



Ashut Plastics Limited & 4 others (All Suing as Members of the Plastics Division of the Kenya Association of Manufacturers) v Attorney General & 2 others; Kenya National Authority (Interested Party) (Petition E702 of 2024) [2025] KEHC 7943 (KLR) (Constitutional and Human Rights) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7943 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E702 OF 2024

AB MWAMUYE, J

MAY 29, 2025

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 10, 19, 20, 21, 22, 23, 24, 40, 47, 94, 114 AND 201 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, NO. 3 OF 2012

AND

IN THE MATTER OF SECTION 27 (A) (I) (S) OF THE TAX LAWS (AMMENDMENT) ACT 2024

AND

IN THE MATTER OF SECTION 31 OF THE FINANCE BILL 2018

AND

IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT NO. 23 OF 2013

AND

IN THE MATTER OF KENYA GAZETTE SUPPLEMENT NO. 215 OF 13TH DECEMBER 2024

AND

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

BETWEEN

ASHUT PLASTICS LIMITED 1ST PETITIONER

SANPAC AFRICA LIMITED 2ND PETITIONER



NAIROBI PLASTICS LIMITED 3RD PETITIONER
TECHPACK INDUSTRIES LIMITED 4TH PETITIONER
BLOWPLAST LIMITED 5TH PETITIONER
ALL SUING AS MEMBERS OF THE PLASTICS DIVISION OF THE KENYA
ASSOCIATION OF MANUFACTURERS

AND

ATTORNEY GENERAL 1ST RESPONDENT
CABINET SECRETARY – NATIONAL TREASURY 2ND RESPONDENT
THE NATIONAL ASSEMBLY 3RD RESPONDENT

AND

KENYA NATIONAL AUTHORITY INTERESTED PARTY

JUDGMENT

1. The Petitioner approached this court vide Petition dated 19th December, 2024 seeking the following orders:
 - a. An order of certiorari to remove and bring to this Honourable Court and quash the 2nd and 3rd Respondents' decision to impose Excise Duty on locally manufactured plastic contained in Section 27 (a)(i)(s) of the Tax Laws (Amendment) Act 2024 published on 13th December, 2024 in Kenya Gazette Supplement No. 215 of 13th December, 2024 and or signed into Law on 11th December, 2024.
 - b. An order of Mandamus directing the 2nd and 3rd Respondents to first seek the views of the public and/or set-up a consultative taskforce to collect the views of the public before presenting Section 27 (a)(i)(s) of the Tax Laws (Amendment) Act 2024 for debate by the 3rd Respondent.
 - c. A declaration do issue that the actions and decisions of the 2nd and 3rd Respondent in respect of Section 27 (a)(i)(s) of the Tax Laws (Amendment) Act 2024 contained in the Kenya Gazette Supplement No. 215 of 13th December, 2024 purporting to declare that the effective date of Section 27(a)(i)(s) of the Tax Laws (Amendment) Act 2024 to be 27th December, 2014 and or passed into Law is null, void and unconstitutional for lack of public participation as mandated by *the Constitution* of Kenya.
 - d. An Order compelling the 2nd and 3rd Respondents' permit the Petitioners, local manufacturers of Plastic products to continue operating in the system and regime applicable before the proposals set out in Section 27(a)(i)(s) of the Tax Laws (Amendment) Act 2024 were published.
2. The Petition was accompanied by a Notice of Motion Application dated 19th December 2024 and an Affidavit in support of even date sworn by Amit R. Shah on the grounds that on 13th December, 2024, the 3rd Respondent pursuant to the proposals of the 2nd Respondent published Kenya Gazette Supplement No. 215 dated 13th December, 2024 introducing several taxation measures and in



particular to amend the Excise Duty Act to impose Excise Duty on locally manufactured plastic goods at 25% per kg.

