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## **The Test and Place of Public Participation in Kenya's Governance**

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### **Abstract**

*This paper examines the test and place of Public Participation in Kenya's governance. It is based on an evaluation of findings and key pronouncements by Kenyan courts while determining cases filed before them challenging decisions made by public entities in absence of adequate public participation. The author's reliance on precedents is necessitated by the recognition that there is no stand-alone law on Public Participation in Kenya. However, as it will emerge from the discussion, there have been significant milestones made by Kenyan Parliament towards enactment of a Public Participation Law. Moreover, the author highlights on the practical challenges hindering meaningful public participation at both national and County levels and concludes that the absence of a guiding legal and policy framework is the springboard of all the bottlenecks in conducting effective of public participation in Kenya.*

### **1.0 Introduction**

The promulgation of the Constitution of Kenya 2010 ushered in a paradigm shift in governance by placing people at the centre of public administration.<sup>1</sup> This marked a significant departure from the old order which adopted a top-down approach where government decisions were made by policy makers

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<sup>1</sup> National Assembly Reports, 2020, *A report of the Committee on Parliamentary Broadcasting and Library on the Consideration of the Public Participation Bill 2019.*

without citizens' input.<sup>2</sup> Right from the Preamble of the Constitution 2010, the Principle of Public Participation is well encapsulated and transcends all aspects of governance with Kenyans aspiring for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Further, in exercise of their sovereign and inalienable right to determine the form of governance of their country and participating fully in Constitution making process, Kenyans adopted and enacted the Constitution 2010 for themselves and their future generations.<sup>3</sup> Consequently, the introduction of a devolved system of governance coupled with mandatory requirement for public participation in decision making ensures that Kenyans participate in governance not only in electing their representatives but also in policy formulation, law making and implementation of government programs.<sup>4</sup>

Public participation traces history from the origins of democracy. As the underlying and founding principle of democracy is 'rule by the people', true democracy places people at the centre of decision making.<sup>5</sup> The history of early struggle for citizen driven governance can be seen from the history of various democracies around the world, for example, during the American Revolution and French Revolution. During the American Revolution (between 1765 and 1791), for example, there was a clamour for a government led by people where ordinary citizens expressed interest in politics while political elites advocated for and defended a popular government.<sup>6</sup> There

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<sup>2</sup> GOK, Intergovernmental Relations Technical Committee, *The Status of Public Participation in National and County Governments* Available at <https://countytoolkit.devolution.go.ke/sites/default/files/resources/27.%20The%20Status%20of%20Public%20Participation%20in%20National%20and%20County%20Governments%20.pdf> {Accessed on 16<sup>th</sup> May 2022}.

<sup>3</sup> Preamble, Constitution 2010.

<sup>4</sup> GOK, Intergovernmental Relations Technical Committee, *Ibid*.

<sup>5</sup> Open Society Initiative for Eastern Africa, "Kenya: Democracy and Public Participation" A review by Afrimap, *Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi 2014*. Available on [file:///C:/Users/pc/Downloads/kenya-democracy-political-participation-20140514%20\(1\).pdf](file:///C:/Users/pc/Downloads/kenya-democracy-political-participation-20140514%20(1).pdf) (Accessed on 7<sup>th</sup> June 2022).

<sup>6</sup> Jackson Turner Main, 'Government by the People: The American Revolution and the Democratization of the Legislatures', 1966 available on <https://www.jstor.org/stable/1919237> {Accessed on 5<sup>th</sup> May 2022}.

was an ideological shift as Americans were disappointed by the British government due to lack of direct representation hence decisions passed by colonial legislatures negatively impacted on American affairs. Undeniably, the American struggle for independence and the Civil Rights Movement was characterized by a 'ladder of increasing citizen influence and authority' over government decision making. This American aspiration for a citizen centred governance was not without struggle as there was division with some quarters doubting whether public participation would really achieve equality and inclusion or rather exacerbate class and racial differences.<sup>7</sup> Since the American and French Revolution, public participation in decision making has evolved to become a key feature in governance worldwide.<sup>8</sup> Indeed, the principle of public participation has found room in international legal instruments such as the Universal Declaration of Human Rights(UDHR),<sup>9</sup> International Covenant on Civil and Political Rights(ICCPR),<sup>10</sup> United Nations Convention Against Corruption, Declaration on the Right to Development, African Charter on Human and People's Rights(the Banjul Charter), the Aarhus Convention among others.<sup>11</sup>

Kenya attained independence from Britain in 1963. The post-independence Kenya maintained a centralized governance structure where all government functions were conducted by the central government.<sup>12</sup> An attempt to

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<sup>7</sup> D.P. Moynihan, 'Maximum Feasible Misunderstanding: Community Action in the War on Poverty' 1969 *Free Press*, 866 Third Avenue, New York, N,Y 10022. Available on <https://eric.ed.gov/?id=ED035806> (Accessed on 7<sup>th</sup> June 2022).

