



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, MARAGA & MWERA, JJ.A.)**

**CIVIL APPEAL NO. 42 OF 2014**

**(IN THE MATTER OF AN APPEAL BY)**

**NAIROBI METROPOLITAN PSV**

**SACCOS UNION LIMITED & 25 OTHERS.....APPELLANTS**

**VERSUS**

**COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS...RESPONDENTS**

*(Being an appeal against the entire Judgment and Order of the High Court of Kenya*

*at Nairobi (Lenaola, J.) dated 18<sup>th</sup> December, 2013*

*In*

*H.C. Constitutional Petition No. 486 of 2013)*

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**JUDGMENT OF THE COURT**

1. The twenty six appellants in this appeal are licensed Public Service Vehicle (PSV) operators ferrying passengers in and out of Nairobi and to other counties within Kenya. They filed a suit by way of a petition before the Constitutional Division of the High Court at Nairobi challenging the constitutionality of provisions of **Paragraph 6.1** of the **Nairobi City County Finance Act** (*hereinafter referred to as the "Act"*). The said **Act** was enacted on or about September, 2013. Its contents and objective were, inter alia, to levy various taxes, fees, and charges on the various services that are provided by the Nairobi City County Government and for other connected purposes. In their petition before the High Court, the appellants alleged that the **Act** was passed in contravention of the provisions of the Constitution that provide for public participation before a law that affects the public is passed; and that the **Act** also contravened the provisions of the Constitution namely **Articles 37, 46 (c), 174 (c), and 184 (1) (c)**. In addition to the declaratory orders, they also sought for an order of permanent injunction restraining the 1<sup>st</sup> respondent from increasing the daily parking charges from Ksh. 140/= to Ksh. 300/= or any other seasonal parking levies as provided for in the impugned **Act**.

2. The petition was heard by Lenaola, J., who dismissed it in its entirety, thus provoking the present appeal that is predicated on 17 grounds of appeal. During the hearing of the appeal, the grounds were

argued together in a thematic order thus they can also be summarized as follows to avoid repetition:-

The learned Judge erred in law and exercised his discretion wrongly by:

- a. *failing to consider the prayers for declaratory orders which had an impact on the appellant's constitutional rights;*
- b. *failing to consider that the parking levies which were increased by more than 30% were illegal, and without justification;*
- c. *failing to find that the provisions of the Act were unconstitutional;*
- d. *failing to find that the Act was enacted without the participation of the appellants as envisaged under Article 10 (2) of the Constitution, Sections 87, 88, 89, 90 and 91 of the Act and the Urban Cities Act no 13 of 2011;*
- e. *holding that the 1<sup>st</sup> respondent has the exclusive obligation of levying parking fees within the Nairobi City County;*
- f. *failing to appreciate that the levying of increased charges contradicted the provisions of Section 72 B of the Traffic Act, Cap 403 which is a National Legislation that specifies the formula for levying parking fees within the designated parking spaces in the County of Nairobi;*
- g. *holding that the provisions of the Traffic Act could not supercede the County legislation;*
- h. *failing to make a finding on whether or not the consumer rights of the appellant were violated; and*
- i. *failing to consider the submissions and authorities counsel cited on the profound importance of public participation in law making process.*

3. The record of appeal is bulky. It runs into 7 volumes. Mr. Kinyanjui learned counsel for the appellant also filed written submissions and a list of authorities which we will refer to in this judgment. He submitted that the learned trial Judge overlooked and failed to address the declaratory reliefs that were central to the appellant's petition. The appellants expected a declaratory judgment in which the Court expressed an opinion on the questions of law raised without ordering anything to be done. As the appellant invoked the jurisdiction of the Court, they had a legitimate expectation that the Judge would make a pronouncement on the reliefs sought. Counsel emphasized that the Act was also passed in contravention of the **Traffic Act**. In particular the Judge held the **Traffic Act** was a national legislation but erred when he held that the **County Finance Act** superseded it. He referred us to the Supreme Court of Kenya decision in the **MATTER OF ATTORNEY GENERAL, CONSTITUTIONAL APPLICATION NO 21 OF 2012** in which it was held that:-