3. According to the Petitioners there was no consultations or public participation in that particular provision as previously excise duty had been imposed on imported articles of plastics. They aver that the said provisions were to take effect on 27th December 2024 requiring the Interested Party to commence process of application, registration of and issuance of Certificates of Registration to the manufactures of locally produced plastics and it requires the issuance of guidelines by the Interested Party upon consultation with manufacturers.
4. The Petitioners further aver that at the time of filing, the Interested Party had already commenced the process of application of the proposals as it had called upon the manufacturers of local plastics products to apply for registration and licensing for implementation without first having the measures discussed in a consultative meeting before imposing and this process is not only unconstitutional but also null and void and any action taken is in disregard thereof and tantamount to perpetuating illegality, unless and until the stakeholders are involved and the public participate before Parliament.
5. The Petitioners further asserted that it will be impracticable for the local manufacturers of locally produced plastics to risk and penalties and the exercise is in blatant violation of Articles 27(1), 28, 40(1), 47(1) & (2), 50(1) and 201 of the Constitution of Kenya, 2010. They stated that it will be impracticable for the local manufacturers of the plastic products to comply with the new imposition of Excise stamps on their products by 27th December 2024 without sufficient notice and process of changing the system and procedures.
6. The Petitioners contend that additional changes that have been experienced due to the rushed implementation of new Excise Duty on locally produced plastic products without the necessary consultations and guidelines as well as regulatory frameworks to include lack of information on the implementation of the new system, lack of information on the registration of manufacturers and importers which will subsequently lead to closing down of operations pending registration leading to penalties and fines for failure to comply with the new regulations and tax system and finally although the Interested party has already issued notifications for affixing stamps on the goods despite no procurement of the stamp has done encumbering business operations.
7. In response to the Petition, the 1st and 2nd Respondents filed Grounds of Opposition dated 17th January 2025 systematically opposing the Petition on the grounds that extensive public participation was conducted prior to and during consideration of the Tax Law (Amendment) Act including the impugned Sections 27(a)(i)(s).
8. They contend that the Petition is smacked by contradiction making it near impossible for the Respondents to fashion a response and since the Petition does not meet the threshold of specificity, it is irrational, unreasonable and unreasonable making it unfit and improper for this Court to exercise its jurisdiction under Article 165 of the Constitution.
9. They further averred that this Honourable Court's jurisdiction does not extend to merit of policy choices and technical matters regarding the suitability and capacity of a system hence the Court should decline an invitation to entertain the claim on that basis.
10. Moreover, they stated that the Petition does not meet the threshold for grant of conservatory orders as set by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, and should therefore be dismissed with costs to the 1st and 2nd Respondents.



11. In opposition and in response to the Petition, the 3rd Respondent filed a Replying Affidavit sworn by Samuel Njoroge and dated 16th January, 2025 to which he averred that the Tax Laws (Amendment) Bill was published on 1st November, 2024 and read in the House for the first time on 13th November, 2024. It was then committed to the Departmental Committee on Finance and National Planning to conduct public participation.
12. The 3rd Respondent further avers that the Clerk of the National Assembly placed an advertisement in the print media inviting the public to submit memoranda by way of oral and written submissions on 14th November, 2024. After conducting the public participation, the Committee tabled its report before the House on 3rd December, 2024.
13. The 3rd Respondent stated that the Committee conducted public participation forums on diverse dates between 18th and 20th November in six (6) counties namely Isiolo, Bungoma, Siaya, Mombasa, Kericho and Taita Taveta. They attached the report as part of their evidence.
14. They equally stated that the Committee through a letter REF: NA/DDC/F&NP/2024/(126) dated 15th November, 2024 invited stakeholders for engagement sessions which were held on diverse dates between 25th and 29th November, 2024 at Kenyatta International Convention Centre(KICC) where views were submitted on amendment of tariffs by only two (2) stakeholders namely Westminister Consulting and Sanaabil Consultancy Ltd. According to the 3rd Respondent, the Committee agreed with their opinion captured in pages 160 and 27 of the report.
15. The 3rd Respondent concluded by stating that they accorded the public the opportunity to present their vies through public participation and therefore delivered on their mandate as required under Article 95 of *the Constitution* and therefore the Petition lacks merit and should be dismissed with costs.
16. The Interested Party equally responded to the Petition vide Replying Affidavit sworn by Josephine Mugure dated 13th January 2024. In the Replying Affidavit she averred that Section 27 (a)(i)(s) of the Tax Laws (Amendment) Act 2024 was introduced and enacted by the National Assembly and assented to by the President and that the commencement date was slated for 27th December, 2024.
17. The Interested Party further averred that the provision is one of the tax measures the Government has put in place in order to finance its budget therefore restraining them from implementing Section 27 (a)(i)(s) will therefore deny the government much needed revenue. They relied on Article 201 of *the Constitution* that provides on the principles that guide all aspects of public finance and further stated that the public finance system should ensure that the burden of taxation is shared fairly.
18. They then reiterated contents of the 3rd Respondent's Replying Affidavit sworn by Samuel Njoroge on 16th January 2024 and stated that the Interested Party adhered to the express provisions of *the Constitution* and states therefore it would be in the interest of justice that the Petition be dismissed.
19. The petition was canvassed by way of written submissions, and in compliance all parties except the Interested Party filed and served their submissions.