<sup>8</sup> Bingham et al., 'The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government' 2005 *Public Administration Review*, Available at [https://www.researchgate.net/publication/249398666\\_The\\_New\\_Governance\\_Practices\\_and\\_Processes\\_for\\_Stakeholder\\_and\\_Citizen\\_Participation\\_in\\_the\\_Work\\_of\\_Government/link/605b78eb299bf1736768585b/download](https://www.researchgate.net/publication/249398666_The_New_Governance_Practices_and_Processes_for_Stakeholder_and_Citizen_Participation_in_the_Work_of_Government/link/605b78eb299bf1736768585b/download) (Accessed on 7<sup>th</sup> June 2022).

<sup>9</sup> Article 21,UDHR.

<sup>10</sup> Article 25, ICCPR.

<sup>11</sup> GOK, Intergovernmental Relations Technical Committee, op.cit.

<sup>12</sup> Margaret Monyani, 'One Party State: Is it good or Bad for Governance' 2018 *E-International Relations* ISSN2053-8626, available at <https://www.e-ir.info/2018/05/25/one-party-state-is-it-good-or-bad-for-governance/> (Accessed on 9<sup>th</sup> June 2022).

dismantle the centralized system of governance was made post-independence through establishment of regional governments (*majimbo*) but this attempt failed as the regional governments were stripped of their powers, financial support and eventually abolished in 1966.<sup>13</sup> A centralized governance structure was characterized by bureaucracy, exploitation and dictatorship as public participation was only exercised at the ballot. The policy makers were not obligated to consult with the public in policy formulation hence most of the laws and policies were passed without undergoing public participation.<sup>14</sup> Public participation was minimal as direct sovereignty of the people was only practiced at the ballot whereby Kenyans voted to choose their representatives.

The independent Constitution did not place much importance on participatory democracy as there were no provisions to enable Kenyans to fully participate in public decision making.<sup>15</sup> This was worsened by a constitutional amendment which declared Kenya a one party state in order to curb the attempted coup in 1982.<sup>16</sup> During the one party rule period, there were many incidents of human rights violations as the government of the day repressed dissenting voices who were opposed to unfair government policies and dictatorship.<sup>17</sup>

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<sup>13</sup> David M. Anderson, 'Yours in Struggle for Majimbo: Nationalism and the Party Politics of Decolonization in Kenya', 2005, *Journal of Contemporary History* Vol.40, No.3 July 2005 , pp547-564, *Sage Publications Inc.*, available on <https://www.jstor.org/stable/30036342> (Accessed on 9th June 2022).

<sup>14</sup> Jennifer A. Widner., *The Rise of a Party-State in Kenya*, 1993 *University of California Press*, University of California, available at <https://publishing.cdlib.org/ucpressebooks/view?docId=ft9h4nb6fv;chunk.id=0;doc.view=print> (Accessed on 9<sup>th</sup> June 2022).

<sup>15</sup> Research Directorate, Immigration and Refugee Board, Canada, 'Restoration of Multiparty Government and Kenyans of Somali Origin', 1<sup>st</sup> March 1992, Canada. Available on <https://www.refworld.org/docid/3ae6a80a28.html> {Accessed on 5th May 2022}.

<sup>16</sup> This amendment made KANU the one and only ruling party in Kenya.

<sup>17</sup> Odinge Odera, 'Jaramogi's Struggle for Multi-Party Politics and Failed Dream to lead Kenya', 2010 *The Standard Business*, May 27<sup>th</sup> 2010, available at <https://www.standardmedia.co.ke/business/business/article/2000010306/jaramogis-struggle-for-multi-party-politics-and-failed-dream-to-lead-kenya> {Accessed on 5th May 2022}.

