



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CONSTITUTIONAL PETITION NO. 3 OF 2014**

**IN THE MATTER OF ARTICLES 1, 2, 10, 185, 196, 199, 209 AND 210 OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 87 OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012**

**AND**

**IN THE MATTER OF THE UASIN GISHU COUNTY FINANCE ACT, 2013**

**AND**

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 196 OF  
THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ENCLOSED BUS PARKS PARKING CHARGES FOR MOTOR  
CYCLE STICKERS DAILY AND MONTHLY**

**BETWEEN**

**THE NORTH RIFT MOTOR BIKE**

**TAXI ASSOCIATION (NRMBTA) ..... PETITIONER**

**AND**

**THE UASIN GISHU COUNTY GOVERNMENT ..... RESPONDENT**

**JUDGMENT**

The Petition dated 11th February, 2014 was filed by the North Rift Motor Bike Taxi Association (NRMBTA) against the Uasin Gishu County Government. It prays that a declaration do issue pursuant to Article 2 (4) of the Constitution of Kenya, 2010 that the Uasin Gishu County Finance Act, 2013 as

enacted is invalid for failure of compliance with Articles 10 (2) (a) and 196 (1) (b) of the Constitution of Kenya, 2010 and Section 87 of the County Government Act, 2012.

The Petition is brought pursuant to Articles 1, 2, 10, 185, 196, 199, 209 and 210 of the Constitution, 2010.

### **THE PETITIONER'S CASE**

The Petitioner is a duly registered association under the Societies Act, Cap 108. It operates under Certificate number 30785. The members of the Petitioner are involved in public transport business within the Uasin Gishu County (hereafter the Respondent County) by use of motor cycles.

To operate their trade the members of the association are required to pay on a daily and monthly basis parking charges to the Respondent who in turn issue them with stickers. They have been paying Ksh. 850/= and Ksh. 40/= for the monthly and daily charges respectively. The Respondent is now demanding Ksh. 1,000/= and Ksh. 90/= for monthly and daily charges respectively as stipulated in Clause 14 (h) and (I) of the First Schedule of the Respondent's County Finance Act, 2013.

The Petitioner then claim that the said County Finance Act, 2013 is a nullity and/or invalid for the following reasons:-

- Failing to facilitate public participation including the Petitioner before enacting it.
- It militates against national values and principles of governance as envisaged under Article 10 (2) (a) of the Constitution.
- The enactment of the said Finance Act is likely to hamper sustainable development in Kenya and the Respondent's County as it will run the members of the Petitioner out of business, result in job redundancies and increase cost of transport against the spirit of Article 10 (2) (d) of the Constitution.
- The enactment of the Finance Act has flouted Article 1 (1) of the Constitution which provides that sovereign power belongs to the people of Kenya.

### **PETITIONER'S SUBMISSIONS**

The submissions are dated 17th March, 2014 and were filed on 18th March, 2014. They were filed by M/s. Wambua Kigamwa & Company, Advocates for the Petitioner.

The crux of the same is that the Petitioner was not involved in the process of legislation of the Respondent's County Finance Act, 2013. It is submitted that, although the Respondent opposes the Petition, it has not tendered any evidence to show it involved the public participation before enacting the Act, for example a press advertisement requiring the public to give their views or submit memoranda on the Bill.

### **RESPONDENT'S CASE**

The same was canvassed by way of a Replying Affidavit sworn by Peter Leley, the Respondent's Secretary on 20th February, 2014. Its case is as follows:-

- The Constitution and the County Government Act mandates the county government to devise means of raising revenue to fund their broad functions. The said Finance Act was promulgated so as to prescribe the various taxes, fees and charges to be levied by the Respondent to enable it raise funds for its operations.
- That the Respondent carried out extensive public awareness on the Bill through print and electronic media. There was a public forum in each of the six constituencies in the county. Further, a

county magazine named 'The Champion' was freely distributed within the county. It provided general information on county policies, Bills and legislations including the subject Finance Act. Several FM stations (radio) were engaged and newspaper advertisements were carried out to sensitize the public on the Bill. Banners were also erected along the main Highway for the same purpose.

- The fees/charges levied on the motor cycles are not arbitrary as the Petitioner members make an average income of Ksh. 1,000/= per day and Ksh. 30,000/= per month.

