



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC PETITION NO.32 OF 2017**

**(Formerly Milimani High Court Petition No. 375 of 2017)**

**KENYA ASSOCIATION OF MANUFACTURERS.....PETITIONER**

**=VERSUS=**

**CABINET SECRETARY, MINISTRY OF**

**ENVIRONMENT AND NATURAL RESOURCES....1ST RESPONDENT**

**ATTORNEY GENERAL.....2ND RESPONDENT**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....3RD RESPONDENT**

**MULTY TOUCH INTERNATIONAL.....4TH RESPONDENT**

*Consolidated with*

**NAIROBI ELC JUDICIAL REVIEW APPLICATION NO. 30 OF 2017**

**(Formerly Milimani High Court Judicial Review Application No. 421 of 2017)**

**FREDRICK GICHUHI NJENGA.....1ST APPLICANT**

**STEPHEN MWANGI.....2ND APPLICANT**

**=VERSUS=**

**ATTORNEY GENERAL.....1ST RESPONDENT**

**CABINET SECRETARY, MINISTRY OF**

**ENVIRONMENT AND NATURAL RESOURCES....2NDRESPONDENT**

*Further consolidated with*

**NAIROBLELC PETITION NO. 35 OF 2017**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**=VERSUS=**

**CABINETSECRETARY, MINISTRY OF**

**ENVIRONMENT AND NATURAL RESOURCES....1ST RESPONDENT**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....2ST RESPONDENT**

**ATTORNEY GENERAL.....3RD RESPONDENT**

**JUDGMENT**

**Background**

1. What is before us is a protracted dispute the facts of which look straight forward on the surface but contain complicated legal issues underneath. The genesis of the dispute was the decision of the Cabinet Secretary, Ministry of Environment and Natural Resources (hereinafter referred to as “the Cabinet Secretary”), and the National Environment Management Authority(hereinafter referred to as “NEMA”) to ban the use, manufacture and importation of certain types of plastic bags used for commercial and household packaging. To appreciate the nature of the dispute, it is necessary to outline the parties to the dispute and the interests they represent.

2. The petitioner in Petition No. 32 of 2017, Kenya Association of Manufacturers (KAM) has described itself as “the representative organization for manufacturing value-add industries in Kenya”. The applicants in Misc. Civil Application No. 30 of 2017, Fredrick Gichuhi Njenga and Stephen Mwangi who brought the application on their own behalf and on behalf of 353 others have described themselves as “importers, exporters, wholesalers and retailers of plastic bags”. The petitioner in Petition No. 35 of 2017, is Mr. Okiya Omtatah Okoiti. Mr. Okoiti has described himself as “a law abiding citizen of Kenya, a public spirited individual and a human rights defender”.

3. NEMA which is a respondent in two (2) of the consolidated suits is the Principal Government Agency on environmental matters. It exercises general supervision and co-ordination over all matters relating to the environment within the Republic of Kenya. The Cabinet Secretary, a respondent in all the suits is responsible for the formulation and implementation of Government policies on environmental management and administration. The Attorney General, also a respondent in all the suits has been joined in the suits as the principal legal adviser to the Government with the responsibility of representing the national government in legal proceedings of a civil nature pursuant to Article 156 of the Constitution. Multytouch International, a respondent in one of the suits has described itself as a non-governmental organization registered under the Non-Governmental Organizations Act of 1990 and engaged in conservation and management of the environment.

4. The central issue in the three consolidated suits revolves around the validity of a Gazette Notice dated 28/2/2017 that was issued by the Cabinet Secretary and published twice in different issues of the Kenya Gazette on 14/3/2017 under Legal Notice No. 2334 and Legal Notice No. 2356. The Gazette Notice reads as follows:-

In exercise of the powers conferred under Sections 3 and 86 of the Environmental Management and Co-ordination Act, it is notified to the public that the Cabinet Secretary for Environment and Natural Resources has with effect from 6 months from the date of this notice banned the use, manufacture and importation of all plastic bags used for commercial and household packaging defined as follows:

(a) Carrier bag-

Bag constructed with handles and with or without gussets;

(b) bag constructed without handles, and with or without gussets

Dated the 28<sup>th</sup> February, 2017

JUDI WWAKHUNGU

Cabinet Secretary for Environment and Natural Resources.

5. The Gazette Notice outlawed the use, manufacture and importation of certain categories of plastic bags used for commercial and domestic purposes. Aggrieved by the ban, the petitioners and the applicant in the three consolidated suits brought the suits seeking various reliefs.

6. The first suit is **Nairobi ELC Petition No. 32 of 2017; Kenya Association of Manufacturers v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others (formerly Milimani High Court Petition No. 375 of 2017)** in which the petitioner prays for the following orders:

(i) A declaration that Gazette Notices Nos. 2356 and 2334 of 2017 published in Kenya Gazette of 14th March, 2017 banning the use, manufacture and importation of all plastic bags used for commercial and household packaging are unconstitutional, null and void as they were issued;

a) without public participation contrary to Articles 10 and 69(1) of the Constitution, and Section 5 of the Statutory Instruments Act, 2013 and;

b) without the requisite statutory authority and in contravention of Sections 5, 6, 8 (1), 11(1) and (2) of the Statutory Instruments Act, No 23 of 2013.

(ii) A declaration that the respondents have violated the rights of the petitioner under Article 47 of the Constitution and Sections 5 and 6 of the Fair Administrative Action Act, No. 4 of 2015.

(iii) An order quashing Gazette Notices No. 2356 and 2334 of 2017 banning the use, manufacture and importation of all plastic bags used for commercial and household packaging.

(iv) An order prohibiting the implementation of Gazette Notices No 2356 and 2334 of 2017.

(v) Such other and/or further relief as this honourable court may deem fit and just to grant

(vi) The costs of and occasioned by this Petition be provided for.

7. The second suit is **Nairobi ELC Judicial Review Application No. 30 of 2017; Fredrick Gichuhi Njenga & Another v Attorney General & Another (formerly Milimani High Court Judicial Review Application No. 421 of 2017)** in which the applicants pray for the following orders:

**i. An order of *Certiorari* to bring into the High Court and to quash Legal Notice Number 2356 of 2017 issued by the 2<sup>nd</sup> respondent banning the use, manufacture and importation of all plastic bags used for commercial and household packaging.**

**ii. An Order of prohibition to prohibit the 2<sup>nd</sup> respondent from issuing and implementing Legal Notice Number 2356 of 2017 banning the use, manufacture and importation of all plastic bags used for commercial and household packing and subsequently issuing similar legal notices without legal justification.**

8. The third suit is **Nairobi ELC Petition No. 35 of 2017; Okiya Omtatah Okioti v Cabinet Secretary, Ministry of Environment and Natural Resources & 2 Others**, in which the Petitioner has prayed for the following orders:

**(i) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have violated the Constitution of Kenya.**

**(ii) A declaration that the impugned plastic bags ban affects the general public including consumers of plastics and workers in the plastics industry, who ought to have been consulted before the ban was imposed.**

**(iii) A declaration that the plastic bags ban was not enacted in accordance with the Constitution and the applicable statutes, rendering it invalid, null and void *ab initio*.**

**(iv) A declaration that parliament should be allowed the time to consider the National Waste Management Bill, 2017, published by the 1<sup>st</sup> respondent and develop a legal framework for the use and management of wastes, including from plastic bags.**

**(v) A declaration that Gazette Notice Nos.2334 and 2356, both dated 28th February 2017, are unconstitutional and, therefore invalid, null and void.**

**(vi) A declaration that pursuant to Section 11(4) of the Statutory Instruments Act, Gazette Notice Nos. 2334 and 2356, both dated 28th February 2017, are void and of no legal effect.**

**(vii) An order quashing Gazette Notice Nos. 2334 and 2356, both of 28th February 2017, both being unconstitutional and, therefore, invalid, null and void.**

**(viii) An order that the costs of this suit be provided for.**

**(ix) Any other relief the court may deem just to grant.**

9. Petition No. 32 of 2017 and Judicial Review Application No. 30 of 2017 were consolidated pursuant to an order made by the High Court prior to the transfer of the two suits to the Environment & Land Court for hearing and determination. Petition No. 35 of 2017 was consolidated with the two suits on 18/9/2017 pursuant to an order made by Eboso J. on the same date. Following the consolidation of the three suits, Nairobi ELC Petition Number 32 of 2017 was chosen as the lead file. In this judgment, we shall refer to Kenya Association of Manufacturers, Patrick Gichuhi Njenga and Stephen Mwangi, and Okiya Omtatah Okioti as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners respectively, and the Cabinet Secretary, the Attorney General, NEMA and Multytouch International as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively where the context so permits.

### **The 1<sup>st</sup> Petitioner's Case**

10. The 1<sup>st</sup> petitioner contended that it brought its petition in a representative capacity on behalf of its members who carry out the business of manufacture, production, design and sale of plastic ware and plastic packaging material for domestic, commercial and industrial use. The 1<sup>st</sup> petitioner's case is that plastic is an extremely cost-effective, versatile and durable synthetic product made from oil by-product, and is used in diverse sectors, including packaging, construction, transportation, healthcare and electronics. It contended that the ban imposed on plastic bags by the 1<sup>st</sup> and 3<sup>rd</sup> respondents through the impugned Gazette Notice has adversely affected its members. It contended further that due to weak enforcement mechanisms in Kenya, management of the use and disposal of plastic in the country is sub-optimal. The 1<sup>st</sup> petitioner contended that, to address the challenges related to the disposal

of plastic, the 1<sup>st</sup> petitioner and the Government of Kenya, in collaboration with other stakeholders, have been collaborating in an effort to develop an appropriate policy framework on the management of plastic waste. These collaborative efforts culminated in the signing of a joint implementation plan for sustainable management of plastic waste in the country on 29/6/2007 committing the parties thereto to specific key deliverables. The 1<sup>st</sup> petitioner contended that whereas it fully fulfilled its obligations under the said joint implementation plan, the 1<sup>st</sup> and 3<sup>rd</sup> respondents failed to discharge their obligations under the plan which default resulted in a regulatory and policy vacuum. The 1<sup>st</sup> petitioner contended that as a result of the said default, the envisaged national strategies and policies necessary for sustainable plastic waste management have not been effective.

11. The 1<sup>st</sup> petitioner contended further that in 2016, it recommended the establishment of a public-private partnership venture in plastic waste management through which the Government would impose a levy to be utilized in the sustainable management of plastic waste, a proposal which the 1<sup>st</sup> respondent seemed enthusiastic about. The 1<sup>st</sup> petitioner averred that, unknown to it, the 1<sup>st</sup> respondent had already commenced the process of issuing the impugned Gazette Notice dated 28/2/2017 which was published on 14/3/2017, effectively banning the use, manufacture and importation of plastic bags.

12. The 1<sup>st</sup> petitioner averred further that, subsequent to the issuance of the said Gazette Notice, it actively engaged both the 1<sup>st</sup> and 3<sup>rd</sup> respondents in an effort to come up with an amicable solution to the plastic waste problem. It contended that it raised the following concerns with the 1<sup>st</sup> and 3<sup>rd</sup> respondents regarding the plastic bags ban: (i) that the ban would cause economic and job losses; (ii) that the ban would compromise the existing collaborative initiatives towards plastic waste management; (iii) that the sudden unexpected and drastic policy change in addressing plastic waste would cause disarray in the manufacturing sector and was likely to affect investor confidence; (iv) that the wording of the legal notice was ambiguous and amounted to a total ban of all plastic carrier bags and flat bags; and (v) that the ban ignored the existing collaborative initiatives in plastic waste management. The 1<sup>st</sup> petitioner contended that its concerns were ignored by the 1<sup>st</sup> respondent.

