REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

PETITION NO. 2 OF 2019

IN THE MATTER OF: ARTICLES 22, 23, 40(1), (3), AND 7(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 40 (1) (3), 191(2) (3), 199(1), 201, AND (5) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

TATA CHEMICALS MAGADI LIMITED ..... PETITIONER

VERSUS

COUNTY GOVERNMENT OF KAJIADO .....1ST RESPONDENT

THE HON. ATTORNEY GENERAL .....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE..... 3RD RESPONDENT

JUDGEMENT

Introduction

1. The Petitioner is a limited liability company duly incorporated in accordance with the provisions of the Companies Act (Cap 486 of the Laws of Kenya) (Repealed). It is involved, inter alia, with the manufacture of soda ash.

2. The First Respondent is the County Government of Kajiado established under Article 176 of the Constitution of Kenya.

3. The Second Respondent is a Constitutional Office established under Article 156 of the Constitution of Kenya 2010 and the Principal Legal Adviser to the government.

4. The Third Respondent is a Constitutional Office established under Article 245 of the Constitution of Kenya 2010 and exercises independent command over the National Police Service and is further responsible for all matters relating to the command and discipline of the Service.

5. The Petitioner filed a Petition dated 22nd January 2019 and an affidavit sworn by Titus Naikuni on the same day. Contemporaneously, the Petitioner filed a Certificate of urgency, Notice of Motion and supporting affidavit of Titus Naikuni seeking conservatory orders pending the hearing and determination of the Application as well as the Petition.

6. By an Order dated 24th January 2019, this court certified the matter urgent, directed that the respondents be served and scheduled an inter partes hearing for 25th January 2019. The court further ordered that together with the affidavit evidence parties do file brief written submissions on legal perspectives of the matter touching on matters arising on the notice of motion and that during inter-parties hearing the key issues on the claim be subject matter of highlighting by the parties.

7. Pursuant to a consent order issued on the 25th January 2019 and dated 29th January 2019, it was agreed inter alia that the Respondents' shall not close or lock the Petitioner's premises and all business pending the hearing of the application dated 19/1/19 and filled on 22/1/2019 and that the interim conservatory orders remain in place.

8. On 31st January 2019, the court issued further conservatory orders barring the 1st and 3rd Respondents and their agents and/or assigns from trespassing or inter alia interfering with the Petitioner's premises, factories, gates and properties pending the hearing and determination of the instant petition. The court by its order further restrained the 1st Respondent from demanding land rates and royalties in the sum of Ksh. 17,448,485,646/- or any other sum pending the hearing and determination of the instant petition. The conservatory orders extended to and prohibited the 1st Respondent from constructing, occupying or taking possession of any portion of the 1st Respondent's properties or launching any project thereon pending the hearing and determination of the instant petition.

9. By an order issued on 5th February, 2019 and dated 11th February 2019, the court directed the Deputy Registrar do visit the site on 6th February 2019, prepare and file a report on or before 11th February 2019. It was further ordered that for the other issues of collection of rates or levies the conservatory orders granted by this court inter-partes on 25th January 2019 shall remain in place and that the interim conservatory orders of injunction issued addressing matters of entry into the property on the site specifically identified to put up the administration offices for the Respondents or other issues of collection of rates or levies be and are hereby extended pending inter-partes hearing. Partied were directed to file written submissions on the Petition.

10. The 1st Respondent through its County Secretary Francis Sakuda responded to the Petition by an affidavit sworn on the 8th February 2019 and filed in court on the 11th February 2019.

11. On 15th February 2019, the Petitioner filed a further affidavit sworn by Angela Lebu Onyango, the Petitioner's head of legal compliance, on the same day.

12. The Petitioner went on to file its written submissions dated 21st February 2019 on that day.

13. By an Application dated 26th February, 2019 and filed on even date, Lydiah Ndirangu, State Counsel, sought to strike out the suit against the 2nd and 3rd Respondents on the basis that it did not disclose any reasonable cause of action against the 2nd and 3rd Respondent. Upon hearing of the said Application, it was agreed by consent that the 2nd and 3rd Respondents be struck out from the suit.

14. Having laid out the background to the petition, I now turn to the substance of the case by laying out the facts as presented by the contesting parties and highlighting the import of their respective submissions.

The Petitioner's Case

15. The Petitioner averred that pursuant to a Lease dated 20th March 1928 and a Further Lease dated 9th December 2004, it was granted by the Government of the Republic of Kenya a lease of two parcels of land known as Land Reference Numbers 1026/R and 3867 situate at Lake Magadi and Lake Natron in Kajiado County. This was together with the Magadi Deposit and together with full free and uninterrupted right for the Petitioner, its servants and officers and workmen to search for, dig, get, win and carry away all the Magadi Deposit and for any other purposes of the demised premises.

16. According to the Petitioner, in the year 2000 the 1st Respondent's predecessor, the County Council of Olkejuado, tried to levy cess on soda ash at Ksh 15 per tonne the legality of which was challenged by the Petitioner. The County Council was made aware by the Commissioner of Mines and Geology that pursuant to the provisions of the Mining Act, Cap 306 of the Laws of Kenya (now repealed), it could not levy any fees or charges on soda ash or any other minerals falling purview of the mining Act. The County Council was also informed that levying additional charges or fees would adversely affect the viability of the company's operations and must therefore be implemented under carefully considered and appropriate legal framework. Further, it was posited that this position was retained by Section 12 of the Mining Act, 2016.

17. The Petitioner averred that on 24th February 2004, the Olkejuado County Council entered into an Agreement resolving disputes between the parties concerning land rates and the levying of rates by the Council in respect of the premises. Pursuant to clause 4.2 of the said Agreement, the Petitioner was to pay an amount equivalent to the industrial rate of Ksh 50/- per acre on an area of 50,000 acres less the area of 14,031 acres on which it was already paying industrial rates from the date of the Agreement.

18. It was posited that in subsequent engagements and meetings between the Olkejuado County Council and thereafter the 1st Respondent, it was agreed in 2014 that the Petitioner would be paying land rates to the First Respondent at the rate of Ksh 120/- per acre and that the Petitioner who was going through financial challenges leading to the shutdown of one of its factory and retrenchment of some employees would clear 50% of the 2013 land rates arrears by February 2015 and the balance in March 2015.

19. It was the Petitioner's case that the 1st Respondent herein enacted the Kajiado County Finance Bills 2013/2014, 2015/2016, 16/2017 and 2017/2018 **(the "Finance Bills")** which purported to increase land rates to Ksh 11,000- per acre and Ksh 14,000/- per acre respectively, an exponential increase in rates which was untenable and unsustainable as the Petitioner had been operating with negative net worth and had been kept going by line of credit through a scheduled debt amortization of USD11 Million from the parent company, which was due for refinancing on 17th January 2019. It was averred that the Kajiado County Finance Bill 2018/2019, which purports to prescribe land rates at Ksh. 2,000 per acre is unreasonable and fails to meet legitimate expectation.

20. Per the Petitioner, pursuant to sections 3 and 12 of the Rating Act, the purpose of levying rates is for the rating authority to meet liabilities falling to the discharged out of the general rate fund and the rating authority has a duty to ensure equitable distribution of rates which the 1st Respondent had failed and neglected to do. Further the 1st Respondent had not based its rate on any valuation and any values entered in the valuation roll as required under section 3 of the Valuation for Rating Act. The Petitioner has been providing most of the services to the community in Magadi including provision of water, schools, infrastructural development, health, social infrastructure among

others that ought to be rendered by the 1st Respondent out of the general fund.

21. It was posited that the Finance Bills had to date not been published in the Kenya Gazette and could not take effect before such publication pursuant to the mandatory provisions of Article 199 (1) of the Constitution. As such, the collection of any rates, levies, fees and any taxation under the Acts is and was unconstitutional and of no legal effect.

22. The Petitioner went on to aver that by a letter dated 14th February 2018, the 1st Respondent issued demands to the Petitioner to pay alleged land rates and royalties for the period 2013-2018 amounting to Ksh Ksh17,448.485,646/-. In response, by a letter dated 12th March 2018 the petitioner drew the attention of the 1st Respondent to the fact that the Petitioner had over the years enjoyed a harmonious partnership with the County in many areas including economic, social and infrastructural development for the mutual benefit of the local community, the County and the National Government. It further drew the attention of the First Respondent to the fact that the Petitioner had continued to fulfil its obligations to both the National and County Government by paying the rates and royalties as agreed by the parties. The Petitioner thereafter agreed to clear outstanding land rates at the agreed rate of Ksh 120/- per acre, in the sum of Ksh 20,325,130/- by June 2018. The Petitioner posited that it had paid the land rates for the period up to and including June 2018 based on the agreed rate of Ksh 120/- per acre. Further that the third quarter (July to September) 2018 was to be paid in January 2019 and fourth quarter (October to December) 2018 to be paid in March 2019 as per the Petitioner's payment plan.

23. The Petitioner next pointed out that the appointment of a debt collection agent by the name Regional Business Connection to purportedly verify, enforce and ensure that all debts payable to the County in form or rent, rates, cess, loyalties, licences among others are paid by a letter dated 13th November 2018 was illegal and of no legal effect for want of compliance with the provisions of the Public Procurement and Asset Disposal Act.

24. According to the Petitioner, by letters dated 12th and 19th December 2018, the 1st Respondent's purported agent, Regional Business Connection, demanded payment of the alleged outstanding land rates and royalties for the year 2013-2018 in the sum of Ksh 17,448,485,646/- while acknowledging that the amount it was demanding was disputed.

25. In addition to the demands for rates, it was the Petitioner contention that the 1st Respondent was also purporting to impose and demand royalties on soda ash at the rate of Ksh 100- per tonne through its Finance Act 2018/2019 in breach of the Constitution of Kenya, 2010, Section 12 of The Mining Act, 2016 and Clause 4 of the Lease which provide that royalties are payable to the National Government.

26. It was averred that the Petitioner by letters dated 24th September 2018 and 19th December 2018, wrote to the 1st Respondent reminding it that the Petitioner had out of good faith been paying royalties to it as a result of the 2015 negotiations and agreement, notwithstanding that the Mining Act, 2016 stipulated that royalties are payable to the National Government and that the rates stipulated in the Finance Bills would make the Petitioner's business unsustainable. Further that the Petitioner had paid all outstanding rates owed to the 1st Respondent and submitted proof of all relevant payment advices.

27. The Petitioner was further of the view that under Article 209(3) of the Constitution, the 1st Respondent could only levy property rates, entertainment taxes, and any other taxes that its authorized to impose by an Act of Parliament and that there was no such Act in existence to warrant the imposition of royalties on minerals by the County Government. Hence, the said imposition was unconstitutional.

28. According to the Petitioner, Article 191 of the Constitution provides that in the event of any conflict between national laws and county laws, national legislation would prevail if it applies uniformly throughout Kenya and prevents the unreasonable action by a county that would impede be prejudicial to the economic interest of the country or the implementation of national economic policy. Further that one of the objectives of the Mining Act, 2016 and the Rating Act is to have uniformity in the taxation for all minerals and equity in rating.

29. It was the Petitioner's case that on 11th January 2019, the 1st Respondent illegally and without any court order trespassed on the Petitioner's premises and shut down the premises and the operations therein by locking the gates and stationing security personnel and police officers to secure the gates in the name of enforcing payment of its demands for the disputed sum of Ksh. 17,448,485,646/- for alleged arrears of land rates and royalties. On the same date, the Petitioner wrote to the 1st Respondent objecting to the illegal closure of its Premises and requested for the immediate opening of the same to enable the Petitioner continue with its business operations uninterrupted. Despite many pleas and an agreement being reached that the 1st Respondent would immediately reopen the premises, the 1st Respondent sent its security personnel to trespass and occupy the Petitioner's premises during the day and police officers at night to enforce the shutdown of the Petitioner's operations on account of the disputed and illegal debt. As a result of these actions, the Petitioner claimed that on 13th January 2019, it was forced to shut down one calciner as it could not transport fuel for the running of the factory which operates on a 24 hour basis and only one calciner was in operation and it could not last long in the circumstances. According to the Petitioner, it suffered revenue loss to the business from the shutdown of operations exceeding Ksh. 24,221,334 daily and Ksh. 726,640,017 monthly. The Petitioner averred that it was required to supply and transport soda ash to the port of Mombasa for loading and export by ships, which it could not do if the 1st Respondent's illegal actions of shutting down the Petitioner's premises were to take place again. The Petitioner intimated that it would suffer heavy penalties for failure to supply the soda ash.

30. It was stated that the 1st Respondent opened the gates to the Petitioner's premises on the morning of 14th January 2019. Further, it acknowledged the illegal closure of the Petitioner's premises and affirmed that it had authorized the Debt collector to open the premises pending a scheduled meeting on 22nd January 2019 with the Governor, with the condition that the Petitioner forwards a valid agreement or presents a payment plan for the disputed sum of Ksh17,448,485,646/-.