*“We take judicial notice that the passage of legislation to redress an injustice, or to deliver public goods, is not the single execution-orientated act that can be discharged immediately upon command; it is inherently, a process and must run over time, in the context of supportive measures, and responsible exercises of discretion. It involves the conduct of studies, and the development of legislative proposals. Indeed, by the constitution, the development of legislation is no longer the preserve of Parliament, or the legal draft persons in the State Law Office; public participation in the legislative process is a constitutional imperative”.*

[4] Moreover, under the provisions of **Section 18** of the **4<sup>th</sup> Schedule** of the **Constitution**, matters of transport and road traffic are within the mandate of the National Government. Thus counsel urged us to find that there was conflict of the laws in as far as **Section 5** of the **Traffic Act** placed issues of parking under the County Government. In his view, **Article 191 (2)** of the **Constitution** prevails. It was violated by the provisions of **Paragraph 6.1** of the **Act** which he urged us to declare null and void. Counsel cited a

persuasive authority by the High Court in the case of **ROBERT N. GAKURU & OTHERS V GOVERNOR KIAMBU COUNTY & 3 OTHERS, [2014] e KLR** in which Odunga, J., stated:-

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

5. Counsel further submitted that the County Government did not have unfettered discretion to levy parking fees. He cited the provisions of **Section 120 (b)** of the **County Government Act** which provides certain standards that a County is supposed to comply with. For example it is mandatory for a County Government to formulate a tariff policy which should apply to all equally. The charges must be equitable. Counsel faulted the blanket charge of Ksh. 300/= parking fees per day that did not take into account the time a vehicle spent in the parking bay. He said the equity envisaged by the Traffic Act is a formula where a standard fee takes into account the time spent at a parking. He, therefore, termed a uniform charge Ksh. 300/= a violation of the law.

6. On public participation during the formulation and enactment of the Finance Act, Mr. Kinyanjui submitted that the purported consultation did not meet the legal threshold of **Article 196 (1) (a)** and **(b)** of the Constitution or **Section 87** of the **County Act**. Commenting on the documents produced by the 1<sup>st</sup> respondent on the publication in the media of a stakeholder consultation and the minutes of the meeting, counsel contended that those who were recorded as being in attendance were public officers and yet Nairobi County has over three million inhabitants. Besides, the invitation for the meeting was publicized in the Sunday Nation calling for public participation at a meeting dubbed **“FORUM FOR PUBLIC PARTICIPTION IN 2013-2014 BUDGET ESTIMATES”** that was to be held on the following Tuesday thus giving the public notice of only one day. Counsel further argued that the Nairobi City County Government should have used the mass media such as radio announcements to invite the stakeholders as the majority of people cannot access information from the newspapers or from the County website as alleged by the respondents.

[7] Counsel further submitted the 1<sup>st</sup> respondent’s Committee on Budget must have ignored the recommendations that any increment in the parking fees was going to be by a margin of 30%. That indication caused the appellants and others to expect an increment of not more than Ksh. 182/= as opposed to Ksh. 300/= which was over 100%. Counsel implored us to find that a dangerous precedent would be set if County Governments were allowed to ignore the sovereign power of the people failing to provide for and allow public consultations before enacting legislation which affects the public’s consumer rights enshrined under **Article 46** of the **Constitution**.