13. The 1<sup>st</sup> petitioner averred further that on 29/3/2017, Hon. John Olago Aluoch M.P presented a public petition to the National Assembly seeking among other measures: (i) a recommendation that the ban be suspended; (ii) are commendation that the Environmental Management and Co-ordination Act (hereinafter referred to as “EMCA”) be amended to address the issue of plastic waste management; and (iii) a recommendation that a plastic waste management levy be introduced. It averred that the relevant Committee of the National Assembly considered the petition and concluded, among others, that there was need to suspend the impugned Gazette Notice. The 1<sup>st</sup> petitioner averred that, the National Assembly’s Implementation committee could not enforce the said recommendations because the National Assembly’s calendar had lapsed. It contended that subsequent engagements with the 1<sup>st</sup> and 3<sup>rd</sup> respondents did not resolve the dispute, hence the filing of its suit.

14. The 1<sup>st</sup> petitioner raised four (4) grounds upon which it sought the annulment of the impugned Gazette Notice. The first ground was lack of public participation. The 1<sup>st</sup> petitioner contended that the 1<sup>st</sup> respondent failed to inform it and the general public that she intended to impose a complete ban on the manufacture and importation of plastic carrier and flat bags. The 1<sup>st</sup> petitioner’s contention was that failure to engage it and/or members of the public prior to the imposition of the ban violated Article 10 and Article 69(1) of the Constitution and the provisions of the Statutory Instruments Act, 2013 in the sense that the Gazette Notice was not preceded by public participation and a regulatory impact statement.

15. The second ground raised by the 1<sup>st</sup> petitioner was that the impugned Gazette Notice was fraught with illegalities and violated the 1<sup>st</sup> petitioner’s right to equal protection and benefit of the law under Article 27 of the Constitution. In this regard, the 1<sup>st</sup> petitioner contended that neither Section 3 nor Section 86 of EMCA empowered the 1<sup>st</sup> respondent to ban the manufacture and importation of plastic carrier and flat bags. The 1<sup>st</sup> petitioner also contended that there was no compliance with Section 6 of the Statutory Instruments Act, 2013 prior to the issuance of the Gazette Notice.

16. The third ground raised by the 1<sup>st</sup> petitioner was that the impugned Gazette Notice did not satisfy the requirements of Article 24 of the Constitution in that there was no clear and specific legislation authorizing the imposition of the ban as required under Article 24(2) of the Constitution.

17. Lastly, the 1<sup>st</sup> petitioner challenged the said Gazette Notice on the ground that it violated Article 47 of the Constitution in that the 1<sup>st</sup> petitioner was denied the right to a fair administrative action before the said Gazette Notice was issued.

## **The 2<sup>nd</sup> Petitioners’ Case**

18. The 2<sup>nd</sup> petitioners contended that they are importers, wholesalers and retailers of the banned plastic bags. They challenged the impugned Gazette Notice on several grounds. First, they argued that the said Gazette Notice did not comply with provisions of the Statutory Instruments Act, 2013. Second, they contended that the six months' notice that was given in the said Gazette Notice was too short because they needed ample time to clear all their stock and fulfil their contractual obligations. Third, they averred that there was no adequate stakeholder consultation and/or any public participation as provided under Section 3(5) of EMCA. Fourth, they contended that they, together with their employees, stood to suffer economic loss if the ban was to stand. Fifth, they contended that the 1<sup>st</sup> respondent acted *ultra vires* by issuing the said Gazette Notice under the provisions of Section 3 of EMCA. Sixth, they contended, that the said Gazette Notice was unconstitutional because it was not in tandem with the principles of good governance contained in Article 10 of the Constitution of Kenya, among them; accountability, public participation and transparency. Seventh, they argued that the 1<sup>st</sup> respondent failed to apply the provisions of Articles 69 (1) (d), 192(2) and Article 153(4)(b) of the Constitution.

19. Lastly, they contended that the said Gazette Notice lacked clarity and intelligibility to the anticipated users hence it violated the provisions of the Statutory Instruments Act. The 2<sup>nd</sup> petitioners urged the court to grant the prayers sought in their suit.

### **The 3<sup>rd</sup> Petitioner's Case**

20. The 3<sup>rd</sup> petitioner stated that he is the executive director of Kenyans for Justice and Development Trust. He contended that the trust was founded on republican principles and was set up for the purpose of promoting democratic governance, sustainable economic development and prosperity.

21. The first ground upon which the 3<sup>rd</sup> petitioner challenged the Gazette Notice was that the ban imposed through the Gazette Notice was ultra vires Sections 3 and 86 of EMCA because the said provisions of EMCA do not confer upon the 1<sup>st</sup> respondent the power to ban the use, manufacture and importation of plastic bags used for commercial and domestic packaging. He contended that Sections 3 and 86 of EMCA empowered the 1<sup>st</sup> and 3<sup>rd</sup> respondents to manage waste and not to prohibit the use of any materials. The 3<sup>rd</sup> petitioner contended further that under EMCA, the 1<sup>st</sup> and 3<sup>rd</sup> respondents were only empowered to prohibit the dumping of pollutants into the environment; they were not empowered to ban the use of any materials. He contended further that the banning of any product could only be done pursuant to Articles 24 or 70 of the Constitution. He argued that even then, the precautionary principle contained in Article 70 (2) of the Constitution could not be invoked through executive fiat. The 3<sup>rd</sup> petitioner contended that the principle can only be invoked through the institution of proper court proceedings and the issuance of a court order. He contended that Sections 3 and 86 of EMCA only allows the 1<sup>st</sup> and 3<sup>rd</sup> respondents to regulate the disposal of plastic carrier bags but not to prohibit their use.

22. The second ground upon which the 3<sup>rd</sup> petitioner challenged the Gazette Notice was that it violated the provisions of the Fair Administrative Action Act, 2015. He contended that the Gazette Notice was enacted contrary to the mandatory requirements of Section 5(1) of the said Act which required the 1<sup>st</sup> and 3<sup>rd</sup> respondents to issue a public notice of the proposed administrative action inviting public views in that regard and to consider all views and relevant materials submitted in relation to the matter before taking the administrative action. He contended that the ban was not preceded by stakeholders' consultation.

23. The third ground raised by the 3<sup>rd</sup> petitioner was that the impugned Gazette Notice violated the mandatory provisions of the Statutory Instruments Act, 2013. He contended that the said Gazette Notice was not submitted to Parliament for scrutiny and approval. He argued that Section 11 of the Statutory Instruments Act obligates every Cabinet Secretary responsible for a regulation-making authority, to ensure that a copy of the statutory instrument is transmitted to the responsible clerk for tabling before Parliament within seven (7) sitting days after the publication of a statutory instrument. The 3<sup>rd</sup> petitioner also contended that Sections 4,5,6,7,8,9,10 and 11 of the Statutory Instruments Act were violated to the extent that the plastic ban was not subjected to appropriate consultation or public participation involving all stakeholders before it was effected, and that a regulatory impact statement about the instrument was not made yet the Gazette Notice imposed significant costs on the public.

24. The fourth ground raised by the 3<sup>rd</sup> petitioner was that the impugned Gazette Notice violated various Articles of the Constitution of Kenya. In this regard, he contended that the said Gazette Notice was enacted in violation of Article 24 of the Constitution to the extent that: (i) it is not a legislation within the meaning of Article 260 of the Constitution because Parliament has not donated to the Cabinet Secretary powers to impose a ban on plastic bags and; (ii) the Gazette Notice does not, among other things, balance the enjoyment of rights between the parties. The 3<sup>rd</sup> petitioner contended also that the impugned Gazette Notice violated Article 27 of the Constitution in the sense that the plastic ban was discriminatory to the extent that it did not cover all pollutant plastic such as

plastic bottles and plastic hair. The 3<sup>rd</sup> petitioner contended also that the said Gazette Notice violated Article 47(1) of the Constitution in the sense that it was not expeditious, efficient, lawful, reasonable and procedurally fair. In addition, the 3<sup>rd</sup> petitioner contended that the 1<sup>st</sup> and 3<sup>rd</sup> respondents violated the following Articles of the Constitution in the described manner: (i) Articles 1, 2(1) and (2) and 3(1) by acting contrary to the Constitution; (ii) Article 73(1)(b), 129(1) and (2) and 153(4) by acting contrary to the Constitution; (iii) Article 10(2)(a) by proceeding to effect the ban without following the law; (iv) Article 24 by arbitrarily limiting the enjoyment by consumers of plastic bags, workers in the plastic industry, and the general public of rights and fundamental freedoms enshrined in Articles 24, 27, 40, 43, 46 and 47 of the Constitution; (v) Article 70 by imposing a ban through executive fiat instead of moving this honourable court for an appropriate court order; (vi) Article 69 by imposing a ban on plastic bags instead of acting to eliminate the throw away culture; (vii) Article 232(1)(d), (e) and (f) of the Constitution by denying Kenyans the chance to participate in the enactment of the impugned Gazette Notice; and (viii) Article 259 (1) and (3) of the Constitution by setting out to defeat the purposes, values and principles of the Constitution.

25. The fifth ground raised by the 3<sup>rd</sup> petitioner was that the Gazette Notice violated the doctrine of legitimate expectation in that the petitioner had a legitimate expectation that under Sections 3 and 86 of EMCA, the 1<sup>st</sup> and 3<sup>rd</sup> respondents would, among others, respect, uphold and defend the Constitution, enact a programme or framework for the management and handling of plastic bags and other wastes, direct county governments and manufacturers to establish plastic waste collection centres, use their powers to punish those who litter the environment, adhere to the law governing subsidiary legislation, and allow parliament time to consider the National Waste Management Bill of 2017.

26. The sixth ground raised by the 3<sup>rd</sup> petitioner was that the impugned Gazette Notice is void for being vague. He contended that when the Notice is read together with supporting literature from the 3<sup>rd</sup> respondent, contradictions and inconsistencies emerge which render it vague.

### **The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Case**

27. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the three suits. Their case was that the Constitution of Kenya in its preamble recognizes the need to respect and sustain the environment for the benefit of future generations. They averred that the principle of sustainable development calls for mediation between interests of the current generations and those of future generations, and also calls for mediation between the competing interests of the current generations.

28. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended further that Article 42 of the Constitution secures the right to a clean and healthy environment and places upon the State the obligation to ensure that the right is protected through legislative and other means. The respondents averred that Article 69 of the Constitution creates positive obligations on part of the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources and obligates the State to eliminate processes and activities that are likely to endanger the environment. They averred further that Article 69(2) of the Constitution creates a positive obligation on the petitioners to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended further that Article 70 of the Constitution recognises the precautionary principle and that this court would be acting in consonance with the provisions of Article 70 of the Constitution if it upheld the ban.

29. They argued further that Section 3 of EMCA provides for the right to a clean and healthy environment and contains principles of environmental management and sustainable development. They averred that Section 86 of EMCA on the other hand empowers the 1<sup>st</sup> respondent to issue guidelines and prescribe measures for the management of hazardous materials and processes. They contended that the 1<sup>st</sup> respondent had both the constitutional and statutory basis to prohibit the use, manufacture and importation of the affected plastic bags under Sections 3 and 86 of EMCA.

30. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred further that plastic carrier bags and flat bags are easily blown around and cause harm when ingested by livestock and wildlife. They argued that due to their non-biodegradable nature, plastic bags are known to endanger both flora and fauna, block waterways leading to flooding, emit harmful dioxin and furans when burnt, and are persistent pollutants of the environment. They contended that due to the aforesaid harm, it was scientifically determined under Section 86 of EMCA that plastic is a hazardous material and plastic bags were identified as the most harmful hence the need to isolate and control their use. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred further that plastic bags are easily replaceable with environmentally friendly alternatives.

31. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred further that prior to the imposition of the ban; previous attempts to control the negative impact of plastic to the environment were unsuccessful. They averred that the Gazette Notice applies specifically to plastic carrier bags used for commercial, domestic and industrial packaging and does not impose a blanket ban on all plastic as alleged by the petitioners. They averred further that the ban was a well thought out process implemented after careful study and public consultation with stakeholders.

32. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that the six months' notice that was given before the ban became effective gave the stakeholders' sufficient time to adjust, given that there had been prior engagement with them going back to the year 2005. The respondents averred that the Ministry of Environment and Natural resources through the 3<sup>rd</sup> respondent engaged stakeholders on the issue of plastic in twenty seven (27) meetings between 2006 and 2017. They averred that between May 2006 and February 2012, engagement with stakeholders revolved around the subject of use, standards, thickness, plastic management and levies and from 2014, engagement with the stakeholders shifted to stoppage of the use of certain categories of plastic. They averred that in October, 2015, the 3<sup>rd</sup> respondent recommended to the 1<sup>st</sup> respondent to declare a total ban on the use of certain categories of plastic carrier bags and flat bags and the 1<sup>st</sup> respondent accepted the recommendation.

33. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that the impugned Gazette Notice complied with all relevant provisions of the Statutory Instruments Act, 2013. They averred that the Gazette Notice was tabled in the National Assembly before the Parliamentary Committee on Environment during a meeting attended by representatives of the 1<sup>st</sup> petitioner. They argued that Parliament had the opportunity to scrutinise the said Gazette Notice after it was petitioned to do so. They contended that Parliament did not revoke the Gazette Notice after considering it.

34. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred that the constitutional mandate to formulate policy and administrative measures and to enforce them in order to protect the environment is vested upon the executive arm of Government. They contended that the National Waste Management Bill of 2017 has not been published and that it awaits public participation.

35. Lastly, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that there will be minimal job losses as a result of the ban on plastic bags because most manufacturers of plastic bags also manufacture multiple plastic items and that consumers had enthusiastically switched to and embraced more environmentally friendly packaging. They contended further that the benefits accruing to the environment outweigh any losses that maybe suffered by the economy and that such losses cannot be greater than the public interest to be served by achieving a clean and healthy environment.

#### **The 4<sup>th</sup> Respondent's Case**

36. The 4<sup>th</sup> respondent applied to be joined as an interested party in Nairobi ELC Petition No. 32 of 2017 and its request was granted prior to the transfer of that suit to this court. The 4<sup>th</sup> respondent supported the ban on plastic bags. Its case was that under Article 42 of the Constitution, every citizen is entitled to a clean and healthy environment, and the right to a clean and healthy environment includes the right to have the environment protected for the benefit of present and future generations through legislative and other means. It contended that under Sections 3 and 86 of EMCA, the 1<sup>st</sup> respondent is empowered to issue guidelines and prescribe measures to manage hazardous materials and processes. The 4<sup>th</sup> respondent contended further that Articles 69 and 70 of the Constitution enjoin State organs to initiate positive measures geared towards eliminating processes and activities that are likely to endanger the environment.

37. The 4<sup>th</sup> respondent concurred with the other respondents that key stakeholders and the public were engaged by the 1<sup>st</sup> and 3<sup>rd</sup> respondents on the subject of plastic waste from 2006 and that from 2014 the engagement focused on stoppage of manufacture and use of plastic.

38. Lastly, the 4<sup>th</sup> respondent contended that the ban on plastics is part of the Government's commitment to address pollution in tandem with the United Nations Environment Programme's clean sea initiative. The 4<sup>th</sup> respondent contended that plastic bags are to blame for the proliferation of used plastic in waterways, grazing fields, dwelling homes, urban centres and virtually all empty spaces. It urged the court to dismiss the three suits.

#### **Submissions by the Advocates for the Parties**



39. The parties filed written submissions in support of their respective cases. They were thereafter given opportunity to orally highlight key aspects of their cases. Mr. Amoko and Mr. Dar appeared for the 1<sup>st</sup> petitioner; Mr Ogessa appeared for the 2<sup>nd</sup> petitioners and Mr. Okiya Omtatah Okoiti, the 3<sup>rd</sup> petitioner, appeared in person. The Deputy Chief State Counsel, Mr. Eredi and Mr. Allan Kamau appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents; Prof. Mumma, Mr. Wabwoto and Mr. Agwara appeared for the 3<sup>rd</sup> respondent, while Mr. Anyoka appeared for the 4<sup>th</sup> respondent

### Submissions by the 1<sup>st</sup> Petitioner

40. Mr. Amoko addressed the court on behalf of the advocates who appeared for the 1<sup>st</sup> petitioner. Mr. Amoko submitted that the 1<sup>st</sup> petitioner was never given a reasonable and/or meaningful opportunity to have a say on the impugned Gazette Notice contrary to the constitutional framework on public participation contained in Articles 10 and 69 (d) of the Constitution. He argued that public participation is a key tenet of the national values and principles of governance in Kenya. He argued further that facilitation of public involvement in the legislative process entails taking steps to ensure that the public participates in the legislative process. He argued that no consultations were held before the drastic measure of banning all plastic carrier bags was taken. He relied on, among others, the case of, In the Matter of Mui Coal Basin Local Community (2015) eKLR in which the High Court emphasized the importance of public participation as a constitutional governance principle.

41. Mr. Amoko submitted further that Section 5 of the Statutory Instruments Act requires public consultation prior to the promulgation of a statutory instrument. He contended that the ban contained in the impugned Gazette Notice had a direct impact on the business of the plastic industry across the board and materially affected the rights and interests of the petitioners yet the 1<sup>st</sup> and 3<sup>rd</sup> respondents did not comply with the legal framework in Section 5 of the Statutory Instruments Act. Counsel urged the court to find that the impugned Gazette Notice is unlawful, null and void on that ground. Counsel relied on the decisions of Odunga J. in the cases of Moi University v Council of Legal Education & Others (2016) eKLR and Judicial Service Commission v Mbalu Mutava & Another (2015) eKLR in support of his submissions.

42. He submitted further that the ban imposed through the impugned Gazette Notice offends the principle of proportionality as contained in Article 24 of the Constitution. Counsel contended that the ban limits the 1<sup>st</sup> petitioner's right to engage in trade and falls short of the requirements of Article 24 of the Constitution. The Court of Appeal decision in the case of Seventh Day Adventist Church (East Africa) v Minister for Education & 3 others (2017) eKLR was cited in support of that proposition. Counsel similarly urged the court to annul the said Gazette Notice on this ground.

43. Mr. Amoko submitted further that the ban imposed through the impugned Gazette Notice was effected in contravention of the provisions of Article 47 of the Constitution and Section 5 of the Fair Administrative Action Act, 2015. Counsel contended that the 1<sup>st</sup> and 3<sup>rd</sup> respondents had made the 1<sup>st</sup> petitioner believe that they were working collaboratively on a plastic waste management scheme under a public-private partnership programme only for them to make an about-turn and impose the ban. He submitted that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were constitutionally and statutorily obliged to hear the 1<sup>st</sup> petitioner before imposing the ban. While relying on the decisions in the cases of Geothermal Development Limited v Attorney General & 3 Others (2013) eKLR; Rv National Police Service Commission Ex-parte Daniel Chacha Chacha (2016) eKLR; and Judicial Service Commission v Mbalu Mutava and Another (supra) counsel urged the court to annul the impugned Gazette Notice on the ground that the ban was effected without affording the 1<sup>st</sup> petitioner an opportunity to be heard.

44. Mr. Amoko submitted further that whereas the impugned Gazette Notice was issued under Sections 3 and 86 of EMCA, nothing in the cited provisions of the law authorises the 1<sup>st</sup> respondent to impose a ban on any product. Counsel contended that Section 86(1) and (2) only authorise the 1<sup>st</sup> respondent to issue guidelines and prescribe measures for the management of substances and processes that have been identified as dangerous to human health. He argued that plastic bags do not qualify to be characterised as substances, contending that in the case of plastic bags, the substance is the plastic waste, not the plastic bag itself. He contended further that even if the plastic bags were to qualify to be characterised as substances, what the 1<sup>st</sup> respondent was required to do was to manage them and not to eliminate them through a ban. Counsel added that the impugned Gazette Notice ought to be struck out for want of compliance with a condition precedent to the ban in that there was no recommendation from the 3<sup>rd</sup> respondent identifying plastic bags as a danger to human health and the environment and proposing their ban.

45. Mr. Amoko argued further that the Gazette Notice imposed significant costs on the stakeholders in the plastic Sector and ought to have been preceded by a regulatory impact statement as required under Section 6 of the Statutory Instruments Act. He argued further that the impugned Gazette Notice is null and void because it was not laid before parliament as required under Section 11 of

the Statutory Instruments Act. Counsel urged the court to be guided by the decision in the case of Kenya Country Bus Owners Association ( Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimuri – Treasurer) and 8 Others v Cabinet Secretary for Transport & Infrastructure & 5 others [2014] eKLR. He urged the court to grant the orders set out in the 1<sup>st</sup> petitioner's Amended Petition.

### **Submissions by the 2<sup>nd</sup> Petitioners**

46. Mr. Ogessa, learned counsel for the 2<sup>nd</sup> petitioners filed written submissions dated 31/7/2017. He contended that Section 3 of EMCA confers power upon the court to issue orders to prevent, stop or discontinue any act deleterious to the environment. He submitted that the section does not confer upon the 1<sup>st</sup> respondent any power to impose a ban on a product. He argued that the impugned Gazette Notice is *ultra vires* the Act.

47. Counsel argued further that Section 86 of EMCA only grants the 1<sup>st</sup> respondent power to issue guidelines on how particular waste ought to be disposed of and that it does not grant the 1<sup>st</sup> respondent power to ban the use and manufacture of plastic bags.

48. Finally, Counsel submitted that Article 69(1) of the Constitution requires public participation. He argued that only a select few stakeholders were consulted in relation to the ban. He contended that the 1<sup>st</sup> respondent violated Section 5 of the Statutory Instruments Act 2013.

### **Submissions by the 3<sup>rd</sup> Petitioner**

49. The 3<sup>rd</sup> petitioner who acted in person submitted that under Article 2 (4) of the Constitution, any law which is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. He argued that the impugned Gazette Notice contravenes Sections 3 and 86 of EMCA; Sections 3, 4, 5, 6, 7, 8, 10 and 11 of the Statutory Instruments Act, 2013; Sections 3, 4, 5 and 6 of the Fair Administrative Action Act, 2015; and Articles 1 (1), 2(1), 2(2), 3(1), 10, 24, 40, 47, 69, 70, 73(1), 153(4) (a), 232 (1) (a), (b), (d) and (e); 259(1) and (3) of the Constitution. The 3<sup>rd</sup> petitioner urged the court to be guided by the decision in the case of Republic v Kenya National Examination Council, Misc. Civil Application No. 328 of 2015 and annul the impugned Gazette Notice. The 3<sup>rd</sup> petitioner added that Article 47 is breached when a respondent's actions are unreasonable.

50. The 3<sup>rd</sup> petitioner submitted further that under Section 11(4) of the Statutory Instruments Act, 2013 the impugned Gazette Notice is void because it was not laid before Parliament. He contended that the Gazette Notice automatically became void upon expiry of seven sitting days subsequent to its publication.

51. The 3<sup>rd</sup> petitioner submitted that any person acting under the precautionary principle provided in Article 70 of the Constitution has only two options, either to move the court for an order or to legislate under Article 24 of the Constitution. He submitted that the Gazette Notice amounted to an executive fiat which was an extra- constitutional measure.

52. The 3<sup>rd</sup> petitioner also submitted that the ban imposed through the Gazette Notice is discriminatory in nature since it allows large scale manufacturers to use polythene paper for primary packaging but denies common traders the use of polythene paper for primary packaging. He argued that under Article 27 of the Constitution, the law ought to apply equally to all.

53. The 3<sup>rd</sup> Petitioner submitted further that the Gazette Notice arbitrarily deprived investors in the plastic industry of their right to property by shutting down their businesses. He contended that this contravened Article 40 of the Constitution. He added that since Article 260 of the Constitution defines property to include choses in action, the shutting down of businesses dealing in plastic violated the affected workers' right to wages.

54. The 3<sup>rd</sup> petitioner also submitted that the ban imposed through the impugned Gazette Notice violated Articles 43 and 46 of the Constitution in the sense that by banning primary packaging materials, it exposed Kenyans to health risks, and unreasonably increased the cost of living for ordinary Kenyans.

55. The 3<sup>rd</sup> petitioner submitted further that the impugned Gazette Notice infringed on the enjoyment of rights enshrined in Articles 40, 43 and 46 of the Constitution in the sense that it limited those rights without complying with the mandatory procedure spelt out

in Article 24 of the Constitution.

