REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CONSTITUTIONAL PETITION NO. 8 OF 2016

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE(S) 2 (4), 10(2)(a), 22(2)(c), 209(3) & (4), 216(2), 258(2)(C), 259 AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE COUNTY TRADE LICENCE BILL, 2016 VIDE KIAMBU COUNTY GAZETTE SUPPLEMENT NO. 6 (BILLS NO. 4) DATED 10TH JUNE 2016 AND/OR THE SUBSEQUENT KIAMBU COUNTY TRADE LICENCING ACT THERETO

AND

IN THE MATTER OF AN ALLEGED THREAT TO THE RIGHT(S) TO PROPERTY UNDER ARTICLE 40(1) OF THE CONSTITUTION OF KENYA 2010 OF BUSINESS PERSONS IN KIAMBU COUNTY

AND

IN THE MATTER OF AN ALLEGED THREAT TO THE RIGTHT TO FREEDOM AND SECURITY OF THE PERSON UNDER ARTICLE 29 (a) OF THE CONSTITUTION OF KENYA 2010 OF BUSINESS PERSONS IN KIAMBU COUNTY

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES 209(3) & (4), 216(2) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

JAMES GACHERU KARIUKI T/A CONSTITUYEN

TRADERS AND 536 OTHERS.....PETITIONERS

AND

THE COUNTY GOVERNMENT OF KIAMBU

& OTHERS.....RESPONDENTS

JUDGMENT

A. INTRODUCTION

1. Should County Governments charge for trade licences without an enabling Act of Parliament under Constitutional of Kenya, 2010 or are County Governments obligated to issue trade licences for free as part of their functions under the Constitution? That is the central question presented in this suit. The Applicants argue that the County Government of Kiambu has no legal basis for charging fees for trade licences and that it is illegal and constitutionally impermissible for them to do so. The County Government of Kiambu and all the other Respondents balk at this idea and argue that there is sufficient Constitutional and statutory basis for charging fees for trade licences by County Governments. In the analysis below, I describe and evaluate the rival positions of the parties and come to a conclusion and finding on the question.

2. James Gacheru Kariuki and 536 others are the Petitioners in the suit. They all work as business people within Kiambu County. They are aggrieved by the imposition of trade licencing fees and other like fees charged by the County Government of Kiambu (the 1st Respondent). Arguing that all such fees are illegal and unconstitutional, they seek for the following prayers:

> a. "A declaration do issue that a trade licencing fee, a business permit fee, a single business permit fee a non-annual trade charge and/or enforcement and occupational permit fees as matters of financing a County Government are not required by the Constitution of Kenya, 2010 and/or any national legislation and are therefore illegal and unconstitutional hence null and void.
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> b. A declaration do issue that business persons within the territorial jurisdiction of the 1st Respondent are entitled to fair administrative action which is lawful of being issue issued with trade licences and/or business permits and/or single business permits and/or non annual trade permits and/or Enforcement and Occupational Permits free from any charges if at all.
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> c. A prohibitory injunction do issue prohibiting the 1st Respondent from implementing and/or enacting any county legislation providing for the payment of any fees, charges, levies, rates and/or taxes that are not provide for by the provisions of Article 209(3) & (4) of the Constitution of Kenya and a corresponding national legislation from where the tariffs and pricing policies shall be adopted and implemented.
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> d. Costs of the petition as shall be assessed by the Honourable Court."

B. THE PETITIONERS' CASE

3. The Petitioners' case is straightforward. They argue that the imposition of trade licencing fees, business permit fees, single business permit fees, non-annual trade charges and/or enforcement and occupational permit fees (hereinafter collectively and generically referred to as "Trade Licences") by the County Government of Kiambu is unconstitutional and illegal and infringement of their rights under Articles 31(a) and 40(a) & (b) of the Constitution of Kenya, 2010. They base their contention of unconstitutionality on two related arguments:

> a. First, they argue that the plain reading of the Constitution does not confer on County Governments the right or power to charge for Trade Licences as the revenue raising measures of County Government are strictly enumerated in Article 209(3) of the Constitution – and they do not include the power to impose fees for Trade Licences.
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> b. Second, the Petitioners argue that it is contrary to national government economic policy to charge Trade Licence Fees and therefore in violation of Article 209(5) of the Constitution.