- In the result the Finance Act which was passed by the Respondent's County Assembly on 19th November, 2013 and assented to by the Governor on 20th November, 2013 is not unconstitutional.

### **RESPONDENT'S SUBMISSIONS**

The Respondent's submissions are dated 18th March, 2014 and were filed on 19th March, 2014 by M/s. Z. K. Yego Law Offices. In a nutshell, it is submitted that under Article 209 (4) of the Constitution, the National and County Governments are mandated to impose charges for services they provide. Under Section 5 (c) of the Fourth Schedule of the Constitution the county governments have exclusive powers over county transport which include traffic and parking. Hence, the Respondent acted legally in enacting the Finance Act.

It is submitted that public participation was conducted throughout the county to sensitize the public on the Act before it was enacted.

That further the charges are not arbitrary. They are also not against national economic policies.

The Respondent's counsel relied on the case of **NAIROBI METROPOLITAN PSV SACCOS UNION LTD & 25 OTHERS -VS- THE NAIROBI COUNTY GOVERNMENT NAIROBI & 3 OTHERS H.C. PETITION NO. 486 OF 2013** in which the Petitioner was challenging the increment of parking charges within the Nairobi County from Ksh. 140 to Ksh. 300/= as was provided in that County's Finance Act. Hon. Justice Lenaola held that the court cannot direct the 1st Respondent on how to exercise its duty of levying parking fees. He also held that the Petitioners had not demonstrated how the levying of the parking fees was prejudicial to national economic policies, economic activities across the county, mobility of goods and services, capital and labour as demanded by Article 209 (5) of the Constitution.

It is urged that the Petition be dismissed with costs.

### **ISSUES FOR DETERMINATION**

From the foregoing, I propose the issues for determination to be.

(a) Whether there was adequate and appropriate public participation prior to the enactment of the Uasin Gishu Finance Act, 2013.

(b) Whether the Petitioner is entitled to the remedies sought.

### **PUBLIC PARTICIPATION**

I find the following legal provisions relevant to the issue at hand.

Article 196 (1) (b) of the Constitution provides that;

***“A county assembly shall—***

***(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.”***

Article 10 (2) provides as follows:-

***“(2) The national values and principles of governance include—***

***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***

***(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***

***(c) good governance, integrity, transparency and accountability;and***

***(d) sustainable development.”***

Whereas Article 2 (4) reads 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.”***

And Section 87 of the County Government Act, 2012 provides:-

***“Citizen participation in county governments shall be based upon the following principles—***

***(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;***

***(b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;***

***(c) protection and promotion of the interest and rights of minorities,***

***marginalized groups and communities and their access to relevant information;***

***(d) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;***

***(e) reasonable balance in the roles and obligations of county***

***governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;***

***(f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and***

***(g) recognition and promotion of the reciprocal roles of non-state actors’ participation and governmental facilitation and oversight.”***

### **RELEVANT CASE LAW**

In a South African Case of Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) (CCT 73/05A) [2006]ZACC 12; 2007 (1) BCLR 47(CC), it was observed as follows;

**“...the provincial legislatures have broad discretion to choose the mechanisms that, in their view, would best facilitate public involvement in their processes. 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. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.....The purpose of permitting public participation in the lawmaking process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning...”**

Ngcobo, J, further noted;

**“Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other.....What our constitutional scheme requires is “the achievement of a balanced relationship between representative and participatory elements in our democracy.” The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.....To uphold the government’s submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government’s argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected.....Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of “a society based on democratic values[and] social justice” and declares that the Constitution lays down “the foundations for a democratic and open society in which government is based on the will of the people.” The founding values of our constitutional democracy include human dignity and “a multi-party system of democratic government to ensure accountability, responsiveness and openness.” And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that**

*members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a “commitment to a right to . . . public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect.” (This citation/quotation is as per Mwango J. in Andrew Ireri Njeru & 34 others v County Assembly Of Embu & 3 others [2014] eKLR, H.C at Embu Constitutional Petition No. 8 of 2014.*

*In Andrew Ireri Njeru & 34 others v County Assembly Of Embu & 3 others [2014] eKLR, H.C at Embu Constitutional Petition No. 8 of 2014, *ibid*, the learned Mwango J. observed as follows;*

