



**Apiyo v Attorney General & 2 others (Petition E013 of 2023)
[2024] KEHC 1967 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PETITION E013 OF 2023
MS SHARIFF, J
FEBRUARY 29, 2024**

**IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 1(1) (2(1) (2) (4) 2(1) 10,
22,23,27, 33, 35, 43(1) (B), 56(1), 118, 258 AND 259 OF THE CONSTITUTION OF KENYA**

BETWEEN

LAWRENCE OMULE APIYO.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

**THE CABINET SECRETARY FOR LANDS,
PUBLIC WORKS, HOUSING**

AND URBAN SETTLEMENT.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT

BETWEEN

LAWRENCE OMULE APIYO PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

**THE CABINET SECRETARY FOR LANDS, PUBLIC WORKS, HOUSING AND
URBAN SETTLEMENT 2ND RESPONDENT**

THE NATIONAL ASSEMBLY 3RD RESPONDENT



JUDGMENT

A. Chronology of Events:

1. On 28th November, 2023 the High Court of Kenya sitting in Nairobi in Constitutional Petition No. 181 of 2023 as consolidated with Constitutional Petitions Nos. E211/2023, E217/2023, E219/2023, E221/2023, E227/2023, E228/2023, E232/2023, E234/2023, E237/2023 and E254/2023, declared Sections 76 and 78 of the Finance Act 2023, amending Section 7 of the *Kenya Roads Act* 1999, Section 87 of the Finance Act, 2023 amending Section 28 of the Unclaimed Assets Act 2011 and Sections 88 and 89 of the Finance Act 2023 which repeals Section 21 of the *Statutory Instruments Act* and Section 84 of the finance Act 2023 which amends the *Employment Act* unconstitutional.
2. Subsequent thereto the leader of the Majority in the Kenyan National Assembly Hon. Kimani Ichungwah tabled before the National Assembly a bill title the Affordable Housing bill (National Assembly Bill No. 75 of 2023) on 4th December, 2023 and on 7th December 2023 the bill underwent its first reading whereat the National Assembly condensed the publication period from 14 to 3 days and the same was then committed to the Departmental Committee on Housing Urban Planning and Public Works and the Departmental Committee on finance and National Planning for due consideration with the aim of eventually reporting back to the National Assembly.
3. On 9th December, 2023 the Clerk of the National Assembly placed in the local dailies a notice inviting submissions of memoranda by members of the public either physically to this office situated at main parliament building, Nairobi or through the following email address; cna@parliament.go.ke with a deadline of 28th December 2023 at 5pm.

B. Petition and Application:

4. The Petitioner herein was aggrieved by the mode of submission of memorandum and the timelines as provided for in the aforesaid notice and thus approached this court by way of a petition dated 15th December 2023. He simultaneously filed a notice of motion of even dated under a certificate of urgency wherein he sought the following orders:-
 1. Spent.
 2. A conservatory order be and is hereby issued prohibiting the conduct of public participation in the manner prescribed by the notice published on 9th December 2023 by the Clerk of the 3rd Respondent, pending the hearing and determination of this application and the petition.
 3. The Respondents bear the Petitioner's costs of this application.
5. On 19th December, 2023 this court considered the Petitioner's said notice of motion *exparte* and granted his prayer No. 2 pending the hearing of his application *interpartes*.
6. The Petitioner craves for the following orders in the petition:
 - a) A declaration be and is hereby issued that the Respondent's rushing of the Affordable Housing Bill 2023 without adequate and effective public participation and considering the special needs of the marginalized is unlawful and unconstitutional for failure to comply with the requirement of public participation and protection of marginalized as enshrined under Article 10(2)(a) and (b) of *the Constitution*.



- b) An order of certiorari be and is hereby issued to remove into this court and quash the Notice by the Clerk of the National Assembly dated 9th December 2023 inviting submissions of memoranda in relation to the proposed Affordable Housing Bill, 2023 for failing to meet the constitutional threshold on public participation and protection of marginalized.
 - c) Costs of the petition against the Respondents or in the alternative there be no orders as to costs.
7. Subsequently directions were given for the parties to file submissions on the main petition. All parties complied and on 17th January, 2024, parties highlighted their respective submissions.