56. The 3<sup>rd</sup> petitioner also submitted that Section 3 of EMCA echoes Articles 42, 69 and 70 of the Constitution while Sections 86 and 87 of EMCA empower the 1<sup>st</sup> respondent to issue guidelines and to prescribe measures for the management of plastic litter. He contended that the powers donated to the 1<sup>st</sup> respondent under Section 86 of EMCA do not include banning of plastic bags. He added that the 1<sup>st</sup> and 3<sup>rd</sup> respondents ignored the requirement to consider less restrictive means to achieve the intended objective.

57. The 3<sup>rd</sup> petitioner submitted further that the impugned Gazette Notice pre-empted, the National Waste Management Bill and the Report by the National Assembly's Departmental Committee on Environment and Natural Resources which were pending before Parliament and urged the court to recommend that Parliament provides a mechanism for managing the challenges of plastic litter.

58. On the issue of public participation, the 3<sup>rd</sup> petitioner submitted that public participation is a requirement widely recognized as a critical aspect of public policy and accountability in environmental processes. He contended that through effective public participation, the processes and outcomes of planning, policy and decision making are expected to be more efficient, equitable and sustainable. He submitted that Articles 10(2) (a), 69(1) (d) and 232 (1) (d) of the Constitution require the State to encourage public participation in the management, protection and conservation of the environment. He submitted that Section 3(5) (a) of EMCA enjoins this court to be guided by the principle of public participation in the development of policies for the management of the environment. He contended that there was consultation for several years on the issue of managing plastic litter but not on the issue of banning plastic bags. He argued that under both the Statutory Instruments Act and the Fair Administrative Action Act, the 1<sup>st</sup> and 3<sup>rd</sup> respondents were required but failed to consult the affected public before banning plastic bags. He contended that their decision not to consult the public was unlawful, illegal and fatal to the impugned Gazette Notice.

59. The 3<sup>rd</sup> petitioner submitted further that he had a legitimate expectation that the 1<sup>st</sup> and 3<sup>rd</sup> respondents would execute their mandate within the confines of the law and in particular within the provisions of Sections 3 and 86 of EMCA.

60. In conclusion, the 3<sup>rd</sup> petitioner urged the court to declare the impugned Gazette Notice unconstitutional, invalid, null and void on grounds of technical, procedural defects and violation of the petitioners' rights. He also prayed for the costs of the suit.

#### **Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents**

61. The Deputy Chief State Counsel, Mr. Eredi submitted that at the heart of the national values and principles of governance in the Constitution, is the principle of sustainable development. This is a development model that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. He added that sustainable development calls for a mediation between competing intergenerational and intergenerational interests. He submitted further that environmental rights are fundamental human rights and every person is entitled to a clean and healthy environment. He added that the ban on plastic bags has ensured that there is conservation of the environment and the right to a clean environment is safeguarded. He submitted further that the petitioners and the applicants are constitutionally obligated to co-operate with the State in ensuring that the environment is protected and conserved.

62. Counsel submitted that both the Constitution and EMCA recognise the precautionary principle which serves to ensure that any substance or activity posing a threat to the environment is prevented from adversely affecting the environment even if there is no conclusive scientific proof linking the substance or activity to environmental damage. He invited the court to uphold the impugned Gazette Notice as a way of enforcing the right to a clean and healthy environment. He added that the Gazette Notice was constitutional and lawful.

63. He submitted that Section 3 of EMCA spells out the principles to be applied in the management of the environment and Section 86 of the Act confers upon the 1<sup>st</sup> respondent powers to identify materials and processes that are dangerous to human health and the environment; to issue guidelines and prescribe measures for the management of the materials and processes so identified. He contended that the 1<sup>st</sup> respondent acted within the confines of the law in issuing the Gazette Notice in question.

64. On the issue of the alleged non-compliance with the Statutory Instruments Act, counsel submitted that the impugned Gazette Notice was tabled in Parliament and considered by the Parliamentary Committee on Environment and Natural Resources during a session attended by the 1<sup>st</sup> respondent, the Director General of the 3<sup>rd</sup> respondent as well as representatives of the 1<sup>st</sup> petitioner. He

argued therefore that Parliament had the opportunity to scrutinise the Gazette Notice.

65. Counsel also submitted that the impugned Gazette Notice was complementary to the substantive policy regulation under Section 86 of EMCA. He submitted further that under Section 9 (g) of the Statutory Instruments Act, the Gazette Notice was exempted from the requirement of regulatory impact statement. He added that the affidavit of Mr. William K. Kiprono indicated that various stakeholders were consulted prior to the issuance of the Gazette Notice. Counsel submitted further that the impugned Gazette Notice was saved by dint of Sections 32 and 33 of the Interpretation and General Provisions Act.

66. On the issue of the National Waste Management Bill, 2017, counsel submitted that the bill had not been published and that the contention that the Gazette Notice was intended to pre-empt the Bill had no basis.

67. Counsel submitted further that the Government had several engagements with the plastic sector from 2005 when the Government first attempted to ban the use of plastic in the country and a total of twenty seven meetings were held with the stakeholders. He added that the ban on plastic bags was a policy decision aimed at achieving a clean and healthy environment and did not come as a surprise because the plastic sector had been duly consulted. He contended that public participation was achieved because the plastic sector was engaged through the twenty seven meetings. He relied on the cases of Diani Business Welfare Association & Others v County Government of Kwale[2015]eKLR, and Malindi Law Society v Attorney General & 4 Others[2016]eKLR.

68. Counsel contended further that consumers of plastic bags had enthusiastically switched to and embraced more environmentally friendly packaging alternatives and urged the court not to reverse the gains achieved so far.

69. Counsel contended that annulling the impugned Gazette Notice would hurt the public interest. He relied on the case of Michael Osundwa Sakwa v Chief Justice & President of the Supreme Court of Kenya & Another [2016]eKLR in urging the court to place more consideration on public interest.

### **Submissions by the 3<sup>rd</sup> Respondent**

70. Professor Albert Mumma advocate addressed the court on behalf of the legal team that appeared for the 3<sup>rd</sup> respondent. He submitted that between May 2006 and February 2012, the 3<sup>rd</sup> respondent held not less than seventeen stakeholder consultations to discuss how best to control the menace presented by plastic bags. The consultations centered on standards to be adopted, the thickness of plastic, management strategies and possible self-regulatory approaches by industry players. He contended that these engagements came to naught. He submitted that in August 2012, the 3<sup>rd</sup> respondent adopted a different approach focusing on eliminating the root cause of the plastic menace. He submitted that the 3<sup>rd</sup> respondent held ten meetings and stakeholder consultations with industry players, but the plastic production sector was uncooperative and sought to change the theme of the meetings to the pre-2014 approach.

71. He submitted that following the said stakeholder consultations and meetings, and in light of the persistent public outcry against the plastic menace, in October 2015, the 3<sup>rd</sup> respondent recommended to the 1<sup>st</sup> respondent to ban the use of certain categories of plastic. Placing emphasis on the criteria for public participation set out in In the Matter of the Mui Coal Basin Local Community (supra), he submitted that the 1<sup>st</sup> respondent met the requirements and threshold for public participation prior to gazetting the ban.

72. Counsel submitted further that the purpose of the requirement for parliamentary scrutiny of statutory instruments is to give Parliament an opportunity to oversee the executive's power to make subsidiary legislation. He submitted that the oversight role is intended to ensure that subsidiary legislation does not infringe on the rights of the individual, exceed the law making powers delegated to the executive by Parliament, interfere with the jurisdiction of the courts or introduce tax.

73. He contended that although there was an oversight on the part of the 1<sup>st</sup> respondent with regard to placing the impugned Gazette Notice before Parliament, the essence and spirit of the requirement for parliamentary scrutiny was met because parliament was seized of the impugned Gazette Notice on 29/3/2017 within the time frame of seven sitting days, and the Gazette Notice was duly transmitted to the relevant Committee of Parliament for scrutiny. He invited the court to be guided by the decision in the case of Richard Dickson Ogendo & 2 Others v Attorney General & 5 Others[2014]eKLR in which Majanja J. declined to invalidate the alcohol breathalyzer rules. Counsel urged the court to uphold the Gazette Notice on the basis of the Constitutional imperative

underpinning the right to a clean and healthy environment.

74. He submitted further that, if the court were to find that Parliament was not properly seized of the said Gazette Notice pursuant to the Petition by Hon. Olago Aluoch M.P, or that the oversight on the part of the 1<sup>st</sup> respondent cannot be excused, the court should give the 1<sup>st</sup> respondent time to rectify the omission by tabling the Gazette Notice formally before Parliament within a time frame to be determined by the court.

75. Counsel submitted further that statutory instruments are made within the parameters set out in Section 24 of the Statutory Instruments Act, 2013 and where a statutory instrument is made in exercise of a particular power; it is also deemed to have been made in exercise of all other enabling powers. He submitted further that Article 69 (1) (g) of the Constitution enjoins the State to eliminate processes and activities that are likely to endanger the environment. He submitted further that Section 7 of the Sixth Schedule of the Constitution provides that all laws in force prior to the effective date of the Constitution are to be construed with alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution. He contended that the Gazette Notice was not in any way inconsistent with the provisions of EMCA. He argued further that although the Gazette Notice was stated to have been made under Sections 3 and 86 of EMCA, it is to be deemed to have been made in exercise of all enabling powers, including the powers granted to the 1<sup>st</sup> respondent by Section 147 of EMCA. Counsel submitted further that Article 69 of the Constitution which enjoins the State to eliminate processes and activities that are likely to endanger the environment when read together with Section 7 of the Sixth Schedule, require that Section 86(2) of EMCA be construed as empowering the 1<sup>st</sup> respondent to prescribe measures to eliminate materials and processes that are dangerous to human health and the environment. He contended that the ban imposed through the Gazette Notice is one such measure.

76. Counsel submitted that the decision to eliminate plastic bags is justified in the public interest. He argued that plastic waste poses danger to the environment, human beings and animals. He contended that even where there is uncertainty as to the existence or extent of risk to human health and the environment, public institutions may take protective measures with due regard to the public interest without having to wait for the risks to become fully apparent. Counsel also submitted that where the precautionary principle is concerned, the burden of proof rests with the petitioners whose individual interests are at stake, to adduce credible evidence that its activities are not detrimental to the environment. Counsel submitted that under Article 40 (3) (b) of the Constitution, the State may lawfully deprive an individual of constitutionally guaranteed rights in order to safeguard the public interest.

77. Counsel submitted further that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were within their mandate to ban plastic bags in light of the urgent need to give effect to the precautionary principle, taking into account considerations such as the toxicity, persistence and bio-accumulative properties of plastics, which once disposed into the environment, have long term effects lasting hundreds of years. He contended that the ban on plastic bags is both preventive and precautionary in character and substance, and that to achieve their mandate, the 1<sup>st</sup> and 3<sup>rd</sup> respondents rightfully applied the precautionary principle with due regard to its fundamental elements. He urged the court to dismiss the three suits.

#### **Submissions by the 4<sup>th</sup> Respondent**

78. Counsel for the 4<sup>th</sup> respondent, Mr. Anyoka, submitted that the Constitution of Kenya recognises the environment as the foundation for socio-economic advancement and that the right to a clean and healthy environment is a fundamental right secured and protected by Article 42 of the Constitution. He submitted that the right to a clean and healthy environment includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures. He argued that, under Article 69 of the Constitution, the State is obligated to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. Counsel submitted that the state is obligated to ensure that processes which are likely to endanger the environment are eliminated. He argued that Article 69(2) of the Constitution imposes a positive obligation on every person, including the petitioners, to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. He urged the court to act in consonance with the provisions of Article 70 of the Constitution and to take into account the precautionary principle. He urged the court to dismiss the three suits.