**“In addition, the 1st and 2nd Respondents contended that there was public participation in the impeachment of the Governor by virtue of the fact that the County Assembly established inquiry committees which, in accordance with the County Assembly Standing Orders, were held in public and involved receiving complaints from members of the County Executive.**

**This is perhaps best responded to by stating that the extent and scope of public participation should be broader than conducting an inquiry and questioning a number of County Executives. In the Robert Gakuru case, Odunga, J, stated at paragraphs 76 and 79 of his judgment:**

*“76. In my view to huddle a few people in a 5 star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation.....*

*79. In support of their position that there was public participation, the Respondents have exhibited an advertisement in the Daily Nation of 17th August, 2013. However, a careful perusal of the said advert reveals that apart from the mention of the Finance Bill in the title of the advert and the mention of the Bill in passing, there was not much mention of the said Bill. In other words there was no attempt to exhort the public to participate in the process of the enactment of the Bill. In my view there was no “facilitation”. That the Finance Bill was an important Bill cannot be doubted. Its effect on the people of Kiambu in terms of ordering their way of life was bound to be far reaching. It was therefore crucial that the information going out to the public be clear and ought not to have admitted any ambiguity. The other document relied upon were list of certain persons. However, the said lists only referred to County Integrated Development Plan and not the Finance Bill. There is no evidence at all that at the said meetings the participants were invited to comment on the said Bill let alone that the contents of the same were availed to them.”*

*In Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR, H.C at Nairobi Constitutional Petition No. Petition No. 532 Of 2013 Consolidated With Petition Nos. 12 Of 2014, 35, 36 Of 2014, 42 Of 2014, & 72 Of 2014 And Judicial Review Miscellaneous Application No. 61 Of 2014, which I find facts therein similar to the instant case on all fours, Odunga J.,*ibid*, outlined the relevant Constitutional provisions as follows;*

**“...Before proceeding with the matters, I directed the parties to formulate the issues for determination of this Court.**

**40. Pursuant thereto, the following broad issues were formulated for determination by this Court.**

**1. Whether the Kiambu Finance Act, 2013 was passed with sufficient public participation as required by the Constitution of Kenya, 2010.**

2. Whether the County Government of Kiambu is entitled to publish and/or raise new or existing taxes.

3. Whether the levies and charges under the Kiambu Finance Act are within the meaning of the 4th Schedule of the Constitution of Kenya.

**41. Before determining these issues it is important to deal with the legal provisions which are relevant to the matters before this Court.**

**42. Article 10 of the Constitution of Kenya provides as follows:**

**“(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**

**(a) applies or interprets this Constitution;**

**(b) enacts, applies or interprets any law; or**

**(c) makes or implements public policy decisions.**

**(2) The national values and principles of governance include—**

**(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**

**(b) human dignity, equity, social justice, inclusiveness, equality,**

**(c) good governance, integrity, transparency and accountability; and**

**(d) sustainable development.”**

43. Article 174 of the Constitution provides:

**The objects of the devolution of government are—**

**(a) to promote democratic and accountable exercise of power;**

**(b) to foster national unity by recognising diversity;**

**(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;**

**(d) to recognise the right of communities to manage their own affairs and to further their development;**

**(e) to protect and promote the interests and rights of minorities and marginalised communities;**

**(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;**

**(g) to ensure equitable sharing of national and local resources throughout Kenya;**

**(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and**

**(i) to enhance checks and balances and the separation of powers.”**

44. Article 196 on the other hand provides:

**“(1) A county assembly shall—**

**(a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and**

**(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.**

**(2) A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.**

**(3) Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.”**

45. Article 201 of the Constitution provides:

**The following principles shall guide all aspects of public finance in the Republic—**

**1. there shall be openness and accountability, including public participation in financial matters;**

**2. the public finance system shall promote an equitable society, and in particular—**

**(i) the burden of taxation shall be shared fairly;**

**(ii) revenue raised nationally shall be shared equitably among national and county governments; and**

**(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;**

**(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;**

**(d) public money shall be used in a prudent and responsible way; and**

**(e) financial management shall be responsible, and fiscal reporting shall be clear.”**

The Honourable Judge thereafter quoted the provisions of Section 87 and 115 of the County Government Act. For purposes of this Judgment, I shall only refer to Section 87 hereafter.

He then went on to say;

“These being constitutional provisions one needs to keep in mind the words of Mahomed, Ag. JA in Namibian case of S v Acheson 1991(2) SA 805 (Nm HC) at 813 that:

“the constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.”

