REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.176 OF 2016

BETWEEN

GEORGE NDEMO SAGINI……………………………...................…PETITIONER

AND

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

REGISTRAR OF COMPANIES……………………….......……..2ND RESPONDENT

AND

LAW SOCIETY OF KENYA……………………........……..1ST INTERESTED PARTY

NATIONAL ASSEMBLY……………………...….………..2ND INTERESTED PARTY

JUDGMENT

Introduction

1. This Petition as amended on 11th July 2016 was brought under **Articles 20, 22, 23, 47** and **165** of the **Constitution of Kenya, 2010** and the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.**

2. The Petitioner is aggrieved by the alleged sudden unilateral increase in the fees charged for registration of companies vide Legal Notice No.61 of 2016 contained in Kenya Gazette Supplement No.49 issued on 12th April 2016. He therefore seeks to enforce his constitutional rights under the legal provisions cited above and also seeks a declaration that the said Legal Notice is null and void. The Petitioner further seeks an order setting aside the said notice and an order of prohibition directed at the Respondents from implementing or effecting it.

Petitioner's case

3. According to the Petitioner, by Legal Notice No.61 of 2016 aforesaid, the 1st Respondent adjusted the registration fees charged by the 2nd Respondent for a company's registration to a flat figure of Kshs.10,000.00 irrespective of the company's share capital. Previously, the registration fee for

companies with a share capital of less than Kshs.100,000.00 had been set at Kshs.4,050.00 and therefore, according to him, the Legal Notice issued by the 1st Respondent has increased the registration fees by over 100%.

4. It is the Petitioner's further contention that the increment aforesaid only came to his knowledge when he sought information on the fees for registration of a company from the 2nd Respondent on 28th April, 2016 and was notified that the fees had suddenly been increased. He had meanwhile envisaged to pay Kshs.4,050.00 to register the company with a nominal share capital of Kshs.100,000.00 as had been the norm and the increment, he argues, is an ambush to those it has affected and should be reversed forthwith to prevent a cataclysm in company registration.

5. The Petitioner furthermore contends that he had the expectation that the company he had sought to register would be registered at the rate prescribed before the 1st Respondent abruptly and unilaterally effected the increment, which increment took effect immediately and without notice to affected parties or even the general public. This expectation he submitted, should be protected by an immediate reversal of the Respondents' rushed decisions.

6. The Petitioner has added that the 1st and 2nd Respondents have not at any point engaged him as a person who is in the business of registering companies among other entities, nor did they engage the 1st Interested Party, the Law Society of Kenya, and other stakeholders before increasing the registration fee. In his view, their actions therefore contravene **Article 10(1) (b)** and **(c)** and **10(2)(a)** of the **Constitution** which require public participation and consultation in governance, which provision is binding on the Respondents.

7. It is also his case that the capricious, unilateral and insular manner in which the Respondent increased the registration fee for companies and implemented the said increment contravenes the principles spelt out in **Article 129(2)** of the **Constitution** requiring the Executive, part of which the Respondents are, to govern for the benefit of the people and not merely rule them. That the Respondents have also not considered the negative implications the sudden and unilateral increment in the registration fees has had on those thereby affected. Further, that the Respondents were merely concerned with boosting revenues through issuance and implementation of oppressive and costly directives without caring whether the public was able to meet the heavy costs of registration of companies.

8. In any event, according to the Petitioner, Legal Notice No.61 of 2016 is subsidiary legislation which requires approval from the National Assembly prior to enactment as per **Sections 5(1) (2)** and **(3), 6, 8, 9** and **11** of the **Statutory Instruments Act**, which approval the Respondents did not seek thus making the notice illegal *ab initio*. That the 2nd Interested Party's (National Assembly) membership includes advocates engaged in the business of registering companies and who are also the citizenries' elected representatives and from whom the Respondents are legally bound to seek approval from and on behalf of the citizens. And that since **Article 1(2)** of the **Constitution** recognizes elected representatives as exercising sovereign power on behalf of the Kenyan people, the need for approval from the said representatives enables them to exercise that power legitimately.