#### **Issues for determination**

79. The parties were unable to agree on a common set of issues emerging for determination in the three consolidated suits. Consequently, the court allowed the 1<sup>st</sup> and 3<sup>rd</sup> petitioners to file a joint statement of issues. The other parties framed their own set of

issues. We have considered the cases put forward by the petitioners and the respondents, the submissions of counsels and respective sets of issues framed by the parties. We have summarised the issues which fall for determination in the three consolidated suits as follows:

**(i) Whether the Gazette Notice dated 28/2/2017 published twice in the Kenya Gazette on 14/3/2017 as Numbers 2334 and 2356 by the Cabinet Secretary for Environment and Natural Resources, the 1<sup>st</sup> respondent, violated the principle of public participation as set out under Articles 10 and 69(d) of the Constitution; Section 3 of the Environmental Management and Coordination Act, 1999(EMCA); and Section 5 of the Statutory Instruments Act, 2013;**

**(ii) Whether the impugned Gazette Notice met the requirements for parliamentary scrutiny under of the Statutory Instruments Act, 2013;**

**(iii) Whether the impugned Gazette Notice was subject to and satisfied the requirements for a regulatory impact statement under Sections 6, 7, 8 and 9 of the Statutory Instruments Act, 2013;**

**(iv) Whether the impugned Gazette Notice violated the petitioners' right to fair administrative action under Article 47 of the Constitution and Section 5 of the Fair Administrative Action Act, 2015;**

**(v) Whether the impugned Gazette Notice violated the petitioners' legitimate expectation;**

**(vi) Whether the 1<sup>st</sup> respondent acted *ultra vires* her powers under Sections 3 and 86 of EMCA in issuing the impugned Gazette Notice;**

**(vii) Whether the impugned Gazette Notice violated Articles 1 (1), 2(1) & (2), 3(1), 24, 40,43, 46, 70, 73(1), 153(4) (a), 232 (1) (a), (b), (d) & (e) and 259(1) & (3) of the Constitution;**

**(viii) Whether the punishment prescribed under the plastic ban is oppressive and unreasonable;**

**(ix) Whether the impugned Gazette Notice should be annulled; and**

**(x) Who should bear the costs of the three suits.**

**Whether the impugned Gazette Notice violated the principle of public participation**

80. The petitioners contended that the impugned Gazette Notice is null and void for want of public participation. It is necessary to reproduce the provisions of the Constitution and the Statutory Instruments Act, 2013 cited by the petitioners as the basis for their contention on this issue.

Article 10 (1) and (2) of the Constitution provides as follows:

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

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

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

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

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

- a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- c) good governance, integrity, transparency and accountability; and
- d) sustainable development

Article 69(1)(d) of the Constitution provides as follows:

(1) The State shall—

- (d) encourage public participation in the management, protection and conservation of the environment;

Article 232(1)(d) of the Constitution provides as follows:

(1) The values and principles of public service include—

- (d) involvement of the people in the process of policy making;

Section 5 of the Statutory Instruments Act, 2013 provides as follows:

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 subsection (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.

81. The principle of public participation is not new. It did not come with the promulgation of the new Constitution. It was always recognised as an element of the common law doctrine of natural justice. The parties cited a number of authorities before us in support of their rival positions on the issue. We wish to mention a few of the cases which we find relevant.

82. In the South African case of Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006]ZACC11;2006 (12)BCLR 1399(CC); 2006(6)SA 416(CC) that was cited by the 1<sup>st</sup> petitioner, the court stated that:

*“According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore means taking steps to ensure that the public participate in the legislative process.”*

83. In the other South African case of Minister of Health and Another v New Clicks South Africa(Pty) Ltd. and Others [2006](2)SA 311(CC) that was also cited by the 1<sup>st</sup> petitioner, the court stated that:

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

84. In the case of Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR, the court stated that:

*“The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, Article 174 (c) of the Constitution provides for the principles of devolved government and has given powers to the people to enhance self-governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view, an essential part of public participation.”*

85. In the case of Judicial Service Commission v Mbalu Mutava & Another (supra), the court stated that:

*“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”*

86. In the Matter of the Mui Coal Basin Local Community(supra), the court that:

*“.....the petitioners only response was that public participation and due diligence undertaken were not adequate. As the cases before us have noted, it is not possible to come up with arithmetic formula or litmus test for categorically determining when a court can conclude there was adequate public participation. However as we have alluded above, the courts look at the bona fides of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible.”*

87. In the case of British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR, the court stated as follows:



*“From these decisions and others that were cited before us by the parties’ advocates, 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.”*

88. It is on the foregoing principles that the petitioners’ contention that the 1<sup>st</sup> respondent failed to undertake public participation would be considered. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed two affidavits sworn by William Kiprono on 29/9/2017 and 15/2/2018 in which they averred that adequate consultation was conducted before the impugned Gazette Notice banning the use of plastic carrier bags and flat bags was issued. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents annexed to the said affidavits documents showing that they engaged the stakeholders in the plastic sector from 2006 to 2017 before the said Gazette Notice was issued.

89. The said documents which include minutes of the meetings held over that period and attendance records show that the 1<sup>st</sup> and 3<sup>rd</sup> respondents and the stakeholders in the plastic sector initially held general discussions on plastic management in Kenya. The 1<sup>st</sup> respondent thereafter set up a task force in 2014 to coordinate the implementation of a commendation to stop the use of plastic carrier bags in Kenya. The material before us shows that the consultative meetings that were called by the 1<sup>st</sup> and 3<sup>rd</sup> respondents were attended by key stakeholders in the plastic industry including plastic manufacturers, retailers and large consumers of plastic bags. The attendance lists produced by the respondents show that between 2012 and 2015, representatives of the 1<sup>st</sup> respondent, the 3<sup>rd</sup> respondent, the 1<sup>st</sup> petitioner, Kenya Bureau of Standards (KBS), Retail Trade Association (RETRAK), Kenya Industrial Research and Development Institute (KIRDI), Decase Chemicals, King Plastic Industries, Packaging Manufacturers(1976) Limited, Polythene Industries Limited, Government Chemist, Laneeb Plastics Limited, Cleanshelf Supermarkets, Nakumatt Supermarkets, Naivas Supermarkets, Kenya Private Sector Alliance, Ministry of Health and Kenya Water Towers Agency (KWTA) attended consultative meetings.

90. It is clear from the minutes of the meetings held between 2014 and 2015 that, what was on the agenda was the stoppage of the use of plastic bags in Kenya. The 3<sup>rd</sup> petitioner had contended that the ordinary Kenyans such as individual plastic users and workers in the plastic industry whom he is representing were not consulted. We are satisfied that the 1<sup>st</sup> respondent acted in good faith and consulted many stakeholders in the plastic industry. We are of the view that it would not have been possible to consult all users of plastic bags and players in the plastic industry. We have noted that most of the persons who attended the consultative meetings did so in representative capacity. In our view, the organisations they represented formed the largest segment of the persons who were to be affected most by the plastic bags ban. The question as to what degree of engagement satisfies the threshold of public participation was discussed In the Matter of the Mui Coal Basin Local Community [supra] case where the court stated that:

*“(d)..... public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. 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. (e) Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.”*

91. We are satisfied that those who would be most affected by the impugned Gazette Notice were consulted and participated in the deliberations that led to the issuance of the ban. The 3<sup>rd</sup> petitioner contended that those who were most affected by the ban on plastic bags were the consumers and the workers in the plastic manufacturing industries. We are not convinced on the evidence before us that that is the case. The 1<sup>st</sup> and 3<sup>rd</sup> respondents’ contention that the members of the public have enthusiastically switched to more environmentally friendly carrier bags has not been controverted by the petitioners. The same applies to the 1<sup>st</sup> and 3<sup>rd</sup> respondents’ contention that the operations at the plastic factories are continuing since not all types of plastic bags and products were banned.

92. The 1<sup>st</sup> petitioner also contended that although it was consulted, the subject of consultation was different from the conclusion or decision that was made by the 1<sup>st</sup> respondent. As we have stated above, the discussions that were held between the 1<sup>st</sup> and 3<sup>rd</sup> respondents and the stakeholders in the plastic industry during the period 2014/2015 concerned the ban on the use of plastic carrier bags in Kenya. It is not true as the 1<sup>st</sup> petitioner claimed that the consultation was limited to the management of plastic waste. Again as was stated in the case cited above, the duty that was placed upon the 1<sup>st</sup> and 3<sup>rd</sup> respondents by law was to inform, consult and obtain the views of the public. They were not obliged to accept the views which were given by the stakeholders. The fact that the 1<sup>st</sup> respondent decided to ban plastic carrier bags instead of adopting the other proposals for managing plastic waste suggested by the stakeholders does not nullify the public participation exercise that was conducted by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

93. In the case of British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others (supra), the court stated that:

*“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.”*

94. Due to the foregoing, we are satisfied that the 1<sup>st</sup> and 3<sup>rd</sup> respondents conducted the process of public participation before issuing the impugned Gazette Notice.

#### **Whether the impugned Gazette Notice met the requirements for parliamentary scrutiny under the Statutory Instruments Act, 2013**

95. The second issue is whether the impugned Gazette Notice met the requirement for parliamentary scrutiny under the Statutory Instruments Act. The petitioners contended that the impugned Gazette Notice did not meet the requirements for parliamentary scrutiny under Section 11 of the Statutory Instruments Act.

96. The Statutory Instruments Act was enacted in 2013. The object of this Act is to provide a comprehensive regime for the making, scrutiny, publication and operationalisation of statutory instruments. The legal framework on parliamentary scrutiny of statutory instruments is contained in Part IV (Section 10 to Section 19) of the Act.

97. It is clear from the language of the Act that the purpose of the above legal framework is to facilitate the scrutiny, by Parliament, of statutory instruments and to outline the circumstances and manner in which the statutory instruments may be disallowed. The overall objective of the legal framework is to ensure that every statutory instrument that is required to be scrutinized by parliament is scrutinised. Where the relevant Committee of Parliament resolves that the statutory instrument should be revoked, the committee is required to submit a report containing a resolution to that effect only.

98. The petitioners contended that the 1<sup>st</sup> respondent did not cause the impugned Gazette Notice to be laid before parliament within seven days from the date of publication. They argued that the said Gazette Notice was null and void because it was not laid before Parliament within seven days from the date it was published. In response, the respondents argued that the requirement for parliamentary scrutiny was met because before the expiry of the seven days, the Hon. Olago Aluoch, Member of Parliament for Kisumu West Constituency, on behalf of the 1<sup>st</sup> petitioner, caused the impugned Gazette Notice to be laid before Parliament through a public petition. The petition together with the Gazette Notice were committed to a departmental committee of Parliament for consideration.