The learned Odunga heavily relied on South African case law to try and explain what constitutes public participation. He replicated at great length what he thought was relevant to the case before him.

Although the issues that were before him are similar to the instant Petition, I will only cite what I think will guide me in making a well informed decision.

*“In order to understand how the South African Constitutional Court has interpreted the principle of public participation, I will reproduce in extenso the pronouncements of the said Court (referring to South Africa Constitutional Court) in the following cases.*

53. *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), Ngcobo, J who delivered the leading majority judgment expressed himself as follows:*

“The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected. . . . Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation. . . . . The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalisation of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation. . . . .”

55. *Public participation ought not to be seen as a derogation from Parliamentary representation or representation at the County Assembly level. This the Judge recognised by expressing himself as follows:*

“In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the lawmaking processes. Parliament must therefore function in accordance with the principles of our participatory democracy. . . . .”

56. *What then does facilitation of public participation connote? The issue was dealt with by the Judge thus:*

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active. According to their plain and ordinary meaning, the words public involvement or public

participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.....”

57. *The issue of who and to what extent the issue of public participation ought to be determined was dealt with as follows:*

“Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfill their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

The standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government’s fulfillment of positive obligations to realize social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that “reasonable measures may be taken” to regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if ‘it is reasonable and justifiable to do so in an open and democratic society.’ Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. “In dealing with the issue of reasonableness,” this Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. ‘In dealing with the issue of reasonableness,’ this Court has explained, ‘context is all important.’ Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory

democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realized. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity beginning with the broader duty to take steps to ensure that people have the capacity to participate.....”

60. *The Judge then considered the options available to the Court where the Court finds that the Constitutional threshold of public participation is not met and held:*

“I have found that the NCOP failed to fulfill its constitutional obligation comprehended in section 72(1)(a) in relation to the CTOP Amendment Bill and the THP Bill. Pursuant to section 172(1)(a) of the Constitution, this Court is obliged to declare that the conduct of the NCOP in this regard is inconsistent with the Constitution and is therefore invalid. The respondents did not contend otherwise. A declaration to that effect must accordingly be made. The question which was debated in the Court is whether the CTOP Amendment Act and the THP Act must as a consequence be declared invalid. Counsel for the respondents contended that this Court has no power to declare the resulting statute invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers. This Court has emphasized on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, ‘there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.’ But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government.”

61. The Judge added:

“When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And in so far as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O’Regan J explained in a recent minority judgment, ‘the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.’ In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; ‘[w]hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid’. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the ‘Constitution is supreme . . . ; law or conduct inconsistent with it is invalid’. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid.....”

64. *“It may be argued that where the action taken is in consonance with the Constitution in its formal aspects then the mere fact that there was no public participation ought not to nullify such otherwise legal action. However the Judge dealing with the issue said:*

“The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation

invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected.”

65. *However the Court cannot be blind to the effects of such action which is not “substantially” illegal and where as a result of its implementation certain rights may have been acquired and obligations undertaken which may cause chaos and lead to undesirable disruption and vacuum. Whereas that state of affairs does not legitimise the action undertaken an abrupt change may be undesirable and in such circumstances the Court may invoke its powers under Article 23(3) of the Constitution to grant an appropriate remedy including the suspension of the invalidity of the action taken with such period as would enable the authority concerned to remedy the defect.*

66. *On this point the Judge expressed himself as follows:*

“However, these two statutes have come into operation. Members of the public may have already taken steps to regulate their conduct in accordance with these statutes. An order of invalidity that takes immediate effect will be disruptive and leave a vacuum. In terms of section 172(1)(b)(ii), this Court has discretion to make an order that is just and equitable, including an order suspending the declaration of invalidity. Parliament must be given the opportunity to remedy the defect. In these circumstances, I consider it just and equitable that the order of invalidity be suspended for 18 months to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution.”

*On whether each member must be heard orally, the Judge cited the following passage of the Judgment.*

“Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament’s judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament’s judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings. However, for citizens to carry out their responsibilities, it is necessary that the legislative organs of state perform their constitutional obligations to facilitate public involvement. The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process. Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the lawmaking process may not be able to participate and make such contributions.”

