REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 190 OF 2018

IN THE MATTER OF AN APPLICATION BY TANNERS ASSOCIATION OF KENYA FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF A DECISION OF THE MINISTER FOR AGRICULTURE, LIVESTOCK AND FISHERIES TO IMPOSE CESS/LEVY TO THE MEMBERS OF TANNERS ASSOCIATION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA; THE MISCELLANEOUS FEES AND LEVIES ACT NO. 29 OF 2016; THE STATUTORY INSTRUMENTS ACT, 2013; HIDE SKIN AND LEATHER TRADE ACT, CAP 359; AND EXECUTIVE ORDER NO. 2/2013 OF THE EXECUTIVE OFFICE OF THE PRESIDENT; THE CONSENT DATED 22ND APRIL 2016 ADOPTED AS THE DECREE OF COURT ON 25TH APRIL 2016 IN CONSTITUTIONAL PETITION NO. 498 OF 2013

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF AGRICULTURES, LIVESTOCK & FISHERIES.....RESPONDENT

AND

THE CABINET SECRETARY, MINISTRY OF INDUSTRY, TRADE & CO-OPERATIVES.....INTERESTED PARTY AND

TANNERS ASSOCIATION OF KENYA

(SUING THROUGH ITS CHAIRMAN ROBERT NJOKA.....EX PARTE APPLICANT

JUDGMENT

INTRODUCTION

1. Pursuant to leave of this court granted on 15th May 2018, the *ex parte* applicant seeks the following judicial review orders:-

*a. **That** an order of certiorari to quash the decision made by the Respondent vide Legal Notice No. 300 of 2017 published on 26th January 2018 in Kenya Gazette Vol. CXX-No. 11 imposing cess on the applicant's goods destined for export.*

*b. **That** an order of prohibition restraining the Respondent from imposing and collecting cess from the applicant's goods destined for export.*

*c. **That** the costs of the application be provided for.*

Grounds in support of the application

2. The applicant is aggrieved by Legal Notice 300 of 2017 published by the respondent on 26th January 2018 in Kenya Gazette Vol. CXX-No. 11 gazetting Hide Skin and Leather Trade (Cess) Rules imposing cess on processed hides and skins before they are cleared for export. The *ex parte* applicant contends that the Respondent has no power to impose the levy.

3. The *ex parte* applicant contends that the decision violates the Statutory Instruments Act,[1] the Miscellaneous Fees and Levis Act,[2] a consent order made on 22nd April 2016 in Nairobi Constitutional Petition No. 498 of 2013 and Executive Order No. 2/2013 issued by the Executive Office of the President and the Constitution.

4. The *ex parte* applicant states that the Respondent gazetted the cess without complying with the provisions of sections 5 and 11 of the Statuary Instruments Act.[3] In addition, the *ex parte* applicant contends that processed hides and skins do not fall in the category of goods, which are subject to export levy under the First Schedule of the Miscellaneous Fees and Levies Act,[4] hence, imposing the levy, contravenes section 5(1) and the First Schedule of the Miscellaneous Fees and Levies Act.[5] It is also contended that the impugned decision offends the terms of the above consent order in that the cess was neither justified nor agreed upon as provided in the said order/decree.

5. Additionally, the *ex parte* applicant states that the Respondent acted *ultra vires* because the Interested Party herein, namely, the Cabinet Secretary, Ministry of Industry, Trade & Co-operatives is the responsible Cabinet Secretary mandated by the Executive Order No. 2/2013 to carry out the responsibility of "leather development" and not the Respondent herein, namely, The Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries. The *ex parte* applicant contends that the Interested Party is the relevant Cabinet Secretary to make rules under section 20(g) of the Hide, Skin and Leather Trade Act[6] for purposes of improving the quality of Hides, Skins, Leather and leather goods.

6. The *ex parte* applicant also contends that the Respondent purports to levy cess on the members of the applicant without providing any service to them contrary to Article 209(4) of the Constitution.

7. In addition, it is argued that the Respondent acted unreasonably, irrationally, procedurally (sic) and in bad faith in arriving at the said decision because the function in question falls under the mandate of the Interested Party. It is also contended that the Respondent acted irrationally by gazetting rules, which penalize value addition and contravene the government policy on leather development. Further, it is contended that the Respondent acted in bad faith by ignoring the applicant's and Interested Party's objections prior to gazetting the said rules.

8. The *ex parte* applicant also complains that the Respondent linked the levy with the customs systems; hence, since 8th May 2018, it has been impossible for its members to clear their goods for export without paying the levy, and, that, the goods are held at the port and cannot be cleared for export. Consequently, it contends that unless the orders sought are granted, the applicant's members will continue to suffer irreparable loss and damage.

