



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 9 OF 2018

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 2(1), 3,(1),10(1),(2) a, b, c, 27& 73 OF THE CONSTITUTION AND IN THE MATTER OF ARTICLES 20(20), (20)(3) & a(b)4(a)&(b),

ARTICLES 21(1), 22(1), (2)& 23(1)& (3) a, b, c& e OF THE CONSTITUTION

IN THE MATTER OF PRINCIPLES OF PUBLIC FINANCE: OPENNESS, EQUALITY, FAIRNESS, PRUDENCE AND PUBLIC PARTICIPATION

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 196, 201, 203, 209(3) & 210(1), (2)&(3) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND

IN THE MATTER OF THE FINANCE MANAGEMENT ACT, NO. 18 OF 2015

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

AND

IN THE MATTER OF MACHAKOS FINANCE ACT, 2015

AND

IN THE MATTER OF ARTICLES 165a, b, d, I & ii & 4 OF THE CONSTITUTION AS READ WITH SECTION 4 OF KENYA PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

SIMEON KIOKO KITHEKA.....1ST PETITIONER

ANTHONY KYENGO.....2ND PETITIONER

MUTUNGA KALELI.....3RD PETITIONER

DRICON TRANSPORTERS SACCO.....4TH PETITIONER

SYOKAS AND TRANSPORTERS SACCO.....5TH PETITIONER

SWAMIRANAYAN TRANSPORTERS SACCO.....6TH PETITIONER

KARROT TRANSPORTERS SACCO.....7TH PETITIONER

SANTRACCO TRANSPORTERS SACCO.....8TH PETITIONER

EMOTRA TRANSPORTERS SACCO.....9TH PETITIONER

HOTLINE TRANSPORTERS SACCO10TH PETITIONER

KIAMA TRANSPORTERS SACCO.....11TH PETITIONER

TRUCKERS TRANSPORTERS SACCO.....12TH PETITIONER

INTERCOUNTY TRANSPORTERS SACCO.....13TH PETITIONER

ATHI SAND TRANSPORTERS SACCO.....14TH PETITIONER

JUKAGI TRANSPORTERS SACCO.....15TH PETITIONER

BUMASUTRA TRANSPORTERS SACCO.....16TH PETITIONER

UTS TRANSPORTERS SACCO.....17TH PETITIONER

HITMAK TRANSPORTERS SACCO.....18TH PETITIONER

UNITRA TRANSPORTERS SACCO.....19TH PETITIONER

-VERSUS-

1. COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

2. COUNTY ASSEMBLY OF MACHAKOS.....2ND RESPONDENT

3. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The Petitioners herein describe themselves as officials of the Kenya National Chamber of Commerce and Industry (Machakos Branch) and SACCO's involved in the harvesting and transportation of sand within Machakos County respectively.
2. The 1st Respondent (hereinafter referred to as "the County Government") and the 2nd Respondent (hereinafter referred to as "the County Assembly") are both devolved systems of governance established under Article 176 of the Constitution.
3. The 3rd Respondent is the Principal legal adviser to the Government.
4. According to the Petitioners, the 2nd Respondent enacted the *Machakos Finance Act 2017* (hereinafter referred to as "the Act") whose effective date was provided as 14 days from the date of assent. The said Act, it was disclosed, provided for, *inter alia*, Sand Harvesting/Transportation Cess (hereinafter referred to as "the Cess"). It was the Petitioners' case that the residents and stakeholders in the industry of Machakos County were totally left out of the process leading to the enactment of the Act and in particular the levying of exorbitant Sand Harvesting and Transporting fees as there was no public participation, a requirement embodied in the Constitution of Kenya, 2010 and the doctrines of reasonableness and legitimate expectation.
5. Accordingly, the 1st and 2nd Respondent were accused of having acted unconstitutionally by enacting the said Act without consulting the residents of Machakos and all stakeholders, including business entities yet the Petitioners have a right to be consulted and a right to participate in all national and county matters. As a result it was contended that the Act levies taxes that are not only unconstitutional but also detrimental to their socio-economic well-being as the same were are both oppressive and draconian.
6. Pending the hearing and determination of the petition, the Petitioners, vide their Motion dated 5th June, 2018 sought a conservatory order on the terms that this Court be pleased to order the suspension of the increased levies, taxes and other licensing fees levied by the 1st and 2nd Respondents by itself, its servants, employees and/or agents on Sand Harvesting and Transport under *Machakos Finance Act, 2018*.
7. The application was however opposed by the 1st Respondent. Apart from contesting the allegation that the Petitioners were not consulted, the 1st Respondent took issue with the manner in which the petition was drawn. It was its case that the affidavit in support of both the application and the petition is defective because it is sworn by a person who is not a party to these proceedings. According to the County Government, the petitioners' prayers in both the application and the petition are amorphous and thus cannot be granted by this Court because although they seek suspension of the increased rates, taxes and licensing fees, they have not specified which among the various items

contained in the *Finance Act* is to be suspended. The 1st Respondent lamented that the petitioners have not pointed to the court what violations of the Constitution which have been committed by the 1st respondent and the Court is left guessing as to what the petitioners want; That the pleadings are also not clear as to which prayers they want, they are uncertain and hence ripe for striking out.

