therefore be reluctant to nullify the enactment of **Mombasa County Finance Bill 2019/2020** in the absence of any evidence that the Applicants or any of their members attended the meeting at Tononoka and were locked out from presenting their views.

41. The Applicants purport that the Act is imposing a double taxes and it would be unfair to them and their members. It is thus clear that the Applicants' case is anchored to the levies imposed on Liquor licenses as opposed to the Act generally. Whereas the Applicants argue that the public participation was headed by a County Secretary as opposed to a **Director** of the **Public Participation Board,** there is no satisfactory material that has been placed before this court to convince it, the Applicants were deprived of an opportunity to participate in the process as a result of that omission.

42. In this case, there was an opportunity for public participation and there is no evidence that any member of the public was deprived of an opportunity to participate in the law making process. Whereas it is submitted that there is no justification to levy taxes twice, the court's view is that Judicial Review is not concerned with the merits of the decision but whether or not there was fair treatment in the decision making process. The Court of Appeal in the case of **Cortec Mining Kenya Ltd –vs- Cabinet Secretary Ministry of Mining & 9 Others [2017]eKLR**, considered the scope of Judicial Review and after reviewing several authorities stated thus:-

> **As for the scope of the remedy, it is also trite that:**
>
> **"In order to succeed in any application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety…….illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or *ultra vires,* or contrary to the provisions of the law or its principles are instances of illegality…..irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards….**
>
> **Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision." See Pastoli –vs- Kabale District Local Government Council and Others [2008] 2 E.A 300.**

43. In the instant application for Judicial Review the issue is whether there is any illegality, irrationality and/or procedural impropriety in the enactment of the **Mombasa County Finance Act** by failing to involve public participation. This Court has established that there was appropriate public participation and the Act was enacted without any Constitutional impropriety. Further, the Applicants have not placed material evidence to show that the **County Government of Mombasa** is not entitled to levy taxes on liquor licences. It is therefore safe to conclude that the criteria set by law for public participation was met, removing the barriers for enactment of the law.

44. The other aspect upon which the opposition of the **Mombasa County Finance Act, 2019** is based on the fact that after its enactment, the same was not gazetted in order for it to come into effect as stated in the Act itself under **Article 199(1).**

45. I have perused through the filed documents on record, but find no single statement or challenge as to why the Act was not gazetted as required by **Article 199**. However, as will be seen, the life of **Mombasa County Finance Act 2019** expires on **31st December 2020** and hence only a few months are left for it to remain in force. Notwithstanding the fact that the Act is in force, it is imperative for the parties to be reminded that violation of the Constitution is frowned upon by the courts which lack a duty to protect it. And all the individuals including all those before this court, have a similar calling to protect the Constitution. **Article 3(1)** of the **Constitution** states as follows:-

> ***"Every person has an obligation to respect, uphold and defend the Constitution."***

46. The power of the court is further cemented **by Article 165(3)(d)** of the **Constitution**. This particular power is the one enacted at **Article 165(3)(d)(ii)** whereby-

> ***"The question of whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution".***

47. Where the Constitution expressly states that County Legislation comes into effect after gazettement (see Article 199), parties are bound by that whether or not they followed the procedure in the enactment of the same and will not validate the failure to comply with the express command of the Constitution. I **therefore find and hold that the Mombasa County Finance Act, 2019 is operating in contravention of the Constitution**.

48. The next question for determination is ***"Does the Application dated 24th April, 2020 affect other Acts cited***?

49. It is trite law that an application of this nature ought to be brought to court within six(6) months from the date of the injury or violation complained of.

50. It is not disputed that the Acts have been in force **since 2017/2018** Financial Year. The **Mombasa Financial Act 2019** was simply suplanted to rely on other Acts. I have looked at the copies thereof annexed by the Applicant and find that the Acts were gazetted after their enactment. And to challenge this, the relevant procedure to be followed in determining this would be that provided for under **Article 23** of the **Constitution of Kenya 2010**. I therefore find that the application dated **24th April, 2020** does not apply to this Acts.

51. Having reached the above findings of fact and law, the following orders issue:-

a) The Mombasa County Finance Act 2019 be and is hereby removed into court and quashed.

b) The various Acts that were operational as listed in the application for Leave to remain in force until the end of the Financial Act will be enacted. And so as to avoid any doubt as to the time, till 31st December, 2020.

c) The Order of Prohibition sought in the Notice of Motion dated 24th April 2020 and Notice of Motion dated 25th June 2020 be and is hereby denied and the later motion decreed as spent.

d) The Notice of Preliminary Objection dated 5th June, 2020 in so far as it relates to technicalities in the main motion having seen decided on merit in superflows.

e) Each party to bear its own costs.

Judgment is Delivered, Dated and Signed at Mombasa this 2nd day of September, 2020.

D. CHEPKWONY

JUDGE

2/9/2020

In the presence of

Mr. Kabundu in Exparte for the Applicant

Mr. Tajbhai Counsel for the Respondent, 1st and 2nd Interested Parties and also holding brief for Mr. Mwandege Counsel for 3rd, 4th and 6th Interested Parties.

Miss Mwanaidi - Court Assistant

D. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all Judgments and Rulings be pronounced in open Court.

D. CHEPKWONY

JUDGE

2/9/2020