[8] The appeal was opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents represented by Prof. Ojienda, SC, assisted by Mr. Okoth while Mr. Obura, appeared for the 4<sup>th</sup> respondent. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents also filed written submissions in which they set out the issues for determination in this appeal as follows:

a. ***“The applicable law in levying parking charges by the 1<sup>st</sup> respondent;***

b. ***Whether the 1<sup>st</sup> respondent effectively involved the public in enacting schedule 6;1 of the***

*Nairobi City County Finance Act; 2013;*

*c. Whether the increment of parking charges by the 1<sup>st</sup> respondent was duly sanctioned;*

*d. The scope of Court jurisdiction in determining the validity of a legislation; and*

*e. Whether Nairobi City County Finance Act No. 23 of 2013 falls within the meaning of the statutory Instruments Act no 23 of 2013”.*

9. Prof. Ojienda further submitted that the power to levy parking fees is the exclusive mandate of County Government. Prior to the enactment of the **Constitution of Kenya 2010**, the predecessor of the 1<sup>st</sup> respondent, the Nairobi City Council, charged parking fees under the **Traffic Act, Cap 403** of the **Laws of Kenya**. Under the provisions of **Section 72A** thereof, local authorities were empowered to make by-laws to designate parking places and other matters which would then be approved by the Minister as provided for under that **Act**. Thus the **Act** did not only provide for one formula of determining the parking fees. There was a standard charge and excess charge for vehicles that overstayed at a parking. The parking fees could be determined as provided in the **Traffic Act** or the local authorities’ by- laws. Since the coming into effect of the **Constitution** of Kenya 2010, the **Traffic Act** must be harmonized with **Section 7** of the Transitional and Consequential Provisions of the Constitution which provides that:

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

**2. If, with respect to any particular matter-**

**a. A law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State Organ or public officer; and**

**b. A provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of the Constitution prevail to the extent of the conflict”.**

10. According to Prof Ojienda, the mandate of setting the parking charges within the City County of Nairobi was vested upon the 1<sup>st</sup> respondent. This is provided for under **Article 209 (4)** of the **Constitution** which provides:

**“4 The national and county governments may impose charges for the services they provide.**

**(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour”.**

Counsel further submitted that under **Section 5(c)** of **Part 2** of the **Fourth Schedule** to the **Constitution**, the powers specifically given to the counties are transport that includes traffic and parking. Under **Article 210 (1)** of the **Constitution**, no fee or licensing fee can be imposed or waived except as provided for by legislation. The legislative authority of a County is vested and exercised by the County Assembly that makes laws that are necessary or incidental to the effective performance of the functions of the County Government as per the provisions of **Article 185 (1)** and **(2)** of the **Constitution**.

[11] Regarding the enactment of the **Finance Act 2013**, Prof. Ojienda maintained that the same was done in strict compliance with the legal requirements in the **Constitution** and the **Public Finance Management Act** on the budget making procedure and enactment of a **Finance Act** by the 1<sup>st</sup> respondent. Under **Section 125** of the **Public Finance Act**, the County Executive Committee is supposed to set the process of coming up with an overall estimation of the County Government Revenue and Expenditure. After that,

it is supposed to prepare budget estimates for consideration and approval by the County Assembly and enactment of appropriation laws. In all this, there is a requirement for public participation in the budget process. We were told all the processes were complied with and the public were invited to give their views in a public forum and the following advertisements were carried out as follows:

- 1. Advertisement of the forum for public participation in 2012-2014 budget estimates carried in the 1<sup>st</sup> respondent's website from April, 12<sup>th</sup> 2013.**
- 2. Advertisement carried in the Sunday Nation of April, 14<sup>th</sup>, 2013. Advertisement in the 1<sup>st</sup> respondent's website from April 19<sup>th</sup> 2013. Advertisement in the Standard Newspaper of April, 23<sup>rd</sup>, 2013 and Advertisement in the Star Newspaper of April, 23<sup>rd</sup> 2013.**