Ci. Petitioner's Case:

8. The gist of the Petitioner's case is that the National Assembly was unusually and unprecedentedly fast tracking the legislation of the Affordable Housing Act by disregarding set criteria for such enactment and by violating constitutional provisions on public participation, with special reference to the marginalized communities, given that the Constitution of Kenya recognizes the sovereignty of the people of Kenya and the supremacy of the Constitution of Kenya 2010.
9. The Petitioner pleads deficiency of the methodology adopted and inadequacy of the time given to the public and specifically the marginalized communities to submit their views on the Affordable Housing Bill. He further pleads that whereas the 3rd Respondent published factsheet No. 14 on Public Participation, which sets out the methodology to be adopted for effective public participation namely; creating awareness, involvement, contacting the public, meetings and feedback mechanism, it has disregarded the said factsheet and is out to do a cosmetic public participation in gross violation of the constitutional enshrined rights of the marginalized to participate in legislation making process.

Cii. 1st and 2nd Respondent's Case Response:

11. The 1st and 2nd Respondents filed grounds of opposition dated 21.12.2024 and a replying affidavit sworn by Charles M. Hinga, the Principal Secretary in the Ministry of Lands, Public Works, Housing and Urban Development who explained the genesis of the Affordable Housing Levy that was introduced by Section 84 of the Finance Act 2023 which amended the Employment Act 2007 by introducing a levy of 1.5% of an employee's salary with a matching top up by the employer.
12. Mr. Charles M. Hinga deposes that pursuant to the ruling delivered on 28th November, 2022 Nairobi High Court Constitutional Petition No. E181 of 2023: Okiya Omtata Okoili & 47 Others –vs- The Cabinet Secretary for National Treasury 7 Planning & 5 Others which declared inter alia Section 84 of the Finance Act 2023 unconstitutional due to lack of a comprehensive legislative basis for the introduction the Affordable Housing Levy, the Attorney General had advised the National Assembly that despite the high chances of success of it's appeal before the Court of Appeal, it should respect the principle of separation of powers and thus comply with the said decision by enacting appropriate legislation, hence the tabling before parliament by the leader of majority the Affordable Housing Bill (National Assembly Bill No. 75 of 2023).
13. The 1st and 2nd Respondents thus posit that the petition herein is an affront to the doctrine of separation of powers as it seeks to scuttle a constitutional process, hence unconstitutional. Further that this court has no jurisdiction to determine this matter as to do will be a violation of the doctrine of separation of powers.
14. Mr. Charles M. Hinga has expounded on the objectives of the intended legislation and the disadvantages of stopping its fruition. He deposes that in the event that this bill is stopped, the national purse would suffer loss of anticipated and budgeted revenues with the resultant effects of stoppage of



the construction works already under way thus translating to a housing backlog of 4 million homes by the end of the term of the current government. The 1st and 2nd Respondents thus seek dismissal of this petition. This deponent states that the Affordable Housing Bill is aimed at enacting a legal framework for the collection of the Housing Levy. He maintains that this court lacks jurisdiction to grant the prayers sought as grant of the same would be an affront to the doctrine of separation of powers as enshrined in articles 94(1)(5) 95(3) and 109(1) of *the Constitution*. Further that articles 118 and 119 provides for public participation which the Petitioner has endeavored to stop.

Ciii. 3rd Respondent's Response:

15. On 21st December, 2023 the 3rd Respondent filed a notice of motion of even date which was supported by an affidavit of Jeremiah Ndombi, the Deputy Clerk of the National Assembly, wherein he deposes that the submissions of memoranda as envisaged in the impugned notice was not exclusive and that the conservatory orders made on 19.12.2023 has in effect suspended the operations of articles 10, 117, 118 and 129 of *the Constitution* and National Assembly Standing Order 127 (3).
16. The 3rd Respondent states that the Petitioner is guilty of material non-disclosure and misrepresentation of facts that the submission of memoranda was the only element of public participation that the 3rd Respondent intended to employ, yet it was just one of the methods that were to be employed in undertaking public participation.
17. The 3rd Respondent posits that the legislative process has been scuttled, members of public have been denied their right to submit their memoranda and the court has violated the principle of separation of powers.