31. The Petitioner contended that it wrote to the First Respondent on 16th January 2019, requesting for confirmation of the meeting time with the Governor, in attempt to discuss for mutual settlement of the outstanding issues between the Petitioner and the 1" Respondent. It was further averred that on 17th January 2019, in a bid to incite the community living in the area against the Petitioner, the Governor of the 1st

Respondent Honourable Joseph Ole Lenku visited Magadi Township, the Petitioner's premises and held a public forum with the residents of the area. The Governor publicly issued threats directed towards the Petitioner and in particular to exercise intrusion into the area owned by the Petitioner, to close down the Petitioner's premises in Kajiado and Magadi respectively and closure of the source of water abstraction for the Petitioner, if the Petitioner failed to provide a payment plan for the disputed sum of Ksh17, 448,485,646/- during the meeting scheduled for 22nd January 2019.

32. If the Petitioner is to be believed, there still was an imminent threat and the Petitioner was reasonably apprehensive that it would suffer irreparable loss, harm and damage if the 1st Respondent would again trespass on the Petitioner's premises, lock the gates and station security personnel and police officers with a view to shut down the Petitioner's premises and the operations therein in the name of enforcing payment of illegal demands for the disputed Ksh17, 448,485,646- .

33. The Petitioner contended that it was an abuse of office for police officers who are under the command and control of the 3rd Respondent and who are supposed to ensure law and order to all the citizens to be used in an illegal operation to oppress the Petitioner and violate its constitutional rights by shutting down the Petitioner's premises and operations on account of a dispute debt between the Petitioner and the First Respondent.

34. In closing, the line of argument advanced by the Petitioner was that the 1st and 3rd Respondent's actions of trespassing on and purporting to shut down the Petitioner's premises and operations had occasioned great loss, damage and embarrassment to the Petitioner and amounted to illegal trespassing and unauthorised interference with the Petitioner's properties and was a violation of the Petitioner's constitutional rights. Further, the imposition of royalties on soda ash was contrary to Articles 201 and 209(5) of the Constitution.

35. Banking on the foregoing grounds, the Petitioner prayed for orders that:

a. This Honourable Court be pleased to declare that Kajiado County Finance Bills 2013/2014, 2015/2016, 2016/2017 and 2017/2018 were enacted contrary to the provisions of Articles 201, 209(3) and 209(5) of the Constitution and are therefore null and void;

b. This Honourable Court be pleased to declare that the Kajiado County Finance Bills 2013/2014, 2015/2016, 2016/2017 and 2017/2018 were enacted contrary to the provisions of Article 196 and 201 of the Constitution and Section 115 of the County Government Act and are therefore mull and void;

c. This Honourable Court be pleased to grant an order of prohibition to prohibit the First and Third Respondents by themselves or their servants, agents, and or assigns from trespassing, entering, remaining on, closing, locking, blocking or in any other manner whatsoever and howsoever interfering with the Petitioners premises, factories, gates and properties situated in Kajiado and Magadi in the County of Kajiado;

d. This Honourable Court be pleased to declare that any and all provisions of the Kajiado County Finance Acts in so far as they provide for the levying of royalties on soda minerals and in particular soda ash, by Kajiado County are null and void for being contrary to Article 191 (2) and (3) of the Constitution;

e. This Honourable Court be pleased to quash the decisions and demands of the First Respondent contained in the letters dated 14th February 2018 and the demands made by the First Respondent's agent in the letters dates 12th December 2018 and 19th December 2018 directing the Petitioner to remit Ksh 17,448,485,646- to the First Respondent on account of the alleged arrears of land rates and royalties;

f. This Honourable Court be pleased to grant an order of prohibition to prohibit the First Respondent by itself or its servants, agents, and or assigns from levying royalties on soda ash by the Kajiado County Finance Acts;

g. This Honourable Court be pleased to grant a permanent injunction restraining the First Respondent by itself or its servants, agents, and or assigns from demanding and collecting the sum of Ksh 17,448,485,646/-or any other amounts in respect of the alleged arrears of land rates and royalties for the period between 2013-2018 from the Petitioner;

h. This Honourable Court be pleased to grant an order for general and punitive damages against the First and Third Respondent arising from loss of production due to their acts of shutting down and paralysing the Petitioner's operations from 11th January 2019;

i. Such other orders as this Honourable Court shall deem just; and

j. Costs of this Petition.

The 1st Respondent's Case

36. As stated, the 1st Respondent's case was present through an affidavit sworn by Francis Sakuda. The point of departure was that It was within the remit of the County Assembly of Kajiado to make laws that, inter alia, are necessary for or incidental to the effective performance of the functions and exercise of the powers of the County Government as well as to provide for the revenue raising measures for the County.

37. The 1st Respondent admitted to the existence of the Agreement dated 24th February 2004, between the Petitioner and the now defunct

Olkejuado County Council. It averred that the parties entered into an agreement for payment of royalties and rates by the Petitioner to the then County Council in respect of its properties in Kajiado, after a dispute arose between the Parties therein concerning the levying of rates by the Council in respect of the premises.

38. According to the 1st Respondent, it was a term of the Agreement that:

> *"a) Under Clause 1.1, the Company and the County Council agree that the Court Case on Cess be settled on the basis of a Consent Judgement marking the Court Case as settled with no order as to costs and such consent shall be signed simultaneously with this agreement on behalf of the parties by their respective advocates on record, namely Kaplan & Stratton, Advocates for the Company and Kantai and Company, Advocates for the County Council. Such consent shall thereafter be filed in the High Court by Kaplan & Stratton.*
>
> *b) Under Clause 1.2, the County Council resolved that the company shall be exempt from the Gazette Notice relating to the Cess to be imposed against the Company*
>
> *c) Under Clause 1.3, the Company and the County Council agreed that the County Council will not levy any future rates, taxes, cesses, penalties or any other kind of charge against the Company other than a specifically provided in this Agreement and as provided by the Laws of Kenya*
>
> *d) Under clause 4.1; the Company intended to review its land requirements over the next two years with a view to agreeing with the County Council a process for releasing or transferring such portion or portions of the premises as may be agreed with the County Council from time to time to Shompole Group Ranch, Olkiramatian Group Ranch, Olkeri Group Ranch and Oldonyonyokie Group Ranch (together the "Group Ranches) located in the Magadi area.*
>
> *e) Under Clause 4.2, until such time that the Company released its land to the Group Ranches, it shall commence paying from the date of the agreement an amount equivalent to the industrial area (Shs. 50= per acre) on an area of 50,000 acres (which shall include the Railway) less the area of 14,031 acres (on which the company already pays industrial rates).*
>
> *f) Under Clause 4.3, in the event that the Company did not review and determine its land requirements in the next two years the rates payable on the Premises and the Railway shall be deemed to be at an industrial rate.*
>
> *g) Under Clause 5.1, the Company agreed that the rates to be charged by the County Council under the Rating Act (Cap 267) on the land to be retained by the Company in respect of the Premises and the Railway shall be on the basis that it is deemed to be land not used for agricultural or residential purposes being an industrial rate as defined in Section 5 of the Rating Act (Cap 267 of the Laws of Kenya).*
>
> *h) Under Clause 7.1, the agreement did not in any way negate the obligations and responsibilities that the Company has under its community social responsibility program.*
>
> *i) Under Clause 8.2, all claims and disputes whatsoever arising under the agreement shall be referred by either party to arbitration in accordance with the provisions of the Arbitration Act, 1995 to an arbitrator to be appointed by agreement between the parties or, failing agreement, within 14 days of the notification by either party to the other of the existence of a dispute or claim to be appointed by the Chairman for the time being of The Chartered Institute of Arbitrators, Kenya Branch, Nairobi on the application of either party."*

39. On the basis of the foregoing, the 1st Respondent contended that it was therefore unequivocal as per the Agreement between the Petitioner and the 1st Respondent that the Petitioner's Properties comprising a total of 224,991 Acres are a rateable Property in terms of the relevant provisions of the law; and as per Clause 1.3 of the Agreement, any future rates, taxes cesses and penalties or any other kind of charge against the Petitioner shall be levied as provided for in the Agreement and the Laws of Kenya. According to the 1st Respondent, in breach of the Clause 4 of the Agreement, the Petitioner did not release any land that was not required to the Group Ranches and therefore remained with the entire 224,991 Acres.

40. It was further contended by the 1st Respondent that the provisions of the Agreement that provided for payment of rates and royalties by the Petitioner and the future taxes by the County Council as per the Agreement and laws of Kenya was meant to allow the County Council to charge the same without limitation and allow flexibility and uniformity of charges amongst all the rates payers in the County Council.

41. Furthermore, the 1st Respondent averred that despite numerous requests and demands by it, the Petitioner in breach of the Agreement, persistently delayed, defaulted, failed and/or refused to pay the rates and royalties. The First Respondent's requests and demands for the same were often met with a wide range of implausible excuses from the Petitioner.

42. It was further contended that under Clause 2 of the Agreement, the Petitioner was also required to furnish the First Respondent with a certificate certifying the number of metric tonnes of Soda Ash and all types of salts sold to by the Company in the preceding year to enable the County Council to confirm its due payments from royalties. In default of the provision of the certificates, the accuracy of the payments of royalties could not be verified by the County Council and the subsequent County Government to ascertain gross receipts from sale of products.

43. It was contended that the Petitioner's deposition on the issue of rates reflected the Petitioner's deliberate misapprehension of the terms of Agreement. Contrary to the Petitioner's deposition, the Agreement allowed the First Respondent to charge levies as per the Laws of Kenya. Since the Petitioner's properties are rateable, the First Respondent is mandated by the laws to charge rates for the same. The rates demanded

by the First Respondent were legal and not actuated by any ill will, ulterior motive or malice.

44. The 1st Respondent further averred that in exercise of the powers conferred by **Section 5 (1) (a) of the Rating Act Cap 267**, the County Council of Olkejuado did, with the approval of the Minister of Local Government by Gazette Notice No. 15416 of 2nd December 2011, impose new industrial land rates with effect from 16th June 2008. As per the Gazette Notice, the Petitioner was bound to pay Kshs. 5000/= per Acre. **Section 5 (1) (a)** provides:

> *"5. Alternative methods of area rating*
>
> *(1) Subject to subsection (2) of this section, the rating authority may, with the approval of the Minister, adopt one or more of the following methods of rating—*
>
> *(a) A flat rate upon the area of land;*
>
> *(b) A graduated rate upon the area of land;*
>
> *(c) a differential flat rate or a differential graduated rate upon the area of land according to the use to which the land is put, or capable of being put, or for which it is reserved;*
>
> *(d) An industrial rate upon the area of land used for other than agricultural or residential purposes;*
>
> *(e) A residential rate upon the area of land used for residential purposes;*
>
> *(f) Such other method of rating upon the area of land or buildings or other immovable property as the rating authority may resolve, and a rate levied in accordance with any such method as aforesaid shall in this Act be known as an area rate."*

45. It was further averred that in the year 2014, the first Respondent, as was required of it by the law enacted the Kajiado County Finance Act, Act No. 1 of 2014 to provide for the revenue raising measures of the County Government of Kajiado. Under the said Act, industrial rates for mining companies was fixed at Kshs. 14,000/= per Acre for companies owning more than 11 Acres of land

46. In the Premises, it was the 1st Respondent's contention that it had the constitutional and statutory mandate to collect rates on all rateable properties in the County and parties cannot waive that obligation. Further that after taking into consideration what had been paid by the Petitioner, the current amount due was Kshs. 18,380,131,186/-

47. In response to the allegation by the Petitioner that the 1st Respondent had also demanded royalties from it, the 1st Respondent averred that this was either a deliberate or reckless falsehood under oath.

48. The First Respondent went on to aver that the County Assembly of Kajiado prepared and passed the Kajiado County Finance Act, 2014. The said Act was gazetted as is required by the law. Further that before the enactment of the Bill and its eventual Gazettement, there was public participation. It was contended that the Petitioner participated by filing Memorandum in the County Assembly in opposition to the proposed rates and royalties. The allegation therefore that the Act was not gazetted was without any basis.

49. It was averred that since the subsequent Finance Bills had not been gazetted, the 2014 Finance Act was still applicable until another Finance Act is gazetted and further the Petitioner had failed to state which particular section of the Bills/Acts that offended it. As such, it was contended that the allegations that the Finance Bills were unconstitutional are preposterous and without any basis.

50. According to the 1st Respondent, if the Petitioner took issue with Regional Business Connection, the debt collection agent, the first port of call ought to have been the Public Procurement Administrative Review Board as this Honourable Court had no jurisdiction to determine issues of procurement. In any event, contended the 1st Respondent, Regional Business Collection, were not parties to this matter and therefore it would be contrary to the law to make any orders against them.