I will describe each of the arguments below.

4. First, the Petitioners argue that County Governments can only impose taxes and other fees as permitted by the Constitution. This, the Petitioners argue, is provided in Article 209(3), (4) and (5) of the Constitution. Article 209 of the Constitution is entitled "Power to Impose Taxes and Charges" an provides as follows:

> 1) Only the national government may impose --
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> (a) income tax;
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> (b) value-added tax;
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> (c) customs duties and other duties on import and export goods; and
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> (d) excise tax.
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> 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.
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> (4) The national and county governments may impose charges for services.
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> (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.

5. The Petitioners argue that County Governments can only impose property rates and entertainment taxes directly. For any other tax or charge they impose, they must be expressly permitted by an Act of Parliament. The Petitioners argue that there is no Act of Parliament permitting the imposition of Trade Licences Fees since the Trade Licencing Fees Act was repealed in 2006. As such, the imposition of Trade Licence Fees by the County Government of Kiambu is illegal and unconstitutional.

6. Further, the Petitioners argue that the County Government of Kiambu cannot charge Trade Licence Fees under Article 209(4) as charges for services because trade licensing is not a service provided by the County but is, in fact, a revenue raising measure by the County. Finally, the Petitioners argue that trade licencing under the Fourth Schedule is recognised as a "function" of the County Government. When an entity performs its functions it is not offering services but fulfilling its legal mandate. Hence, there is no necessary association with services offered when the County Governments are assigned the "function" of trade licencing.

7. In aid of the argument that imposition of Trade Licence Fees is not for services offered but as a measure to raise revenue, the Petitioners point to two provisions of the law:

> a. First, the Petitioners point out that County Governments were permitted to utilise the revenue raising measures of the defunct Local Authorities that preceded them for a set-time that expired on 30/09/2013. This is per Sections 23 and 30 of the County Governments Public Finance Management Transition Act. The necessary implication, the Petitioners argue, is that after that the County Governments were to resort only to the financing mechanisms provided under the

Constitution – which does not include raising revenue by imposition of Trade Licence Fees absent an Act of Parliament.

b. Second, the Petitioners claim that the tale-tell signs of the purpose of Trade Licences is betrayed by the money of enforcement. If the Trade Licences were issued for services rendered, the Petitioners argue, then going by the provisions of Sections 70 and 71 of the Interpretations and General Provisions Act, the penalty for not paying the Trade Licence Fees would be denial of the service. However, the Petitioners remind the Court, failure to pay Trade Licence Fees is enforced through the Criminal Justice System whereby those who do not pay are hauled to Court and charged with criminal offences. This is clear evidence, in the eyes of the Petitioners, that the Trade Licence Fees has nothing to do with services rendered by the County but an illegal means to raise revenue without legal authorization.

8. The second major argument expounded by the Petitioners in favour of their Petition is that there is a National Economic Policy against Trade Licence Fees. To make this argument, the Petitioners have traced what they see as the legal history of repeal of the use of Trade Licence fees as a matter of National Economic Policy even before the passage of Constitution of Kenya, 2010. They have given the following relevant chronology:

a. There used to be trade licencing fees under the Trade Licencing Act (Chapter 297 of the Laws of Kenya – which is now repealed). These Trade Licencing Fees were contained in the First Schedule to that repealed Act but were done away with in 1997 through section 54 of Act No. 8 of 1997. That section repealed the entire First Schedule to the repealed Trade Licencing Act. Consequently, Trading Licences were issued for free from 01/01/1998 until the time the Trade Licencing Act was repealed by the provisions of section 112 of the Licencing Laws (Repeals and Amendment) Act of 2006.