D. Submissions:

Di. Petitioner's Submissions:

18. The Petitioner has framed the following 3 issues for determination by this court viz;
 - i) What is the import of public participation in a constitutional democracy?
 - ii) What is the constitutional threshold on public participation?
 - iii) How to ensure effective inclusion of the marginalized during public participation.
19. On the import of public participation the Petitioner cites article 10 on national values and principles of governance and article 118(1)(b) of *the Constitution* which enjoins parliament to facilitate public participation and involvement in the legislative making process. The case of Legal Advice Centre & 2 others vs County Government of Mombasa & 4 others (2018) eKLR has been cited wherein the court held thus;

“it is common ground that participation plays a central role in both legislative and policy functions of the government whether at the National or County level. It is one of the modes that citizens who are vested with sovereign power participate in decisions affecting them or in conduct of public affairs notwithstanding that they have delegated the exercise of sovereign power to elected representatives”
20. Reliance was also placed on the holding in the case of Matindi vs Cabinet Secretary, National Treasury & Planning & 4 Others (Constitutional Petition E280 of 2021) (2023) KEHC 144 (KLR) where the court restated that parliament has no power to exclude public participation when executing its legislative mandate and any other business.



21. The Petitioner also cited the South African case of Matatiele Municipality –vs- President of the Republic of South African (1) (CCT 73/05) (2006) where the court ruled that public participation ensured accuracy of legislative decisions, preserves human dignity and self respect.

Constitutional Threshold on Public Participation:

22. The Petitioner submits that the 3rd Respondent has failed to meet the constitutional threshold for conduct of public participation as his stand point, the notice given by 3rd Respondent on 9th December 2023 via the national dailies was grossly inadequate and fell short of the constitutional threshold envisaged under article 118 (1)(b). Further that public participation must be real and not illusory, or a mere formality akin to public relations exercise; the case of Legal Advice Center & 2 others vs County Government of Mombasa and 4 others (2018) eKLR has been recited to support this position. The Petitioner has also relied on the case of British American Tobacco Kenya, PLC –vs- Cabinet Secretary for Ministry of Health & Others (2019) eKLR, where the Supreme Court set out the principles of public participation thus;

“(v) public participation is not an abstract notion; it must be purposive and meaningful.”

23. The Petitioner maintains that the 3rd Respondent had no intentions of facilitating adequate and effective public participation in respect of the Affordable Housing Bill, as was required of it under article 118(1)(b) of *the Constitution*.

24. The Petitioner posits that the Affordable Housing legislation was aimed at filling the housing gap for the marginalized who are economically disadvantaged and cannot afford to purchase houses at market rates thus affected by the Affordable Housing Bill, hence the need for the 3rd Respondent to protect this group of persons in tandem with the constitutional detects by affording them reasonable opportunity to submit their views on the bill. Further that the public participation programme adopted must exhibit inclusivity; in this regard the case of Mui Coal Basin Local Community & 15 Others –vs- Permanent Secretary Ministry of Energy & 17 Others (2015) eKLR has been cited for the position that:

“In determining inclusivity in the design of a public participation regime the government agency or public official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.”

25. Further reliance is placed on the case of KAPS Parking Limited & Another –vs- County Government of Nairobi & Another (2021) eKLR when the court held that the public entity that is conducting public participation must accord the public reasonable access to the information that they are supposed to react to in a language that they understand; the mode of conveying the information reigns; factors such as illiteracy must be considered and reasonable time given for the public to process the information and defined manner of tendering of responses must be provided. The Petitioner thus maintains that the marginalized communities must be accorded access to information, sensitization and adequate time to tender their views on the bill.

Dii. 1st and 2nd Respondents’ Submissions:

26. The 1st and 2nd Respondent submits that this court has no jurisdiction to grant the prayers sought as so to do will contravene the provisions of article 2(4) of *the Constitution* of Kenya 2010. It is posited that by virtue of the provisions of Article 1 of *the Constitution*, sovereign power vests in the people of



Kenya and the same is exercisable by the people either directly or through their democratically elected representatives and not through the Judiciary.

27. It is submitted that the court cannot stop the National Assembly whilst performing its core mandate as provided for under article 109 (1) and 109 (2) of *the Constitution*. Further that under part 4 of Chapter 8 of *the Constitution* sets out the legislation making procedures and the Judiciary is excluded therein. Reliance has been placed in the case of *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR where the Court of Appeal rendered itself as follows:

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court’s dicta in the petition the subject of this appeal that “[Separation of Powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent....”