The first Respondent's Replying Affidavit

9. Mr. Harry Kimtai Kachuwai, the Principal Secretary, State Department of Livestock, Ministry of Agriculture, Livestock, Fisheries and Irrigation swore the Replying Affidavit dated 19th October 2018. He deposed that prior to the year 2006, the then Minister for Agriculture in exercise of his powers under section 20(a) of the Hide, Skin and Leather Trade Act[7] made rules vide Legal Notice No. 200 of 1995, imposing cess on Hides, Skins, and Leather for Export. He averred that in 2006, the act was amended deleting section 20(a) of the Act rendering the rules obsolete. He also averred that in 2012, the rules under Legal Notice No. 200 of 1995 were revived by the Minister vide Corrigenda No. 41/1995 and subsequently the Directorate of Veterinary Services continued to levy Cess under the deleted provision.

10. Mr. Kachuwai deposed that in 2013, the *ex parte* applicant filed Nairobi HC Pet No. 498 of 2013 challenging the legality of the Levy, but the parties recorded a consent on 22nd April 2016. The terms of the consent are reproduced later in this judgement.

11. He also averred that the Respondent sought to comply with a term of the consent, which provided that any levy or cess to be charged by the Respondent be agreed upon and justified by the stakeholders before gazettement. He deposed that pursuant to the powers given to the Minister under section 20(g) of the Act, the Respondent proposed introduction of 'The Hide, Skin and Leather Trade Act (Cess) Rules' which was necessary to promote and improve the quality of Skins/Hides, Leather and Leather Products for export.

12. Mr. Kachuwai deposed that the Respondent through the Directorate of Veterinary Services called various meetings with stakeholders in the sector in order to deliberate on the proposed cess, and, that, the meetings were held on 30th May 2016, 28th July 2016, 17th August 2016, 5th October 2016 and 14th June 2017. He averred that despite the said meetings, the *ex parte* applicant wrote a letter to the Directorate of Veterinary Services through its advocate alleging lack of consultation and public participation of their members in the meetings, prompting the Respondent's Principal Secretary to seek legal opinion from the Attorney General. He deposed that the Attorney General advised them to advertise the meetings in a local daily, which they did on 22nd February 2017. He averred that the Directorate of Veterinary Services also delivered copies of the advert to all the stakeholders inviting them for the meeting on 14th June 2017. He deposed that the meeting was a success and that it was attended by various stakeholders and the proposed rates were agreed as follows: Raw Hides/Skins 1% of F.O.B; Processed hides and Skins (pickle state) 1% of F.O.B; Wetblue 0.75% of F.O.B; Crust 0.5% of F.O.B; Finished 0.5% of F.O.B.

13. He also deposed that the Respondent having satisfied itself that the public participation was sufficient and having taken into account the input by the stakeholders including the Interested Party, the Cabinet Secretary following the proper procedure and acting in good faith gazetted the Rules vide Legal Notice No. 300 of 2017 dated 17th November 2017. He averred that nothing in section 5(1) of the Miscellaneous Fees Act[8] precludes the Minister from exercising powers granted to him under section 20(g) of the Hide, Skin and Leather Trade Act[9] nor has section 20(g) been amended.

14. Mr. Kachuwai also deposed that the actions complained of are reasonable since the aim of imposing the cess is to finance the operations

of the tanning industry and promote the quality of Hides/Skins, Leather and Leather goods that are produced for export. He stated that the cess was necessitated by the fact that the Directorate of Veterinary Services does not get funding from the treasury to carry out its mandate of promoting the quality of the Hides/Skins, leather and leather goods among other functions.

15. Further, he averred that Executive Order No. 1 of 2018 defines the Respondent's function as "promotion of the Tannery Industry" while the Interested Party's function is defined as "Leather Sector Development."

Applicant's supplementary Affidavit

16. Robert Njoka, the *ex parte* applicant's Chairman swore the supplementary Affidavit dated 8th March 2019. He averred that there was no agreement on the levy, and, that, the *ex parte* applicant complained to the office of the President, which office advised the Respondent to liaise with the first Interested Party and chart the way forward.

Issues for determination

17. Upon carefully analyzing the diametrically opposed facts presented by the parties and the parties advocates submissions, I find that the following issues fall for determination:-

a) Whether the Respondent acted ultra vires.

b) Whether the decision is tainted with illegality.

c. Whether the Respondent violated the provisions of the Statutory Instruments Act.

a. Whether the Respondent acted ultra vires.