68. *Sachs, J who concurred with Ngcobo, J had this to add:*

“The principle of consultation and involvement has become a distinctive part of our national ethos. It is this ethos that informs a well-defined normative constitutional structure in terms of which the present matter falls to be decided. This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions. It should be emphasized that respect

for these three inter-related notions in no way undermines the centrality to our democratic order of universal suffrage and majority rule, both of which were achieved in this country with immense sacrifice over generations. Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended. Accountability of Parliament to the public is directly achieved through regular general elections. Furthermore, we live in an open and democratic society in which everyone is free to criticize acts and failures of government at all stages of the legislative process. Yet the Constitution envisages something more. True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticize it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years. Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense.<sup>7</sup> It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.

69. *According to the learned Judge:*

“A vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterize the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits. A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.”

The learned judge Odunga J., *ibid*, further referred to another South African Case and observed that;

“...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), it was 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.”

71. *However the caution expressed by Sachs, J in Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:*

“The passages from the *Doctors for Life* majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one’s views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government’s mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect..... Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication..... There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat.”

In NAIROBI METROPOLITAN PSV SACCOS UNION LIMITED & 25 OTHERS; -VS- COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS (2013) e KLR, HC AT NAIROBI, Honourable Justice Lenaola stated as follows:-

“Despite the above actions taken however, the Petitioners have attacked the impugned legislation on ground that it failed to comply with the process of public participation as required by the Constitution. Where legislation fails to comply with the Constitution, courts have powers to make necessary orders in that regard as was held in the Constitutional Court of South Africa in the case of *Doctor's for Life International v The Speaker National Assembly and Others (CCT 12/05) 2006 ZACC II* where it was stated as follows;

“It is trite that legislation must conform to the Constitution in terms of both content and the manner in which it is adopted. Failure to comply with the manner and form requirements in enacting

legislation renders the legislation invalid. And courts have the powers to declare such legislation invalid”.

**One of the golden principles running through the Constitution is the articulation of the principle of public participation of the people at both national and county levels. With regard to participation in County level, Article 196(1)(b) of the Constitution provides that;**

“(1) A County Assembly shall-

(a) .....

(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

(c) A county Assembly may not exclude the public, or any media from any sitting in unless in exceptional circumstances the Speaker has determined that there are justifiable reasons for doing so.”

**The essence of the duty for the public to participate in legislative process is to my mind an aspect of the right to political participation in the affairs of the State. In this aspect, the Constitutional Court of South Africa in the case of Doctors for Life International v The Speaker National Assembly (supra) explained the importance of public participation as follows;**

“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all, it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.”

**46. This right flows directly from the principle of sovereignty of the people which is in Article 1 of the Constitution and which provides as follows;**

“(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under 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 structure in the county governments; and

(c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at—

(a) the national level; and

(b) the county level.”

Applying the above principles and in the totality of the evidence before me, it is clear that the 1st and 2nd Respondents involved the public in the process leading to the enactment of the Nairobi City County Finance Act of 2013 they engaged those who would be affected by their decision and the latter were given details of the proposals and an opportunity of stating their objections if any. To my mind the process was highly public as there were public forums, meetings with stakeholders, media reports and even lobbying and an opportunity to make written representations through written memoranda.

47. Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

*“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”*

48. In the instant case, the Petitioners were and are stakeholders in the affairs of the City of Nairobi and specifically as relates to the transport business. They were in that capacity invited by the 1st Respondent to submit their views on the 1st Respondent's 2013- 2014 budget estimates at the stakeholder forums of 25th April 2013 and 26th April 2013. It is not in dispute that the 1st and 2nd Respondents thereafter carried out substantial public consultations and came up with a draft Bill that reflected public sentiments. A Bill was thereafter presented to the City County of Nairobi Budget and Appropriation Committee and according to the unchallenged deposition of Lilian Ndegwa, that Committee considered the public views in preparing the final budget estimates which were later on passed included in the Act that was passed by the County Assembly. Surely, after this lengthy enactment process, the Petitioners cannot now be heard to blame the 1st Respondent while all along they were made aware of the process, right from the time of the preparation of the 1st Respondent's budget estimates of revenue and expenditure up to the time the impugned Act was enacted. The Petitioners have in any event failed to demonstrate to this Court how the 1st and 2nd Respondents failed to achieve public participation taking into account all that the 1st Respondent did in the process of enacting the impugned Act. I should say in passing that public participation is not the same as saying that particular public views must prevail.