28. The case of *Cormack -vs- Cope* (1974) HCA 28;130 CLR 1 *International -vs- Speaker* has also been cited where the Australian High Court stated that:

“It is not part of the authority of this court, however, to restrain Parliament from making unconstitutional laws. It is of course convenient to speak of an unconstitutional law but the phrase means merely that the purported law is not a law at all. This court does not consider in advance whether if Parliament were to pass a particular bill it would result in a valid law. Another aspect of the same matter is that the introduction of a bill does not affect rights; it is the making of a law that does that. Closely associated with these principles is another principle of great constitutional importance, namely that the court will not interfere with the proceedings of Parliament or the Houses of Parliament. The validity of the law that follows from what Parliament has done is one thing. The proceedings of Parliament that lead to a valid or an invalid law are another. It is not for this court to prevent Parliament from doing what, in the opinion of this court, will result in an invalid law.”

29. The 1st and 2nd Respondents maintain that the prayers sought by the Petitioner offend and contravene the principle of separation of powers as set out in articles 94(1), 94 (5), 95 (3) and 109 (1) of *the Constitution* of Kenya. It is posited that the petition is aimed at disrupting the functioning of public agencies and Government and the same is against public interest.

30. It is further submitted that the Petitioner is calling upon the Court to contravene the provisions of article 163 (7) of *the Constitution* which states that all courts other than the Supreme Court are bound by the decisions of the Supreme Court. Reliance has been placed on the case of *Justus Kariuki Mate & Another -vs- Martin Nyaga Mwambora & Another* (2017) eKLR to support this position.

31. It is submitted that the Petitioner’s petition is presumptuous that the only mechanism of public participation being adopted by the 3rd Respondent is as per the notice in the advertisement, yet that presumption is incorrect as submission of memoranda was just one of the modes of effecting public participation and that the Petitioner has not presented any real dispute before this court but rather a



hypothetical question. The case of John Harun Mwau & 3 Others –vs- Attorney General & 2 Others Petition No. 65 of 2011 has been cited where the court held that:

“We also agree with the submissions of Prof. Ghai that this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret *the constitution* conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.”

32. The 1st and 2nd Respondent maintain that the Petitioner has also offended the doctrine of ripeness given that the facts of the dispute were still at infancy and cannot thereof enable this court make a useful decision thereto. The court has been referred to the case of Communications Commission of Kenya & 5 Others –vs- Royal Media Services Ltd & 5 Others Petition 14A, 14B, 14C of 2014 (2014) eKLR for the position that courts should frown at premature disputes. The cases of National Assembly of Kenya & Another –vs- Institute For Social Accountability & 6 Others Nairobi C.A 92 of 2015 (2017) eKLR has also been cited in this regard where the Court of Appeal rendered itself on the principle of ripeness of a dispute as follows:

“Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.”

33. Reference has also been made of the case of Wanjiru Gikonyo & 2 Others -vs- National Assembly of Kenya & 4 Others, Nairobi Constitutional Petition No. 453 of 2015 (2016) eKLR.

34. It is submitted by the 1st and 2nd Respondent that the petition offends the doctrine of exhaustion given that the Petitioner has not exhausted other available remedies such as submission of his memoranda to the 3rd Respondent for its consideration of the same. This court is thus called upon to exercise constitutional avoidance and thus decline the invitation made by the Petitioner. Court of Appeal case of Speaker of National Assembly –vs- Harun (1992) eKLR has been relied on wherein the court held that:

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”

35. The case of R vs Independent Electoral & Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others (2010) eKLR, Geoffrey Muthiga Kabiru & 2 Others vs Samuel Muiga Henry & 1756 Others (2015) eKLR and Anthony Miano & Others –vs- Attorney General 7 Others (2021) eKLR have also been cited in support of the doctrine of exhaustion.

36. It is posited that this petition is premature. The Petitioner has not adduced facts upon which he challenges ongoing legislative processes and lastly that his court lacks jurisdiction to grant the prayers sought.