51. It was the 1st Respondent's case that the Petition and the entire proceedings herein had been filed in contravention of the mandatory provisions of the arbitration clause, in Clause 8.2 of the Agreement between the Petitioner and the 1st Respondent. That the Petition and the entire proceedings herein were an affront to the constitutional mandate of the 1st Respondent with regard to raising revenue through the Kajiado County Finance Act, Act No. 1 of 2014, the enabling statute.

52. Furthermore, it was averred that the Petition and the entire proceedings were res judicata in view of the decisions of this Court in **Kajiado Judicial Review Case No. 13 of 2016 Anne Wanjiru Kingori & Others vs The Kajiado County Assembly & Others** and **Kajiado Constitutional Petition No. 3 of 2015 Lucy Wanjiru & Another Vs The Attorney General & Another**

53. In closing, it was averred that the allegations in the Petition were unfounded and without basis and that the same were mischievous, malicious, misconceived and purely calculated to attract public sympathy by a perennial defaulter on payments of rates and other charges to the 1st Respondent. As such, the Petition ought to be dismissed with costs.

The Petitioner's Rejoinder

54. The Head of Legal Compliance for the Petitioner swore an affidavit in answer to the 1st Respondent's averments. She averred that the provisions of Article 209(5) of the Constitution were 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 which is what the 1st Respondent was doing when it had shut down the Petitioner's premises and operations on 11th January 2019 without any Court order leading to revenue losses of KES 24,221,334/- per day for a full three days, before the premises were opened. Further that the 1st Respondent had on 11th February 2019 ordered the closure of the Petitioner's Kajiado town depot contrary to court orders issued on the same day.

55. The Petitioner noted the admission by the 1st Respondent that it could only impose "any other tax that it is authorized to impose by an Act Parliament" as provided under Article 209 (3) (c). The 1st Respondent was therefore not permitted to levy the taxes known as "Royalties" and "quarry Chips" as it had been purporting to charge the Petitioner.

56. According to the Petitioner, 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.

57. It was noted that the demand for purported rates and royalties arrears totalling KES 17,448,485,646/ captured in the 1st Respondent's letter of 14th February 2018 was based on the 2013/2014, 2015/16, 2016/2017 and 2017/2018 Kajiado County Finance Legislation. Further that the 1st Respondent's collection agent's demand letter dated 19th December 2018 from Regional Business Connection claiming the same amount of KES 17,448,485,646 from the Petitioner, confirmed that the Petitioner ought to have familiarized itself with the contents of the various Finance Bills in operation in Kajiado County from 2013 to date on which the County had based its claim.

58. Additionally, it was averred that the 1st Respondent had admitted at Paragraph 20(ii) of its own Affidavit of Francis Sakuda that the Kajiado County Finance Act 2014 was the only County Finance legislation that had ever been gazetted. The said Act in itself is used to create or justify a legal obligation to pay tax, fees and charges yet as a matter of law should contain the amendments to legislation required to give effect to a County Government's revenue raising measures thus automatically rendering any claims under 2013/2014, 2015/16, 2016/2017 and 2017/2018 Kajiado County Finance Legislation a nullity.

59. The Petitioner went on to note that at page 184 of the 1st Respondent's Exhibits to the Affidavit of Francis Sakuda, the CEC for Finance had designated 1st January 2015 as the date when the Kajiado County Finance Act 2014 would come into operation, thus rendering a nullity any claim under the Act arising during the period 2013/2014. In the result, according to the Petitioner, there was not a coin payable under the demand letters issued to the Petitioner by the 1st Respondent and its agents.

60. The Petitioner averred that it had constructed and maintained various facilities of a public nature free of charge within its Magadi town property. It was further contended that within its land, the Petitioner also had extensive infrastructure used extensively by the public.

61. It was further deponed that the Petitioner owned, maintained and operated a railway line from Magadi town to Konza which is 146 km and is used for transportation of the public, at a very subsidized rate as there was no other means of transport on the route. The railway also carries water tanks for free water distribution to the community twice a week. The Petitioner had recently procured two passenger coaches from Kenya Railways at a rate of 23 million and the same had been commissioned by the 1st Respondent for public use on 19th June 2018.

62. According to the Petitioner, the 1st Respondent does not provide a single service and owns absolutely no assets within the Petitioner's property. It was the Petitioner through its elaborate Corporate Social Responsibility programmes that provided education, water, health, infrastructure, environmental and skills development. It was averred that in 2018 Financial Year, the Petitioner offered over Ksh. 276,000,000/- in both direct and indirect costs to the community related activities.

63. It was reiterated that pursuant to Article 209(5) of the Constitution, 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. Thus, even if Rates were payable to the 1st Respondent, which according to the Petitioner they were not, it was inconceivable that the Petitioner could be condemned to pay Rates over a vast area of land solely occupied and utilized for public purposes over which the Petitioner does not derive a benefit. For the avoidance of doubt, the Petitioner intimated that it had in the past made payments to the 1st Respondent, without any obligation to do so, in respect of Rates and Royalties, totalling KES 185, 877, 651/-.

64. It was the Petitioner's averment that from the Further Lease issued to the Petitioner and dated 9th December 2004 the Petitioner's properties were not rateable as the Further Lease was issued by the Government of Kenya to the Petitioner and not by the 1st Respondent. Further, that the Further Lease was registered in the Lands Office in Nairobi and not in the lands offices of the 1st Respondent. Additionally, the Further Lease stipulated that the royalties and land rents were payable to the National Government. It did not provide for payment of any Rates whatsoever and the 1st Respondent had not demonstrated the existence of a Valuation Roll which extended to the Petitioner's properties.

65. It was posited that the Further Lease expressly allowed the Petitioner full free and uninterrupted rights to search and carry away the Magadi Deposit with access to the Guaso Nyiro for water for purposes of their operations and for any other purposes. The Further Lease expressly allowed the Petitioner to do all things it deemed necessary to work the Magadi Deposit and to construct any work ships, buildings, stores, appliances, reservoirs, water races, roads, tramways, railways, canals, as necessary or convenient,

66. The Petitioner maintained that the only remedy of the 1st Respondent, was to wait for the Further Lease to expire on 1st November 2053, where after new terms may be negotiated with all parties including the 1st Respondent and the National Government.

67. Per the Petitioner, the imposition of extortionate Rates by the 1st Respondent amounted to double taxation, in a situation where the 1st Respondent does not provide a single service or offer value to the Petitioner and is not only in breach of the principles of public participation as contemplated under the Constitution and the County Government Act 2012, but also violates the Petitioner's constitutional rights to equal protection of law, property and fair administrative action under Articles 27, 40 and 47 of the Constitution.

68. It was averred that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. According to the Petitioner, it behoved the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively; and the concerns of different sectors of the constituents should be taken into account in formulating a legislation.

69. The Petitioner averred that the impugned County Finance legislation was not the law that enabled the setting up of Rates payable, and it could not exist without the County Rating Act, which was neither gazetted nor provided by the 1st Respondent. According to the Petitioner, up to 30th September 2019 it was proper legal and constitutionally permissible for the County Government of Kajiado to rely on existing National Legislation to impose rates and the existing Valuation Rolls. However the Constitution did not envisage the usage of National Legislation by a County Government would be infinite and therefore each County Government was to pass its own legislation on the issue.

70. It was averred that only the National Land Commission under Article 67(2) (g) had jurisdiction to assess tax on land and premiums on immovable property in any area designated by law and not the 1st Respondent. The 1st Respondent's attempts to assess the Rates payable was thus ultra vires, illegal and unconstitutional.

71. Finally, it was averred that the 1st Respondent had already submitted to the jurisdiction of the Court and as such any allegation that the dispute ought to have been forwarded for arbitration was not feasible.

The Petitioner's Submissions

72. The Firm of Walker Kontos filed submissions on behalf of the Petitioner. The following issues for determination were identified:

a. Whether the Petitioner's Properties were rateable

b. Whether there had been compliance with the Valuation for Rating Act

c. Whether the Petitioner had previously paid any rates to the County Government

d. Whether royalties were payable under the Kajiado County Finance Act 2014 and the Petitioner's claim of double taxation

e. Whether the current Kajiado Finance Act covered the Petitioner's Properties

f. Whether the rates demand covered the Petitioner's properties

g. Whether the rates demand was in breach of the Rating Act

h. Whether the rates demand was in breach of Section 161 of the Public Finance Management Act

i. Whether the requirement of sufficient public participation and consultation was achieved to the standard required by law

j. The role played by the Petitioner in Corporate Social Responsibilities and its impact on the question of rates

k. Whether the court should grant Prohibition and Injunction Orders sought by the Petitioner

l. Whether the court should grant general and punitive damages against the 1st Respondent arising from the loss of production during the period of illegal shutdown from 11th January for 3 days.

73. It was submitted that the terms of the Initial Lease and the Further Lease dated 9th December 2004 contained very express language that the Petitioner would be paying the applicable royalties and land rents to the National Government of the Republic of Kenya. Further that the rates demand claim tendered by the 1st Respondent was not provided for in the further lease and must be construed to be a breach and fetter of the terms of the Further Lease granted to the Petitioner.

74. It was further submitted that the Petitioner rendered extensive services, including basic services like water, health and transport services as well as extensive infrastructural developments in the county of Kajiado to the exclusion of the 1st Respondent. As such no rates were payable in respect of its properties.

75. Counsels for the Petitioner further submitted that pursuant to Article 67(2) (g) of the Constitution, only the National Land Commission has jurisdiction to assess tax on land and premiums on immovable property in any area designated by law and not the 1st Respondent. The 1st Respondent's attempts to assess the Rates payable and demand payment were ultra vires, illegal and unconstitutional. Reliance was placed on **In the matter of the National Land Commission [2015] eKLR**. The court was therefore urged to grant Prayers E and G of the Petition dated 22nd January 2019.

76. It was submitted that the rest of the Petitioner's properties were not used for mining and could not be categorized as industrial property therefore the attempt by the 1st Respondent to condemn the Petitioners to pay Rates of KES 14,000 per acre on 224,911 acres without any distinction as to the use of the entire property, was not only malicious but untenable.

77. The Petitioner's advocates submitted that the demand for payment of Rates by the 1st Respondent from the Petitioner, where the Petitioner had already paid Land Rents and Royalties for the same parcels of land, must be must be deemed as a double taxation as the Petitioners are being compelled to pay charges twice for the same properties to the two levels of government and it would amount to double taxation, in the strict sense of the words as defined by Black's Law Dictionary, 8th ed. (2004) as "the imposition of two taxes on the same property during the same period and for the same taxing purpose."

78. It was submitted that the Petitioner's lands were not rateable and the 1st Respondent had absolutely no jurisdiction in respect of the said properties in so far as Rates and Royalties were concerned on account of the vast majority of the Petitioners property falling under Lake Magadi and Natron, the fact that Salt and Soda Ash was mined on this property and the fact that the Petitioners property included a 146km railway line and its attendant facilities buildings and structures. This rendered the Petitioners property public land as defined under Article 62(1)(f) which land vested in the National Government in trust for the People pursuant to Article 62(3). Reliance was placed on **County Government of Kwale v Kenya Airports Authority [2017] eKLR.**

79. It was further submitted that, Section 2 of the Valuation for Rating Act defined "rateable property" to exclude public land. Section 27(1) of the same Act excluded from valuation for rates areas with wildlife, an exclusion which the Petitioner contended applied to it on account of the wildlife to be found on its property.

80. According to Counsel for the Petitioner, having established that Petitioner's land is by far and large a lake and further holds minerals which by law constitutes public land under Article 62(1) of the Constitution and further taking into account the multiple public facilities put up by the Petitioner on the properties serving public purposes including schools, hospitals, churches, playing fields, police stations and so on, and further considering the provisions of Sections 2 and 27(1) of the Valuation for Rating Act, the inescapable conclusion must be that the Petitioner's properties are not rateable.

81. It was submitted that there had been no compliance with Sections 3 and 16(5) of the Valuation for Rating Act on account of no notice having been given to date by the 1st Respondent to the Petitioner and no notice has been published in the Kenya gazette, of the intention to increase any rates, including from KES 100 to KES 14,000 or otherwise howsoever.

82. While placing reliance on **Base Titanium Limited v The County Government of Mombasa & Another 12017] eKLR**, it was submitted that the Petitioner was able to demonstrate that the imposition of the impugned Rates and Royalties would be catastrophic to the very existence of the Petitioner, and constituted clear prejudice to the national economic policies, economic activities across county boundaries and the national mobility of goods, services, capital or labour contrary to the provisions of **Article 209(5) of the Constitution.** Citing excerpts from a Memorandum on the Impact of the Proposed Draft County Finance Bill 2013 on Tata Chemicals Magadi Limited, it was asserted that the 1st Respondent's action of raising the rates payable would result in the immediate collapse of the Petitioner Company.