49. It is against this background that I am unable to find that the impugned Act is unconstitutional on account of lack of public participation. I am also clear in my mind that the 1st and 2nd Respondents involved the public in enacting the Nairobi City County Finance Act as stipulated by Article 10(2) and Article 196(1)(b) of the Constitution. I am also in agreement with the sentiments expressed by Chaskalson, Chief Justice of South Africa, in the Constitutional Court of South Africa case of Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he stated that;

*“[155] It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations.*

*[156] In parliament this is done through the publication of a Bil containing the provisions of the proposed legislation, hearings before Parliamentary Committees, and debates in Parliament where matters of principle raised by sectors of the public affected by the law can be contested.*

*[157] Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose, It enables people who will be*

affected by the proposals to make representation to the lawmaker, so that those concerns can be taken into account in deciding whether changes need to be made to the draft.

[158]This does not mean that the Minister who makes the regulations has to study thousands of pages received from the general public and respond to them. The analysis of these responses can be left to officials whose responsibility it is to consider the comments received and to report to the Minister on them.”

I am in complete agreement and I shall adopt the above words as if they were mine and will therefore hold and find that there was adequate and appropriate public participation prior to the enactment of paragraph 6.1 in the schedule to the Nairobi City County Finance Act, 2013 but subject to what I shall say about the public advertisement in daily newspapers at the end of this judgment.”

In the present case, the Respondent did not exhibit any single evidence that public participation was conducted prior to the enactment of the County Finance Act, 2013. The Replying affidavit refers to various means by which the public was involved, namely;

- *Print and electronic media*
- *Community forums in the six constituencies of the County*
- *Launch of the 'The Champion' magazine that publishes information on county bills, policies and legislations.*
- *Newspaper advertisements*
- *Publicization on FM radio station*
- *Erecting banners along the main highway*

But the Respondent failed to demonstrate the existence of such public sensitization programmes. For instance, no copy of newspaper or radio advertisement was annexed to the affidavit. It did not site a single date or venue on and at which the public forums were held. There is also no indication as to who the participants were in those forums. Further, not a single copy of the said 'The Champion' magazine was exhibited bearing any information on the County legislations. It was also not demonstrated, if at all the magazine existed, how wide its coverage was or is so as to reach all or a substantial proportion the stakeholders of the Act. Neither was a sample of any banner erected on the road exhibited.

Against this backdrop, it follows that the Respondent knew what it ought to have done in sensitizing the stakeholders of the Finance Bill before it was promulgated and what it constituted to do so but in a mockery of that knowledge, opted not to execute that mandate.

It is then not clear why the Respondent failed to follow the law. It totally disregarded the very tenets of recognizing that sovereign power comes from the people (Article 10). It also disregarded Article 196 1 (b) that is the basis of mandatory public participation before a county legislation is enacted. Of course the mischief sought to be cured by this Article was to decentralize the powers that were hitherto concentrated in the central government. Our progressive Constitution is intended that the power goes to the grassroots so that every citizen has a say in what affects him. The management of the County governments cannot turn around and mutilate the Constitution – enact laws without the participation of the very persons they affect.

As envisaged by Hon. Justice Lenaola in **NAIROBI METROPOLITAN PSV SACCOS UNION LTD & 25 OTHERS -VS- COUNTY OF NAIROBI & 3 OTHERS**, public participation does not imply that each of the county residents must give their oral views in the public forums or otherwise write their memoranda respecting their views on a bill. But simple acts of, say, conducting random public forums, posting programmes on popular radio stations and publishing of the Bill in the dailies with wide

circulation would do.

But in the instant case, none of these was done. What the Respondent alluded to as constituting public participation were mere allegations that were not substantiated.

In effect, the Respondent violated the Petitioner's constitutional right as provided by Articles 1, 2, 10 and 196 of the Constitution and Sections 87 of the County Government Act, 2012.

It is of course important to recognize that County governments have the right to enact legislations for the effective performance of their functions as provided by Article 185 of the Constitution which reads;

***“(1) The legislative authority of a county is vested in, and exercised by, its county assembly.***

***(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.***

***(3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.***

***(4) A county assembly may receive and approve plans and policies for—***

***(a) the management and exploitation of the county’s resources; and***

***(b) the development and management of its infrastructure and institutions.”***

While Article 209 (4) empowers them (county governments) to “impose charges for the services they provide”.