99. The fact that the Hon. Olago Aluoch presented the petition together with the Gazette Notice to Parliament is not contested. Similarly, it is not disputed that the petition together with the Gazette Notice were committed to a departmental committee of Parliament and the Committee considered the petition together with the Gazette Notice and made recommendations. It was also common ground that Parliament did not revoke the impugned Gazette Notice. The public petition by the 1<sup>st</sup> petitioner read as follows:

#### **PUBLIC PETITION**

**BY THE KENYA ASSOCIATION OF MANUFACTURERS**

**ON THE BAN ON THE USE, MANUFACTURE AND**

**IMPORTATION OF PLASTIC BAGS**

**I, UNDERSIGNED on behalf of members of Kenya Association of Manufacturers DRAW the attention of the House to the following:**

**1. THAT, the Environment Cabinet Secretary, via a Gazette Notice dated 28th February 2017, announced a ban on plastic bags use, both domestic and commercial use, which ban is scheduled to take effect six months from the date of the said Gazette Notice;**

**2. THAT, polythene is one amongst materials found in the environment and that a large portion of these waste materials are not being collected and treated in an environmentally sound manner to ensure disposal and this is a real challenge to the environment;**

**3. THAT, the Global Waste Management Outlook for 2015, a report by the United Nations Environment Program (UNEP) and the International Solid Waste Association (SWA) stated that *“inadequate waste management has become a major public health, economic and environmental problem, with 7-10 billion tonnes of urban waste produced each year and 3 billion people worldwide lacking access to controlled waste disposal facilities fueled by a population growth, urbanization and rising consumption, the volumes of waste are likely to even double in lower income African and Asian cities by 2013”*;**

**4. THAT, the ban imposed by the Cabinet Secretary for Environment does not resolve the problems identified by experts or create a sustainable approach to addressing the problem.**

**5. THAT, there are over 176 plastic manufacturing companies in the country which is 3.4% of all the manufacturers combined;**

**6. THAT, the cost value of the plastic manufacturing sector is in excess of Kenya Shillings 88 Billion;**

**7. THAT, the direct employment created by the plastic sector is over 289 of the Kenyan employees which is approximately 60,000 while the indirect employment through retailers, wholesalers and outlets is well over 600,000 personnel nationwide and their annual turnover is over Kenya Shillings 100 Billion;**

**8. THAT, any interference with the sector in terms of a prohibition would restrict the country's competitive edge with EAC and in the region, and**

**9. THAT, the issues in respect of which this Petition is made are not pending before any court of law, constitutional or legal body.**

**THEREFORE your humble petitioners PRAY that the National Assembly, through the Departmental Committee on Environment and Natural Resources.**

**a) Recommends suspension of the implementation of the Gazette Notice since the notice given is too short;**

**b) Recommend amendment to the Environment Management and Co-ordination Act No. 8 of 1999 to ensure inclusion of fiscal incentives such as Green Levy Fund, Tax incentives on capital goods and tax rebates to industries promoting management, and imposition of fines for littering in unlawful places among others; and**

**c) Recommend establishment of a waste management levy to be charged on all plastic at source (point of entry) at one**

**percent of the value equivalent to the product's cost insurance and freight. The funds should be collected by the Treasury through the Kenya Revenue Authority and allocated to the Ministry of Environment and the National Environment Management Authority**

**And your PETITIONERS will ever pray,**

**PRESENTED BY**

**signed**

**Hon. John Olago Aluoch, MP**

**MEMBER FOR KISUMU WEST CONSTITUENCY**

100. The question that calls for an answer is whether the presentation of the Gazette Notice to Parliament by way of public petition as opposed to the delivery of the Gazette Notice to the Clerk of the House by the Cabinet Secretary and its consideration by the Departmental Committee on Environment and Natural Resources met the criteria for parliamentary scrutiny. In our view, it did. We say so for two reasons. Firstly, the overall objective of the concept of parliamentary scrutiny of statutory instruments is to afford Parliament the opportunity to interrogate the statutory instrument and revoke it if it deems fit. In this regard, parliament's power to interrogate and revoke statutory instruments is unfettered. Secondly, besides the procedural framework on parliamentary scrutiny set out under Part IV (Section 10 to Section 19) of the Statutory Instruments Act, Articles 37 and 119 of the Constitution and Standing Orders Number 219, 220, 222,225 and 227 provide for public petitions as an alternative mechanism through which Parliament may be invited to undertake scrutiny of legislation.

101. Article 37 of the Constitution, gives every person a right to present petitions to public authorities while Article 119 of the Constitution gives every person the right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. Article 119 further gives Parliament the power to formulate a procedural framework for the exercise of this right by the public.

102. Pursuant to Articles 119 of the Constitution, Parliament enacted Part XXIII of the Parliamentary Standing Orders to provide an elaborate framework for presentation, consideration and disposal of public petitions. Standing Order No. 219 in Part XXIII of the Standing Orders defines a petition as:

**a written prayer to the house under Article 37 or 119 of the Constitution by a member of the public requesting the house to consider any matter within its authority, as contemplated in Article 94 and 95 of the Constitution, including enacting, amending or repealing any legislation.**

103. A petition to the House is either submitted to the Clerk by the petitioner and reported to the House by the Speaker or presented by a member of parliament on behalf of the petitioner with the consent of the Speaker under Standing Order No. 220. A Member of Parliament intending to present a petition is required to give the Clerk two sitting days' notice of intention to present the petition. The Clerk then examines the petition to ensure that it is presented in the manner, form and content prescribed by the Standing Orders. On the appointed day, the Speaker directs the Member to present the petition to the House, and the Member takes to the floor of the House, reads the petition and lays the petition on the Table of the House. Every petition presented to the House stands committed to the relevant Departmental Committee of the House and the Committee has sixty days within which to consider the petition. This elaborate framework in the Standing Orders is intended to afford Parliament the opportunity to scrutinize and act on the petition. Where the petition calls for the revocation or the repeal of the delegated legislation, the Committee scrutinises the legislation to establish the merit of the petition.

104. There is uncontroverted evidence that the impugned Gazette Notice was presented to Parliament by the Hon. Olago Aluoch as an annexure to the 1<sup>st</sup> petitioner's petition to Parliament urging Parliament to suspend the Gazette Notice. Seized of the petition and the Gazette Notice, Parliament committed the petition and the Gazette Notice to the relevant Departmental Committee. The Committee considered the petition and the Gazette Notice and prepared a report. The Committee did not recommend the revocation of the Gazette Notice as required under Section 15 (1) of the Statutory Instruments Act or under Standing Order No. 227.

Consequently, the Gazette Notice remains in force as a statutory instrument.

105. The petitioners urged us to find that the Gazette Notice was not scrutinised by Parliament. They relied on the decision in 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 (supra). While we agree with the findings of the court in the cited case that parliamentary scrutiny of statutory instruments is a mandatory requirement, we are of the view that the facts of that case are distinguishable. In the *Kenya Country Bus Owners Association case*, the statutory instrument was not tabled in the House for scrutiny at all. In the present dispute, the statutory instrument was tabled in the House through a public petition within the framework of Article 119 of the Constitution and Standing Order Number 220 and it was scrutinized by Parliament's Departmental Committee on Environment and Natural Resources.

106. The petitioners faulted the fact that the Gazette Notice was considered by the National Assembly's Committee on the Environment and Natural Resources instead of the Committee on Delegated Legislation. In our view, that cannot be a basis for contending that the requirement for parliamentary scrutiny was not met. Once the instrument was laid on the Table of the House, it became a property of the House and it was the duty of the House to commit the instrument to the proper Committee. We note that in its 23<sup>rd</sup> Sitting held on 06/04/2017 the Departmental Committee on Environment and Natural Resources sought to know if the Committee on Delegated Legislation was seized of the same matter.

107. The other reason why we hold the view that Parliament was afforded the opportunity to scrutinise the impugned Gazette Notice is the fact that the Departmental Committee had the unfettered power to recommend its revocation. Had it done so and the House accepted the recommendation, the Gazette Notice would have stood revoked notwithstanding the fact that its tabling in the House took the route prescribed by Article 119 of the Constitution as opposed to the route prescribed by the Statutory Instruments Act.

108. In light of the foregoing, our finding on this issue is that, although the impugned Gazette Notice was not forwarded to the Clerk of the National Assembly as contemplated by Section 11 of the Statutory Instruments Act, it was nonetheless laid on the Table of the House by the Honourable Olago Aluoch M.P through a public petition by the 1<sup>st</sup> Petitioner pursuant to Article 119 of the Constitution and Standing Order No. 220.

#### **Whether the impugned Gazette Notice was subject to and satisfied the requirement for a regulatory impact statement under Sections 6, 7, 8 and 9 of the Statutory Instruments Act**

109. The petitioners contended that the Gazette Notice imposed significant costs on the stakeholders in the plastic sector and ought to have been preceded by a regulatory impact statement as required under Section 6 of the Statutory Instruments Act. They urged the court to annul the Gazette Notice on the ground that it was not preceded by a regulatory impact statement. On their part, the respondents contended that the impugned Gazette Notice was exempted from the requirement for a regulatory impact statement under Section 9(g) of the Act.

110. Section 6 of the Statutory Instruments Act requires that where a statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority should prior to making the statutory instrument prepare a regulatory impact statement about the instrument. Among other features, the regulatory impact statement is supposed to contain: objectives of the instrument and the reasons for the objectives; statement explaining the effect of the instrument; statement of other practicable means of achieving those objectives; an assessment of the costs and benefits of the proposed instrument and any other practicable means of achieving the same objectives; the reasons why the other means are not appropriate; and a draft copy of the proposed statutory instrument. The assessment of costs and benefits is expected to include an assessment of the economic, environmental and social impact and the likely administrative and compliance costs.

Section 9 (g) of the Act provides as follows:

**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-**

**(g) a matter arising under legislation that is substantially uniform or complementary with legislation of the National Government or County.**

111. The question to be answered is whether the material statutory instrument was substantially uniform or complementary with a legislation of the National or County Government so as to fall within the exemption contemplated under Section 9 (g) of the Statutory Instruments Act. The respondents contended that the Gazette Notice was a policy regulation made under Section 86 of EMCA and for this reason; it fell within the exemption under Section 9 (g). The petitioners countered this, by contending that "a total ban on plastic carrier bags is a whole new kettle of fish that is not uniform with any legislation or policy". They added, "nor can it be said to be complementary (i.e supports or reinforces) for there is no such legislation or policy".

112. The tenor and import of Section 9 (g) of the Statutory Instruments Act was the subject of interpretation by the Court of Appeal in British American Tobacco Ltd. v Cabinet Secretary for the Ministry of Health & 5 Others (supra). In that case, the appellants challenged regulations made under the Tobacco Control Act, 2007 on the ground that the regulations were not preceded by a regulatory impact statement. The respondents contended that the regulations were exempted under Section 9 (g) of the Statutory Instruments Act because they were uniform with and complementary to the Tobacco Control Act. The Court adopted the Black's Law Dictionary (9th Edition) definition of the word **uniform** as "**characterized by lack of variation, identical or consistent**". The Court further adopted the Concise Oxford English Dictionary (12th Edition) definition of the word "**complementary**" as "**(of two or different things) combining in such a way as to form a complete whole or enhance each other**". Based on that definition, the court held that because the impugned regulations derived their existence directly from the Tobacco Control Act, and were subsidiary legislation made under the powers donated by Section 53 of the Act for the purpose of better carrying out the objects of the Act, they were complementary to the Act hence enjoyed exemption under Section 9 (g) of the Statutory Instruments Act.

113. In the dispute before us, the impugned Gazette Notice was issued under Sections 3 and 86 of EMCA. Section 3 of EMCA sets out the general principles of environmental governance in Kenya. Section 86 donates to the Cabinet Secretary responsible for environment power to take certain specified measures to protect the environment.

114. We have carefully examined the impugned Gazette Notice and the provisions of EMCA and are satisfied that the Gazette Notice complements the general environmental governance principles set out in Section 3 of EMCA. We are therefore satisfied that the Gazette Notice enjoys exemption under Section 9 (g) of the Statutory Instruments Act. Our finding on this issue therefore is that, the impugned Gazette Notice was not subject to the requirement for a regulatory impact statement under Section 6 of the Statutory Instruments Act.

### **Whether the impugned Gazette Notice violated the petitioners' right to fair administrative action**

115. This issue is connected to the issues considered above. The petitioners contended that the impugned Gazette Notice is null and void having been issued in violation of the requirements for fair administrative action under Article 47 of the Constitution and Section 5 of the Fair Administrative Action Act. In essence, the petitioners' contention is that the rules of natural justice were not observed in the issuance of the said Gazette Notice. The petitioners alleged that the impugned Gazette Notice is tainted with bias and that, they were neither given notice nor were they heard before it was issued.

116. In the Indian Supreme Court case of Ajit Kumar Nag v G.M.(PJ), Indian Oil Corpn. Ltd.,(2005) 7 SCC 764 that was cited in All India Plastic Industries Association v Government of NCT of Delhi, Writ Petition(Civil) No. 883 of 2009 & CM 4355/2009, 14<sup>th</sup> July, 2009 the court stated as follows:

*"But we are also aware that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in straightjacket. They must yield to and change with the exigencies of situations. They must be confined within their limits and cannot be allowed to run wild.....While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. In our opinion, the approach of the court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential."*

117. As we have observed above, the 1<sup>st</sup> and 3<sup>rd</sup> respondents consulted major stakeholders in the plastic industry before issuing the ban on plastic carrier bags. We are of the opinion that the requirement for a hearing was met when major stakeholders in the plastic industry who would be most affected by the ban were consulted on the issue and their views taken. It was not practicable to consult and take the views of every Kenyan who had an interest in plastic bags before the said ban was imposed.