9. For the above reasons, the Petitioner prays for Judgment against the Respondents in the following terms:

i) A declaration that Legal Notice No.61 of 2016 issued by the 1st Respondent adjusting company registration is null and void and legally defective.

ii) An order of certiorari against the 1st Respondent and 2nd Respondent quashing/setting aside Legal Notice No.61 of 2016 on adjustment of registration fees for companies.

iii) An order of prohibition against the 1st Respondent and 2nd Respondent from implementing/effecting Legal Notice No.61 of 2016 on adjustment of company registration fees.

iv) Costs for the Application be awarded in favour of the Petitioner.

The Respondent's case

10. The 1st and 2nd Respondents responded to the Petition by way of a replying affidavit sworn on 6th July 2016 by Ms. Margaret Wangu, State Counsel at the Companies Registry. Their case is that the registration fees for companies in the amended **Companies (General) Regulations, 2015** had ranged from Kshs.4,000.00 to Kshs.62,200.00 That the fees were pro-rated and were also pegged on the nominal capital of the company to be registered.

11. That the Government of Kenya, through the Ease of Doing Business initiative, however decided to undertake several legal reforms to ease the cost and time of doing business in Kenya and began by exempting the payment of stamp duty for the initial process of the registration of companies where the same was previously payable.

12. Further, upon review of the above fees' structure and in consideration of the Government policy on Ease of Doing Business, it was found prudent to have a fixed registration fee of Kshs.10,000.00 for registration of all companies regardless of their share capital and this was a strategic initiative to comply with international best practices and global competitiveness in the Ease of Doing Business index ranking.

13. Furthermore, that the intention of standardizing and lowering the cost of registration of companies was purely meant to make it convenient and cheaper to register companies and was not meant to oppress or boost Government revenues as alleged by the Petitioner.

14. For the above reasons, the Respondents pray that the Petition herein be dismissed in the public interest but I should also state that from the record, the Respondents did not file any submissions.

Interested Parties' Case (s)

15. I note that the Interested Parties, the Law Society of Kenya and the National Assembly did not participate in the proceedings and so I will determine the Petition from matters on record and the Petitioner's submissions filed on 31st August 2016.

Determination

16. From the parties' pleadings and the aforesaid submissions, the following issues fall for determination:

i) Whether the procedure leading to the enactment of Legal Notice No.61 of 206 contained in Kenya Gazette Supplement No.49 issued by the 1st Respondent on 12th April 2016 is unconstitutional for lack of public participation.

ii) Whether the publication and enactment of Legal Notice No.61 of 2016 contained in Kenya Gazette

Supplement No.49 issued by the 1st Respondent on 12th April 2016 contravened the provisions of the **Statutory Instruments Act.**

iii) Whether the Petitioner is entitled to the prayers sought.

(i) Whether the procedure leading to the enactment of Gazette Notice No.61 of 2006 was unconstitutional for lack of Public Participation

17. It is no longer a matter of debate that upon the promulgation of the **Constitution 2010,** the participation of the general public in public affairs including direct and indirect participation in the enactment of legislation is now a constitutional imperative. In the present Petition, therefore, the Petitioner's complaint is that the increase in registration fees for companies was made abruptly, arbitrarily and without the public having any opportunity to comment on it.

18. In the above context, while the question of public participation has received wide judicial interpretation and application over the last four years, its parameters are still a matter of individual appreciation from Court to Court. On my part, I maintain the view that pending the enactment of the **Public Participation Act** which is on-going, relevant case law must continue to guide this Court.

19. In addressing that issue, it is also not in doubt that Legal Notice No. 61 of 2016 was published pursuant to **Section 1022** of the **Companies Act 2015** which grants the relevant Cabinet Secretary the mandate to make subsidiary legislation including to determine what fees are payable for registration of companies. The initial issue to address even before the larger issue of public participation is the serious claim made by the Petitioner that the Attorney General is not the Cabinet Secretary envisaged in that Section ? and therefore he had no lawful mandate to cause the publication of the said Gazette Notice. In that regard, **Article 132(2)** of the **Constitution** as read with **Article 151(1)** creates a cabinet with executive authority. One distinct member of that cabinet is the Attorney General with executive mandate like any other member thereof. But nonetheless is he a Cabinet Secretary"

Is the Attorney General, a Cabinet Secretary"