b. Secondly, Occupational Licence Fees were paid to Local Authorities only upto 02/12/1998 when the then Local Government Act (Chapter 265 of the Laws of Kenya) was amended through section 42 of Act No. 8 of 1997. This Section amended Section 2 of the Local Government Act by inserting a new definition of "Licence". "Licence" was now defined to "include a permit but exclude a business permit." The practical implication of this was that no occupation licence fees were paid to Local Authorities after 1998. However, it would appear that Local Authorities continued charging Business Permit fees as evidenced by the Petitioners' own exhibits being Gazette Notices from various Local Authorities announcing the rates payable as Business Permit Fees. The Petitioners argue that "effective 1st January, 1999 [Business Permit Fees] was a fee for services rendered by a local authority and/or facility offered by a local authority." I will return to this later.

c. Thirdly, the Petitioners argue that the provisions of Section 22 of the County Government Public Finance Management Transition Act permitted the County Governments to continue utilising the revenue-raising measures of the defunct local authorities – but only until the sunset of that Act which was 30/09/2013. As such, the Petitioners argue that Parliament clearly intended that County Governments could no longer rely on the revenue raising measures of the defunct Local Authorities after 30/09/2013.

d. Finally, the Petitioners point out the provisions of Section 70 of the Interpretations and General Provisions Act. It provides as follows:

> Where a written law confers a power to issue licence, permit or authorization, then, unless a contrary motion appears, the licence, permit or authorisation may be issued subject to conditions, not inconsistent with that Law, which the authority issuing it deems expedient.

The Petitioners argue that the Kenyan people expressed contrary intention by including trade licencing as a function of the County Government under the Fourth Schedule of the Constitution rather than as a power to tax under Article 209 of the Constitution.

C. <u>THE RESPONDENTS' CASE</u>

9. Naturally, the Respondents have vigorously opposed the Petition. The 1st Respondent (County Government of Kiambu) filed a Replying Affidavit and Written Submissions including a List of Authorities. The other four Respondents were represented by the Honourable Attorney General who filed Grounds of Opposition. Both Mr. Ranja for the County Government of Kiambu and Ms. Wawira of the Honourable Attorney General's chambers also submitted orally. The arguments by all the Respondents mirror each other so I will summarize them together.

10. First, the Respondents urged the Court to endeavour to interpret the Constitutional holistically so as to arrive at the correct determination. In particular, they urged me to follow the lead of Lenaola J. (as he then was) in ***Africa Rafiki Ltd & 2 others v Nairobi City County Government & 3 others [2015] eKLR*** in adopting a purposive mode of interpreting the Constitution so as to bring to life the true aspirations of the people of Kenya.

11. They also urged me to follow, as persuasive authorities the cases of *Tinyefunza vs Attorney general Const. Petition No. 1 of 1996 (1997 UGCC 3), Hambarda Wakhana vs Union of India AIR (1960) AIR 554* and lastly *Olum and Another vs Attorney General of Uganda (2002) 2 EA 508, 518.*These are all cases that enunciate a "purpose interpretation" method of constitutional interpretation.

12. The 1st Respondent placed reliance on Article 209 and 210(1) of the Constitution. They argued that the two Articles permit County governments to levy property tax, entertainment tax as well as charges for services they provide. Lastly, the Respondents argued that if a County wishes to impose a tax or license fee there must exist legislation.

13. The 1st Respondent submitted that in charging license fees/business permit fees, laws guiding the levy of such fees were informed by Articles 210(1), 185(2) and the Fourth Schedule. They relied on the case of ***Robert N. Gakuru & others v County Government Of Kiambu & another [2016] eKLR*** where the Court remarked that "....to that extent it is not necessarily unlawful for County Government of Kiambu to impose or levy parking fees, business permits, single business permits and/or business or trade license fees."

14. The 1st Respondent's submitted that the County Governments provide fire brigade services, cleaning of streets, repair of roads within the towns, garbage collection and sewerage services. These services require funding, which funds are derived from the payment of business license fees.

15. They also submitted that a clear reading of the provisions of Articles185, 209, 210, and 260 and the Fourth Schedule of the Constitution reveal that the County Government may levy licensing fees for a devolved function where there exist a requisite legislation. In this instance therefore, the 1st respondent in tabling the trade a license bill, seeks to levy license fee once the legislation in enacted, which is by all means constitutional.