Petitioners' Submissions

20. In their written submissions dated 4th March 2025, the Petitioners identified and analyzed three (3) issues of determination namely; whether Section 27 (a)(i)(s) of the Income Tax (Amendment) Act, 2024 was substantive amendment to the Tax Laws (Amendment) Bill 2024, whether Section 27 (a)(i) (s) of the Income Tax (Amendment) Act, 2024 ought to have been subjected to public participation



before gazettment and finally whether the Notice of Motion and Petition dated 19th December, 2024 are merited.

21. While relying on the case of Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 KLR which defined substantive amendment as one intended to change the law, as opposed to merely clarifying or explaining the previous law, the Petitioners contend that Section 27(a)(i)(s) of the Income Tax (Amendment) Act, 2024 was never subjected to public participation before the same was assented and gazetted to law.
22. The Petitioners contend that a reading of clause 25 of the said Bill does not in any way reflect any provision in relation to imported articles of plastic and being members of the Kenya Association of Manufacturers, they provided their views on the bill as was presented before them as such Section 27(a)(i)(s) of the Income Tax (Amendment) Act, 2024 having not been part of the Bill as presented in the public, the Petitioners were unable to give their views on the same.
23. They submit that Section 27(a)(i)(s) of the Income Tax (Amendment) Act, 2024 was only introduced after an alleged round of public participation but the same was indeed a new and novel issue. They further aver that the Section was not only new but also a substantive amendment to the Bill as it sought to impose Excise Duty on locally manufactured plastic goods at 25% per kg. Such an amendment had the capacity to change the existing tax laws in the country and considerably impact the manufacturers of locally produced plastic products
24. On the second issue, the Petitioners submitted on importance of public participation and relied on Okoiti v National Assembly & another [2022] KEHC 16361 (KLR). They further stated that Section 27 (a)(i)(s) of the Income Tax (Amendment) Act, 2024 ought to have been subjected to a new round of public participation in Court and relied on the case of Cabinet Secretary for the National Treasury and Planning & 4 others.
25. According to the Petitioners Section 27 (a)(i)(s) of the Income Tax (Amendment) Act, 2024 was not only a new provision not reflected in the bill as published but was also not a product of sufficient public participation. The consequence of this is that being a substantive amendment, this ought to have triggered a new round of public participation aimed at proper sensitization of all affected persons.
26. On the third and final issue, the Petitioners relied on the case of British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) [2019] KESC 15 (KLR) and further contend that unless the implementation of Section 27(a)(i)(s) of the Income Tax (Amendment) Act, 2024 is stopped, they shall not only suffer irreparably but also lose their business and potentially cripple the Plastics business.

Respondents' Submissions

27. The 1st and 2nd Respondents filed written submissions dated 4th March 2025 where they averred that based on the pleadings, the Petition presents a single issue for determination being whether the amendment of clause 25 of the Tax Laws (Amendment) Bill, 2024 brought by a stakeholder at the Committee stage ought to have been subjected to fresh round of public participation.
28. They submitted that all parties are in agreement that the early stages of the legislative process, the Bill was subjected to sufficient public participation further, it is uncontroverted that during the Committee stage of the Tax Laws (Amendment) Bill, 2024, one of the stakeholders suggested that stake 25 of the Bill be amended to introduce excise duty on domestic plastics of tariff line 3923.30.00 and 3923.90.90, which proposal was accepted and later enacted into law.