20. The question whether the Attorney General is a Cabinet Secretary or not was the basis of the decision in **George Bala v The Attorney General, H.C. Petition No.238 of 2016.** In that case, the issue that confronted the Court was whether the Attorney General was the Cabinet Secretary conferred with certain functions under the **Legal Education Act.** In his decision, Odunga J. had this to say:

"It is worth noting that whereas the Attorney General is pursuant to Part 3 of the Constitution a member of the Cabinet, apart from being mentioned as such member, Part 3 has nothing else to do with the Attorney General. It is Part 4 that substantially deals with the office of the Attorney General and that part is entitled "Other Offices". Whereas the procedure for appointment of the Attorney General is substantially the same as that of a Cabinet Secretary, the Constitution specifically provides for the qualifications that one must meet in order to be appointed as the Attorney General. There are no such requirements for the position of Cabinet Secretaries. His role is that of the principal legal adviser to the Government and the National Government's legal representative in Court or in any other legal proceedings to which the National Government is a party, other than criminal proceedings. The Attorney General also performs any other functions conferred on the office by an Act of Parliament or by the President. Under Article 153(2) Cabinet Secretaries are accountable individually, and collectively, to the president for the exercise of their powers and the performance of their functions. The Attorney General, on the other hand is required by Article 156(6) to promote, protect and uphold the rule of law and defend the public

interest. Apart from, that Article 260 of the Constitution defines "State Office" as meaning the office of inter alia, Cabinet Secretary and Attorney General."

The learned Judge then determined the question I posed above as follows:

"From the foregoing provisions it is clear that the Attorney General cannot be termed as a Cabinet Secretary. To do so may lead to a Cabinet whose composition may surpass the constitutional threshold. The Attorney General is not required by the Constitution to take a prescribed oath under the Constitution before assuming office. There is no express procedure for the removal of the Attorney General. He cannot for example be removed on a motion passed by the National Assembly; he protects the public interests as opposed to merely being accountable to the President.

It is however contended by the Respondent that under the Constitution of Kenya 2010, the Attorney General has been considered a Cabinet Secretary for the purposes of bringing into effect Article 132(3)(c). That provision empowers the President to, by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. The Respondent further relies on Section 3 of the Interpretation and General Provisions Act which proves that:

"the Cabinet Secretary" means the Cabinet Secretary for the time being responsible for the matter in question, or the President where executive authority is retained by him:

Provided that for the purposes of the administration of laws relating to the legal sector, the expression shall, subject to any assignment under Article 132(3)(c) of the Constitution, include the Attorney General".

In my view, what this provision means is that when it comes to the administration of laws relating to the legal sector the term "the Cabinet Secretary" includes the Attorney General. This interpretation is however subject to Article 132(3)(c) which provides that the powers of the President to, through a publication in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, must not be inconsistent with any Act of Parliament. In other words where an Act of Parliament expressly confers functions on a particular Cabinet Secretary, the President cannot assign such functions to another Cabinet Secretary.

In my view, Section 3 of the Interpretation and General Provisions Act is what is termed as a deeming provision. It only deems the Attorney General as "the Cabinet Secretary" for the purposes of the administration of laws relating to the legal sector and only to the extent permitted by Acts of Parliament. The term "deem" was dealt by the Court of Appeal in Telkom Kenya Ltd v Jeremiah Achila Gogo & Anor Civil Appeal No.153 of 2004, as follows:

"The word "deemed" is used a great deal in modern legislation – sometimes it is used to impose for purposes of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain – sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible…"

It must however be appreciated that the preamble to the Interpretation and General Provisions

Act provides that it is an Act of Parliament to make provisions in regard to the construction, application and interpretation of ***written law****, **to make certain general provisions with regard to such law and for other like purposes. Section 2 thereof expressly provides that:***

"This Act shall not apply for the construction or interpretation of the Constitution, which is not a written law for the purposes of this Act."