83. On whether the Petitioner had previously paid any Rates to the County Government, it was submitted that whereas the initial Lease and the Further Lease did not make any provision for payment of Rates, the Petitioner had in the past made payment of Rates without any obligation to do so to the former Olkejuado County Council under an Agreement dated 24th February 2004 on a voluntary basis. However this Agreement was overtaken by events with the issuance of the Further Lease to the Petitioner by the Government of Kenya, which Lease did not provide for payment of any Rates and by the dissolution of the Olkejuado County Council following the passage of the Constitution of Kenya 2010 which provided for County Governments.

84. It was further submitted that the Petitioner paid rates to the current County Government of Kajiado on a voluntary basis to the tune of KES 150,743,970/- between the years 2013 to 2018 and an amount of KES 35,133,681/- as Royalties during the same period in spite of the admission and concession of the 1st Respondent that the allegations on demand for royalties were either a deliberate or reckless falsehood under oath.

85. On whether Royalties were payable under the Kajiado County Finance Act 2014 and the Petitioner's claim of double taxation, it was submitted that the 1st Respondent's demand for royalties amounted to an illegality as under the Further Lease, the Petitioner had entered into a covenant with the National Government and not the 1st Respondent. Further, the Mining Act under Section 183 dictated that royalties were payable to the State. As such, any demand for royalties could only be made by the National Government and not the 1st Respondent under any circumstances as a similar payment in royalties to the 1st Respondent clearly amounts to double taxation. On the strength of this line of argument, the court was urged to grant Prayer D of the Petition dated 22nd January 2019. For these arguments, reliance was placed on the cases of **Bumasutra Savings and Credit Co-operative Society Ltd v County Government of Nakuru [2016] eKLR** and **Raiply Woods (K) Ltd & Another v Baringo County & 3 Others [2017] eKLR.**

86. Regarding whether the current Kajiado Finance Act covered the Petitioner's properties, it was submitted that it did not as the same had not been gazetted. It was further submitted that the rates demand was not directed at the Petitioner's properties as the properties cited in the letter of demand dated 14th February 2018 exhibited in the Supporting Affidavit of Titus Naikuni of 22nd January 2019 were LR No.2241/R and 2978/1 totalling 224,991 acres whereas the Further Lease identified the Petitioner's properties as LR NO.1026/R and LR No. 3867. There was also a further lease dated 9th December 2004 covering the Railway line property being LR No.2341/R measuring 2,208 acres. Upon this basis, the court was urged to grant Prayers E and G of the Petition dated 22nd January 2019.

87. Turning to whether the Rates Demand was in breach of the Rating Act, it was submitted that the 1st Respondent had made no reference at all to any Rating Act within Kajiado County, on which reliance was made to come up with the purported applicable Rates. Such Rating Act would have to be in place prior to the 2014 Kajiado Finance Act, which the 1st Respondent has admitted to be relevant for purposes of Rates.

The 2014 Kajiado Finance Act cannot exist in a vacuum in so far as Rates are concerned. Therefore, in the absence of a Kajiado Rating Act passed on or before the year 2014, the Rates demand issued by the 1st Respondent has no legs to stand on. Based on this, it was submitted that the Court ought to grant Prayers E and G of the Petition dated 22nd January 2019.

88. Next, Counsels for the Petitioner submitted on whether the Rates Demand was in breach of **Section 161 of the Public Finance Management Act** which provides:

> *"County government revenue raising measures to conform to Article 209(5) of the Constitution.*
>
> *In imposing a tax or other revenue raising measure, a county government shall ensure that the tax or measure conforms to Article 209(5) of the Constitution and any other legislation, and before imposing any tax or revenue raising measures under this Article, shall seek views of the Cabinet Secretary and the Commission on Revenue Allocation."*

89. It was argued that the 1st Respondent was in breach of the above Section by virtue of the extortionately high Rates it was purporting to charge the Petitioner as well as the fact that the 1st Respondent did not seek the views of the Cabinet Secretary for the National Treasury and neither did it seek the views of the Commission on Revenue Allocation. Therefore according to the Petitioner's advocates, there was no compliance with the provisions of Section 161 of the Public Finance Management Act, which renders the demand for rates as invalid.

90. The Petitioner's advocate subsequently turned to whether the requirement of sufficient public participation and consultation had been achieved to the standard required by law. Articles 196 (1) (a) and (b) of the Constitution were cited in reference to the manner in which a county assembly ought to conduct its business and to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Article 201 was also cited as providing for public participation in matters public finance. Sections 87 and 115 of the County Government Act 2012 provisions on public participation were also cited in an effort to show that public participation played a major role in the legislative and policy functions of the 1st Respondent.

91. It was submitted that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It was further submitted that the 1st Respondent had an obligation to ensure that the spirit of public participation was attained both quantitatively and qualitatively.

92. An argument was put forth that whereas the Petitioner had sent a Memorandum to the 1st Respondent on 11th March 2014 on the subject of the Kajiado County Finance Bill 2013, the submissions of the Petitioner were ignored. While the Petitioner complained against the Proposal in the Finance Bill 2013 to increase Land rates payable from KES 100 per acre to KES 11,000 per acre, the 2014 Kajiado Finance Act provided for KES 14,000 per acre. The 1st Respondent was clear in its Memorandum that such high rates would cripple and cause the Petitioner to shut down its operations in Kenya. The amount of Rates in the Finance Bill 2013 was hiked from KES 11,000 per acre to KES 14,000 per acre in the Finance Act 2014, rendering the legislative process to be invalid. For this assertion reliance was placed on **Simeon Kioko Kitheka &18 Others v County Government of Machakos & 2 Others [2018] eKLR**,

93. It was further submitted that where the 1st Respondent decided to deviate from the recommendations to the Kajiado Finance Bill 2013 made by the Petitioner, the 1st Respondent had an obligation to clarify and/or justify to the Petitioner the reasons why the fruit of consultation was not taken into account. The 1st Respondent did not contact the Petitioner to explain why it had decided not to take not to take into account its submissions, rendering the legislative process leading to the enactment of the 2014 Kajiado County Finance Act as invalid, void and a nullity. Further reliance was placed on the case of **Robert N. Gakuru v Governor Kiambu County & 3 Others [2014]eKLR**

94. The next issue to be tackled was the role played by the Petitioner in corporate social responsibilities and its impact on the question of Rates. On this, Counsels' reiterated the extent of service delivery provided by the Petitioner to the exclusion of the 1st Respondent. They further highlighted the facilities constructed and maintained by the Petitioner. It was submitted that the Petitioner continued to offer elaborate Corporate Social Responsibility programmes to the community through provision of education, water, health, infrastructure, environmental and skills development. On account of these numerous activities undertaken by the Petitioner, it was submitted that in the circumstances no rates could be properly levied by the 1st Respondent upon the Petitioner.

95. As to whether the Court should grant the Prohibition and Injunction Orders sought by the Petitioner, it was submitted that the forceful closure of the Petitioner's premises by the 1st Respondent on 11th January 2019 for a total of three days, without a Court order, in order to compel the Petitioner to make the Rates payments demanded and causing daily losses to the Petitioner in the sum of KES 24,221,334/- per day was in breach of the Petitioner's rights to fair administrative action under Article 47(1) and (2) of the Constitution of Kenya. That action was also in breach of Section 4(3) of the Fair Administrative Action Act 2015 since no prior adequate notice of the proposed administrative action was given to the Petitioner by the 1st Respondent.

96. It was further submitted that the Petitioner had been harassed through threats by the Governor of the 1st Respondent to shut down the depots of the Petitioner, levying of illegal taxes known as "Royalties and "quarry chip" and violating the Petitioner's rights to property under Article 40(3) of the Constitution by forcefully entering onto the property of the Petitioner and purporting to take forceful possession a portion thereof and commencing construction activity, compelling the Petitioner to turn to this Honourable Court for conservatory orders which were issued. On the basis of the foregoing, the Court was urged to grant prohibit ry and permanent injunction orders as sought in Prayers C and F of the Petition.

97. With regard to the final question of whether the Court should grant General and Punitive Damages against the 1st Respondent arising from the loss of production during the period of illegal shut down from 11th January 2019 for three days, it was submitted that it was only fair that the 1st Respondent be directed to pay the Petitioner the sum of KES 72,664,002/- in general and punitive damages for the losses suffered by the Petitioner during the period of illegal shut down.

98. In closing, advocates for the Petitioner submitted that the present Petition was brought by an aggrieved Petitioner who has, over a period of almost a century, owned properties in the present Kajiado County where it carries out mining activities of soda ash and salt on a portion of them, built a town with every possible facility supplied free of charge to the residents, and has faithfully paid whatsoever taxes that were properly down and owing. The present dispute was the culmination of an extortionately high rates demand issued by the 1st Respondent that was not founded in law, and whose manner of enforcement had been extremely high handed and in breach of the Constitution and various applicable laws. Counsel referred to **Robert N. Gakuru v Governor Kiambu County & 3 Others [2014]eKLR.**

99. The Petitioner prayed that the court grant all the orders sought in the Petition of 22nd January 2019 with costs.

The 1st Respondent's submissions

100. Arguing on behalf of the 1st Respondent was the firm of Tobiko Njoroge and Company Advocates. Seven issues for determination were formulated by the Counsel for the 1st Respondent namely:

a. Whether the Petitioner's properties are rateable

b. Whether there is conflict between the national and county legislation in respect of levying of rates, and if so which one prevails

c. Whether the 1st Respondent's Finance Bills/Acts, the basis of the rates, are null and void

d. Whether the Petitioner owes the rates claimed by the 1st Respondent

e. Whether the 1st Respondent can levy royalties

f. Whether the Appointment of Regional Business Connection to collect rates on behalf of the First Respondent is illegal and of no effect

g. Whether the Petition is bad in law in view of the Notice of Preliminary Objection.

101. Starting off with whether the Petitioner's Properties are rateable it was submitted that under **Article 209(3) (a)** County may impose Property taxes. It was further submitted that **Section 70 of the Government Lands Act (repealed)** imposed an obligation on the Petitioner, as lessee of the Government land, to pay rent, royalties, taxes, rates, charges, duties assessments or outgoings as may be imposed, charged or assessed upon the buildings thereon. Section 70 (b) provided thus:

"In every grant, lease and license under this Act, there shall by virtue of this Act be implied covenants and conditions by the grantee, lessee or license.

(a) That he will pay rent and royalties thereby reserved at the time and in the manner therein provided.

(b) That he will pay such taxes, rates, charges, duties, assessments or outgoings of whatever description as may be imposed, charged or assessed upon the buildings thereon or upon the lessor or grantor or lessee or licensee in respect thereof"

102. It was submitted that similar provisions abound in **Section 24 (a) and (b) of the Land Act 2012, Act No.6 of 2012**

103. It was submitted that the constitutional duty to impose property rates being conferred upon the County Governments by Article 209(3) (a) of the Constitution, it followed that the Petitioner was bound by both the Constitution and statutes to pay rates to the County Government. It was therefore unequivocal as per the Agreement between the Petitioner and the First Respondent that the Petitioner's Properties comprising a total of 224,991 acres were a rateable property in terms of the relevant provisions of the law and as per Clause 1.3 of the Agreement, any future rates, taxes cesses and penalties or any other kind of charge against the Petitioner shall be levied as provided for in the Agreement and the Laws of Kenya. It was further submitted that the as per the 2004 Agreement, the Petitioner agreed to be paying rates at an industrial rate as per the Agreement and Laws of Kenya which definitely included the Rating Act.

104. It was then submitted that in exercise of the powers conferred by Section 5 (1) (a) of the Rating Act, the County Council of Olkejuado did, with the approval of the Minister of Local Government by Gazette Notice No.15416 of 2nd December 2011, impose new industrial land rates with effect from 16th June 2008. As per the Gazette Notice, the Petitioner was bound to pay Kshs. 5,000/= per Acre.

105. It was submitted that pursuant to the powers conferred to it by the Constitution, in the year 2014, the 1st Respondent, as is required of it by the law enacted the Kajiado County Finance Act No. 1 of 2014 to provide for the revenue raising measures of the County Government of Kajiado. Under the said Act, industrial rates for mining companies was fixed at Kshs. 14,000/= per Acre for companies owning more than 11 Acres of land.

106. It was submitted that the Petitioner's allegations were baseless for a number of reasons. For one, though the Petitioner alleged that its property is public land, Public Land is defined in **Article 62 (1) (a)** of the Constitution as land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date. The key ingredient in the foregoing definition is "unalienated government land". Such land is defined in Section 2 of the Government Lands Act Cap 280 (repealed) that was in force when the Petitioner took possession of the said land as *"Government land which is not for the time being leased to any other person or in respect of which the Commission has not issued any letter of allotment."*

107. It was submitted that the moment the Petitioner was granted a lease of the land they occupy, the said land ceased being public land and became private land. Indeed, Article 64 (5) of the Constitution defines private land as consisting of land held by any person under leasehold tenure, a description that undoubtedly applied to the land held by the Petitioner.

108. It was further submitted that the definition of a rateable owner included a Lease of any property, including a public land for a term of not less 25 years and in possession thereof.