However, to the extent that the Respondent did not invoke the public's view of the stakeholders of the Finance Act which imposes the charges that are contested, means that it cannot be overruled that those charges that affect the national economic policies and activities in the Respondent's County may not necessarily reflect the situation on the ground. Otherwise there would be no outcry in protest of the said Finance Act.

The Respondent has contended that the public was aware of the Finance Bill prior its implementation which led to the scrapping of what it termed as the infamous 'cattle tax'. It is also further contended that the Bill was aggressively debated by the Respondent's County Assembly. But these contentions do not constitute acts of public involvement. At the risk of repeating myself, let me say that the 'public' in the constitutional context does not refer to the elected or employed persons of the particular institution. It means the stakeholders who will be affected by the legislation. These are the common people who will generate the income that in turn will be charged. Definitely, they do not include the County Assembly members who debated the Bill; and scrapped some charges. Those are the stakeholders whose views ought to have been sought.

The emphasis in public participation is to underscore the importance of the legislation and its impact on the stakeholders. That is why the public must have a reasonable say. This of course is coined around Article 10 (2) (a) which is that the national values and principles of governance include ***the participation of the people.***

As Sachs, J. in his minority judgment in **DOCTORS FOR LIFE INTERNATIONAL V THE SPEAKER NATIONAL ASSEMBLY (Supra)**, observed:

*“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an*

*adequate say,*” in the present case the Respondent made no single attempt of making it known what the Bill contained and/or entailed before it became law. The Petitioner members appear to just have been ambushed with demands for increased charges.

Under this head, I would not therefore hesitate to declare the Uasin Gishu County Finance Act, 2013 as unconstitutional and therefore invalid.

### **IS THE PETITIONER ENTITLED TO THE REMEDIES SOUGHT**

It was submitted by the Respondent that the petition was fatally defective and legally untenable. However, the elements constituting the defect were not disclosed. But for record purposes, it is important that I look into whether the Petitioner has a legal standing (*locus standi*) to bring forth the petition.

The Petitioner is an association comprising about 150 members – See annexure (c) to the Supporting Affidavit. It is registered under the Societies Act, Cap 108, Laws of Kenya and issued with a certificate No. 55896 (Annexure B).

Prior to the coming into place of the Uasin Gishu Government, the monthly levy charged by the then municipal local authority was Ksh. 850/= and Ksh. 70/= as the daily charges. The Respondent's Finance Act currently provides for a levy of Ksh. 1,000/= and 90/= respectively – See annexure E and F. Hence the charges imposed by the Respondent affect the Petitioner's members as stakeholders.

Again under Article 22;

***“(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its members.***

***(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—***

***(a) the rights of standing provided for in clause (2) are fully facilitated;***

***(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;***

***(c) no fee may be charged for commencing the proceedings;***

***(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and***

***(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.***

***(4) The absence of rules contemplated in clause (3) does not limit the right of any person to***

***commence court proceedings under this Article, and to have the matter heard and determined by a court.”***

And Article 260 defines a person as follows:-

***“‘person’ includes a company, association or other body of persons whether incorporated or unincorporated.”***

In my candid view, the Respondent could not overlook the Petitioner as a stakeholder in the transport sector of its County. Its members contribute revenue for its development. And if the charges levied are in its view, exorbitant, it follows that those charges effect the capacity of its members to generate not only their income but also the levies. As such, the failure by the Respondent to involve the Petitioner's members in promulgating the Finance Act infringed on their constitutional rights.

For these reasons, it is my view that the Respondent has not demonstrated any prejudice it will suffer if the Finance Act is nullified. I find that the Uasin Gishu Finance Act, 2013 was irregular and it contravened Articles 1 (1), 10 (2) (a) and 196 1 (b) of the Constitution, 2010 as well as Section 87 of the County Government Act, 2012. In the end pursuant to Article 2 (4) of the Constitution, I declare the said Act as null and void.

Each party shall bear its own costs.

It is so ordered.

**DATED and DELIVERED at ELDORET this 2nd day of October, 2014.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Mwinamo holding brief for Kigamwa for the Petitioner/Applicant

Mr. Yego for the Respondent