118. We are in agreement with the petitioners that the 1<sup>st</sup> and 3<sup>rd</sup> respondents may not have complied strictly with the notification

requirements provided under Section 5 of the Statutory Instruments Act. However we are satisfied that the spirit of that section was met in that the 1<sup>st</sup> and 3<sup>rd</sup> respondents reached out to major stakeholders in the plastic industry, notified them of what they had intended to do, sought and obtained their views.

119. On the issue of bias, no evidence was placed before us to show that the 1<sup>st</sup> respondent was biased against any of the petitioners. The impugned Gazette Notice did not prohibit all plastic bags. The ban only affected carrier and flat bags for domestic and commercial use which were considered to be a major source of plastic waste. There is no evidence that in banning these categories of plastic, the 1<sup>st</sup> respondent was actuated by ill will. The reason given for the ban is in our view reasonable.

#### **Whether the impugned Gazette Notice violated the petitioners' legitimate expectation**

120. On the issue of violation of legitimate expectation, again, we are not satisfied that that was proved. In their book, Judicial Review of Administrative Action, 6<sup>th</sup> Edition, Sweet & Maxwell, De Smith, Woolf & Jowell, at page 609. have outlined the following key features of the doctrine of legitimate expectation:

*“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle of fairness that legitimate expectation ought not to be thwarted. The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public.”*

121. The petitioners did not place any evidence before us showing that the respondents had at any time promised or induced them to believe that plastic bags would not be banned. In the circumstances, we are unable to see any basis for the petitioners' alleged expectation that the plastic bags could not be banned by the 1<sup>st</sup> respondent. We are not satisfied therefore that the impugned Gazette Notice violated any legitimate expectation.

#### **Whether the 1<sup>st</sup> respondent acted *ultra vires* her powers under Sections 3 and 86 of EMCA in issuing the impugned Gazette Notice**

122. The petitioners contended that the 1<sup>st</sup> respondent acted *ultra vires* her powers because Sections 3 and 86 of EMCA did not empower her to ban plastic bags. They argued that these sections only gave power to the 1<sup>st</sup> respondent to issue guidelines and prescribe measures for the management of plastic waste. In response, the respondents argued that environmental rights are fundamental rights and that the petitioners are enjoined to cooperate with the State in ensuring that the environment is protected and safeguarded. They contended that the ban on plastic has ensured the environment is protected and the right to a clean environment is safeguarded. They added that alternatives to plastic bags are now being used since the plastic ban was implemented. They invited the court to uphold the impugned Gazette Notice as a way of enforcing the right to a clean and healthy environment.

123. The respondents submitted that Section 3 of EMCA spells out the principles to be applied in the management of the environment which include sustainable development as a development model for meeting the needs of the present generation without compromising the ability of future generations and the precautionary principle which calls for the prevention of harmful activities and substances that may pose a threat to the environment even without conclusive scientific proof that links the substance or activity to environmental damage. The respondents also argued that Section 86 of EMCA confers power to the 1<sup>st</sup> respondent to identify materials and processes that are harmful to the environment and prescribe measures for management of the materials and processes.

124. A proper understanding of Sections 3 and 86 of EMCA requires that the two sections be interpreted in a manner that meets the constitutional underpinnings on the environment. For this reason, it is necessary for us to consider in detail the relevant provisions of the Constitution.

125. The primacy of the environment can be discerned from the Constitution of Kenya. The preamble states among others that:

**We, the people of Kenya-RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations:**

126. Article 20 (2) of the Constitution provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. These rights include the right to a clean and healthy environment in Article 42 of the Constitution.

Article 42 of the Constitution provides as follows:

**Every person has the right to a clean and healthy environment, which includes the right—**

**(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and**

**(b) to have obligations relating to the environment fulfilled under Article 70.**

127. Article 69 of the Constitution provides as follows:

**(1) The State shall—**

**a) Ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;**

**b) .....**

**c) .....**

**d) encourage public participation in the management, protection and conservation of the environment;**

**e) .....**

**f) .....**

**g) eliminate processes and activities that are likely to endanger the environment; and**

**h) .....**

**(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.**

128. Article 72 of the Constitution mandated Parliament to enact legislation to give full effect to the provisions on the right to a clean and healthy environment as provided under Part 2 of Chapter 5 of the Constitution. Pursuant to this Article of the Constitution, Parliament amended EMCA through the Environmental Management and Coordination (Amendment) Act No. 5 of 2015 (EMCAA, 2015).

Section 3 of EMCA as amended by EMCAA, 2015 provides as follows:

**1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and the relevant laws and has the duty to safeguard and enhance the environment.**

**2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.**



**(2A) every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.**

**3) If a person alleges that the right to a clean environment has been, is being or is likely to be denied, violated, infringed, or threatened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in public interest apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to –**

**a) prevent, stop or discontinue any act or omission deleterious to the environment;**

**b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;**

**c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this act;**

**d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and**

**e) provide compensation for any victims of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.**

**4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action – (a) is not frivolous or vexatious; or (b) is not an abuse of the court process.**

**5) In exercising the jurisdiction conferred upon it under subsection**

**6) (the Environment and Land Court shall be guided by the following principles of sustainable development;**

**(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;**

**(b) the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;**

**(c) the principle of international co-operation in the management of environmental resources shared by two or more states;**

**(d) the principles of intergenerational and intergenerational equity;**

**(e) the polluter-pays principle; and**

**(f) the pre-cautionary principle.**

129. Section 86 of the same Act as amended provides as follows:

**The Cabinet Secretary shall, on recommendation of the Authority -**

**(1) identify materials and processes that are dangerous to human health and the environment;**

(2) issue guidelines and prescribe measures for the management of the materials and processes identified under subsection (1);

(3) prescribe standards for waste, their classification and analysis, and formulate and advise on standards of disposal methods and means for such wastes; or

(4) issue regulations for the handling, storage, transportation, segregation and destruction of any waste.”

130. We are not in agreement with the petitioners that the 1<sup>st</sup> respondent did not have power under Sections 3 and 86 of EMCA to ban plastic bags. Besides the Constitution guaranteeing the right to a clean and healthy environment to every person, Article 69 of the Constitution sets out the obligations of the State in respect of the environment. One of these is the requirement to ensure sustainable exploitation, utilisation, management and conservation of the environment. The State is also enjoined to eliminate processes and activities that are likely to endanger the environment.

131. We are of the view that, if the law enacted by Parliament pursuant to Article 72 under the obligations on the environment does not give the 1<sup>st</sup> respondent power to eliminate processes and activities that are harmful and likely to endanger the environment, then such a law would fail to meet the constitutional requirement of giving effect to the right to a clean and healthy environment. The court in construing such a law would be required by Article 20 of the Constitution to develop it so as to give effect to the right in question.

132. As we have highlighted above, Article 69 of the Constitution among others imposes an obligation on the State to *eliminate processes and activities that are likely to endanger the environment*. The Oxford Advanced Learner’s Dictionary defines the word “**eliminate**” as “**to remove or get rid of something**” while “**ban**” is defined as “**to decide or say officially that something is not allowed**”. The synonym of “ban” is “prohibit”. This means that banning is one of the ways of eliminating processes and activities that are likely to endanger the environment.

133. In our view, the right to a clean and healthy environment is the highest form of right in the hierarchy of constitutional rights. This is because a clean and healthy environment is the sustainer of life itself which is the trajectory on which all other forms of rights gravitate. The right to a clean and healthy environment is fundamentally a right to life. In the case of Peter K. Waweru v Republic [2006] eKLR, the court stated that:

*“Under section 71 of the Constitution all persons are entitled to the right to life - In our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man, it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.”*

134. In the case of Nzioka & 2 Others v Tiomin Kenya Limited[2001] eKLR, the court while considering the balance of convenience held that environmental degradation is not necessarily an individual concern or loss but a public loss. The convenience to be considered in such a matter is not only that of the parties but also of the public at large so that if the injunction was not issued, any form of feared degradation, danger to health and pollution was to the detriment of the population. This case was decided prior to the promulgation of the 2010 Constitution which provides for the right to a clean and healthy environment.

135. The courts in other jurisdictions have also defined the right to a clean and healthy environment. In the Supreme Court of Philippines case of Oposa v Factoran 224 SCRA 792 which involved grant of timber license agreements to corporations for commercial logging purposes, the petitioners through their parents sought to stop the Department of Environment and Natural Resources from issuing licences to cut timber, invoking their right to a healthy environment enshrined in the Constitution of the Philippines. The court stated that the right to a balanced and healthy ecology incorporated in the Constitution carried with it the duty to refrain from impairing the environment and implies among other things, the judicious management and conservation of the country’s forests.

136. The court ruled that the petitioners could for themselves, their generation and succeeding generations, file a class suit. This decision was based on the concept of intergenerational responsibility as far as the right to a balanced and healthy ecology was concerned. The court came up with the expression “*rhythm and harmony of nature*” and held that every generation has a

responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthy ecology.

137. In the Nigerian case of Gbemre v Shell Petroleum Co. Nigeria Ltd. & Others (2005) AHRLR 151 (NgHC 2005), the applicants argued that the gas flaring in the course of oil extraction violated their right to life and a healthy environment. The applicants argued that connected to their right to life and dignity, was the right to enjoy the best attainable state of physical and mental health as well as the right to a general satisfactory environment favourable to their development.

138. The court held that the fundamental right to life and dignity of the human person as guaranteed by the Constitution inevitably includes the right to a clean, poison-free, pollution-free healthy environment. The court found that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in continuing to flare gas in the course of their oil exploration and production in the applicant's community was a gross violation of their right to life including healthy environment and dignity of human person as enshrined in the constitution.

139. Although we are not experts on plastic and cannot render ourselves authoritatively on the issue as to whether plastic is harmful or not, we cannot avoid considering and expressing ourselves on the arguments that were put before us on the issue. The petitioners did not dispute that unless handled properly, plastic produces waste that would potentially cause significant environmental degradation. The petitioners' argument was that plastic waste is capable of effective management through recycling to minimise the amount of plastic reaching the disposal stage.

140. The petitioners argued strongly that the plastic *per se* was not the problem and that the 1<sup>st</sup> and 3<sup>rd</sup> respondents acted unreasonably and out of proportion in banning plastic carrier bags instead of targeting plastic waste. The petitioners argued that plastic has positive social and environmental aspects and stressed that the negative impacts can be managed and that the ban on plastic was arbitrary, irrational and unjustified.

141. The 1<sup>st</sup> petitioner argued that the respondents had stated in their affidavits that plastic carrier bags are blown around and consumed by livestock and wildlife to their peril, and that tonnes of plastic end up in the ocean endangering flora and fauna without giving any evidence to back that assertion.

142. The 1<sup>st</sup> petitioner urged the court to approach the issue not on the basis of plastics being an unmitigated environmental evil but as a useful product with tremendous social utility with both positive and adverse environmental impacts, which are capable of amelioration by proper waste management. It argued that plastic waste management schemes have been successfully developed and implemented in other jurisdictions. It urged that paper made from trees preferred by the respondents would not be a suitable option to plastic as it would have a negative impact on our forest cover.

143. The 1<sup>st</sup> petitioner argued that plastic is an extremely cost effective, versatile and durable synthetic product made from oil by-product used in various sections such as packaging, construction, transportation, health care and electronics. It averred that plastic for domestic use is recyclable and gave the United Kingdom(UK) as an example of countries which had introduced or were in the process of introducing recycling schemes.

144. From the undated British Broadcasting Corporation (BBC) report cited by the 1<sup>st</sup> petitioner, we have noted that the Polyethylene terephthalate (PET) and High-density polyethylene (HDPE) bottles in the UK were collected by 92% of the Councils while the low density polyethylene carrier bags were only collected by some supermarkets and recycled into low grade uses such as bin bags. The report indicated that the carrier bags were not generally collected from households for recycling although it was expected that mixed plastic recycling would soon be underway in the UK.

145. The 1<sup>st</sup> petitioner contended that although all plastic bag manufacturers faithfully remitted Excise Duty levies which were to augment the Government funds to specifically address plastic waste management as agreed in the joint implementation plan, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents failed to fulfill their commitments under the said plan and did not channel the accumulated funds towards developing a plastic waste management program as envisaged. The 1<sup>st</sup> petitioner contended that this state of affairs led to manufacturers of plastics being blamed and public perception being created that the manufacturers are the source and cause of the plastic waste menace in the country.