Diii. 3rd Respondent's Submissions:

37. The 3rd Respondent submits that the introduction of the Affordable Housing Bill 2023 by the Leader of Majority was informed by the judgment made on 28th November 2023 in Milimani HCCA No. E181 of 2023 (as consolidated with others) where the court declared Section 4 of the finance Act 2023 that introduced a housing levy unconstitutional for lack of informative legislation.
38. The bill was, pursuant to Standing Order 127 (1), referred to departmental committee whereafter pursuant to Standing Order 127 (3), the Clerk of the National Assembly published on 9th December 2022 notice in the local dailies inviting submission of memoranda by the public.
39. It is submitted that the aforesaid notice did not state that public participation was limited to the submission of memoranda in the manner prescribed in the said notice.
40. The 3rd Respondent submits that this petition is unsuited as it seeks to challenge an ongoing legislative process and is an affront to the doctrine of Separation of Powers. Further that this court cannot assume supervisory jurisdiction on the 3rd Respondent while the later is executing core mandate of enacting legislation; that court cannot usurp the role of the clerk of the 3rd Respondent. The case of Kariuki Male & Another –vs- Martin Wambora & Another (2017) eKLR and Mumo Matemu –vs- Trust Society of Human Rights Alliance & 5 Others (2013) eKLR have been cited.
41. It is posited that this petition is premised on a mistaken presumption that submission of memoranda is the only mode of public participation adopted by the 3rd Respondent and that the Petitioner made material omissions when he approached the court *ex parte* and that this court issued the *ex parte* conservatory orders devoid of provision of full information.
42. The 3rd Respondent submits that it ordinarily conducts various forms of public participation such as submissions of memoranda, conduction of public consultations, meetings with stakeholders and receipt of petitions as envisaged by article 119 of *the Constitution* and Standing Order 127(3) which states that:
 - “(3) The Departmental Committee to which aa Bill is committed shall facilitate public participation on the Bill through an appropriate mechanism, including
 - c. Consulting relevant stakeholders in a sector and
 - d. Consulting experts on technical subjects.
43. It is submitted that the Petitioner has not met the public interest threshold for grant of conservatory orders given that a stay of public participation contravenes the provisions of article 10 and 118 of *the Constitution* of Kenya 2010. Further that the conservatory orders sought are aimed at addressing an alleged illegality yet the Petitioner has not pleaded that the submission of memoranda is illegal. Reliance is placed on the case of Gitaru Peter Munya –vs- Dickson Mwenda Kithinji 7 2 Others (2014) eKLR.
44. The 3rd Respondent has generally aligned it's submissions with those of the 1st and 2nd Respondents.

E. Analysis and Determination:

45. Given that interim conservatory orders were granted on 19.12.2023, and regard being had to the fact that directions were taken on 17.1.2024 that this court will render a judgment on the petition, the Petitioner's application has thus been rendered moot.



46. This court has considered the petition, the replying affidavits filed by the Respondents, the notice of motion filed by the 3rd Respondent, the replying affidavit of the Petitioner to the 3rd Respondent's notice of motion, and the grounds of opposition filed by the 1st and 2nd Respondents and the rival submissions of parties as filed and highlighted and the issues that emerge for determination as follows:-
1. Whether this court has the requisite jurisdiction to grant the prayers sought in the petition herein?
 2. Whether the 3rd Respondent's conduct as per the notice of 9.12.2023 contravenes articles 10(2) (c) and article 118 (1)(b) of *the Constitution*?
 3. Whether the Petitioner herein has made a case for grant of orders of declaration and mandamus?
47. The petition herein is solely grounded on the impugned notice issued by the Clerk of the National Assembly as advertised on the local dailies on 9th December 2023.
48. The gravamen of the Petitioner's case is what he terms as inadequacy of the prescribed mode of public participation with special reference to the marginalized communities who are not able to submit memoranda in the manner prescribed by the impugned notice.
49. The Respondents have unanimously taken the position that this petition which invites this court to assume a supervisory role over the conduct of the 3rd Respondent as it executes its constitutional mandate as provided under article 109(1) and 109(2) of *the Constitution* of Kenya 2010, is an affront to the doctrine of separation of powers.
50. Article 109(1) and 109(2) of *the Constitution* provide as follows:-
- “ 109
- (1) Parliament shall exercise its legislative power through bills;
 - (2) any bill may originate in the National Assembly.
51. Kenya is a constitutional democracy with *the Constitution* being the supreme law that binds all persons and state organs. The three arms of government namely the executive, the legislature and the Judiciary thus exercise delegated sovereign power of the people of Kenya in accordance with *the Constitution*. Articles 94(1) 94(5) 95(3) and 109(1) (2) mandate the National Assembly to make legislation having the force of the law in Kenya. The tabling before the National Assembly of the Affordable Housing Bill No. 75 of 2023 by Hon. Kimani Ichungwa, the Leader of Majority in that house is thus pursuant to the said constitutional mandate of the National Assembly.
52. Article 94(1) of *the Constitution* provides that:
- “ The legislative authority of the Republic is derived by the people, and at national level, is vested and exercised by Parliament.”
53. Under Article 95(5) parliament is vested with the power to enact legislation while article 109 provides thus:
- (1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.