12. After the above advertisements, the 1<sup>st</sup> and the 2<sup>nd</sup> respondents conducted two stakeholder forums. The first one, which was attended by 301 stakeholders, was held on 24<sup>th</sup> April, 2013. Their views regarding the budget were collated and taken into account in the **Finance Act**. They held another stakeholder forum on 26<sup>th</sup> April, 2013, where views were expressed and taken on board. According to the list provided, the attendees ranged from the residents of Nairobi City County, Motorists Association and PSV Operators, Government Ministries, International Organizations, Non-governmental Organizations, Private Sector Organizations and Religious Organizations among others. The 1<sup>st</sup> respondent was able to justify the parking charges and other charges they were levying such as house rents, land rates and licence fees. The budget estimates were duly advertised in the website well in advance of the stakeholder forum and the information was available to the public. Following that stakeholder engagement, the Nairobi City County Assembly Budget and Appropriations Committee took into consideration the views of the stakeholders and introduced some amendments. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the appellants were part of the members of public who were invited to participate and some attended and gave their views during the stakeholders' forum of 24<sup>th</sup> and 26<sup>th</sup> April, 2013.

[13] Responding to the arguments that the Finance Act did not take into account the principles of equality, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' view was that **Paragraph 6 (1)** of the **Act** prescribes the various methods for charging parking fees which includes:

- i. ... paying for daily parking tickets;**
- ii. ... subscribing for seasonal tickets, which subscription can be monthly, quarterly, half yearly or annually;**
- iii. ... off- street parking in automated areas, by paying Kshs. 50 per hour after the first 30 minutes of entry into the parking place. This is a form of payment for parking charges by way of a parking meter; and**
- v. ... country bus parking station, buses and matatus pay Kshs.150/= as entry fee and Kshs. 30/= for every quarter hour after the entry into the parking place. This is another form of payment for parking charges by way of a parking meter.**

[14] Counsel further argued that the appellants did not controvert the averments in the replying affidavit of Lilian Ndegwa sworn on 16<sup>th</sup> October, 2013, in which she explained the process followed to allow participation by the members of public including the appellants. The views of the public were taken into account and they were weighed against the exigencies of the services required to be rendered by the 1<sup>st</sup> respondent. In any event there is no complaint by the members of public regarding the parking charges of Kshs. 300/= per day. It is also not possible to get every individual to be heard on a matter before the legislation is passed as long as the information was shared with the public. Prof. Ojienda urged us to find that the Court would only be interested in the process that was followed up to the passing of the legislation and not the details of how the 1<sup>st</sup> respondent who is mandated to render services, arrived at the various charges that were levied. He cited the case of **Municipal Council of Mombasa vs Republic, Ex**

parte Umoja Consultants Ltd., Nairobi Civil Appeal No. 185 of 2001, where this Court held as follows:

*“Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review”.*

[15] On the authorities cited by counsel for the appellant especially the South African case of The Minister of Health vs. New Clicks South Africa (PPTY) Ltd., [2006] (2) SA 311, counsel for the respondents urged us to find the conclusions drawn by the learned trial Judge were correct in that it cannot be expected that every individual who claims to be affected by a law or a regulation will be given an individual hearing. What is necessary are the concerns of different sectors of the public which public should be given a chance to formulate and forward to the legislative body. After reviewing the voluminous documents that included the minutes of the consultative forums and the committee meetings, counsel said the Judge aptly found that the views of public were sought when the Bill was published through the Assembly Committee hearings and during the public debate. Prof. Ojienda further submitted that the parameters of public participation are drawn to balance the interest of justice and fairness. In this case, the Finance Bill has been in operation for almost a year and any attempt to declare it unconstitutional, will go against the interests of the larger public. A Statute cannot be condemned without an enquiry. Counsel urged us to dismiss the appeal.

16. The 3<sup>rd</sup> respondent did not participate in the High Court proceedings or in this appeal. Mr. Obura, learned counsel for the 4<sup>th</sup> respondent associated himself fully with the submissions of Prof. Ojienda for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and stated that the 4<sup>th</sup> respondent was in total agreement with the judgment of the High Court. Counsel did not file written submissions.