16. In regard to the issue whether reliance was placed on a repealed law, the Petitioner allege that the applicants are relying on the County Government Public Finance Management Transition Act No, 8 of 2013(Repealed), which law now stands repealed. It was the 1st Respondent's humble submission that that was not the position.

17. They submitted that the purpose of the County Government Public Finance Management Transition Act No.8 of 2013(Repealed), "to provide for ,pursuant to section 15 of the Sixth Schedule of the Constitution, a framework for establishment and functions of Transition County Treasuries."

18. A reading of the Sixth Schedule provides an understanding that the said law was limited for a transition period and it is the reason why the said law provided that it shall stand repealed on the 30th of September, 2013, this is because the County Government upon the swearing in of the Governor and the MCAs it was believed that they would now formerly take over their duties and functions and the

consequent effect was that the now repealed law would be of no benefit.

19. The 1st Respondent argued that it followed, therefore, that in answer as to whether the 1st Respondent relied on a repealed law, the answer was in the negative. This was because it was evident that the law ceased to exist and further the 1st Respondent as submitted earlier had tabled a specific County legislation providing for the licensing/business permit fees without making reference to the repealed law.

20. The 1st Respondent's also submitted in regard to whether they acted contrary to the provisions of the Articles 209 and 216 of the Constitution. They submitted that Article 209 of the Constitution provides that a County can impose levy charges for the services it provides. The argument of the 1st Respondent is that the 1st Respondent does not wish to levy a tax but a license.

21. The 1st Respondent pointed out that Article 209(3)(c) of the Constitution specifically prohibits Counties from levying taxes unless their exists an Act of Parliament but goes ahead to provide that a County may levy Charges for services it provides. The 1st Respondent submitted that the Court ought to take judicial notice of the fact that County Government's provide services, which are used by business owners as they run and operate their various business within the jurisdiction or the 1st Respondent.

22. The 1st Respondent submitted that a plain reading of the Article 216 of the constitution which provides that;

> The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government.

23. The 1st Respondent argues that that the provision relates to the function of a Constitutional Authority and the same does not relate to a means of revenue raising as submitted by the Petitioner.

24. In dealing with whether the 1st Respondent acted contrary to Section 120 of County Governments Act the 1st Respondent cited Section 120(5) of the County Government Act which provides that:-

> A county government may make laws and regulations to give effect to the implementation and enforcement of tariff policies.

25. The 1st Respondent submitted that it was evident that under Section 120(5) of the County Governments Act, County Governments are empowered to make laws that provide for pricing and tariffs. It is on the strength of this that the 1st Respondent enacted a legislation that allowed it to require payment of a license fee/Single business permit fee where it provides services.

26. Lastly, on whether the Petitioner is entitled to the prayers sought, the 1st Respondent stated that the Petitioners have argued that the 1st Respondent has re-introduced revenue raising measures that were done away with sometimes in 1998. The 1st Respondent humbly submitted that though the trade a licenses may have been done away with, this position was adopted prior to enactment of the 2010 Constitution. The Constitution post 2010 created County Government and vested in them legislative authority and autonomy to act within Constitutional limits.

27. Further, the 1st Respondent submitted that under the Constitution, County Government have the capacity to demand for license fees provided the same is provided for in legislation. This position is supported by The Honourable Odunga J, in ***Kenya Pharmaceutical Association v City Council of Nairobi & 2 other[2015] Eklr*** where he placed reliance on the decision in **Nairobi High Court Miscellaneous Application No.596 of 2008-*Kenya Union of Saving and Credit Cooperatives (KUSCCO)Limited vs Nairobi City Council (Now Nairobi City County)*.**

28. The 1st Respondent submitted that from the foregoing submissions the declaratory prayers sought

ought not to be issued on account of the fact that in demanding for the said fees they acted within the statutory and constitutional limits.