18. Learned counsel for the *ex parte* applicant submitted that the Respondent acted *ultra vires* its powers under section 20 (g) of the Hide, Skin and Leather Trade Act.[10] He argued that the section empowers the Minister to make rules generally for the purposes of improving the quality of hides, skins, leather and leather goods produced, prepared or sold in or exported from Kenya, including among others providing for imposition of cess or tax on hides, skins, leather and leather goods. In his view, the relevant Minister contemplated under the said section is the Cabinet Secretary, Ministry of Industry, Trade & Cooperatives; the Interested Party in these proceedings, and, that, the docket was transferred to the Interested Party by Executive Order No. 2/2013 issued on 20th May 2013.

19. He submitted that *certiorari* may lie where a body acts without jurisdiction or in excess of its jurisdiction. To buttress his argument, he cited *Republic v Public Procurement Administrative Review Board & another ex parte SGS Kenya Limited*[11] in support of the proposition that *certiorari* can issue where a body acts contrary to the law. Additionally, he submitted that the impugned action violated the order issued in Petition No. 498 of 2013.

20. Learned counsel for the Respondent submitted that following the consent order, the Cabinet Secretary acting pursuant to section 20 (g) proposed the introduction of *The Hide, Skin and Leather Trade Act Rules, 2017*. She argued that prior to the gazettement of the rules, various stakeholder meetings were held on diverse dates, and, that, the *ex parte* applicants' members chose not to attend the meetings. She argued that they opted to write through their advocate alleging lack of consultation and public participation of their members, a move that prompted the Principal Secretary to seek advice from the Attorney General. She stated that the Attorney General advised the Respondent to place an advertisement in the local dailies, which they did. She further argued that the Respondent satisfied the requirement for public participation, took the views collected into account and gazetted the rules. To fortify her argument, she cited *Republic v County Government of Kiambu ex parte Robert Gakuru & Another*[12] and *In the Matter of the Mui Basin Coal Basin Local Community*.[13]

21. In addition, she submitted that nothing in section 5 (1) of the Miscellaneous Fees Act[14] precludes the Minister from exercising powers granted to him under section 20(g) of the Hides, Skin and Leather Trade Act,[15] and, that every citizen has a duty to pay taxes.

22. The *ex parte* applicant's assault under the issue under consideration as I understand it is on two fronts, *one*, whether the Respondent acted outside its statutory mandate, and, *two*, whether the Respondent violated section 5(1) of the Miscellaneous Fees Act.[16] I will address these two sequentially.

23. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality." Differently stated, in response to a challenge to the legality of administrative action, courts generally need to consider the compliance with both substantive and procedural legal rules. This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

24. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites. So long as administrators comply with these two rules, their decisions are safe. This fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision can be judicially challenged on grounds that the administrative decision does not comply with the basic requirements of legality.

25. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

26. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute. A government Minister is bound to adhere to the law. The courts when exercising this power of construction are enforcing the rule of law, by requiring government functionaries to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[17]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

27. Statutes do not exist in a vacuum.[18] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[19] The courts should therefore strive to interpret powers in accordance with these principles.

28. What must be borne in mind is that exercise of statutory power has a constitutional underpinning and that the Constitution should be the point of reference for any one exercising statutory power. Thus, exercise of public power must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally, the rule of law. Such rights cannot be narrowly construed. Differently put, every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

29. In *Council of Civil Service Unions v. Minister for the Civil Service*[20] Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are *illegality*, *irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely *proportionality*.[21]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it to *"unreasonableness"* in Wednesbury Case.[22] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

30. Judicial intervention is posited on the idea that the objective is to ensure that the agency of government functionary remains within the area assigned to it by Parliament. A decision, which falls outside that area, can therefore be described, interchangeably, as a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

31. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did, and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts. Errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

32. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense, the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised. It must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

33. The first contestation in the issue under consideration is whether the Respondent remained within the area assigned to it by Parliament. Differently put, whether the Respondent acted outside its statutory ordained mandate. Central to this question is section 20(g) of the Hides, Skin and Leather Trade Act.[23] The section provides that the Minister may make rules generally for the purposes of improving the quality of hides, skins, leather and leather goods produced, prepared or sold in, or exported from Kenya. The section proceeds to state that without prejudice to the generality of the section, the Minister may make rules for all or any of the purposes listed therein. Relevant to this case is paragraph (g) which provides for the imposition of a cess or tax on hides, skins, leather and leather goods, either generally or on any specified grade or class or type of hides, skins or leather or leather goods.