17. In his rejoinder to the above submissions, Mr. Kinyanjui, emphasized that the notices issued by the 1<sup>st</sup> respondent for public participation in a forum to discuss the budget estimates were short. Therefore, the limited public participation at the said fora did not meet the threshold that is envisaged under **Article 191 (2)** of the **Constitution**. He urged us to find that the **Finance Act** contravened the provisions of **Section 72 (b)** of the **Traffic Act** which is a national legislation that gives guidelines on how parking fees should be levied. He urged us to find that the levies charged by the 1<sup>st</sup> respondent are, therefore, unconstitutional and allow the appeal.

18. The several issues raised in the memorandum of appeal boil down to two broad issues; firstly whether the learned Judge erred in dismissing the appellant’s petition that sought for declaratory orders that Paragraphs 6.1 of the Nairobi County Finance Act was unconstitutional and secondly, whether there was adequate notice calling for the participation of the stakeholders before the Finance Act was enacted. This case was determined by way of submissions and affidavit evidence. There were no witnesses that testified even on the contentious issue of public participation. Nonetheless it being a first appeal, it is the duty of this Court as the 1<sup>st</sup> appellate court to re-evaluate the evidence, assess it and make its own conclusions. See the case of Selle and Another v Associated Motor Boat Company Ltd and Others, [1968] EA 123 at P.126. Sir Clement Lestang VP said:-

*“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of facts by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself*

*and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abani Hameed Saif v Ali Mohamed Sholaw [1955] 22 Each 270)".*

[19] The issue for determination is whether the Nairobi City County Assembly exceeded its mandate when passing the Paragraphs 6.1 of the **Finance Act. Article 185 of the Constitution** provides that the legislative authority of a County is vested in its County Assembly. The County Assembly is mandated to make laws that are necessary for, or incidental to the effective performance of the functions and exercise of the powers granted in the **4<sup>th</sup> Schedule** of the **Constitution**. That **Schedule** isolates the functions that can be undertaken by County Government and **Section 5 (c)** provides *inter alia* for **traffic and parking** as a function by the County Government.

[20] Who then should regulate the parking fees for the Nairobi City Government, is it the County Government or the National Assembly? As regards this question, it is already demonstrated above that under **Section 5 (c)** of the **4<sup>th</sup> Schedule** to the **Constitution**, the mandate of regulating **traffic and parking** is given to the County Government. We have no doubt, on reading the various provisions of the Constitution, that the mandate of regulating parking fees in a County is clearly vested upon the County governments. This mandate as aforesaid is derived from the fourth schedule that designates traffic and parking to the County Government as **Article 185** of the Constitution donates power to County Assembly to enact the relevant legislation which may be necessary or incidental to the effective performance of its functions. In our view, the **Finance Act** that regulates the parking charges among other charges and levies is such a legislation that was envisaged. **Article 209 (4)** also provides that **"The national and county government may impose charges for services."**

21. The next issue we wish to tackle is whether there is a conflict between the provisions of **Paragraphs 6:1** of the **Finance Act** and those of **Section 72 (B)** of the **Traffic Act**. It is imperative to reproduce the entire provision of **Section 72B** of the **Traffic Act** for its full import. It provides:-

***"(1) There shall be paid to the local authority in respect of a vehicle left in a designated parking place charges calculated in accordance with this section or in such other manner as the local authority may by by-laws prescribe.***

***(2) There shall be a prescribed standard period for each designated parking place and, subject to this section, the amount of the charge for a vehicle left in the parking place, for a time not exceeding the standard period, called, the initial charge, shall be such amount, called the standard amount, as may be prescribed, and the initial charge shall be payable on the leaving of the vehicle in the parking place:***

***Provided that:***

***i. if it is so prescribed, the initial charge for a vehicle for a time not exceeding one-half of the standard period shall be one-half of the standard amount; and***

***ii. Where paragraph (i) has effect, and it is further so prescribed, then, if before the end of the prescribed time a further payment of one-half of the standard amount is made, the two payments shall be treated as a single payment of an initial charge of the standard amount made on the leaving of the vehicle.***