(2) Any Bill may originate in the National Assembly.”

54. The question that arises in this petition is whether this court can interfere with the above process in light of the principle of separation of powers. The Respondents have called upon this court to await the enactment of Affordable *Housing Act* and have maintained that any deficiencies thereto can be addressed thereafter.
55. In light with the legal doctrine of state decisis, this court is bound by the decision of superior courts. Guidance is thus drawn by this court from the case of Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR wherein the Court of Appeal held as follows:
- “It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the others functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are however not a license to take over functions vested elsewhere. There must be judicial, legislative and execute deference to the repository of the function.”
56. In the Australian case of Cormack –vs- Cope Queensland –vs- Whitlaw, the then chief Justice Barwick rendered himself on the issue as follows:-
- “Whilst it may be true the court will not interfere in what I would call intra-mural deliberative activities of Parliament, it has both a right and a duty to interfere if the constitutionality required process of law making is not properly carried out. In this connexion we have the guidance of the privy council in Redifusion (Hong Kong) Ltd -vs- Attorney General (Hong Kong (1970) A.C. 1136 Ordinarily, the courts interference to ensure a due observance of *the Constitution* in connexion with the making of laws is effected by declaring void what purports to be an Act of Parliament, after it has been passed by the Parliament and received the Royal assent.In my opinion the court in point of jurisdiction is not limited to that method to ensuring the observance of the constitutional process of law making. It seems to me that in appropriate, though no doubt unusual, case when moved by parties who have an interest in the regularity of the steps of the law-making process at the time intervention is sought, the court is able, and indeed in a proper case bound, to interfere..... I would therefore reject entirely the Attorney-General’s submissions that this court is powerless to decide upon the regularity of any steps in the law making process.....”.
57. This court places reliance on the above authority and finds that in peculiar cases where the National Assembly has breached constitutional provisions in the legislation making process it can interfere with the law making process.
58. The question that I thus ask is whether the petition falls within the exceptions envisaged in the case of Cormack –vs- Cope and whether the 3rd Respondent has breached the provisions of Articles 10 and 118(1)(b) of *the Constitution* so as to justify the grant of orders of declaration and mandamus as sought for in this petition.
59. Articles 10(2)(1) and article 118(1)(b) enjoins parliament to ensure that it conducts public participation and involvement of the people when undertaking legislative and other business.



60. The Affordable Housing Bill when eventually passed into an Act will provide the legal framework upon which the 1st and 2nd Respondents will implement the Affordable Housing Levy. The impact of the Act on the lives of Kenyans cannot be over emphasized. Indeed marginalized communities are persons affected by this Bill and are targeted by the current government when it made the decision to actualize the provisions of article 43(1)(b) which provides that:

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“(1) Every person has the right:-

(b) to accessible and adequate housing, and to reasonable standards of sanitization.

61. The court takes judicial notice of the fact that marginalized communities such as persons living in the slums of Korogocho, Mathare and Kibra may not be in a position to participate in the public participation as prescribed in the impugned notice.

62. The Kenya Draft Policy of Public Participation defines public participation as the process by which citizens, as individuals, groups or communities (also known as stakeholders) take part in the conduct of public affairs, interact with the state and other non-state actors to influence decisions, policies, programs, legislation and provide oversight in service deliver, development and other matters concerning their governance and public interest, either directly or through freely chosen representative.