109. The 1st Respondent's advocate submitted that the allegation that the Petitioner has put up multiple facilities serving a public purpose remains an allegation with no evidence at all as no documentation was annexed in evidence of the public purpose. The fact that the Petitioner offered corporate social responsibility, if any, was not a bar to payment of rates as per the provisions of Article 210 of the Constitution as well as clause 7.1 of the 2004 Agreement.

110. As regards the allegations that the Petitioners properties were exempted from payment of rates by reasons of the presence of wildlife, it was submitted that since the properties were not gazetted as per Section 18 (1) of the Wildlife (Conservation and Management) Act (Cap 376), as a National Reserve or National Park by the Minister, the claim was baseless.

111. Regarding the allegation that the First Respondent had not passed a County Rating Act, it was submitted that the First Respondent passed and gazetted the **Kajiado County Rating Act (Act No. 4 of 2016)** to provide for the imposition of rates on land and buildings in the entire County of Kajiado. As correctly affirmed by the Petitioner, under Section 8 of the County Governments Act, Act No. 17 of 2012, a corresponding National Legislation, apply to a matter in question until a County Assembly enacts its own particular legislation.

112. It was submitted that the National Land commission had no role in the fixing of rates as this was a preserve of the County Government.

113. As to whether the 2004 Agreement was now binding, it was submitted that it was indeed binding by virtue of Section 33 of the Sixth Schedule of the Constitution which provided that an institution established under the Constitution is the legal successor of the corresponding institution under the former Constitution or by an Act of Parliament and therefore the County Governments took over the assets, liabilities and obligations of the defunct local authorities. Reliance was placed on **Kenya Broadcasting Corporations Vs City Council of Nairobi (2014) KLR**

114. Addressing whether there was a conflict between the national and county legislation in respect of rates, and if so which one would prevail, counsel submitted that it was clear that both the Rating Act and the Valuation for Rating Act were pieces of legislation which were in force before the effective date of the Constitution of Kenya, 2010. Section 7 of the Transitional and Consequential Provisions of the Constitution of Kenya states that:

> *"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."*

115. From the foregoing it was submitted that whereas the Kajiado County Finance Act, 2014 is a county legislation, the Valuation for Rating Act (Cap 266) and the Rating Act (Cap 267) are clearly national legislation. That there was a conflict between the county legislation and the national legislation with regard to the manner in which rates were to be imposed within the Kajiado County.

116. Under Article 191 of the Constitution the first condition for the national legislation to override county legislation is that the national legislation must apply uniformly throughout Kenya and further that the provisions of Article 191(3) must have been fulfilled in that firstly, the national legislation must provide for a matter that cannot be regulated effectively by legislation enacted by the individual counties; secondly, the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing norms and standards or nation policies and thirdly, the national legislation must be necessary for the maintenance of national security: the maintenance of economic unity: the protection of the common market in respect of the mobility of goods, services, capital and labour; the promotion of economic activities across county boundaries; the promotion of equal opportunity or equal access to government services; or the protection of the environment.

117. It was further submitted that under the Rating Act "rating authority is defined in section 2 thereof to encompass three kinds of local authorities. Section 5 thereof provides for alternative methods of area rating. It was submitted that what came out clearly from the foregoing was that even before the devolved system of government came into existence by the promulgation of the Constitution of Kenya, 2010, there was no uniform rate in the Country. It follows that the Rating Act cannot be said to apply uniformly throughout Kenya when it comes to the rates payable by the property owners. Accordingly, Article 191(2)(a) cannot be invoked in order for the Rating Act to supersede the Kajiado County Finance Act, 2014.

118. Counsel went on to submit that the Rating Act was an enabling Act. It was neither restrictive in its purpose nor regulatory on the powers of the County Assemblies to impose rates. It was meant to enable the County Assemblies collect funds necessary for them to meet their obligations of providing services to the residents of the County. In other words it is not aimed at preventing unreasonable action by a county that is prejudicial to the economic, health or security interests of Kenya or another county; or impedes the implementation of national economic policy. Citing **Republic vs Nairobi City County exparte Job Kiruki Kiaira & another (2017) KLR** and **Nairobi Metropolitan Psv Saccos Union Limited & 25 others vs County of Nairobi Government & 3 others [2014] EKLR** it was submitted that it had been held that the Rating Act and the valuation for Rating Act cannot supersede the provisions of a County legislation in the event of a conflict therewith.

119. Moving on, counsel submitted that there was an elaborate procedure for the enactment of county legislation with public participation playing a pivotal role therein. This procedure was not available during the tenure of the local authorities as opposed to County Governments. In this scheme of things, to subject the enactment of a county legislation which is otherwise in compliance with the Constitution to the ministerial fiat would be to defeat the letter and the spirit of devolution. As Section 7(1) of the Transitional and Consequential Provision of

the Constitution of Kenya provides

> *"All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution"*

120. It was submitted that accordingly both the Rating Act and the Valuation for Rating Act must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with this Constitution. For the said legislation to conform to the Constitution they must be interpreted in a manner that gives recognition to the principle of devolution including the independence of the devolved governments. Under Article 185 the legislative authority of a county is vested in, and exercised by, its county assembly and the a county assembly is empowered to 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, Under Article 209(1)(a) of the Constitution a county is empowered to impose property rates. Reliance was placed on **Republic vs Nairobi City County ex-parte Job Kiruki Kiaira & Another (2017) KLR**, **Nairobi Metropolitan Psv Saccos Union Limited & 25 Others vs County of Nairobi Government & 3 Others [2014] KLR** and **Nairobi Metropolitan Psv Saccos Union Limited & 25 Others vs County of Nairobi Government & 3 Others [2013] eKLR.**

121. The next issue to be submitted on was whether the First Respondent Finance Bills were unconstitutional and therefore null and void. It was submitted that the First Respondent was mandated under the law and was guided by the law in raising of the revenue. In discharge of such powers as mandated and conferred by the Constitution, the Assembly of Kajiado prepared and passed the Kajiado County Finance Act, 2014. The said Act was gazetted as is required by the law. Before the enactment of the Bill and its eventual gazettement, there was public participation. The Petitioner participated by filing Memorandum in the County Assembly in opposition to the proposed rates and royalties a copy of which had been availed to the record. The allegation therefore that the Act was not gazetted is without any basis.

122. Counsel made the argument that the constitutionality of the Kajiado County Finance Act, 2014 had already been settled by in the following matters: **Kajiado Judicial Review Case No. 13 of 2016 Anne Wanjiru Kingori & Others vs The Kajiado County Assembly & Others** wherein this Honourable held that Courts should be hesitant to curtain the County Governments from raising revenue and accordingly held that there was nothing unconstitutional over the Kajiado County Finance Act, 2014; and **Kajiado Constitutional Petition No. 3 of 2015 Lucy Wanjiru & Another vs The Attorney General & Another** wherein this Honourable Court held that the Kajiado County Government complied with the Constitution with its obligations to facilitate public involvement and accordingly the process leading to the enactment of the Kajiado Finance Act, 2014. Act No. 1 of 2014 cannot be impugned.

123. A submission was made that it was trite law and pursuant to the provisions of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya there has to be continuity in legislation and since the subsequent Finance Bills had not been gazetted, the 2014 Finance Act was still applicable until another Finance Act was gazetted unlike a County Appropriation Act that was functional for only one financial year. It was further submitted that the Petitioner had failed to state which particular section of the Bills/Acts that offends it. Reference was made to **Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another (2017) EKLR.**

124. Counsel submitted that it had been held that failure to gazette a County Bill did not render the legislation unlawful as the same is not rendered null and void but is merely put in abeyance. Further reliance was placed on **Robert N. Gakuru Vs County Government of Kiambu & Another (2016) KLR.**

125. Regarding the question of whether the Petitioner owed the rates claimed by the 1st Respondent, it was submitted that under the Constitution and the County Governments Act, levying of rates was a preserve of the County Governments. It was further submitted that Section 12 of the Kajiado County Rating Act, 2016 provided that the County Government may charge interest on any amount of a rate remaining unpaid after the day on which the rate became payable. Any unpaid rates therefore attracted a penalty.

126. As a result, based on the Gazette Notice dated 23rd December, 2014 and the Kajiado County Finance Act, 2014, the amount unpaid owing by the Petitioner to the First Respondent was Ksh.18,380,131,896/-

127. It was submitted that it was not for the Courts to decide what an appropriate or right or wise legislative provision was. That power fell squarely with the legislature, and in this case the County Assembly which casts policies into statutes. The Courts will only intervene if in the face of the claims, a particular statute or part thereof contravenes the Constitution.

128. It was submitted that the Court could not direct the First Respondent on how to exercise its duty of levying rates. The First Respondent had the mandate of legislating on the calculation of the rates payable with regard to the revenue it ought to raise. That the Court could not enter into the arena of deciding what fee was reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the County Government. It was therefore not enough for the Petitioner to state that its operations are not able to sustain the rates owed to the First Respondent yet their Property is rateable under the relevant provisions of the law. For this notion, reliance was placed on **Nairobi Metropolitan Psv Saccos Union Limited & 25 others vs County of Nairobi Government & 3 others [2013] eKLR.**

129. As to whether royalties were payable, the 1st Respondent maintained its position that it had not demanded for royalties and had only charged royalties before the enactment of the Mining Act, 2016. Counsel charged that the Petitioner knew very well that the First Respondent cannot raise any invoice on royalties as by its own deliberate action, it had failed to provide the certificate of tonnage and therefore the First Respondent was incapacitated in calculating or estimating the precise amount of tonnage. In the premises, it was submitted that the allegations on demand for royalties were either a deliberate or reckless falsehood under oath.

130. As to whether the appointment of Regional Business Connection was illegal, null and void it was submitted that this court had no jurisdiction to determine issues of procurement as the first port of call for such disputes was the Public Procurement Administrative Review Board. Counsel referred to **John Kakindu Makau vs County Government of Makueni & Another (2018) KLR.** It was further submitted that since Regional Business Collection were not parties to this matter, it would be contrary to the law to make any orders against them.

131. On the issue of whether the Petition is defective and an abuse of the Court in view of the Notice of Preliminary Objection, counsel for the 1st Respondent submitted that the Petition and the entire proceedings herein had been filed in contravention of the mandatory provisions of the arbitration clause, in Clause 8.2 of the 2004 Agreement between the Petitioner and the First Respondent. It was submitted that where parties agree to submit themselves to arbitration, one party cannot file suit unilaterally. Such a suit would be premature and an abuse of the court process as the grieved party must first exhaust the arbitration process before moving to court. Reliance was placed on **Hussein Virani & 8 Others vs Twenty Redhil Ltd (2018) eKLR, The Greenhouse Management Ltd vs Jericho Development Co Ltd (2015) KLR** and **Paul Njogu Mungai & Others vs Kenya Airports Authority (2011) EKLR.**

132. It was further submitted that the Petition and the entire proceedings in so far as they challenged the Kajiado Finance Act, 2014 were res judicata in view of the decisions in **Kajiado Judicial Review Case No. 13 of 2016 Anne Wanjiru Kingori & Others vs The Kajiado County Assembly & Others** wherein this Honourable held that Courts should be hesitant to curtail the County Governments from raising revenue and accordingly held that there was nothing unconstitutional over the Kajiado County Finance Act, 2014; and **Kajiado Constitutional Petition No. 3 of 2015 Lucy Wanjiru & Another vs The Attorney General & Another** wherein this Honourable Court held that the Kajiado County Government complied with the Constitution with its obligations to facilitate public involvement and accordingly the process leading to the enactment of the Kajiado Finance Act, 2014. Act No. 1 of 2014 cannot be impugned.

133. Counsel went on to cite **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another (2016) KLR** where the Court held that the relevance of res judicata is not affected by the substantial justice principle of Article 159 of the Constitution. Res judicata entails more than procedural technicality and lies on the place of substantive legal concept; and that the Courts must be vigilant against the drafting of pleadings in such a manner as to obviate the res judicata principle as well as introducing new causes of action so as to seek the same remedy before Court. Further reliance was placed on **E.T Vs Attorney General & Another (2012) KLR** where it was held that the rationale behind the said doctrine of res judicata and issue estoppel is that if the controversy in issue is settled or determined or decided by the Court, it cannot be reopened.

134. Lastly, in the face of the Petitioner's allegation that the levying of rates by the First Respondent offends the provisions of Article 209 (5) of the Constitution it was submitted that it is trite law that he who alleges must prove. The Petitioner's allegations had no basis. The Petitioner had failed to prove by any documentary evidence of the national economic policies, both across County boundaries or the national mobility of goods, services, capital or labour that will be prejudiced by the levying of rates on the Petitioner. According to counsel, the totality of the Petitioner's constitutional leaning was pure conjecture devoid of merit, and an attempt to evade payment of taxes disguised as a constitutional petition hinged on purported violation of rights and fundamental freedoms.