***(3) If a vehicle is left in the parking place after the period for which payment was made by the initial charge has expired, the amount of the charge shall be the amount of the initial charge together with such additional amount, called an excess charge, as may be prescribed, and the excess charge shall be payable in such manner and at such time as may be prescribed.***

**4. A parking meter of a type approved by the Minister shall be provided for each space in a designated parking place, and shall be erected as close to that space as is practicable; and –**

**(a) payment of the initial charge shall be made by the insertion of coins in the parking meter and turning the handle of the parking meter to its full extent so as to indicate the length of time paid for;**

**b. subject to paragraph (c), if, at any time while a vehicle is left in the parking space, the specified indication appears in the parking meter for the space in which the vehicle is left, it shall be presumed unless the contrary is proved that the initial charge has been duly paid and that the period for which payment was made by the initial charge has already expired.**

**c. if it is proved that the time for which the vehicle has been left in the parking place is less than the standard period, or (where proviso (i) to subsection (2) has effect) less than half the standard period, paragraph (b) shall not have effect but it shall be presumed unless the contrary is proved that the initial charge has not been duly paid for the vehicle.**

**(5) Notwithstanding anything contained in this section, a local authority may, by by-laws, prescribe other methods for the payment of parking fees in respect of a vehicle left in each designated parking place. “**

[22] It was contended by the appellant that the provisions of **Paragraph 6.1** of the **Schedule** to the **Finance Act** conflicts with the provisions of **Section 72(B)** of the **Traffic Act** and is thereby in contravention of the appellants’ consumer rights as well as the provisions of **Article 190 (2)** of the **Constitution** that require a County Government to operate Financial Management Systems that comply with the requirements prescribed by the relevant national legislation. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents contended that **Paragraph 6.1** of the **Schedule** of the **Act** prescribes the various methods for payment of parking charges which includes:

**a. Daily parking tickets for saloon cars - Kshs. 300/= and lorries - Ksh.1,000/=.**

**b. Seasonal Tickets which can be either monthly, quarterly, half yearly or annually.**

There is also provision for automated parking areas that has entry fees for hourly charges, on-street parking for the designated areas of the city, and country bus parking station for buses and *matatus* which are charged Ksh.150/= for entry and Ksh.30/= for every quarter of an hour.

[23] The judgment of the High Court was challenged because the learned Judge made the following conclusion which, according to counsel for the appellant, elevated the provisions of a county legislation above a national statute. This is what the learned Judge stated in his own words:

**“It must be understood that the Traffic Act was enacted in 1968 or thereabouts, way before the Constitution, 2010, was promulgated. Between 1968 and 2010, there were no County Governments and the “distribution of functions between the National Government and the County Governments” was all but a mirage.**

**Local authorities cannot be equated to County Governments as the structure and design of the Constitution has given County Governments an elevated position as one of the organs to which sovereignty of the people of Kenya is delegated under Article 1 of the Constitution reproduced elsewhere above.**

**In that context, traffic and parking issue have been deliberately given to County Governments and if the Traffic Act purports to take away that mandate, as is argued by the Petitioners, then Section 7 of Schedule 6 has the answer. It provides as follows:**

**“(1) All law in force immediately before the effective existing laws, date continues in force and**

**shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.**

**2. If, with respect to any particular matter –**

**a. a law that in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and**

**b. a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer; the provisions of this Constitution prevail to the extent of the conflict”.**

**The Traffic Act must be brought to conformity and must, therefore, be construed with the devolved County Government structure in mind and it cannot supersede County Legislation on an issue exclusively reserved for the County Government, not by Statute, like the Traffic Act, but by the Constitution itself”.**