It is therefore clear that Cap 2 cannot be invoked for the purposes of construction or interpretation of the Constitution. It is therefore my view that the Attorney General is not a Cabinet Secretary for the purposes of the Constitution. He can however be assigned duties and functions by the President as long as the same is not inconsistent with the provisions of any Act of Parliament". (Emphasis added)

12. In concluding on the same question, the Learned Judge issued the following declarations and orders:

"a) A declaration that whereas the Respondent the Attorney General, is a member of the Cabinet, he is not a Cabinet Secretary and therefore cannot, where to do so would be contrary to an Act of Parliament, perform or purport to perform the functions specifically reserved for a Cabinet Secretary under any piece of legislation.

b) A declaration that the Respondent's purported exercise of Cabinet Secretarial functions under the Legal Education Act, 27 of 2012 or under any other piece of legislation, where the same is inconsistent with or contrary to the spirit Constitution or the law in null and void.

c) A declaration that before performing Cabinet Secretarial duties, where permitted by the Constitution and the law, the Attorney General must take the oath appropriate to Cabinet Secretaries.

d) A declaration that the Attorney General, while performing the duties of a Cabinet Secretary is subject to the process of removal from that position of a Cabinet Secretary.

e) A declaration that any executive order that purports to assign the Respondent, the Attorney General, Cabinet Secretarial functions and powers contrary to the letter and spirit of the Constitution and the law, is invalid, null and void.

f) I however appreciate that the effect of immediate invalidity of the appointment of the Respondent as a Cabinet Secretary may not uphold public interest. In the circumstances and pursuant to Articles 23 of the Constitution I declare that this decision will only affect future actions of the Respondent and the declaration of unconstitutionality of the Cabinet Secretarial functions of the Respondent will be suspended for a period of three months to enable the executive take appropriate remedial action.

g) As this is public interest litigation there will be no order as to costs. I however commend the Petitioner for taking the bold step as required of him by Article 3(1) of the Constitution to protect and uphold the Constitution."

22. I am unable to find any reason to disagree with Odunga J. on his findings above and in addition, **Article 132 (2)** of the **Constitution** if read holistically can but only confirm the position that the Attorney General is not a Cabinet Secretary but sits in the Cabinet in the special position of Legal advisor to the Government generally. For avoidance of doubt, that **Sub-Article** provides thus:

"(1) …

(2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—

(a) the Cabinet Secretaries, in accordance with Article 152;

(b) the Attorney-General, in accordance with Article 156;

(c) the Secretary to the Cabinet in accordance with Article 154;

(d) Principal Secretaries in accordance with Article 155;

(e) High Commissioners, ambassadors and diplomatic and consular representatives; and

(f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss." (Emphasis added)

23. If the framers of the Constitution had intended that the Attorney General would be a Cabinet Secretary, why would he be given special mention in the above sub-Article and why would **Article 156** be dedicated to his office alone" That office is then further given prominence in the enactment of the office of the **Attorney General Act**, No.49 of 2012 which in its preamble states that it is:

"An Act of Parliament to make further provision for the functions and powers of the Attorney-General, to provide for the discharge of duties and the exercise of powers of the Attorney-General and for connected purposes."

24. But having so stated, like Odunga J. did in the case before him, the above finding must find relevance to the case at hand and in that regard, **Section 1022(1)** of the **Companies Act, No.17 of 2015** provides as follows:

"(1) The Cabinet Secretary may make general companies regulations prescribing matters—

(a) required or permitted by this Act to be prescribed by regulations; or

(b) necessary or convenient to be prescribed by regulations for carrying out or giving effect to this Act.

25. Like in the **Bala Case**, had it been the intention of the framers of the Companies Act to grant the Attorney General the authority to make Regulations pursuant to **Section 1022** above, then **Article 132(3)(c)** as read with **Section 3** of the **Interpretation and General Provisions Act** ought to have been invoked and a decision to that effect, by the President, ought to have been published in the Gazette. I have seen no such decision and the implication is that although it is logical, practical and a fact of history that the Registry of Companies is under the administrative jurisdiction of the Attorney General, in the full glare of the law above, it is very difficult to reach any other conclusion than that the Attorney General had no mandate or jurisdiction to issue the impugned regulations however well intentioned the action was and whatever the benefits to Kenya under the Ease Of Business Initiative.

Public Participation

26. Having so held, I must now return to consider the issue of public participation in the context of the impugned Gazette Notice.