146. On his part, the 3<sup>rd</sup> Petitioner argued as we have stated above that plastic is not a problem, and that what poses a challenge to the environment is the plastic litter and the "throw away culture" of Kenyans. The 3<sup>rd</sup> Petitioner contended that the 3<sup>rd</sup> respondent

ignored the requirement to consider less restrictive means to achieve the intended objective.

147. The 3<sup>rd</sup> petitioner argued that the impugned Gazette Notice pre-empted the National Waste Management Bill and the Report by the National Assembly's Departmental Committee on Environment and National Resources pending before Parliament. He urged the court to recommend that parliament provides a mechanism for managing the challenges of plastic litter. The 3<sup>rd</sup> petitioner opined that the ban was a knee jerk reaction and yet there was no impending doom to warrant the summary execution.

148. We have considered the able arguments by the counsels for the petitioners on the social and economic benefits of plastic and the approaches the respondents should have taken in dealing with plastic waste. We are not persuaded that the benefits to be derived from plastic outweigh its negative effects on the environment. We are also not persuaded that the approach that was taken by the 1<sup>st</sup> and 3<sup>rd</sup> respondents in dealing with the threat that plastic poses to the environment was unreasonable. To the contrary, we are persuaded by the arguments by the respondents that the ban on plastic bags will work positively to protect the environment from plastic waste.

149. As we have mentioned above, the petitioners blamed the 1<sup>st</sup> and 3<sup>rd</sup> respondents for failing to fulfil their obligations under the joint implementation plan for the sustainable management of plastic waste of 29/6/2007. The 1<sup>st</sup> petitioner also mentioned the recommendation it made in 2016 for the setting up of a public private partnership venture for the imposition of a levy that was to be utilised in the sustainable management of plastic waste to show that the 1<sup>st</sup> respondent had other ways of managing plastic waste apart from total ban.

150. EMCA defines the "polluter-pays principle" to mean that the cost of cleaning up any element of the environment damaged by pollution is to be paid or borne by the person convicted of pollution under the Act or any other applicable law. The polluter pays principle essentially requires that the polluter should bear the expenses of carrying out pollution prevention or paying for damage caused by pollution. Our view on these submissions is that the 1<sup>st</sup> respondent was not under an obligation to employ the polluter pays principle in the management of plastic waste.

151. We are of the view that the 1<sup>st</sup> respondent was at liberty to employ one or series of initiatives to deal with the plastic problem. As we have stated earlier, during the stakeholder consultations, several proposals were made to the 1<sup>st</sup> and 3<sup>rd</sup> respondents on how to tackle the plastic waste. We have made a finding above that the 1<sup>st</sup> respondent was not obliged to accept any of the proposals. The 1<sup>st</sup> respondent did not therefore commit any error in her failure to implement the other initiatives and strategies that had been proposed to deal with the plastic menace which the petitioners referred to as "less restrictive".

152. The petitioners cited countries like South Africa and Uganda where the plastic ban was unsuccessfully implemented. We are aware that there are jurisdictions that have successfully banned the manufacture and use of plastic bags with the objective of protecting and conserving the environment. Rwanda which is a member of the East African Community successfully banned plastic bags in 2008. We are not convinced that the plastic ban imposed by the 1<sup>st</sup> respondent is doomed to fail because similar initiatives in other jurisdictions have not seen the light of the day.

153. In a ruling that was delivered in the Indian case of Maharashtra Plastic Manufacturers Association v State of Maharashtra and Another on 13<sup>th</sup> April, 2018 on an interlocutory application, the Bombay High Court, declined to stay the Maharashtra State Governments' decision to ban plastic materials and require citizens to dispose the existing stock within 3 months. In that case, the State Government had issued a notification imposing a ban on the manufacture, use, sale, distribution and storage of all plastic materials such as one-time use bags, spoons, plates, PET bottles and also thermocol items. The manufacturers argued that the prohibition on plastic was illegal and the State did not have the powers to impose the ban via an executive fiat. In support of the ban, the State had cited the plastic waste as well as the deaths of whales and cows which were found to have kilograms of plastics in their stomachs. The plastic manufacturers and retailers challenged the notification which gave them 3 months to clear their stock on the ground that the ban was arbitrary, bad in law and violated their fundamental right to livelihood.

The court stated as follows:

*"As far as first part [clause 3(1)(1)] of the impugned notification is concerned, it concerns plastic bags and mainly disposable items of plastic and thermocol. It has a direct nexus with the object of reducing the quantity of plastic waste which at present is of 1,200 metric tonnes per day. It appears from the stand of the State Government that plastic carry bags and disposable items such as dish, cups, plates, bowls pouches etc. constitute plastic waste much of which is thrown in public drains, open grounds etc. Considering*

*the object sought to be achieved by the said Act of 2006, the State Government has issued impugned notification. We do not accept that exercise of power by the State Government by the impugned notification imposes unreasonable restrictions on fundamental rights under Article 19(1)(g) of the Constitution of India of the manufacturers of plastic items and those businessmen who deal with storage or sale of the plastic items. Larger public interest has been considered by the State. The adverse impact on environment affects every citizen. .... An argument is canvassed across the bar that the plastic industries would suffer. We are considering the question of reasonableness of restrictions. Possibly, the manufacturers and those who deal with plastic items would suffer in terms of loss of money but, prima facie we are of the view that by the impugned notification, the State Government has put restrictions which are reasonable.”*

154. We are fully in agreement with this decision. This case confirms that dealing with plastic waste is an issue of the moment the world over. From the material before us, this is the same state in which the 1<sup>st</sup> respondent found herself. Although the *Maharashtra Plastic Manufacturers Association* decision was on interlocutory application, it is in accord with our findings herein on the issue as to whether or not the 1<sup>st</sup> respondent acted unreasonably in issuing the impugned Gazette Notice which we have found not to be the case.

155. Due to the foregoing, it is our finding that the 1<sup>st</sup> respondent has power under Sections 3 and 86 of EMCA to ban plastic bags. We therefore reject the petitioners’ contention that the 1<sup>st</sup> respondent acted *ultra vires* the said provisions of EMCA.

**Whether the impugned Gazette Notice violated Articles 1 (1), 2(1) & (2), 3(1), 24, 40,43, 46, 70, 73(1), 153(4) (a), 232 (1) (a), (b), (d) & (e) and 259(1) & (3) of the Constitution**

156. In addition to the other provisions of the Constitution that we have discussed, the petitioners contended that the impugned Gazette Notice also violated the provisions of Articles 1 (1), 2(1) & (2), 3(1), 24, 40,43, 46, 70, 73(1), 153(4) (a), 232 (1) (a), (b), (d) & (e) and 259(1) & (3) of the Constitution. We have already made a finding that the impugned Gazette Notice satisfied the parameters set out in the Constitution, the Statutory Instruments Act and Fair Administrative Action Act in relation to the exercise of executive power to enact delegated legislation. We are of the view that the Constitution should be read as a whole and that the provisions of the Constitution should be interpreted as complementing each other. Having made a finding that the 1<sup>st</sup> and 3<sup>rd</sup> respondents complied with the statutory and constitutional imperatives on delegated legislation, we find no merit in the alleged violation of Articles 1, 2, 3, 70, 73, 153 and 259. We will however consider the alleged violations of Articles 24, 40, 43 and 46 of the Constitution.

157. The 1<sup>st</sup> petitioner argued that the restriction on its rights was wholly disproportionate and as such did not meet the threshold set out under Article 24 of the Constitution for limitation of rights and fundamental freedoms. Article 24 of the Constitution allows the limitation of a right or fundamental freedom in the Bill of Rights by law where that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This has to take into account the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. The 1<sup>st</sup> petitioner argued that the plastic bags ban limited its rights to engage in trade.

158. We have discussed above at length the reasonableness and justification for the impugned Gazette Notice. For the reasons we have given, it is our finding that the limitation of rights imposed through the impugned Gazette Notice is reasonable and justifiable in a democratic society. In our view, the impugned Gazette Notice met the conditions set out in Article 24 of the Constitution. We are not satisfied that the said Gazette Notice offended the principle of proportionality.

159. The 3<sup>rd</sup> Petitioner had also argued that the Gazette Notice infringed the enjoyment of the rights enshrined in Articles 40, 43 and 46 of the Constitution by limiting the enjoyment of those rights without complying with Article 24 of the Constitution. The 3<sup>rd</sup> petitioner contended that the impugned Gazette Notice arbitrarily deprived investors in the plastic industry of their rights to property by shutting down their businesses. With regard to the alleged non-compliance with Article 24 of the Constitution, we reiterate what we have stated above in respect of a similar allegation by the 1<sup>st</sup> petitioner.

160. With regard to the alleged violation of the right to property, we are not satisfied that the petitioners’ rights to property were violated by the 1<sup>st</sup> respondent through the impugned Gazette Notice. There is no evidence that the respondents deprived the petitioners of their property. The petitioners did not demonstrate that the plastic industries were shut down due to the ban on plastic

carrier bags as alleged by the 3<sup>rd</sup> petitioner.

161. The 3<sup>rd</sup> petitioner argued further that the ordinary Kenyans' social and economic rights under Article 43 of the Constitution were violated. The 3<sup>rd</sup> petitioner contended that after the plastic ban, traders were selling food items without wrapping or wrapping it in unhygienic material thereby exposing consumers to the risk of "food borne" diseases. The 3<sup>rd</sup> petitioner also contended that the ban of plastic bags had unreasonably increased the cost of living for the ordinary Kenyan due to the fact that alternative packaging is expensive and has several drawbacks.

162. In our view the fundamental rights under Articles 43 and 46 of the Constitution can be limited under Article 24 of the Constitution. As we have held above, the limitation of rights imposed by the impugned Gazette Notice was reasonable and justifiable and as such accords with Article 24 of the Constitution. It follows therefore that although some ordinary Kenyans may suffer social and economic losses as a result of the ban, the plastic ban is for the common good of the general public and as such lawful. Secondly, the 3<sup>rd</sup> petitioner did not place any evidence before the court in proof of his allegations about the health risks and the increased cost of packaging associated with the ban on plastic carrier bags. It is therefore our finding that the respondents did not violate Articles 43 and 46 of the Constitution.

#### **Whether the punishment prescribed under the plastic bags ban is oppressive and unreasonable**

163. The three (3) suits before us challenged the Gazette Notice dated 28/2/2017 the effect and purport of which was to ban the manufacture and use of certain types of plastic. The Gazette Notice did not prescribe any penalty. The penalty complained of by the 3<sup>rd</sup> petitioner is provided for in Section 137 of EMCA and was not imposed by the 1<sup>st</sup> respondent. The validity of the impugned Gazette Notice cannot therefore be challenged on account of the alleged unreasonableness of the penalty imposed by Parliament. We therefore find no merit in this argument.

#### **Whether the impugned Gazette Notice should be annulled and who should bear the cost of the suit**

164. In light of our findings above, we decline to annul the Gazette Notice dated 28/2/2017 published on 14/3/2017 under Legal Notice numbers 2334 and 2356. The three suits are dismissed accordingly. Since the suits raised weighty issues of public interest, we order that each party bears its own costs.

**Delivered and Dated at Nairobi this 22<sup>nd</sup> day of June 2018**

**S. OKONG'O**

**PRESIDING JUDGE**

**K.BOR**

**JUDGE**

**B.M.EBOSO**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Amoko & Mr. Dar .....for the 1<sup>st</sup> Petitioner

No appearance.....for the 2<sup>nd</sup> Petitioner

No appearance.....for the 3<sup>rd</sup> Petitioner

Mr. Kamau.....for the 1<sup>st</sup> Respondent

Prof. Mumma & Mr. Wabwoto.....for the 2<sup>nd</sup> Respondent

Mr. Kamau.....for the 3<sup>rd</sup> Respondent

Mr. Anyoka.....for the 4<sup>th</sup> Respondent

Catherine/V. Owuor/Halima.....Court Assistants



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