29. In regard to the prohibitory injunction they submitted that the Petitioners had failed to meet the threshold required for the grant of the prayers sought. Reliance was placed in ***JIPE HOUSE KINDERGATEN LIMITED V CITY COUNCIL OF NAIROBI [2012] Eklr*** where the Justice C.W.Githua stated that:

> .....the law is that the Court cannot issue orders of prohibition to prevent public bodies like the Respondent or inferior tribunals from performing their statutory duties and functions when the same are executed in accordance with the law.....

30. Finally, the 1st Respondent sought that the Petitioners suit be dismissed with costs to the Respondents.

D. ANALYSIS AND DETERMINATION

31. I have considered the rival positions of the parties in this important case. I am fully aware of the import of the interpretation to the Constitutional provisions I have been asked to give meaning to. That is why, I have begun, in addition to accepting the admonition by Lenaola J. (as he then was) in the ***Africa Rafiki Ltd Case*** above on the correct method on Constitutional interpretation, I have reminded myself of the in-built theory of interpretation of our Constitution in Article 259 of the Constitution. That Article provides as follows:

> (1) This Constitution shall be interpreted in a manner that-
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> (a) promotes its purposes, values and principles;
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> (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> (c) permits development of the law; and
>
> (d) contributes to good governance.
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> …….
>
> (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…

32. The Supreme Court has interpreted Article 259 as among other things requiring Courts to interpret the Constitution in a manner that eschews mechanical jurisprudence but, instead to breathe meaning to the Constitution in a manner that comports with the lived realities of the People of Kenya. In other words, Courts are expected to interpret the Constitution contextually – aware of the history and social context that shaped it. Hence, in ***In the Matter of the Kenya National Commission on Human Rights***, *Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR* thus (at paragraph 26) the Supreme Court, in stating that the Constitution must be interpreted holistically expounded thus:

> But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

33. In an earlier case.

Re *In the matter of the Interim Independent Electoral Commission* the Supreme Court quoted with

approval the South African Case of ***Minister of Defence, Namibia -vs-Mwandinghi*** and stated as follows:

> Interpreting the Constitution is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.

34. In the ***Africa Rafiki Ltd Case*** Lenaola J. cited with approval a seminal decision by the US Supreme Court on the correct mode of Constitutional interpretation which is in line with the guidelines given by our own Supreme Court which I also adopt and will guide me here. The case is ***South Dakota vs North Carolina 192 US, 268 (1940) LED.*** In the decision the US Supreme Court stated at paragraph 465:

> Elementary rule of constitutional construction is that no one provision of the constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the general purpose of the instrument.

35. This same principle was announced next door in Uganda in the case of ***Tinyefunza vs Attorney General Const. Petition No. 1 of 1996 (1997 UGCC 3)*** where the Court of Appeal of Uganda stated that:

> The entire constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.

36. What unmistakably emerges from these cases and principles as the most important guidance in constitutional interpretation, one that I will apply in the case at hand is that Courts are required by our Constitution to adopt a purposive interpretation of the Constitution that advances national values and principles, promotes the rule of law, good governance and human rights on the basis and in light of the socio-political and economic history, context, culture and circumstances of our country.

37. With this admonition in mind, the task at hand lightens. The Petitioners insist on the principle of legality: that any financing mechanism that the County Government of Kiambu chooses must pass Constitutional muster; it must have been provided for under the Constitution. They insist that the Constitution permits County Governments to impose only three types of taxes and one type of charges. The three types of taxes are:

a. Property rates – Article 209(3)(a);

b. Entertainment taxes – Article 209(3)(b); and

c. Any other tax authorised by an Act of Parliament – Article 209(3)(c).

38. The Petitioners contend that other than these three types of taxes, the only other charges a County Government can impose is that permitted under Article 209(4) of the Constitution namely charges for the services they provide.

39. It is the Petitioners' case that Trade Licence Fees do not fall under any of the specifically permitted taxes and they are not charges for services provided by the County Government. Further, they argue, as enumerated above, that Trade Licence Fees prejudice national economic policies because they reverse the policy of the National Government in the period immediately before the promulgation of the Constitution to charge Trade Licence Fees as a means of raising revenues.