29. According to the 1st and 2nd Respondents pursuant to Article 94(5) and 95(3) of *the Constitution* grants the National Assembly mandate during debate to change the contents of any bill submitted to it for enactment by adding, modifying or removing the proposal contained in the Bill. They further stated that to hold that every amendment moved must undergo the process of public participation would undermine and negate the legislative process. They relied on the case of Institute of Social Accountability & another vs National Assembly and 4 others [2015] KEHC 6975 (KLR) and the Supreme Court case of Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus curiae) (Petition E031,E032 & E033 of 2024 (Consolidated) [2024] (Consolidated) [2024] KESC 63 KLR(29TH October 2024 (Judgment) which held that amendments which have been made in response to the result of public participation do not need to be subjected to another round of public participation.
30. The 3rd Respondent filed written submissions dated 25th February 2025 where they submitted on two issues for determination namely; whether the Tax Laws (Amendment) Act, 2024 was subjected to public participation and whether Section 27 (a)(i)(s) of the Tax Law (Amendment) Act, 2024 was subjected to public participation.
31. On the first issue, the 3rd Respondent reiterated contents of their Replying Affidavit sworn by Samuel Njoroge, dated 16th January 2025. On the second issue, they submitted that during public participation exercise, views were submitted on the amendment on tariffs by only two (2) stakeholders namely Westminister Consulting and Sanaabil Consulting which is sufficient evidence that public participation was conducted on Section 27(a)(i)(s) of the Tax Laws (Amendment) Act, 2024 before it became law.
32. Having carefully considered the Petition, the responses, the affidavits and submissions, the following key issue arise for determination: -

(a) Whether there was any and/or sufficient public participation preceding the amendment to Section 27 (a)(i)(s) of the Tax Laws (Amendment) Act, 2024.

33. The Petitioner contend that the 3rd Respondents either by their own volition or at the request and/or influence by third parties amended Clause 25 of the Tax Laws (Amendment) Bill, 2024 without conducting public participation for a second time after effecting changes to the Bill thus stake holders such as the Petitioners were denied a right to participate in the exercise that clearly made decisions affecting them making the said amendment unlawful.
34. The impugned amendment of the First Schedule to the *Excise Duty Act* provided under clause 25 of the Bill that read as follows:

“Clause 25 of the Bill is intended to amend the First Schedule to the *Excise Duty Act* to review the excise duty rates of various products so as to enhance the protection of the local industries producing similar products. Further, the Clause proposes to enhance taxation of tobacco products to discourage consumption of these products due their negative externalities such as effect on health caused by cigarette smoking. The harmonization of the rate of filter and non-filtered cigarette is meant to protect revenue leakage as a result of mis-declaration and misreporting. The uniform rate of taxation will ease the administration of taxation in these products.”
35. The Clause amended Section 27(a)(i)(s) of the Tax Law (Amendment) Act, 2024 which reads as follows:



27. The First Schedule to the *Excise Duty Act* is amended-
- (a) in Part I-
 - (i) in the second table of paragraph I- (s) in the tariff description “Imported Articles of plastic of tariff heading 3923.30.00 and 3923.90.90” by deleting the word “imported”;
36. The Petitioners do not dispute that the Bill was subjected to public participation and that two stakeholders namely; Westminster Consulting and Sanaabil Consulting proposed the amendment to introduce excise duty on domestic plastics of tariff line 3923.30.00 and 3923.90.90 which proposal was accepted and enacted into law. The Petitioners are in dispute that since the proposals were new provisions not incorporated in the bill, the same should have been subjected to sufficient public participation. They equally aver that since the Bill was subjected to roughly 6 days of public participation in 7 counties, the public participation cannot be said to be reflective of a fair representation of all persons affected by the bill as it only featured a select number of counties in select regions.
37. The arguments by the Respondents and the Interested Party are an attempt to prove the fact that public participation indeed took place and that the allegations by the Petitioners are misleading and misguiding since the same was done and due process followed.
38. The requirement for public participation in decision making in Kenya has been expanded by progressive legislation on public participation and by courts through case law. According to the Public Participation in the Legislative process, Factsheet No. 27 by the National Assembly, public participation can be defined as process of interaction between an organization and the public with an aim of making an acceptable and better decision. The process involves informing, listening, dialogue, debate and analysis as well as implementation on agreed solutions.
39. Public access and participation in both the national and county legislature is guaranteed specifically under Article 118(1) (b) and 196(1) (b) of *the Constitution* which directs the national and county legislatures to respectively facilitate public participation which is also guaranteed by Article 10, 27, 33, 35 and 119 of *the Constitution* of Kenya, 2010.
40. Public participation is an essential public obligation that has to be observed prior to the enactment of any legislation and we can therefore not negate its importance in the process leading to the formulation and implementation of any legislation.
41. The question that I now need to address myself to is whether there was sufficient public participation in the process leading to the enacting of the impugned legislation.
42. The issue of public participation was exhaustively discussed in the case of Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya and 6 Others [2017] eKLR where the Court pronounced itself on the importance of public participation as follows:

“The people of Kenya did not intend that these provisions be merely suggestions, superfluous or ornamental: they did not intend to include these provisions as lofty aspirations. Kenyans intended that the said provisions should have substantive bite and that they will be enforced and implemented.”