8. On its part the 2nd Respondent averred that the reliefs sought are omnibus and cannot be granted by this Court as they seek a suspension of the increases levies rates, taxes and other licencing fees levied by the Respondents without specifying what exactly is to be suspended and who are the beneficiaries of the reliefs sought herein. It was noted that the Act the subject of these proceedings contains different and various items. There were other allegations which were directed at the substance of the petition itself.

Determination

9. I have considered the applications the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

10. It is clear that in this application, the petitioners seek the suspension of a legislation, or at least part of it, passed by the 1st and 2nd Respondents.

11. Before delving into the merits of the application, the Respondents raised the issue of separation of powers as a bar to the grant of the orders sought herein. Being an issue going to the jurisdiction of this Court, **Nyarangi, JA** in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** while citing *Words and Phrases Legally Defined* – Vol. 3: I-N page 13 held:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

12. In that case the Court further held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

13. It is therefore from the point of jurisdiction that I intend to start my determination since without jurisdiction I have no option but to lay down my tools.

14. What is then is the doctrine of separation of powers? In his separation of powers theory, **Montesquieu** had sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed [*The Spirit of the Laws* (1948)]:

When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.

15. That this principle is reflected in our own Constitution appears in Article 1(3) thereof which provides that sovereign power which pursuant to Article 1(1) of the Constitution ***“belongs to the people of Kenya and shall be exercised only in accordance with this Constitution”***:

“...is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county

governments;

(b) the national executive and the executive structures in the

county governments; and

(c) the Judiciary and independent tribunals.

16. This was appreciated by the High Court in **Trusted Society of Human Rights v. The Attorney-General and Others, High Court Petition No. 229 of 2012; [2012] eKLR**, at paragraphs 63-64 where it held as follows:

“Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two.”

17. Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people’s sovereign power is vested in the *Executive, Legislature and Judiciary*.

18. The broad principle of “separation of powers”, certainly, incorporates the scheme of “checks and balances”; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from **Commission for the Implementation of The Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR** where Njoki, SCJ opined that:

“The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting ultra vires the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided.”

19. The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies which exercise public power. The commissions and independent offices restrain the arms of Government and other State organs, and *vice versa*. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers.

20. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

“The effect of the constitution’s detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

21. However, Article 2(4) of our Constitution which provides as follows:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

22. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution constitutionally empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since, under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to “... institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”

23. My position is supported by the decision in **Coalition for Reform and Democracy (CORD) & Another versus the Republic of Kenya & Another (2015) eKLR** where the court stated *inter alia* at paragraph 125 that:

“Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people’s will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution... Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid...”

24. Therefore when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same. As was held in Jayne Mati & Another vs. Attorney General and Another - Nairobi Petition No. 108 of 2011 at paragraph 31:

“...separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution.”

25. On that note, the Supreme Court in Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR stated that:

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. ”

26. The Court went on to state as follows:

“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts.”

27. Ngcobo, J in Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) on his part expressed himself as follows:

“The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation... By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does.”

28. The Court went on to state as follows:

“While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution.”

29. The South African Constitutional Court in Minister of Health and Others vs. Treatment Action Campaign and Others (2002) 5 LRC 216, 248 at paragraph 99 underscored the Court’s role to protect the integrity of the Constitution thus:

“The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.”

30. I am duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

31. It is accordingly clear that the mere fact that the legislative assembly enacts an Act that is not the end of the matter. I am satisfied that I can grant the orders sought in the petition, where appropriate, or appropriate orders in accordance with Article 23(3). It is therefore my view and I hold that this Court cannot where there is an allegation of violation of the Constitution down its tools without investigating the same. The only question in those circumstances would be whether the intervention or intrusion by the Court is justified.

32. The circumstances of this case are that an Act has been passed by the 2nd Respondent. Dealing with such circumstances the Supreme Court of India in **Hambardda Wakhana vs. Union of India Air [1960] AIR 554** held that:

“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.”

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

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

34. In **Kizito Mark Ngaywa vs. Minister of State for Internal Security and Provincial Administration & Anor [2011] eKLR Ibrahim, J** (as he then was) referred to his own decision made on 6th October 2010 in Mombasa High Court Petition No. 669 of 2009 – **Bishop Joseph Kimani & Others vs. Attorney General & Ors** in which he pronounced himself as follows:

“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that “there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.” It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first.”