40. I have carefully considered the arguments by the Petitioners and I must say that they raise powerful logic. Ultimately, however, I have come to the conclusion that the interpretation to the Constitution that they propose fails the ultimate test of purposive interpretation that the Constitution itself decrees. I say so for three reasons.

41. First, while it is true that Article 209 of the Constitution identifies three types of taxes and one form of charges that County Governments can levy, Article 210 of the Constitution is quite explicit that it envisages that both the National as well as County Governments may impose licencing fees. The text of the Constitution is quite clear: No tax or licencing fee may be imposed, waived or varied except as provided by legislation. Hence, the drafters of the Constitution anticipated that both levels of Government may impose licencing fees provided that it was contained in legislation.

42. Article 260 of the Constitution, on the other hand, defines "legislation" to include "an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or a law made by an assembly of a County Government, or under authority conferred by such law."

43. In other words, Article 210 of the Constitution plainly contemplated that the National Government and County Governments could impose licencing fees as long as the imposition of such licencing fees were provided for in either an Act of Parliament or a County Legislation.

44. If when interpreting Article 209(3) and (4) of the Constitution I am required to assume that I am interpreting the whole Constitution as the theory of purposive interpretation demands, then, I must take into consideration Article 210 of the Constitution before concluding that the categories of charges or levies that a County Government can impose is closed in Article 209(3) and (4) of the Constitution.

45. I am buoyed in this holistic interpretation by the context, history and the pragmatic reality of Kenya. I begin by noting that one of the clear aspirations of Kenyans in the Constitution of Kenya, 2010 was to entrench, vivify and accelerate devolution. Kenyans saw devolution and the establishment of County Governments as a necessary step in ensuring both good governance of the country as well as more equitable sharing of the prosperity of the nation. Any interpretation we give to the various provisions related to devolution in the Constitution must take this plain historical fact and context into account.

46. Doing so in the case of interpreting Articles 209 and 210 of the Constitution requires one to ask whether Kenyans intended that the National Parliament would need to act to permit County Governments to levy charges which are the staple of local governments anyway in the world: Trade Licences. It is unfathomable that Kenyans intended to subject County Governments – which are declared as autonomous entities under the Constitution – to this level of intrusion by the National Parliament. Taking this context into consideration would yield the conclusion that the drafters of the Constitution intended that County Governments should be able to impose Trade Licences provided that they lawfully enacted legislation providing for their imposition.

47. The second reason I am persuaded that Trade Licences within a County legislative framework are constitutionally permissible is that despite rigorous efforts by the Petitioners, I am unable to agree with them that the National Government has enunciated a clear policy against the use of Trade Licences as a revenue raising measure. While it is true that the majestic legal history presented by the Petitioners point to an un-articulated policy of moving away from use of Trade Licences as revenue raising measures in the pre-2010 period, there is no such discernible National Policy in the post-2010 period. It would, therefore, be quite a stretch to conclude that the use of Trade Licences as a revenue raising measure by the County Governments is inimical to stated National Economic Policy as to be violative of Article 209(5). The argument by the Petitioners is really that the imposition of Trade Licence Fees by County Governments is pre-empted by pre-announced National Economic Policy. However, there is no evidence of such National Economic Policy. Indeed, the Honourable Attorney General who is the Chief Legal Adviser to the National Government opposed the Petitioners' claims.

48. One may theorize that one reason no such policy exists is because it would probably be in conflict with the Constitutional text given my interpretation of Articles 209 and 210 of the Constitution above. It is doubtful whether the National Government can legitimately formulate a National Economic Policy that pre-empts legally permissible mechanisms for County Governments to finance themselves. That would be pernicious to the objects of devolution and probably inimical to the written text of the Constitution.

49. Finally, I would independently hold that the impugned Trade Licences can easily be comprehended

under Article 209(4) of the Constitution as "charges" imposed by the County Government for the services they provide. I find the distinction drawn by the Petitioners between "functions" of the County Government and "services" unpersuasive to the extent that the argument cannot envision some services being offered in performance of the functions of the County Government.