27. In that regard, and as stated above, case law on this subject has continued to evolve and a number of decisions of the High Court have addressed the contours of public participation. For example, in **H.C Petitions Nos.45, 61 and 63 of 2014**, **Diani Business Welfare Association & Others v County Government of Kwale,** Emukule J. relied on the decisions in **Robert N. Gakuru & Others v Governor, Kiambu County & 3 Others [2014] eKLR** and **Nairobi Metropolitan PSV Sacco Union Ltd & 2 Others v County Government of Nairobi & 3 Others (2013) eKLR** among others as having extrapolated on what public participation in the context of *inter alia* **Article 10** of the **Constitution** is.

28. Some of the principles emerging from the above cases include;

i) The fact that there is no template for public participation in every situation and that what is generally required is that at the end of the day, the public and all Interested Parties are given a reasonable opportunity to know about an issue (legislative or policy in nature) and to make representations on it – see also Sachs J. in **Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC).**

ii) What amounts to a reasonable opportunity depends on the circumstances of each case and the quality of the opportunity and material proposals made.

iii) The representations should be of diverse interests.

iv) A flexible approach is necessary to account for the variations that exist e.g. population density, literacy trends, media use and distance from the centre.

v) For the participation to be meaningful, citizens must have the capacity to understand the issue(s) at hand.

vi) It does not matter that elected representatives may well have the final say in the matter.

vii) Public participation is both direct and through such representatives.

29. In furtherance of the above principles, in **Matatiele Municipality and Others v President of the Republic of south Africa and Others [2006] ZACC 12,** the purpose of public participation was explained thus:

"…the purpose of permitting public participation in the lawmaking process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning …"

The learned Judges added as follows:

"…what our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement

provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process… to uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process."

They then concluded as follows:

"commitment to a right to … public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."

30. Further to the above, in **Doctors for Life International v Speaker of the National Assembly & Others [2006] ZACC 11**, the Constitutional Court of South Africa elevated public participation to a fundamental human right in the following terms:

"The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected … Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs."

31. I am in agreement with the reasoning of the Courts above and in the context of the present Petition, there has been no response to the contention by the Petitioner that prior to the publication and enactment of the impugned Regulations, neither himself, as a person engaged in the business of registering companies, nor the Law Society of Kenya, were consulted as is the expectation of the law. I have no reason to doubt that assertion and in the course of drafting this Judgment, I came across an email from the Law Society to Kenya dated 6th June 2017 headed **"Notice for Submissions of comments – Companies (General) (Amendment) Regulations 2017"** on proposed amendments by the Attorney General to **Section 660** of the **Companies Act, 2015** following the Recommendations of the Business Registration Services. The Notice requested members of the Law Society of Kenya to make their comments on or before 13th June 2017.

32. I have seen no similar notice in respect of the impugned Regulations and in the totality of the evidence before me, on an important matter that required the input of stakeholders, affected and interested parties, none was sought, none was given and therefore the principle of public participation was certainly breached and I so find.

(ii) <u>Alleged violation of the Statutory Instruments Act</u>

33. In his submissions, the Petitioner relied on the provisions of **Sections 5, 6, 8, 9** and **11** of the **Statutory Instruments Act** to make the point that the Respondent violated the expectations of that Act in that:

i) there was no consultation with affected persons prior to publication of Legal Notice No.61 of 2016. (I have addressed this issue elsewhere above).

ii) there was no regulatory impact statement for regulations likely to impose significant costs on the community.

iii) there was no verification of the said statement in the Kenya Gazette or daily newspapers.

iv) the intended legislation/regulation was not transmitted to the relevant Clerk of either House of Parliament for scrutiny and approval by the house(s), in this case, the National Assembly.

34. In that context, the said **Sections** of the **Act** provide as follows:

"5. Consultation before making statutory instruments

1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to –

a) have a direct, or a substantial indirect effect on business; or

b) restrict competition; the regulation making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation –

a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and

b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

3) Without limiting by implication the form that consultation referred to in sub-section (1) might take, the consultation shall –

a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

6. Regulatory impact statements

If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.

8. Notification of regulatory impact statements

1) Preparation of a regulatory impact statement for proposed statutory instrument shall be notified in the Gazette and in a newspaper likely to be read by people particularly affected by the proposed legislation.