34. The above provision talks of the Minister. The *ex parte* applicants counsel argued that the Minister contemplated under the above section is the Interested Party and not the Respondent. In support of this argument, he placed reliance on Executive Order No. 2 of 2013 and argued that the function in question falls under the docket of the Interested Party and not the Respondent. Mr. Kachuwai in the Replying Affidavit countered this argument by stating that the relevant document is Executive Order number 1 of 2018, which sets out the organization structure of the government and defines the Respondent's functions to include promotion of the tannery industry. It also defines the Interested Party's function as that of Leather Sector Development. He proceeded in his affidavit to explain the distinction between the two functions.

35. It's not clear why the *ex parte* applicant's counsel placed reliance on the 2013 Executive Order, and ignored Executive Order No 1 of 2018-Reorganization of the Government of Kenya, which places the function of promotion of tannery industry on the Respondent and the Leather Sector Development on the Interested Party.

36. In the strictest sense of the term, the leather industry covers the preserving of the raw hide after the slaughterhouse and the tanneries which process the raw skins into durable leather. In the widest sense, the "leather industry" also includes the companies, which then process the skins into ready-for-use articles. These include the shoe manufacturers, the clothing manufacturers, the manufacturers of car upholstery and the furniture industry. But also the manufacturers of belts, bags and many other leather products. Promotions refer to the entire set of activities, which communicate the product, brand or service to the user.

37. It is clear the two Ministries have overlapping functions touching of the leather industry. I find nothing in the letter dated 8th May 2018 (annexture RN8 in the *ex parte* applicant's affidavit) or in the arguments presented before me to suggest that the Respondent acted outside its mandate by gazetting and or implementing the Rules requiring payment of cess. Simply put, under Executive Order No. 1 of 2018, I find nothing expressly prohibiting the Respondent from performing the function in question. Accordingly, this argument fails.

38. The second assault by *ex parte* applicant in support of the issue under consideration is premised on the argument that the Respondent violated section 5 (1) of the *Miscellaneous Fees and Levies**[24]* which provides for imposition of export levy on all the goods listed in the first schedule to the act. However, sub-section 4 of the said section provides that the Commissioner shall, by notice in the *Gazette*, adjust the specific rate of export levy annually to take into account inflation in accordance with the formula specified in Part III of the First Schedule. This section disposes the *ex parte* applicant's counsel's argument.

b. Whether the decision is tainted with illegality.

39. The *ex parte* applicant contends that the Respondent defied a court order issued in HC Constitutional Petition No. 498 of 2013, a suit which involved the same parties as in this case. It is uncontested that the said suit challenged the legality of the same levy, the subject of the dispute in this case. It is common ground that the parties herein in 2013, recorded a consent the terms of which are undisputed. These are the terms of the order:-

> *a.* ***That*** *the first Respondent de-gazette Legal Notice Number 144 of 2014 (The Hide, Skin and Leather Trade (cess) Rules, 2014;*
>
> *b.* ***That*** *any levy or cess to be charged by the first Respondent be agreed upon and justified by the stakeholders before gazettement;*
>
> *c.* ***That*** *the Petitioner and its members agrees and undertakes not to claim all the cess levied on them from 2006 and 2014;*
>
> *d.* ***That*** *this matter be marked as settled with no order as to costs.*

40. The Respondent's counsel submitted that after the above consent, the Cabinet Secretary sought to impose the levy and called for stakeholder meetings, but the *ex parte* applicant opted not to attend. The Respondent states that on advice of the Attorney General, it advertised the meetings in a local daily and observed all the procedures.

41. The question here is whether the Respondent violated paragraph (b) of the consent order. A reading of paragraph (b) of the order shows that it has a conditions precedent to introduction of any levy. This is *any levy or cess to be charged by the first Respondent was to be agreed upon and justified by the stakeholders before gazettement.*

42. There is nothing before me to show that the levy was agreed upon and justified by the stakeholders before the gazettement. That being the case, it is not sufficient for the Respondent to argue that they advertised meetings and proceeded to implement the levy. The Respondent was bound to abide by the terms of the order or file a suitable application in court to review, vary or set it aside. In my view, the existent of a binding court order precluded the Respondent from acting in any manner other than as prescribed in the order. It follows that the decision to gazette or implement the levy in violation of a court order taints the decision rendering it amenable to judicial review.