135. On the basis of the foregoing, it was submitted that the allegations in the Petition were unfounded and without basis and that the same were mischievous, malicious misconceived and purely calculated to attract public sympathy by a perennial defaulter on payments of rates and other charges to the First Respondent and should be dismissed with costs to the First Respondent.

Analysis and Determinations

136. I have dutifully analysed the Petition dated 22nd January 2019, the exhaustive arguments proffered by the opposing parties', their respective advocates' submissions and the evidence on record and I am confident that the Petitioner's gravamen arises from the conduct of the 1st Respondent prior to, and after the demand for payment of land rates totalling to Ksh 17,448,485,646/- by the 1st Respondent through a letter dated 14th February 2018 directed at the Petitioner from Regional Business Connection, an alleged agent of the 1st Respondent.

137. To my mind, the issues raised can be distinguished as below:

a. Whether the Petition is bad in law in view of the Notice of Preliminary Objection made by the 1st Respondent

b. Whether the Kajiado County Finance Act 2014 and the subsequent Kajiado County Finance Bills 2015/2016, 2016/2017 and 2017/2018 were enacted contrary to the provisions of Articles 191 (2) and (3),196, 201, 209(3) and 209 (5) of the Constitution and are therefore null and void;

c. Whether the 1st Respondent has the power to impose property rates on the Petitioner

d. If (c) is answered affirmatively, to what extent could the 1st Respondent impose the property rates? Put differently, whether all the Petitioner's properties are rateable.

e. Whether the Court ought to grant an order of prohibition to prohibit the First and Third Respondents by themselves or their servants, agents, and or assigns from trespassing, entering, remaining on, closing, locking, blocking or in any other manner whatsoever and howsoever interfering with the Petitioners premises, factories, gates and properties situated in Kajiado and Magadi in the County of Kajiado;

f. Whether this Court ought to quash the decisions and demands of the First Respondent contained in the letters dated 14th February 2018 and the demands made by the First Respondent's agent in the letters dates 12th December 2018 and 19th December 2018 directing the Petitioner to remit Ksh 17,448,485,646/- to the First Respondent on account of the alleged arrears of land rates and royalties;

g. Whether this Court ought to grant general and punitive damages as sought by the Petitioner

138. I shall first dispense with in short shrift the argument by the 1st Respondent that the extant Petition is bad in law in view of the Notice of

Preliminary Objection made by the 1st Respondent. Counsel for the 1st Respondent submitted that the Petition and the entire proceedings herein had been filed in contravention of the mandatory provisions of the arbitration clause, in Clause 8.2 of the 24th February 2004 Agreement between the Petitioner and the First Respondent. It was submitted that where parties agree to submit themselves to arbitration, one party cannot file suit unilaterally. Such a suit would be premature and an abuse of the court process as the grieved party must first exhaust the arbitration process before moving to court.

139. My position on this matter is pretty straightforward. The issues raised by this Petition demonstrably go beyond the ambit of what was contemplated in the arbitration clause in Clause 8.2 of the 24th February 2004 Agreement. Additionally, the validity of that Agreement in itself has been thrown into question by the Petitioner. In any case, as things stand both parties' have submitted to the jurisdiction of this court. As such, the existence of the impugned clause is not a bar to the current Petition and I accordingly find so. Be that as it may, should the need arise for the Court to direct that the parties' submit themselves to alternative dispute resolution mechanisms in the interests of justice, the court will not be hesitant to do so.

140. Moving on swiftly, the 1st Respondent further contended that the Petition and the entire proceedings in so far as they challenged the Kajiado Finance Act, 2014 were res judicata in view of the decisions in **Kajiado Judicial Review Case No. 13 of 2016 Anne Wanjiru Kingori & Others vs The Kajiado County Assembly & Others** wherein this Honourable held that Courts should be hesitant to curtail the County Governments from raising revenue and further that there was nothing unconstitutional over the Kajiado County Finance Act, 2014; and **Kajiado Constitutional Petition No. 3 of 2015 Lucy Wanjiru & Another vs The Attorney General & Another** wherein this Honourable Court held that the Kajiado County Government complied with the Constitution with its obligations to facilitate public involvement and accordingly the process leading to the enactment of. Act No. 1 of 2014 cannot be impugned.

141. While it is true that the current Petition also seeks for a declaration that the Kajiado Finance Act, 2014 flies in the face of several constitutional provisions and ought to be impugned, the substantive dispute is dissimilar. Here, the Petitioner questions the 1st Respondent's powers under Article 209(3) and the manner in which said powers were exercised. Concomitantly, the Petition raises other issues that were not subject to any deliberations in the cases referred to this Court by the 1st Respondent. In the end, this Court remains unconvinced that the current Petition is res judicata. With that, I turn the Court's gaze to the substantive issues.

142. The first substantive issue I propose to tackle is whether the Kajiado County Finance Act 2014 and the subsequent Kajiado County Finance Bills 2015/2016, 2016/2017 and 2017/2018 were enacted contrary to the provisions of Articles 191 (2) and (3) , 196, 201, 209(3) and 209 (5) of the Constitution and are therefore null and void.

143. When the constitutional validity of a statute is brought under scrutiny, the general rule or principle is as was stated 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."*

144. In **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Court affirmed this principle by holding *inter alia* that in interpreting the Constitution, the Court would be guided by the general principle 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.

145. Another key principle of determining constitutional validity of a statute is by examining its purpose or effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the constitution. In **Olum and another v Attorney General [2002] EA**, it was stated that;

> "*To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."*

146. In **The Queen v Big M. Drug mart Ltd, 1986 LRC (Const.) 332**, the Supreme Court of Canada stated that;

> "*Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."*

147. Before going further, I must address an issue that was raised by the Petitioner. The Petitioner questioned the validity of the subsequent Kajiado County Finance Bills 2015/16, 2016/17, 2017/18 on account of them having not been published in the Kenya Gazette. On this point, I am in agreement with the submissions of the Counsel for the 1st Respondent that pursuant to the provisions of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya there has to be continuity in legislation and since the subsequent Finance Bills had not been gazetted, the 2014 Finance Act was still applicable until another Finance Act was gazetted. Failure to gazette a County Bill did not render the legislation unlawful as the same is not rendered null and void but is merely put in abeyance as was the position in **Robert N. Gakuru Vs County Government of Kiambu & Another (2016) KLR.**

148. Having found that the applicable Act is the Kajiado County Finance Act 2014, I can now proceed to determine whether the said Act was validly enacted.

149. On account of public participation, the 1st Respondent's position was that the Petitioner participated by filing a Memorandum in the County Assembly in opposition to the proposed rates and royalties a copy of which had been availed to the record. The allegation therefore that the Act was not gazetted validly was without any basis. The Petitioner on the other hand submitted that whereas it had sent a Memorandum to the 1st Respondent on 11th March 2014 on the subject of the Kajiado County Finance Bill 2013, the submissions of the Petitioner were ignored. While the Petitioner complained against the Proposal in the Finance Bill 2013 to increase Land rates payable from KES 100 per acre to KES 11,000 per acre, the 2014 Kajiado Finance Act provided for KES 14,000 per acre. The Petitioner was clear in its Memorandum that such high rates would cripple and cause the Petitioner to shut down its operations in Kenya. The amount of Rates in the Finance Bill 2013 was hiked from KES 11,000 per acre to KES 14,000 per acre in the Finance Act 2014, rendering the legislative process to be invalid. For this assertion reliance was placed on **Simeon Kioko Kitheka &18 Others v County Government of Machakos & 2 Others [2018] eKLR**. The Petitioner had further argued that where the 1st Respondent decided to deviate from the recommendations to the Kajiado Finance Bill 2013 made by the Petitioner, the 1st Respondent had an obligation to clarify and/or justify to the Petitioner the reasons why the fruit of consultation was not taken into account. The 1st Respondent did not contact the Petitioner to explain why it had decided not to take not to take into account its submissions, rendering the legislative process leading to the enactment of the 2014 Kajiado County Finance Act as invalid, void and a nullity. Further reliance was placed on the case of **Robert N. Gakuru v Governor Kiambu County & 3 Others [2014]eKLR.**

150. **Article 196** of the Constitution provides:

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

151. **Article 201 (a)** of the Constitution similarly provides interalia *"The following principles shall guide all aspects of public finance in the Republic: (a) There shall be openness and accountability, including public participation in finance matters."*

152. **Section 115 of the County Government Act 2012** provides:

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

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

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

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

155. The learned judge proceeded to state:

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

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

> "*Public involvement is necessary on in exact concept with many possible facets, and the duty to facilitate it can be fulfilled not in one, but in many different ways: public involvement might include public participation through the submission of commentary and*

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

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

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

158. This Court is ever alive to the principle that public participation ought to be real and ought not to be illusory. My position resonates with that taken in the **Gakuru Case [supra]** where the court stated:

"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that."

159. The Petitioner's bone of contention is that the 1st Respondent ignored its submissions on the impugned Act during public participation. On this, I am informed by the holding in **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County Government of Nairobi & 3 Others [2014]** where the court held that

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

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

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

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

"The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

162. Drawing from the positions dissected hitherto, it is my finding that the Kajiado County Finance Act, 2014 was passed with appropriate

regard being given to public participation. That the County Government chose not to abide by and incorporate the recommendations made by the Petitioner in its Memorandum does not render the Act itself unconstitutional.

163. In another prong of the attack on the constitutionality of the Kajiado County Finance Act 2014, the Petitioner while placing reliance on **Base Titanium Limited v The County Government of Mombasa & Another 12017] eKLR** submitted that it had been able to demonstrate that the imposition of the impugned Rates and Royalties would be catastrophic to its very existence. This constituted clear prejudice to the national economic policies, economic activities across county boundaries and the national mobility of goods, services, capital or labour contrary to the provisions of **Article 209(5) of the Constitution.** Citing excerpts from a Memorandum on the Impact of the Proposed Draft County Finance Bill 2013 on Tata Chemicals Magadi Limited, it was asserted that the 1st Respondent's action of raising the rates payable would result in the immediate collapse of the Petitioner Company. The 1st Respondent's retort on this issue was that it was trite law that he who alleges must prove. The Petitioner's allegations had no basis. The Petitioner had failed to prove by any documentary evidence of the national economic policies, both across County boundaries or the national mobility of goods, services, capital or labour that will be prejudiced by the levying of rates on the Petitioner. According to Counsel, the totality of the Petitioner's constitutional leaning was pure conjecture devoid of merit, and an attempt to evade payment of taxes disguised as a constitutional petition hinged on purported violation of rights and fundamental freedoms.

164. In **Civil Appeal 90 of 2016 County Government of Kwale v Kenya Airports Authority [2017] eKLR** the Court of Appeal held that

> *"a County Government was empowered to impose property rates and such power is qualified to the extent that it should not be exercised in a manner that is prejudicial to the national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour."*

165. On their part, honourable Murithi and Ogola JJ. in **Base Titanium Limited vs. The County Government Of Mombasa & another [2017] eKLR** opined as follows:-

> *"In plain language interpretation, the sub-Article (5) of Article 209 of the Constitution acknowledges the power of county governments to tax under Article 209 (3) and otherwise raise revenues including the service charges under Article 209 (4), with an injunction that the said power shall not be exercised in such a manner that will prejudice the interests set out therein. Accordingly, I respectfully reject the contention in the submissions by Counsel for the Petitioner that Article 209 (5) of the Constitution provides an automatic prohibition on the power of County Governments to levy tax or other charges, when he submits that "the Constitution itself expressly prohibits the 1st Respondent from exercising the said powers and/or imposing the said tax or charges." The prohibition is, in my view, subject to demonstration of prejudice in terms of the sub-Article 5."*

166. I concur with the 1st Respondent's advocate assertion that it was not for the Courts to decide what an appropriate or right or wise legislative provision was. That power fell squarely with the legislature, and in this case the County Assembly which casts policies into statutes. The Courts will only intervene if in the face of the claims, a particular statute or part thereof contravenes the Constitution. This Court cannot purport to direct the First Respondent on how to exercise its duty of levying rates. The First Respondent had the mandate of legislating on the calculation of the rates payable with regard to the revenue it ought to raise. Consequently, the Court could not enter into the arena of deciding what fee was reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the County Government. Ergo, this line of attack fails too.

167. In the face of the Courts findings on the constitutionality of the impugned Acts, all that is left to do is cogitate about the twin issues of whether the Petitioner's properties are rateable and if so whether the 1st Respondent had the power to impose property rates on the Petitioner. Due to their overlapping nature, I will tackle said issues concurrently.