35. **Majanja, J** on his part in **Susan Wambui Kaguru & Ors vs. Attorney General Another [2012] KLR** expressed himself *inter alia* as follows:

“I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so.”

36. My holistic understanding of ***Bishop Joseph Kimani’s Case*** is that the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that the operation of the legislative provision are a danger to life and limb at that very moment and where the national interest demand and the situation is certain. On my part I would modify that view by adding to the phrase “a danger to life and limb” the words “or where there is imminent danger to the Bill of Rights” since Article 19(1) of the Constitution provides that the “Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies” and Article 21(a) provides that “it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.” Similarly **Majanja, J** did not rule out entirely the possibility of grant of conservatory orders. What the learned Judge held was that at the stage of the application for conservatory order he could not make an interim declaration which would effectively undo the legislative will *unless there are strong and cogent reasons to do so*. [Emphasis

mine]. In other words where there are strong and cogent reasons conservatory orders may be granted.

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

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

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

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

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

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

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

41. In Norton v. Shelby County, Justice Field said:

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

42. In my view, if the Court has power to declare an enactment void and invalid, likewise the Court must have jurisdiction in deserving cases to suspend provisions of an enactment if to do otherwise is likely to render whatever decision the Court may arrive at a mirage. Our Constitution for example in Article 29(d) outlaws torture and freedom from torture is one of the fundamental freedoms which by virtue of Article 25 of the Constitution cannot be limited. If Parliament was to purport to pass an Act which introduces torture, it would be illogical for the Court to stand back and say that it has no jurisdiction to grant conservatory orders. To do so would amount to the Court ceding not only its powers but failing to protect the Constitution as envisaged in Article 21(a) of the Constitution. What use would a favourable determination of the petition be to the victim of torture if by the time of the determination, the torture has taken place and freedom lost beyond recall. I therefore do not subscribe to the notion that under no circumstances can conservatory orders be granted where a piece of legislation is under challenge.

43. Where in my view, the Court is convinced that the orders ought to be granted, I do not see why the Court should shy away from doing so. On this note I wish to associate myself with the holding of Mulenga, JSC in Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125 to the effect that:

"The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this."

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

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

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

46. Article 23 of the Constitution does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation. The only rider is that the case must be one which falls under Article 22 of the Constitution.

47. This however does not mean that Courts ought to readily suspend legislation simply because a challenge has been made to a statute. I agree that power ought to be exercised very sparingly where the Court is satisfied that it ought to be exercised. However, it can be exercised. Therefore whereas I agree that there is a presumption of Constitutionality of Statute that is a rebuttable principle. This was clearly appreciated in **Ndyanabo vs. Attorney General [2001] 2 EA 485** where it was held *inter alia* that in interpreting the Constitution, the Court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction.

48. That brings me to the present case.

49. Under what circumstances can the Court grant conservatory orders?

50. In **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

51. This position was reinforced by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors** (supra) where the highest Court in the land held:

“‘Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the *inherent merit* of the case, bearing in mind *the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.*”

52. Whereas it is true that in applications seeking to suspend legislation care must be taken to ensure that Courts do not readily accede to the temptation to render legislation stillborn and that such power ought not to be exercised lightly, to hold that the Court can only grant conservatory orders where the Court is satisfied that the challenged provisions are unconstitutional would in my view be stretching the standard too far. The law as I understand it is that in considering an application for conservatory orders, the court is not called and it is indeed forbidden from making any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the first condition the applicant is required to establish a *prima facie* case with a likelihood of success. As **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre for Rights Education and Awareness (CREAW) & 7 Others** stated:

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

53. What are the issues the petitioners intend to canvass at the hearing of this petition? It is contended that the process of enactment of the Act was itself unconstitutional since it was not in accordance with various constitutional and statutory provisions which require that there be public participation in the enactment of legislation. That there is such a requirement is clearly not in doubt and the Courts have nullified legislation which do not comply with such constitutional edicts. In **Robert N. Gakuru & Ors vs. The Governor Kiambu County & Ors [2014] eKLR** this Court cited with approval the decision in **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC)**, where it was held *inter alia* that held that:

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

54. As was held in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra):

“Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the

opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens....[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few.....It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process...In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.”

55. In Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) the Court discussed what public participation may entail and expressed itself as follows:

“This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.”

56. As regards precision in the pleadings, it is my view that where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed, where the Court can glean from the pleadings the substance of what is complained, to dismiss the petition on the ground of lack of precision would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.

57. The first issue for determination is therefore whether the applicant has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.

58. In this case, it is contended that the decision or action taken by the Respondents flies in the face of the Constitutional provisions in particular the national values and principles of governance set out in Article 10 of the Constitution and specifically the need for public participation in the enactment of the Act in question.