2) If the proposed statutory instrument is likely to have a significant impact on a particular group of people, the notice shall be published in a way likely to ensure members of the group understand the purpose and content of the notice.

3) The notice shall –

a) include a brief statement of the policy objectives sought to be achieved by the proposed legislation; and

b) state where copies of the regulatory impact statement may be obtained or inspected;

c) if a draft of the proposed legislation may be obtained or inspected, state that the draft may be obtained or inspected and where;

d) state that anyone may comment on the proposed legislation;

e) state how and when comments may be made; and

f) state how consultation about the proposed legislation will take place.

4) The notice shall allow at least fourteen days from publication of the notice for the making of comments.

5) A copy of the regulatory impact statement may be available free, or on payment of a reasonable price, at the place, or each of the places, stated in the notice.

6) The responsible Cabinet Secretary shall ensure that –

a) all comments and submissions are considered before the statutory rule is made; and

b) a copy of all comments and submissions is given to the Committee as soon as practicable after the statutory rule is tabled in the House or when requested by the committee.

9. Where regulatory impact statements may be unnecessary

A regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legislation only provides for, or to the extent it only provides for –

a matter that is not of a legislative character, including, for example, a matter of a machinery, administrative, drafting or formal nature;

a matter that does not operate to the disadvantage of any person(other than a government entity) by –

i) decreasing the person's rights;

ii) imposing liabilities on the person;

c) an amendment of statutory instrument to take account of the prevailing Kenyan legislative drafting practice;

d) the commencement of an Act or subordinate legislation or a provision of an Act or statutory instrument;

e) an amendment of statutory instrument that does not fundamentally affect the legislation's application or operation;

f) a matter of a savings or transitional character;

g) a matter arising under legislation that is substantially uniform or complementary with legislation of the National Government or any County;

h) a matter advance notice of which would enable someone to gain unfair advantage;

i) an amendment of a fee, charge or tax consistent with announced government policy.

11. <u>Laying of statutory instruments before Parliament</u>

1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven(7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before parliament.

2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or table under subsection(1).

3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.

4) If a copy of a statutory instrument that is required to be laid before parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void."

37. I have deliberately reproduced the above Sections verbatim to make the point that there is an elaborate process to be undertaken before any statutory instrument is published and enacted. The same position was upheld in the case of **British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 Others, Civil Appeal No. 112 of 2016; [2017] eKLR,** where one of the issues for determination was *whether the process leading to the making of the Tobacco Control Regulations, 2014 (Regulations) was vitiated by lack of public participation and consultation so as to render the Regulations unconstitutional or unlawful.* The Court of Appeal (*Okwengu, Azangalala, Sichale JJ.A*), thus noted that **Section 5** of the **Statutory Instruments Act, 2013** clearly provides that consultation be carried out *"with persons who are likely to be affected by the proposed instrument."* In its determination, the Court therefore observed that:

"It is clear that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable opportunity for public participation and any person concerned or affected by the intended legislation should be given an opportunity to be heard. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other

factors in deciding on the legislation to be enacted."

38.Consequently, in affirming the High Court's position that there was indeed consultation, the Court held that:

"The appellants have maintained that the consultations and interaction did not provide adequate public participation or consultation. In our view, this submission goes against the weight of the evidence that clearly reveals meetings, discussions and communications regarding the Regulations prior to their publication. What the appellant is really saying is that although they had their say, their views were not adequately considered. However, the fact that the views of the appellant and the interested parties did not carry the day was neither here nor there. All that the learned judge needed to establish was the fact that that step of involving the public and any other affected persons was taken. Given the facts that were before the learned judge, we have no reason to fault the learned judge for finding that the stakeholder meetings, discussions and communications constituted adequate public participation and consultation."