43. Obedience of court orders is an integral part of the rule of Law without which the administration of justice would be jeopardized. The Rule of law is one of the core values and principles of governance enshrined in Article 10 of the Constitution. The principles in Article 10 bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law, or makes or implements public policy decisions. Put differently, by flouting a court order, the Respondent violated a core value in Article 10, namely, the Rule of Law. It flouted the principle of legality.

44. Public bodies, no matter how well intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law, and has not been arrived at in breach of the law. To the extent that the Respondent acted in total disregard of a court order, the impugned decision is tainted with illegality and *mala fides.* It cannot be allowed to stand. On this ground, this application succeeds.

c. Whether the Respondent violated the provisions of the Statutory Instruments Act

45. The *ex parte* applicant's counsel also submitted that the Respondent did not comply with the provisions of sections 5 and 11 of the Statutory Instruments Act,[25] and, that it failed to respondent to the issues they raised. To fortify his argument, counsel cited *George Sagini v Attorney General & 3 Others*.[26]

46. The Respondent's counsel's submission as understood it was that all the procedures were adhered to and that sufficient public participation was undertaken. To buttress her argument, counsel cited *Republic v County Government of Kiambu ex parte Robert Gakuru & Another*[27] and *In the Matter of the Mui Coal Basin Local Community*.[28]

47. Section **2** of the Statutory Instruments Act[29] and the Standing Orders of the both houses of Parliament define Statutory Instrument as:-

any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

48. Statutory Instruments are prepared by the Cabinet Secretary or a body with powers to make them, e.g. a Commission, authority or a Board. Statutory Instruments must conform to the Constitution, Interpretation and General Provisions Act,[30] The Parent Act, The Statutory Instruments Act[31] in that the Act requires:- **(a)** Consultation with stakeholders, **(b)** preparation of regulatory Impact Statement,[32] preparation of explanation memorandum, tabling of statutory instrument in the House,[33] consideration of the statutory instrument by the National Assembly,[34] Committee on Delegated Legislation.

49. Section **13** of the Act provides for guidelines for the committee. These guidelines focus on the principles of good governance; the Rule of Law and the Committee considers whether the Statutory Instrument conforms with the Constitution; the parent Act or other written laws; whether it infringes the Bill of Rights or contains a matter that ought to be dealt with by an act of Parliament, and whether it contains taxation; directly or indirectly bars the jurisdiction of the Courts; gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; involves expenditure from the Consolidated Fund or other public revenues; is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights liberties or obligations unduly dependent upon non-reviewable decisions; makes rights liberties or obligations unduly dependent insufficiently defined administrative powers; inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to parliamentary scrutiny; and accords to any other reason that the Committee considers fit to examine. The criteria set out in Section **13** is replicated in standing Order number **210 (3)** on the procedure for considering statutory instruments.

50. Section **15 (2)** of the act provides that where the Committee of Delegated Legislation does not table its report within **28** days following the date of referral of the Statutory Instrument or such other period as the House may, by a resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in Section **13.**

51. In my view, the impugned Regulations fall within the ambit of the definition of Statutory Instruments contemplated in section 3 of the act cited above. The Respondent's counsel only addressed the question public participation and said nothing about all the other requirements enumerated in section 13 of the Act discussed above. It is a constitutional and statutory imperative that the above requirements becomplied with before the Rules were operationalized.

52. The impact of the Legal Notice is impose a tax burden upon the applicant's members. Such a burden can only be imposed after a scrupulous adherence to the law.

53. It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it is adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. Courts have the power to declare such legislation invalid. 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 of the court to say so and declare the resulting statute or Regulations or Rules invalid.[35] Accordingly, I find and hold that Legal Notice No. **300** of 2017 was adopted in a manner inconsistent with the constitutional and statutory requirements. The moment violation of the Constitution or breach of a statutory requirement becomes evident as in this case, the rebuttable presumption of constitutionality of a statute ceases to operate.

Disposition

54. In view of my analysis and conclusions herein above, I find and hold that the *ex parte* applicants Notice of Motion dated 22nd May 2018 succeeds. Accordingly, I make the following orders:-

> *a. An order of **Certiorari** be and is hereby issued quashing the Respondents decision contained in Legal Notice Number 300 of 2017, published on 26th January 2018 in Kenya Gazette Vol. CXX-No. 11. Imposing cess on the members of the applicant's leather goods destined for export.*
>
> *b. An order of prohibition do and is hereby issued directed to the Respondent restraining the Respondent from imposing and collecting cess from the ex parte applicant's leather products destined for export.*
>
> *c. Each party shall bear the costs of this suit.*

Signed and Dated at Nairobi this **20th** day of **May** 2019

John M. Mativo

Judge