50. The Petitioners themselves appear to accede that Trade Licence Fees can be issued in return for services rendered. In their own brief, they accede that the defunct Local Authorities charged for Trade Licences that "effective 1st January, 1999 [Business Permit Fees] was a fee for services rendered by a local authority and/or facility offered by a local authority." This is an acknowledgement that Trade Licence Fees are, at least in part, payment for services rendered.

51. There is no denying that the Petitioners, as, indeed all other business people in Kiambu, receive general services from the County Government. Some of those services are not quantified and paid for at the unit level. Take, for example, fire brigade services or provision of street lights for security or street cleaning. All these are services that are offered by the County Government but it is impossible or undesirable for the County Government to charge them per unit at the point of use. How, then, should the County Government finance these activities and services unless it charged Trade Licence Fees to those who are economically productive in the County and benefiting from its services?

52. Finally, I would point out that there is no necessary and categorical bifurcation between levying Trade Licence Fees for purposes of raising revenues and levying them as charges for services offered. "Offering Services" is not an essentialist and taxonomic category with pre-determined content meaning the retail pay for the particular service per unit. One can envisage the County Government providing a broad array of services which cannot be charged in retail fashion at the unit level but which must be financed by charging for other generic services offered by the County Government. The manner in which the County Government chooses to charge for the services it offers is a matter of policy preference which is left to the County Government as long as the Republican process of law making with the participation of both the County Assembly and the County Executive with effective public participation is followed. I note that other cases have obliquely found (at least in obiter) that County Governments may charge Trade Licence Fees. See, for example, Lenaola J. (as he then was) in ***Cereal Growers Association & another v County Government of Narok & 10 others [2014] eKLR*** (holding that Counties may charge agricultural cess provided there is either National or County Legislation providing for it – after concluding that agricultural cess is a charge which is a form of tax levied as part of the County Government's exercise of its function in Agriculture under the Fourth Schedule). Similarly, Odunga J. remarked in ***Robert N. Gakuru & Others v County Government of Kiambu & Another [2016] eKLR*** that:

> The County Governments are also authorised to impose charges for the services they provide. Therefore if the County Government maintains roads within its area, it may well be entitled to impose charges for the maintenance thereof. To that extent, it is not necessarily unlawful for the County Government of Kiambu to impose or levy parking fees, business permits, single business permits and/or business or trade licence fees. As to whether the County Government of Kiambu offers services in respect of which the said charges are levied cannot be determined based on the material placed before me.

53. Before concluding, I should briefly address an intriguing issue raised by the Petitioners. They perceptively argue that the manner of enforcement of the Trade Licence Fees – through Criminal Justice System – belies the argument that the Trade Licence Fees are for services offered. They point to the provisions of Sections 70 and 71 of the Interpretations and General Provisions Act. In sum these provisions permit an authority that is permitted to charge for services to establish prior payment of the levied charges as a condition for offering those services. However, I note that the phraseology in Section 70 uses the word "may" – indicating that refusing to offer the services is only one of the enforcement methods an authority may choose.

E. <u>DISPOSITION AND ORDERS</u>

54. Ultimately, therefore, the Petition fails. My finding is that the County Government of Kiambu is

entitled by the Constitution to levy Trade Licencing Fees, Business Permit Fees, Single Business Permit Fees, Non-annual Trade Charges or Occupation Permit Fees as long as these fees are anchored in an appropriate County Legislative Framework.

55. This was an important public interest case that sought the correct interpretation to unclear Constitutional provisions. I will, therefore, not saddle the Petitioners with the costs of the Petition. Instead, I deliver my gratitude for a well argued case. Even though the Petitioners did not have Counsel representing them, Mr. James Gacheru Kariuki who filed briefs on their behalf and made oral submissions acquitted himself admirably. He has earned the Court admiration for his conduct of this case. Each party will, therefore, bear its own costs.

Dated and delivered at Kiambu this 15th day of June, 2017.

…….

JOEL NGUGI

JUDGE