39.In another case of **Keroche Breweries Limited & 6 Others v Attorney General & 10 Others [2016] eKLR** it was contended that the ***Alcoholic Drinks Control (Supplementary) Regulations, 2015*** did not comply with **Section 5(1)** of the **Statutory Instruments Act, 2013** for lack of appropriate consultations. The High Court (Odunga J) held at paragraph 143 and 145 that:

"This provision is a clear reflection of the provisions of Article 10(2)(a) of the Constitution which provides that one of the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever they inter alia enacts, applies or interprets any law and makes or implements public policy decisions is participation of the people…It is therefore clear that by definition, the Alcoholic Drinks Control (Supplementary) Regulations, 2015 is a statutory instrument hence subject to the provisions of section 5(1) of the Statutory Instruments Act as read with Article 10(2)(a). It cannot be doubted that the said Regulations had both direct and a substantial indirect effect on businesses of the Petitioners. In fact according to the Petitioners, as a result of their implementation, the Petitioners incurred enormous losses. Therefore the Regulations fell squarely with the contemplation of section 5(1) of the Statutory Instruments Act. In this case there is no evidence that the Alcoholic Drinks Control (Supplementary) Regulations, 2015 were subjected to the process of public participation as mandated under Article 10. Further, the said Regulations were expressed to take effect immediately. Such direction clearly violated both the constitutional and statutory edicts."

40. Further, in the case of **Richard Dickson Ogendo & 2 Others v Attorney General & 5 Others [2014] eKLR,** the issue for determination was whether the provisions of the **Statutory Instruments Act*, 2013*** were complied with in respect to public participation in enacting the ***Traffic Breathalyser Rules, 2011****,* and what the effect of such a finding on the Regulations would be. The Court (Majanja J) noted that the **Statutory Instruments Act, 2013** specifically had provisions for public participation through consultation and therefore the consultations were a statutory imperative.

41.In that case, the task of the Minister under the ***Traffic Act*** was to adopt a tool to measure alcohol content as a means of enforcing the provisions of **Sections 44** and **45** of the ***Act****.* Majanja J. observed that although the evidence before him demonstrated that the experts contemplated in **Section 5(2)(a)** of the ***Statutory Instruments Act*** were involved in identifying a means to enforce the legislative provisions, it was clear that a cross-section of the public were not represented in the preparation or promulgation of the ***Rules****.* He further stated that, although the ***Statutory Instruments Act*** was not applicable then, since it had not yet come into force (the ***Traffic Breathalyser Rules, 2011*** were made

on 27th September 2011 while the ***Statutory Instruments Act, 2013*** came into force on 25th January 2013), the Act was a reflection of the kind of public participation contemplated in future. In addition, he observed that the Act did not provide a consequence for lack of public participation because, ultimately the Legislature, as the representatives of the people would decide on whether the statutory instrument is accepted or rejected in accordance with **Section 11** of the Act. In the end, the Judge was of the view that the said Rules should not be invalidated merely because one aspect of public participation was not achieved. In particular, the Court pronounced itself as follows:

"The Court is obliged to look at the entire process of law making, assess both the quantitative and qualitative aspects of public participation and determine whether the legislation should be invalidated on that account….The Statutory Instruments Act does not require that subsidiary legislation be annulled on that account as it requires the instruments that have not been tabled before Parliament."

42.In making the said declaration, the Court was persuaded by the Judgment in ***John Muraya Mwangi & 495 Others & 6 Others v Minister for State for Provincial Administration & Internal Security & 4 Others Nakuru*** **Petition No.3 of 2011; [2014 eKLR** wherein Emukule J had stated that, *"Similarly the Court cannot say with certainty that there was comprehensive consultation in the passage of the new Regulations. It cannot also say that there was no consultation. The benefit of doubt will therefore go to the purpose of the legislation to regulate the manufacture and sale of alcoholic drinks, and to protect consumers, and especially the children."*

Consequently, Majanja J. held:

"I decline to invalidate the Rules on account of lack of public participation on the ground that I am also required to give effect to other values of equal importance like good governance and the need to the human rights of others particularly those who are at risk of loss of life and property through road carnage arising from drunk driving."

43. On a different issue, *Odunga J.* held in the case of **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 Others v Cabinet Secretary For Transport & Infrastructure & 5 Others JR. No.2 of 2014; [2014] eKLR**, that the failure to comply with **Section 11** of the ***Statutory Instruments*** **Act** rendered the **National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013** null and void and the Court had no choice but to effect the legislative imperative and to declare that the Regulations were null and void. In particular, the Court pronounced itself as follows:

"***Section 11(4) of the Statutory Instruments Act clearly provides for the consequences for the failure to lay the instrument before the house within the stipulated period and the consequences are that*** '***the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void'."***

44.I am persuaded by the reasoning in all the decisions above and in my view, **Section 11(4)** does not give the Court an option since the Section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It also follows that the requirement must be read in mandatory terms as opposed to being merely directory.