63. On the same vain facilitation of public participation is defined to mean to make easy or easier or to promote taking steps to ensure the public is involved or is brought into the matter.

64. This court cannot over emphasize the necessity of effective public participation in the legislative making process given that it is through it that the government achieves prioritized people centered developments and legitimacy of its actions.

65. The General Rules of International Law and any treaty and convention ratified by Kenya is by dint of Article 2(5) and (6) of *the Constitution* part of Kenyan law. Kenya ratified the African Charter on Human and People’s Rights on 1st February, 1992. Article 13 of the said charter provides that:

“1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

66. Similar provisions are mirrored by Article 25(a) of the International Covenant on Civil and Political Rights thus:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions.

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives.”

67. Several domestic and international conventions prescribe for public participation. The Court Users Committees established by the National Council on Administration of Justice is an apt example of public participation in the administration of justice in Kenya. Standing Order No. 127(3) of the National Assembly Standing Orders provides that a committee to which a bill has been committed shall facilitate public participation on the bill through appropriate mechanisms



- a) including inviting submission of memoranda
 - b) holding public hearings
 - c) consulting relevant stakeholders and
 - d) consulting experts on technical subjects
68. A reading of the 3rd Respondent's Factsheet No. 14 on Public Participation in the legislative process reveals that the Kenyan National Assembly employs 3 tools for public participation namely; receipt of petitions under Article 119 of *the Constitution*, submission of memoranda as was requested for in the impugned notice and through public forum. In conducting public participation the 3rd Respondent follows several steps namely creating awareness, involvement, contacting the public, meetings and feedback mechanism.
69. Subsequent to the filing of this petition, the 3rd Respondent's Clerk issued a notice through the local dailies on 12th January 2024 inviting consultation with stakeholders and technical experts and notified members of the public of scheduled public hearings in 20 counties as specified in the said notice. When parties' Counsels appeared before this court for highlight of their submissions on 17th January 2024, public hearings were proceeding in Narok County at the Town Social Hall.
70. Whereas the Petitioner had notice of inter alia the scheduled public hearings as at the date of issuance of the notice, that is the 12th of January 2024 he persisted and insisted on prosecuting the petition herein to its natural conclusion. Given that this petition is premised on the inadequacy of the mode of public participation adopted by the 3rd Respondent as at the date of lodging this petition, I would assume that the Petitioner would have deemed the subsequent notice by the 3rd Respondent to have cured the mischief that the petition intended to address. This court finds that the substratum of this petition decipated as of the 12th of January 2024 when the 3rd Respondent became fully compliant with the provisions of Standing Order 127(3).
71. This court takes judicial notice of the fact that public hearings and consultations with stakeholders and experts concluded on 30th January 2024 and the Affordable Housing Bill has already undergone a second reading before the 3rd Respondent with a vote being taken in its favour.
72. In light of the matters aforesaid, the 3rd Respondent cannot be faulted for the manner in which it has conducted public participation in respect of the Affordable Housing Bill No. 75 of 2023. This court finds that the public participation conducted by the 3rd Respondent was effective and constitutionally compliant.
73. This court concurs with the Respondents on their position that the petition herein breached the principle of ripeness as the Petitioner presumed that the 3rd Respondent intended to conduct public participation through one mode, that is through submission of memoranda when he filed this petition.
74. The final question that begs an answer is whether the Petitioner has in view of the above findings of this court made out a case for grant of orders of declaration and mandamus.
75. It is now evident that this petition does not fall in the pigeon hole of exceptions to the general rule that courts will not interfere with the legislative making process as decided in the case of *Cormack –vs- Cone Queensland (1967) A.C.* and this court is thus disinclined to accept the Petitioner's invitation for a recall of the notice issued by the Clerk of the 3rd Respondent on 9th December, 2023 by way of an order of mandamus.
76. The Petitioner's prayer for orders of declaration also falls by the way.



77. On the balance this petition is devoid of merit and the same is hereby dismissed.

78. Given that this is a public interest matter I order that each party to bear it's own costs.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 29TH DAY OF FEBRUARY, 2024.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of:

Dr. Paul Ogendi for the Petitioner

Mr. Kiragu Kimani SC & Ms. Masaka for the 1st and 2nd Respondents

Mr. Gsore for the 3rd Respondent