168. Counsels' for the parties advanced conflicting arguments regarding the basis upon which the 1st Respondent ought to impose property taxes on the Petitioner. From the Petitioner's standpoint, its properties were the subject of the terms of the Initial Lease entered into between the Colonial Government and the Petitioner's progenitor on 20th March 1928 and later extended by the Further Lease dated 9th December 2004. These leases according to the Petitioner's advocates contained very express language that the Petitioner would be paying the applicable royalties and land rents to the National Government of the Republic of Kenya. However, it was admitted that under the Agreement dated 24 th February 2004, the Petitioner had previously paid rates to the 1st Respondent's Predecessor, the Olkejuado County Council. It was nonetheless pointed out that this Agreement was overtaken by events. Specifically, the issuance of the Further Lease to the Petitioner by the Government of Kenya, which Lease did not provide for payment of any Rates and by the dissolution of the Olkejuado County Council following the passage of the Constitution of Kenya 2010 which provided for County Governments. According to Counsels for the Petitioner, only the National Land Commission had the jurisdiction to assess tax on land and premiums on immovable property in any area designated by law and not the 1st Respondent pursuant to Article 67(2) (g) of the Constitution.

169. From the submissions of both the Petitioner and 1st Respondent it can be gleaned that further reliance was placed on the **Rating Act Cap. 267** and **Valuation for Rating Act Cap. 266** as being the basis upon which property taxes were levied. This court must however point out that while doing so, both the Rating Act and the Valuation for Rating Act must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with this Constitution.

170. The 1st Respondent on top of the preceding proposition advanced the argument that as the County Government had been conferred the power to impose property rates by Article 209(3) (a) of the Constitution, it followed that the Petitioner was bound by the Constitution to pay rates to the County Government. The 1st Respondent further maintained that the Agreement dated 24th February 2004 remained valid and in accordance with it, the Petitioner was bound to pay rates.

171. To reiterate, **Article 209(3) (a)** of the Constitution of Kenya explicitly empowers County Governments to raise Property rates. Article 209 provides:

209. Power to impose taxes and charges

(1) Only the national government may impose—

(a) income tax;

(b) value-added tax;

(c) customs duties and other duties on import and export goods; and

(d) excise tax.

(2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).

(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.

(5) 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.

172. Arguments on the authority upon which land rates ought to be based certainly are not unique to this case. Courts have had occasion to ponder similar issues in the recent past. From the judicial precedent on hand, what emerges is that the use of the national legislation to wit the **Rating Act Cap. 267** and **Valuation for Rating Act Cap. 266** to levy property rates by county governments was within the law. This certainly was the case prior to the new Constitution as the Rating Act was enacted to provide for the imposition of rates on land and buildings in Kenya; to amend the Law relating to valuation and rating in Kenya; and for purposes connected therewith and incidental thereto. Whereas, the Valuation for Rating Act was enacted to empower local government authorities to value land for the purpose of rates; and for purposes incidental to or connected therewith.

173. However, with the advent of devolution and in keeping in line with the constitutional power donated under **Article 209 (3)** of the Constitution, County Legislation to wit the County Finance and County Rating Acts ought to be passed by respective County Governments to control the levying of land rates.

174. According to the Petitioner, the 1st Respondent had made no reference at all to any Rating Act within Kajiado County, on which reliance was made to come up with the purported applicable Rates. Such Rating Act would have to be in place prior to the 2014 Kajiado Finance Act, which the 1st Respondent has admitted to be relevant for purposes of Rates. The 2014 Kajiado Finance Act cannot exist in a vacuum in so far as Rates are concerned. Therefore, in the absence of a Kajiado Rating Act passed on or before the year 2014, the Rates demand issued by the 1st Respondent has no legs to stand on. Based on this, it was submitted that the Court ought to grant Prayers E and G of the Petition dated 22nd January 2019.

175. In Response, the First Respondent argued that it had passed and gazetted the **Kajiado County Rating Act (Act No. 4 of 2016)** to provide for the imposition of rates and that prior this, it had relied on the extant national legislation to levy rates informed by its power to do this envisioned under **Section 8 of the County Governments Act, Act No. 17 of 2012.**

176. Courts have found and I align myself with the position that, even in the absence of a County Rating Act, the County Government had powers to rely on the existing national legislation to impose rates but this situation is not one that should continue in perpetuity. Accordingly, it is my view that the 1st Respondent had the power to levy rates and had exercised that power correctly.

177. In **County Government of Kwale v Kenya Airports Authority [2017] eKLR [supra]** the Court held:

> *"The power to impose property rates by County Governments is enforced through the provisions of **Rating Act** and **Valuation for Rating Act** both of which according to **Paragraph 7** of the **Sixth Schedule** of the **Constitution** are to be construed with necessary alterations, adaptations, qualifications and exceptions in order to bring them into conformity with the **Constitution**. In addition, the In addition, the County Governments enact their respective **Finance Acts** which regulate the issues of taxation in the Counties."*

178. In **Judicial Review No. 4 of 2016 Republic v Kiambu County executive Committee & 3 others exparte James Gacheru Kariuki & 9 others [2017] eKLR**, my colleague Ngugi J had occasion to deliberate a similar issue at great length. I can do no better than reproduce his thoughts on the matter then where at paras. 43-50 he held:

"43. The next question asks whether the County Executive Committee can impose property rates without an enabling County legislation. The question gets at the separation of powers ordered by the Constitution in the conduct of county affairs – with the County Executive Committee given executive powers to implement both County and national legislation and the County Assembly bequeathed the role of making laws for the county as appropriate. The Ex Parte Applicants argue that by the County Executive Committee relying on the National Legislation to impose property rates, the County Executive Committee is bypassing the County Assembly and usurping its functions. According to the Ex Parte Applicants, the only option open to the County Executive Committee is to publish a money bill on property rates and send it to the County Assembly for debate and passage.

44. The County Executive Committee, on the other hand, has placed its reliance on the provisions of Section 8(2) of the County Governments Act. As reproduced above, this Section appears to give a temporary avenue for the County Executive Committee to perform its executive functions by relying on existing national legislation until the County Assembly passes the appropriate legislation.

45. In my view, this is a common case of both sides being right – to some extent. The County Executive Committee is surely right that the provisions of Section 8(2) permit it to use national legislation to perform its executive functions as defined in Section 34 of the County Governments Act. However, four and half years into the life of the County Government, one must ask the question for how long the County Executive Committee will continue to rely on this default position on a matter as serious and consequential as the levying of property rates.

46. The Ex Parte Applicants are right that any money bill – indeed, any legislation – must go through the County Assembly with the attendant procedural safeguards for public participation. They are also right that a County legislation is needed to levy property rates in Kiambu County.

47. On the other hand, as aforesaid, the County Executive Committee is within its legal rights – at least textually – to use the provisions of the Valuation for Rating Act and the Rating Act to impose property rates until the County Assembly passes a County legislation on the matter. Section 8(2) is quite plain on that.

48. Where does that leave us" One must lament at the failure by the County Executive Committee to propose an appropriate county legislation on property rates. Similarly, one must frown upon the failure of the County Assembly to initiate and pass one on its own following the failure of the County Executive Committee to do the same. It would appear that the safeguard in Section 8(2) of the County Governments Act that was meant to ensure the smooth functioning of County Governments ephemerally has become the long term escape route for inaction by County Governments. There appears to be little excuse for not proposing an appropriate legislation relating to property rates in Kiambu County for four and a half years. I noted that the County Executive Committee did not even allege that they have made any efforts whatsoever to propose such legislation. The County Executive Committee is simply contended to rely on the National legislation.

49. There are obvious problems with this state of affairs. The most obvious one – pointed out by the Ex Parte Applicants -- is that it denies the County Assembly its legal function to pass the necessary County legislation on such an important matter. Of course the County Assembly is equally at fault for it could, suo motto, initiate such County legislation. The second and more serious but related problem is that this state of affairs had denied the citizens of Kiambu a role – through the legislative process – in participating in their own governance by giving views on the County legislation on this important issue. This is diametrically opposed to one of the more important objects of devolution which is "to recognise the right of communities to manage their own affairs and to further their development." (Article 174(d) of the Constitution). By importing the use of national legislation in the important area of property rates for an infinite length of time, the County Executive Committee denies the people of Kiambu the right to determine and manage their own affairs and an opportunity to meaningfully participate in their governance. By the same token, the County Executive Committee fails to "enhance checks and balances and the separation of powers" as provided for in Article 174(j) of the Constitution.

50. This leads me to two related conclusions. First, I expressly find that Section 8(2) of the County Governments Act as read together with Section 7(1) of the Sixth Schedule of the Constitution permits the County Executive Committee to use the provisions of Valuation for Rating Act and the Rating Act to levy property rates in Kiambu County. However, I also find that the delay in proposing Kiambu County's own autochthonous legislation on property rates to be inordinate and to be inimical to the principles and objectives of devolution. Hence, while I expressly find that the imposition of property rates by the County Executive Committee is saved by the correct reading of the Constitution and the existing legislation, I will issue conditions on how long such reliance on national legislation must continue in order to protect the objects and principles of devolution."

179. Having positively concluded the issue on whether the 1st Respondent could levy rates, the question that arises is the extent to which the County Government could exercise its rate levying powers on the Petitioner's properties. I find it prudent and agree with the Petitioner's notion that distinctions ought to be drawn on the subject of what property fell within the purview of the County Government for the purposes of rating. The vesting of the Land .ocean, lakes and,rivers in the county government amounts to confiscation of natural resources to be held in trust by the National government on behalf of the people of Kenya.

180. The Petitioner drew the courts attention to the submission that, for a plethora of reasons, which I duly enumerate hereafter, a number of areas that fell within the land covered by its two leases ought to be exempted from taxation by the County Government. For starters, it was argued that a good part of the Petitioner's land fell under Lakes Magadi and Natron was used for mining salt and soda ash; the land had a variety of wild animals and that the Petitioner's property included a 146km railway line and its attendant facilities buildings and structures. This rendered the Petitioner's property public land as defined under **Article 62** which provides:

62. Public land

(1) Public land is—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) …

(c) …

(d) …

(e) …

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

181. The Petitioner further pointed out that in line with the provisions of **Sections 2 and 27(1) of the Valuation for Rating Act** and further taking into account elaborate extent of its corporate social responsibility programme, no rates could be properly levied by the 1st Respondent upon the Petitioner. Counsel arguing on behalf of the Petitioner outlined the extent of service delivery provided by the Petitioner and maintained that this was done entirely to the exclusion of the 1st Respondent. They submitted that the facilities constructed and maintained by the Petitioner for the benefit of the public included numerous schools, water points, health centres, infrastructure, churches, playing fields, police stations and environmental and skills development. Section 27(1) provides:

27. Certain properties exempted from valuation

(1) No valuation for the purposes of any rate shall be made in respect of any land which is used, or, is bona fide intended to be used within a reasonable time, directly and exclusively for any of the following purposes—

(a) public religious worship;

(b) cemeteries, crematoria and burial or burning grounds;

(c) hospitals or other institutions for the treatment of the sick;

(d) educational institutions (including public schools within the meaning of the Education Act) (Cap. 211) whether or not wholly supported by endowments or voluntary contributions, and including the residence of students provided directly by educational institutions or forming part of, or being ancillary to, educational institutions;

(e) charitable institutions, museums and libraries;

(f) outdoor sports;

(g) National Parks and National Reserves within the meaning of the Wildlife (Conservation and Management) Act (Cap. 376):

Provided that nothing in this subsection shall apply to land used for profit or for residential purposes other than those specified in paragraphs (a) and (d) of this subsection.

182. Furthermore, according to the Petitioner, the Mining Act, 2016 under Section 183 dictated that royalties were payable to the State. As such, any demand for royalties could only be made by the National Government and not the 1st Respondent under any circumstances. My observation is that it may be that both parties reached an enforceable lease agreement in 2004 on conditions and obligations specified therein. However I find the clause on mining as it relates to the lease is in conflict with schedule four ,Article 62(1) (F), of the constitution and section 6 of the mining Act.

183. With that restatement, I shall now render this Court's determinations beginning with the latest reason on whether royalties were payable. I concur with the 1st Respondent's position that it had not demanded for royalties and had only charged royalties before the enactment of the Mining Act, 2016. The Petitioner failed to cite with precision or at all the impugned provision in the Kajiado County Finance Act 2014 upon which its claim that the 1st Respondent had charged it royalties was based.

184. I must also be quick to point out that the fact that the Petitioner offered corporate social responsibility, if any, was not a bar to payment of rates. That the multiple facilities put up by the Petitioner served a public purpose remained an allegation with no evidence was adduced in support of it.

185. In answer to the allegation that the Petitioner's properties were exempted from payment of rates by reasons of the presence of wildlife, I find that it is trite that as the properties were not gazetted as per **Section 18 (1) of the Wildlife (Conservation and Management) Act (Cap 376)**, as a National Reserve or National Park by the Minister, the claim remained baseless.

186. I however am in agreement with, and support the Petitioner's argument that the Land forming part of the 146km railway line ought to be exempted from rating.

187. Things get a bit murkier when it comes to the distinction between the Petitioner's property that fell under public land and that property which was not underutilisation for mining and thus could be levied tax upon.