[24] Our own construction of the provisions of **Section 72 (B)** of the **Traffic Act** is that it provides for charges for use of designated parking places which are to be paid to the local authorities. The **Traffic Act** also makes provisions for how the charges should be calculated. The appellants argument, if we understood it well, was that the calculations for parking charges under **Paragraph 6:1** of the **Finance Act** are contrary to what is provided for in the Traffic Act which is a superior legislation that should prevail as against the **County Finance Act**. They further argued that the regulation of parking fees affects a cross-section of people both within and outside of Nairobi and it should, therefore, be a matter for national legislation and not that of the County Government. Without getting into the contest of which legislation is superior to the other, what is obvious is that the **Traffic Act** authorised local authorities make by- laws for the effective discharge of their mandate. That has now been replaced by County Governments legislations that are provided for under the **Constitution of Kenya 2010** which also provides that the calculation of charges may also be done **“in such other manner as the local authority may by- laws prescribe”**. In the circumstances, we do agree with counsel for the respondents that the learned Judge did not err in the above conclusions.

25. The next issue to consider is whether the provisions of the **Finance Act** contravened the provisions of the Constitution. The determination of this issue necessitates examination of the construction of the relevant **Articles** of the **Constitution** which deal with the County Governments and to some extent the principles that guide courts in interpreting a particular provision of a statute. Those guiding principles were aptly set out in the case of **SOUTH DAKOTA V NORTH CAROLINA 192 US, 268 (1940) L ED**, in which the US Supreme Court said at page 465:

**“Elementary rule of constitutional construction is that no one provisions 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”.**

With regard to the constitution, the guiding principles are set out under **Chapter 17** of the **Constitution** which require constitutional the interpretations to:-

**a. Promote its purpose, values and principles;**

**c. Advance the rule of law and human rights and fundamental freedoms in the Bill of Rights;**

**d. Permit the development of the law and the human rights and fundamental freedom in the Bill of Rights;**

**e. Permit the development of the law; and**

**f. Contribute to good governance”.**

[26] The learned Judge of the High Court also appreciated these cardinal principals when he made reference to a Supreme Court of India decision in the case of; ***Hambarda Wakhana V Union of India*** , AIR (1960) AIR 554, where the Judges observed as follows:

***“In examining the constitutionality of a statute, it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment”.***

In the Ugandan case of ***Olum and Another v Attorney General of Uganda***, (2002) 2 EA 508, 518 the Court held that:

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

[27] **Article 191 (1)** of the **Constitution** makes provisions regarding conflict of laws between national and county legislations as follows:-

***“(1) This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.***

**2. National legislation prevails over county legislation if –**

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

***b. the national legislation is aimed at preventing unreasonable action by a country that –***

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

***ii. impedes the implementation of national economic policy.***

**3. The following are the conditions referred to in clause (2) (a) -**

***a. the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;***

***b. the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing –***

***i. norms and standards; or***

***ii. national policies; or***

***c. the national legislation is necessary for –***

***i. the maintenance of national security;***

ii. *the maintenance of economic unity;*

iii. *the protection of the common market in respect of the mobility of goods, services, capital and labour;*

iv. *the promotion of economic activities across county boundaries;*

v. *the promotion of equal opportunity or equal access to government services; or*

vi. *the protection of the environment.*

4. *County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.*

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

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

[28] In so far as the Constitution created County Governments and gave them certain functions and legislative authority to make laws for effective performance of those functions, we find that the Judge was right in declining to declare **Paragraph 6: 1** of the **Finance Act** unconstitutional. We do not agree with Mr. Kinyanjui's contention that although **Section 18 (a)** of the **4<sup>th</sup> schedule** of the Constitution gives the functions of transport and communication to the National Government, the County Government is an organ of the Constitution, the one that is vested with the function of determining matters of **traffic and parking** fees. If it was the intention of the drafters of the Constitution to give the function of parking to the National Government, they should have expressly said so. Instead the Constitution states clearly that the functions of regulating traffic and parking are vested in the County Governments. In addition, the **Traffic Act** gives room to a local authority (read County Government) to use any other method in calculating the parking fees other than what is provided for under **Section 72(B)**.