43. The Court of Appeal in *Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others* (2018) eKLR highlighted the importance of public participation in the law-making process as follows:

“The purpose of permitting public participation in the law-making 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.”

44. Additionally, in *Muli Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR the court prescribed the principles employed to determine whether public participation has been met in a particular case as follows: -An agency should furnish a program of public participation which should take into account the quantity and quality of the governed to participate in their own governance; There is no single regime of public participation that can be prescribed because a variety of mechanisms can be used to achieve public participation. The only test the courts can use is the test of effectiveness; A public participation program must include access to and dissemination of relevant information; It must be inclusive and diverse.

45. The Court in the case above observed that public participation does not mean that everyone must give their views, which is impracticable. Rather that there ought to be evidence of “intentional inclusivity” in the participation program and which, on the face of it, took into account the principle that “those most affected by a policy, legislation or action must have a bigger say: and their views more deliberately sought and put into account.” That notwithstanding, there is no attendant requirement that each individual’s views will be included in the final policy or law: the public authority has no duty to accept any and every view, the opposite of which would effectively neutralize and stall the exercise of the authority’s mandate.

46. There is no standard on proper threshold of public participation as a principle of governance in managing the affairs of the state nevertheless, the aforementioned case laws among others have contributed largely in contributing to the tools and principles that guide the both state and county governments on public participation.

47. In the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR the court stated that:

“Once a Petitioner attacks the legislative process on grounds that the law-making process did not meet the constitutional standard of public participation, the Respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation.”

48. I am equally guided by the case of *Law Society of Kenya v Attorney General Nairobi* Petition No. 318 of 2012 where Majanja J. (as he then was) held as follows;

“(51) In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the Parliamentary



Standing Orders that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these standing orders provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda.”

49. Accordingly, the burden of proof lies with the Respondents to demonstrate there was public participation which in this case is not in dispute. The Respondent adduced sufficient evidence that they made effort in collecting views from the public and even considered those views in amending the Act.
50. It is my view that the Respondents produced sufficient evidence to justify their efforts to facilitate public participation as required under Article 118 of *the Constitution*. I find that a reasonable opportunity was given to the public, interested parties and relevant stakeholders to advance their views but they opted not to.
51. I agree with the Respondents and the Interested party that public participation in the manner explained above and as contained in the 3rd Respondent’s replying affidavit was conducted to a reasonable degree contrary to the Petitioner’s assertions.
52. In addition, it is clear that the Petitioners were also aware that the Bill was being debated in Parliament but what did it do? The process of legislation is a lengthy one, and therefore the Petitioners ought to have been diligent, proactive and participated in the process no matter how minimal it appeared knowing that matters touching on the Tax Law (Amendment) Act was core to its mandate. They cannot therefore be heard to state that there was no public participation while all along they were aware of the process but chose or failed to participate in it.
53. It is also not enough for the Petitioners to state that the 3rd Respondent did not undertake public participation simply because it may have failed to take into account their views which ironically, they did not submit. I am also guided by the case of Association of Gaming Operations -Kenya & 41 others v Attorney General [2014] eKLR where Majanja J (as he then was) stated as follows:
- “29. ...As the authorities I have cited show, an oral hearing is not necessary in every situation and the legislature has wide latitude to determine how to receive submissions. Although public participation in the lawmaking process is required, essentially all that is required of the legislature is to provide opportunity for some form of public participation. This may be by allowing the public to make written or oral submissions at some point in the legislative process.
30. ...In my view the opportunity availed to the Petitioners to forward their memorandum is ample demonstration that there was public participation. The fact that the outcome did not result in what the petitioners’ wanted does not necessarily negate public participation.”
54. In light of the foregoing, I am not persuaded that there wasn’t any and/or sufficient public participation carried out in respect of the Amendment Act. In my view, the Respondents’ actions subjected the Act through the constitutional compliance step of public participation. I therefore conclude by finding that the process leading up to the enactment of the Amendments to the Tax Laws



(Amendment) Act, 2024 including Section 27(a)(i)(s), followed all lawful processes in accordance to Article 118(1)(b) of *the Constitution* and cannot be invalid as claimed.

55. From my findings above, my final orders are that:

- a. The Petition is hereby dismissed
- b. Each party shall bear its own costs because the issues raised are of public importance.

56. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF MAY 2025.

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BAHATI MWAMUYE

JUDGE