188. **Articles 62 (1) (f)** categorises minerals as comprising public land and **Section 6 of the Mining Act, 2016** provides:

> ***6.*** *(1) Every mineral—*
>
> *(a) in its natural state in, under or upon land in Kenya;*
>
> *(b) in or under a lake, river, stream, or water courses in Kenya;*
>
> *(c)in the exclusive economic zone and an area covered by the territorial sea or continental shelf,*
>
> *is the property of the Republic and is vested in the national government in trust for the people of Kenya.*
>
> *(2) Subsection (1) applies despite any right or ownership of or by any person in relation to any land in, on or under which any minerals are found.*
>
> *(3) The national government's control over minerals vested in it shall be exercised in accordance with the provisions of this Act.*

189. The soda ash under lakes Magadi and Natron mined by Petitioner fell squarely under the definition of a mineral in the First Schedule of the Mining Act, 2016. It followed that it was excluded from rating by virtue of it being under the control of the national government.

190. However, the Petitioner conducts its mining activities by virtue of a Land lease entered into between it and the colonial government in 1928 and further extended in 2004. This lease covers a vast area excluding that which is under mining as admitted by the Petitioner itself. To this area, as previously stated, rates ought to accrue to the 1st Respondent. Doing so would be in keeping line with Article 209(3). The basic constitutional principle is that any act of taxation or rates must have legal basis. This means the National and county government cannot levy tax except by the authority of the law enacted by their respective legislatures.

191. There arises a necessity to distinguish the correct acreage of the Petitioner's properties upon which the said rates could be levied as this is the ultimate bone of contention. In the case of **Murai v Wainaina 1982 klR** the court of appeal held on the question of a matter of public importance as follows; *A question of general public importance is a question which takes into account the wellbeing of the society in just proportions. Apart from personal freedom, what is more important than the system of land holding in a society? Landmarks are the basis of continuity of life in human society. The question is obviously made one of general public importance for the subject affects the and rights of a large number of people not merely the portion to the appeal.'* For example what was the role of the community in the allocation of the 234000 acres to the petitioner? Can one say that the lease agreement entered into in 1928 and renewed in 2004 having regard to the clauses on mines and mineral extractives on sodash is in conformity with the provisions of the constitution and mining Act?

192. My take is that the law relied upon by the 1st respondent should not alter the basic structure of the provisions of the constitution or statute.

193. It is not lost on this Court that this matter has been a subject of controversy and schism between the Petitioner on the one part and the 1st Respondent on the other, drawing in the local community too, with the accusations of threats being peddled which is a rather unfortunate circumstance. Be that as it may, the conundrum presented by the dispute herein dictates that this court take into account the social perspective of this decision and exercise its discretion to find a solution that is in the best interests of justice.

194. That the Soda Ash mined by the Petitioner is a natural resource of great importance to the country's economy is not in doubt. It behoves this court to ensure that the taxation powers of the 1st Respondent are not exercised in a way that prejudices the national economic policy or the national mobility of goods. In the tax regime the principle of proportionality and ability to pay should be taken into consideration by any system of government. The ratio of the sum so proposed on rates and taxes on real estate should not be excessive .It's not lost to this court that a country's tax regime is a key policy instrument that supports or discourages any foreign or local investment. .

195. To that end, as **Article 159(2)(c)** of the Constitution empowers the court to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. It is the opinion of this court the national government and other relevant stakeholders be brought on board in pursuit of a lasting conclusion to this dispute. For guidance, **Section 12 of the Mining Act 2016** empowers the cabinet secretary of mining to administer the act, including negotiating for mineral rights. This court will therefore make the appropriate final orders

196. In the interim, the 1st Respondent ought to desist from interrupting the operations of the Petitioner. In furtherance of this, the provisions of the Kajiado County Finance Act 2014 and the Kajiado County Rating Act and any other subsequently gazetted Acts relating to the levying of rates ought to be suspended in as far as they apply to the Petitioner until the area upon which rates may be imposed by the 1st Respondent

can be ascertained. The basis for this being that they are in conflict with the Mining Act, 2016 which is a national legislation. This would be in tandem with Article 191 (2) as read with 191 (3), (5) and (6). They provide:

(2) National legislation prevails over county legislation if—

(a) The national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or

(b) The national legislation is aimed at preventing unreasonable action by a county that—

(i) is prejudicial to the economic, health or security interests of Kenya or another county; or

(ii) Impedes the implementation of national economic policy.

(3) The following are the conditions referred to in clause (2) (a)—

(a) The national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;

(b) The national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) Norms and standards; or

(ii) National policies; or

(c) The national legislation is necessary for—

(i) The maintenance of national security;

(ii) The maintenance of economic unity;

(iii) The protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) The promotion of economic activities across county boundaries;

(v) The promotion of equal opportunity or equal access to government services; or

(vi) The protection of the environment.

(5) In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.

(6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency."

197. The final issue for determination is whether the Petitioner is entitled to general and punitive damages as prayed against the First Respondent arising from loss of production due to their acts of shutting down and paralysing the Petitioner's operations from 11th January 2019. The Court's stand on this matter is mirrored by that taken by Court of Appeal judges **Visram, Sichale and Mohammed JJA** in **Civil Appeal 98 of 2014 Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** where they held:

*"…In **Romauld James v. AGT** [2010]UKPC Lord Kerr at paragraph 13 cited a passage from the judgment of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which we will turn directly. Kangaloo JA said:*

***[28]**. In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated."*

*Further, in regards to the financial losses incurred by the appellants associated businesses and properties, Mr. Onyiso submitted, and correctly so, that these are special damages which should not only be specifically pleaded but also strictly proved. That is the general law and authorities on it are legion. (See **Sande v Kenya Co-operative Creameries Ltd** LLR No. 314 **(CAK) (Case No. 154 of 1992 (Court of Appeal of Kenya); P.A. Okelo & M.M. Nsereko t/a Kaburu Okelo & Partners v Stella Karimi Kobia & 2 others***

*[2012] eKLR**;** and **Bank Of Baroda (Kenya) Limited v Timwood Products Ltd -**Civil Appeal 132 of 2001 In **Bangue Indosuez vs DJ Lowe and company Ltd** [2006] 2KLR 208 this Court held inter alia that; "It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves."*

The appellants in this case did not specifically plead and prove the damages from the losses they allegedly suffered. This could have been done by proof of receipts, bank statements or any invoices to show the liquidated losses incurred as a result of their Constitutional violations. In this case, we find the particulars lacking."

198. In the current case, the Petitioner prayed for KES 72,664,002/- in general and punitive damages. While the amount has been couched as general damages, it is ultimately still a special damage and as shown above, special damages should not only be specifically pleaded but also strictly proved. Nothing by way of evidence in support of this submission has been offered by the Petitioner. This prayer therefore fails.

199. This court would be remiss to conclude this matter without making a final observation on the instant petition. It is a well-developed principle in constitutional litigation that a party who wishes the court to grant a relief for violation of the constitution or for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it**.** In **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** the Court stated;

"if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

200. This principle was emphasized by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR,** where it stated that:

"…the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court… Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle"

201. In **Petition No. 457 of 2015 Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR** it was held that:

"…In that regard, a violation of Section 44 of the Banking Act would be a breach a statutory provision that can readily be redressed through a normal civil suit subject of course to the usual standard of proof in civil matters.

47. A constitutional petition on the other hand is a litigation initiated to either challenge breach of constitutional provisions or violation or infringement of rights and fundamental freedoms granted or recognized by the Constitution. These must expressly or impliedly recognized and protected rights and fundamental freedoms under the Bill of Rights. They must be the sort of rights and fundamental freedoms that belong to each individual, that are not granted or grantable by the state, and belong to individuals by virtue of their being human. These are rights and fundamental freedoms enjoyed by each individual and not collectively…"

202. In **Petition No. 457 of 2015[supra]** the court went on to opine that :

"65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure."

203. Decrying the profligacy with which people resorted to instituting constitutional petitions alleging violation of fundamental freedoms where there was none Lord Diplock in the case of **Harrikissoon V Atttorney General of Trinidad and Tobago [1980]AC** stated;

"The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court… for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action… the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court…"

204. In the case of **Benard Murage v Fine serve Africa Limited & 3 others [2015] eKLR** the Court stated;

"Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

205. The Supreme Court in **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** stated that;

"[349]… Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: ***the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement****…"[****emphasis supplied****]*

206. While there exists a valid dispute in payment of rates, it is my finding that the relationship between the petitioner and the 1st Respondent was governed by a valid agreement that had set out each parties' respective rights and obligations. A dispute arising out of such a relationship did not per se constitute a constitutional question and as such the court ought to refrain from making any pronouncement. Going further, I am also of the opinion that the Kajiado County Finance Act 2014 was properly in operation. In any case and as pointed out by the 1st Respondent, this court has ruled on the validity of the impugned Act in **Kajiado Judicial Review Case No. 13 of 2016 Anne Wanjiru Kingori & Others vs The Kajiado County Assembly & Others** and **Kajiado Constitutional Petition No. 3 of 2015 Lucy Wanjiru & Another vs The Attorney General & Another.** The petitioner as the burden bearer must show actual or threatened restriction under the impugned statute. I am of the conceded view that the petitioner did not sustain in proving facially that the statute was unconstitutional. Thus in its application the drafters made reference to Land rates but I find no reason to strike down the entire statute merely because a portion of it threatens property rights of the petitioner.

207. Applying the principles set out in the **Annarita** case and ruminated upon in the anterior judicial extracts, I find it difficult to discern the link between the 1st Respondent's demand for rates and the alleged violation of the Petitioner's constitutional rights and fundamental freedoms. It is not lost on this court that in the main, the Petitioner's case coalesced around its belief that is was not liable to pay rates to the 1st Respondent owing to the variety of reasons it put forth. As concluded elsewhere in this judgement the Petitioner's case did indeed raise valid points which primarily hinge on schedule four of the constitution that mining is not a devolved function. The validity and applicability of the provisions within the context of the petitioner did not distinguish land and lakes under minerals with the rest applied to other land use. However, a dispute such as the one that had arisen did not per se constitute a constitutional question.

208. The makers of the Constitution of Kenya in their wisdom contemplated scenarios such as the one presented by the instant Petition. It is for this reason that they empowered the Court in the manner that they did under Article 1(3)(c) and 159(1) of the Constitution. Citing **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65 Odunga J** in **Constitutional Petition 51 of 2018 Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR** acknowledged that the Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court's inherent power lies in the nature of the High Court as a Superior Court of judicature.

209. **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 Of 2005** held:

"The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

210. It also bears remembering that in **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself inter alia as follows:

"It is therefore accepted that the court retains…a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

211. In the result, having contemplated all the issues as raised by the Petitioner and reached the conclusions I have in the leading discourse, the court makes the following final orders:

a. The Kajiado County Finance Act, 2014 was validly enacted.

b. In line with the objectives of **Article 159(2)(c)** on Alternative Dispute Resolution, the Petitioner and the 1st Respondent shall hereby submit themselves to a comprehensive consultative process under the supervision of the court and in conjunction with the

national government,(the lead ministry and convenor being that of petroleum and mining) with a view of negotiating the amount of land rates payable by the Petitioner in the period since the commencement of the Kajiado County Finance Act, 2014 and distinguishing the exact acreage of land leased by the Petitioner upon which the 1st Respondent may levy the agreed rates as a devolved function.

c. Such process contemplated above shall be concluded within 6 months from the date of this judgement.

d. Pending the outcome of the process contemplated in (a) above, an order of Prohibition does hereby remove from this court to prohibit the First and Third Respondents by themselves or their servants, agents, and or assignees from trespassing, entering, remaining on, closing, locking, blocking or in any other manner whatsoever and howsoever interfering with the Petitioners premises, factories, gates and properties situated in Kajiado and Magadi in the County of Kajiado; For avoidance of doubt the 145 kilometre Railway line stretch is under the jurisdiction of Kenya Railways and not the county government.

e. An order for the writ of Certiorari hereby removes from this Court to quash the decisions and demands of the First Respondent contained in the letters dated 14th February 2018 and the demands made by the First Respondent's agent, Regional Business Connection Limited, in the letters dates 12th December 2018 and 19th December 2018 directing the Petitioner to remit Ksh 17,448,485,646/- to the First Respondent on account of the alleged arrears of land rates and royalties. In the present petition there is clear evidence in terms of fourth schedule of the constitution and the mining Act which fortifies the petitioner's contention.

f. Pending the outcome of the process contemplated in (a) above, the provisions of the Kajiado County Finance Act, 2014 relating to the imposing of land rates are suspended in as far as they relate to the Petitioner on mines and mineral extractives and until a proper alienation is undertaken making sense of facial and applied challenges of the statute.

g. As none of the parties was fully successful, each party shall bear its own costs.

212. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAJIADO THIS 3RD DAY OF MAY 2019

R NYAKUNDI

JUDGE.

Representation

Mr. Karungo Counsel for the Petitioner

Mr. Sankale for the 1st Respondent