As stated, we find no conflict between the **Finance Act**, the **Traffic Act**. Even if there was, the Finance Act would prevail as the **Constitution** that created the County Governments and gave them legislative powers and the functions of regulating traffic and parking.

[29] Having found that the **Finance Act** is not in conflict with the **Traffic Act**, we now turn to the appellants' contention that the process of enacting the **Finance Act** failed to include public participation. Counsel for the appellant submitted that failure to involve the public by issuing them with a reasonable notice, the **Finance Act** was enacted contrary to the tenets of the Constitution and it should be declared null and void. In support of this submission, counsel cited the High Court case of **ROBERT N GAKURU & OTHERS V GOVERNOR KIAMBU COUNTY & 3 OTHERS, [2014] eKLR** in which Odunga, J., relying on the decision of Constitutional Court of South Africa in the case of **GLENISTER VS PRESIDENT OF SOUTH AFRICA AND OTHERS, (CCT 48/10) 2011** held:

*“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 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”.*

[30] It was seriously contended that none of the appellants were consulted before the **Finance Act** was enacted which is contrary to the provisions of **Article 196 (1) (b)** which makes it mandatory for a County Assembly to facilitate public participation and involvement in the legislative and other businesses of the Assembly and its Committees. Public participation is also guaranteed under **Article 10 (2) (b)** of the **Constitution**. It was argued that the 1<sup>st</sup> respondent also failed to observe the principles of good governance and the rights of the appellants enshrined in the Bill of Rights were violated by the 1<sup>st</sup> respondent in imposing parking fees of Ksh. 300/= and 5,000/= per day and monthly respectively. This, in addition, infringed upon the appellants' consumer rights which are also protected under **Article 46** of the **Constitution**. Mr. Kinyanjui claimed that the High Court chided its duty to declare their rights. According to him, the purported notices that were published by the 1<sup>st</sup> respondent calling for public participation were too short. It was unreasonable to expect the appellants to prepare a presentation and attendance within only one or two days. He said that is why the attendances in the two stakeholder forums were too low. One meeting had only 70 participants out of whom 22 participants were from the 1<sup>st</sup> respondent and the second was attended by 310 participants, 1/3 of whom were also insiders.

[31] The Constitution and the relevant statutes are silent on the period of the notice to be given to the public. Nevertheless, it has to be reasonable notice. Although we agree that the notices issued may not have been sufficient considering the social conditions of the ordinary Kenyans who may not access the information through the websites and the print media, from the averments in the affidavit of Lillian Ndegwa sworn on 16<sup>th</sup> October 2013, in response to the appellant's petition in the High Court, it is clear that "*representatives of Motorist Associations of Kenya, Kenya Bus Operators, Double M Operators among other stakeholders attended and gave their views.*" As Kenya Bus Operators and Double M Operators are among the PSV operators, it means that the appellants had notice of the public fora but only a few attended. As the trial Judge correctly observed, the words of **Chaskalson, CJ.**, in the South African case of **MINISTER FOR HEALTH V NEW CLICKS SOUTH AFRICA (PTY) LTD.**, **succinctly cover the situation in this case:**

***"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 reasonable notice is given and the views of those who attend are taken into consideration.

32. In this case, none of the above mentioned PSV operator groups who attended the 1<sup>st</sup> respondent's consultative for a as well as the representatives of the Motorist Association complained that the notice given to them was too short. Similarly, the other appellants did not adduce any evidence that the notice given was insufficient. In the circumstances, it would not be right to annul the 1<sup>st</sup> respondent's Finance Act on mere submissions of counsel that the appellants were not accorded a reasonable opportunity to air their view on it.

33. In the upshot, we find no merit in this appeal and the same therefore fails. This being a public interest litigation, we order that each party to bear its own costs.

***Dated and delivered at Nairobi this 3<sup>rd</sup> day of October, 2014.***

**M .K. KOOME**

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**JUDGE OF APPEAL**

**D. K.MARAGA**

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**JUDGE OF APPEAL**

**J. M. MWERA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**