59. Having considered the foregoing, it is my finding that considering the issues raised, this petition discloses *prima facie* arguable issues for trial. In other words it cannot be said that the petition is wholly frivolous or unarguable at this stage.

60. Having passed the first hurdle the second issue is whether the petitioner has satisfied the provisions of Article 23(3)(c) of the Constitution.

61. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.

62. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23(3)(c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In my view, an applicant for conservatory order under Article 23(2) (c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a *prima facie* basis that his or her right or fundamental freedom in the Bill of Rights or those of other persons have been denied, violated or infringed, or is threatened. However Article 19(3)(a) and (b) of the Constitution provides that:

The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter.

63. Therefore rights and fundamental freedoms are not restricted to those expressly set out in the Bill of Rights. It is my view and I hold that there is a right for the public to participate either individually or collectively on the process of legislative enactment and the denial of this opportunity may well result in the violation of rights.

64. However whereas under Article 258(1) of the Constitution, every person has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention, the mere fact that a person is entitled to bring such proceedings does not automatically entitle such a person to grant of conservatory orders. The person is enjoined to go further and show how the refusal to grant the said orders is likely to be prejudicial to him or her.

65. The Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** expressed itself on the matter as follows:

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal...These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely...That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.”

66. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a very central position.

67. Dealing with the circumstances under which the Court would grant conservatory orders the Supreme Court in *Munya’s Case* (supra) expressed itself as follows:

“Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources... These principles dictate that our conscientious sense of proportions, stands not in favour of allowing the conduct of fresh elections for Meru County’s gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the Court’s contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that.”

68. As was held in **Centre for Rights Education and Awareness (CREAW) & 7 Others** (supra) a party seeking a Conservatory Order only requires to demonstrate that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. What amounts to real danger was dealt with by **Mwongo, J** in **Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR**, where expressed himself as follows:-

“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

69. Therefore the burden is on the person seeking to suspend the operationalisation of a legislation or part of it to show that there is danger which is imminent and evident, true and actual and not fictitious and which danger deserves immediate remedial attention or redress by the court. A remote danger will not do. In other words the applicant must show that the probability as opposed to mere possibility of the danger occurring is real and imminent. The question that arises is whether in the circumstances of this case that burden has been discharged.

70. As is clear from the affidavit sworn by the applicants herein which affidavits are, with due respect to the applicants rather scanty for an application of this magnitude, there is completely no allusion as to that imminent danger. In fact apart from showing that they have a case that merits further investigation, there is no iota of evidence tending to show any prejudice or danger that the applicants face in the event that the impugned legislation is implemented. The applicants have instead contented themselves with exhibiting copies of the 2016 Schedule of Fees and Charges and 2018 Schedule of Charges and Fees. There is no allegation in the affidavits that the implementation of the new fees and charges would have the effect of immediately driving the applicants out of business hence infringe upon their rights under Article 43 of the Constitution. The applicants instead left it to the Court to peruse the two schedules and arrive at its decision. Whereas learned counsel for the applicants in his submissions alluded to the expenditures incurred by the applicants in the subject business no such averment appears in any of the affidavits sworn and filed on behalf of the Petitioners herein. Being a crucial component and condition for the grant of conservatory orders such an averment is required to be made on oath as it cannot be a matter for submissions. As has been held time and

again parties must understand that if they bring actions for which the burden of proof is on them, it is for them to prove the same and it is not enough to write down the particulars and, so to speak, throw them at the head of the court. Parties ought not to simply bind documents and exhibit them to their affidavits. They must explain the contents to the Court and their relevance. This, the applicants regrettably failed to do in this case. See **Bonham Carter vs. Hyde Park Hotel Ltd. [1948] 64 TLR 177.**

71. Therefore as the applicants have failed to aver, leave alone prove, that they face imminent, evident, true and actual danger that they will suffer prejudice as a result of the violation or threatened violation of the Constitution, the applicants have failed the test for the grant of conservatory order. In the absence of that proof, to grant the conservatory orders in the circumstances of this case would be disproportionate to the mischief that is sought to be cured by such orders. In other words it does not necessarily follow that in every petition that the Petitioner discloses a *prima facie* case, conservatory orders must be issued as a matter of course. Whereas I cannot at this stage make definite findings on the fate of the petition, it is clear to me that the Petitioners have not made out a case for the grant of the conservatory orders sought.

72. Accordingly, the Motion dated 5th June, 2018 fails and is dismissed. Costs in the cause.

73. It is so ordered

Dated at Machakos this 9th day of July, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mburu for the Petitioners

Mr Muumbi for the 1st Respondent and holds brief for Ms Kamende for the 2nd Respondent

CA Geoffrey