45.I must also add that **Section 11(4)** of the ***Statutory Instruments Act*** clearly provides for the consequences for the failure to lay the instrument before the National Assembly within the stipulated

period and the consequences are that *the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.*

46. Applying the rule of harmonization, it is therefore clear that since there is no other timeline stipulated under **Section 11** of the ***Statutory Instruments Act,*** save for the 7 days provided in **Subsection (1),** the phrase ***"in accordance with this Section......after the last day"*** must necessarily refer to the same period of 7 days. And, if the Regulations were not laid before Parliament within seven (7) sitting days after the publication, the same would, on the 8th day, have become void although the voidance of the Regulations would not nullify the acts which were done thereunder before the said 8th day.

47.In the above context and looking at the Petition before me, the Respondent made no effort to answer the contention that the **Statutory Instruments Act** was not complied with and without any such attempts, I will find and hold that there was indeed no compliance with the elaborate and relevant provisions of the said Act.

(iii) <u>Whether the Petitioner is entitled to the orders sought</u>

48. Turning back to the Prayers in the Petition, prayer (i) was to the effect that a declaration be issued declaring Legal Notice No.61 of 2016 null, void and legally defective. Having found that indeed the Legal Notice was enacted in breach of the public participation principles in the Constitution and being also in breach of the consultations expected under the **Statutory Instruments Act**, the said Legal Notice must be declared null, void and legally defective as prayed.

49. Prayers (ii) and (iii) seek the judicial review orders of certiorari and prohibition consequent upon the declaration above. The effect would be that if the said orders are granted, then the requirement for an increment/adjustment in registration fees for companies would not be effected. I have agonized over these particular prayers because there is no doubt that the intention of the Respondent in enacting the impugned Regulations under the Ease of Doing Business Initiative were noble but in the face of the clear expectations of the Constitution and Statute, it is very difficult to find any lawful reason why the said orders should not be granted. It is even more disconcerting that the Respondent not only failed to address pertinent issues of law and fact raised by the Petitioner but also failed to file any submissions to justify a different cause of action by this Court. In the event, the two prayers must also be granted.

50. As for costs, they ordinarily follow the event but in the present circumstances, there is no reason to grant the Petitioner costs as I believe that he has benefitted enough by the favourable orders to be issued shortly. To tax the public with costs in a matter such as this one would also not meet the expectations of real justice. Let each party therefore bear its own costs.

<u>Conclusion</u>

51.As was stated by the Court of Appeal in **British American Tobacco Ltd (supra),** the requirement for consultation with and participation of interested and affected parties, stakeholders and the public generally in the making of statutes and subsidiary legislation is now a constitutional and statutory imperative. The makers of such legislation thereof do not therefore have the luxury of ignoring the input of others while making such legislation and from my analysis of the issues before me, it is obvious that the Respondent completely failed to involve any of the affected parties including the Petitioner and Interested Parties such as the Law Society of Kenya. He ought therefore to retrace his steps and properly act to ensure that all the benefits of the Ease of Doing Business Initiative are not lost.

Disposition

52. Having held as above, the only orders that commend themselves to this Court are that the Petition herein is allowed in the following terms:

i) A declaration is hereby issued that Legal Notice No.61 of 2016 issued by the 1st Respondent adjusting the fees payable for company registration is null and void and legally defective for lack of public participation and non-compliance with the Statutory Instruments Act.

ii) An order of certiorari is hereby issued against the 1st Respondent and 2nd Respondent quashing/setting aside Legal Notice No.61 of 2016 on adjustment of registration fees for companies.

iii) An order of prohibition is hereby issued against the 1st Respondent and 2nd Respondent from implementing /effecting Legal Notice No.61 of 2016 on adjustment of company registration fees. This order shall not however affect past actions pursuant to the said Legal Notice.

53. As for costs, let each party bear its own costs.

54. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF JULY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF JULY, 2017

JOHN M. MATIVO

JUDGE

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