However, in 1990, there was a new wave for a change in style of governance from one party state to a multi-party state with a view to enable Kenyans form political parties and affiliations of their choice. Consequently, the repeal of section 2(a) of the independent Constitution birthed a new era of multiparty democracy with the first multi-party elections in 1992.<sup>18</sup> The achievement of multi-party democracy provided an opportunity to enhance rights and freedoms hence ushering in a new space in which citizens could participate in public affairs and hold leaders to account.<sup>19</sup> Although the attainment of multiparty democracy was a milestone in Kenya's history, it did not achieve the full ideals of democracy as there was no change of administration hence some of the negative aspects of one party rule persisted.<sup>20</sup> Due to the need for a more concrete foundation for a people centred governance, Kenyans undertook a consultative constitutional reforms dialogue between the 1990s and 2000s which took almost two decades to be completed. The Kenyan constitutional making process was a complex democratic process that culminated into the enactment and promulgation of the Constitution of Kenya 2010. The Constitution 2010 replaced the independent constitution introducing salient entitlements, *inter alia*, a constitutional requirement for citizen involvement in decision making. Consequently, any decision that requires public participation must be subjected to public participation and lack of it or inadequacy thereof renders the decision null and void.

### **1.1 The Principle of Public Participation**

Public participation in governance involves direct or indirect involvement of stakeholders in decision-making about policies, plans or programs in which

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<sup>18</sup> The repeal of section 2(a) removed legal impediments to formation of political parties which saw the formation and recognition of parties such as the National Development Party and Forum for Restoration of Democracy(FORD).

<sup>19</sup> Open Society Initiative, op.cit.

<sup>20</sup> Njogu W. Kiarie, 'Language and Multiparty Democracy in a Multiethnic Kenya', 2004 *Africa Today*, 50(3): 55-73,

available at [https://www.researchgate.net/publication/236770350\\_Language\\_and\\_Multiparty\\_Democracy\\_in\\_a\\_Multiethnic\\_Kenya](https://www.researchgate.net/publication/236770350_Language_and_Multiparty_Democracy_in_a_Multiethnic_Kenya) (Accessed on 9th June 2022).

they have an interest.<sup>21</sup> The term ‘stakeholders’ may be construed as persons, groups or organizations that may influence or be affected by policy decisions or place a claim on an organization or other entity’s attention, resources or outputs.<sup>22</sup> Public participation cannot be equated to mere consultation. According to Black’s Law Dictionary ‘consultation’ is defined as *‘the art of asking the advice or opinion of someone* while ‘participation’ is defined as *‘the act of taking part in something, such as partnership...hence participation more generally refers to the process of engagement.*<sup>23</sup> Governance encompasses formal and informal processes of decision-making and management of domains of collective community interest or concern.<sup>24</sup> Therefore, democratic governance requires more public participation in governance over and beyond representation by elected representatives. Public participation is a key aspect of modern democracy as the people are accorded an opportunity to shape the discourse of policy formulation, law making and implementation of public programs.

In most legislations as well as academia, the term ‘citizen participation/engagement’ has been used interchangeably with public participation. However, the use of the term ‘citizen participation/engagement’ renders a narrow interpretation of public participation as it seems to suggest that only citizens have a right to be involved in public decision making, hence locking out other stakeholders like Civil Society Organizations who are not natural persons.

The Constitution 2010 does not define Public Participation but in the Public Participation Bill 2019, public participation is defined *as the involvement and consultation of the public in decision making processes of the relevant State Organs and Public Offices*; while ‘public’ comprises the citizens of

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<sup>21</sup> Kathryn S. Quick and John M. Bryson, ‘Public Participation’, 2016, in the *Handbook in Theories of Governance* Jacob Torbing and Chris Ansell(eds.), Edward Elgar Press, Chapter 12.

<sup>22</sup> Kathryn S.Quick and John M.Bryson., *ibid.*

<sup>23</sup> See the definition of ‘consultation’ and ‘participation’ in the Black’s Law Dictionary.

<sup>24</sup> Kathryn S.Quick and John M.Bryson, *ibid.*

Kenya and any professional, civic, non-governmental, private or public body.<sup>25</sup>

From case law, the South African Court in *Doctors for Life International vs. Speaker of the National Assembly and Others*<sup>26</sup> construed “public involvement” to mean *the process of allowing the public to participate in the decision-making process* where to “involve” includes to ‘bring a person into a matter’ while ‘participation’ refers to ‘taking part with others (in an action or matter)’; thus public involvement regards the active involvement of members of a community or organization in decisions which affect them. In addition, the court opined that the phrase ‘facilitate public involvement’ is a broad concept, which relates to the duty to ensure public participation in decision making process.<sup>27</sup>

From the various definitions, the common denominator in public participation is the involvement of the public/people in decision making to the effect that members of public are accorded an opportunity to participate freely in decision making and their views are considered. Public participation may therefore be construed as a process of engagement in governance where people deliberate and take collective action on various interests that affect them.<sup>28</sup> This is based on the rationale that citizens are important stakeholders in a functioning democracy and must therefore be accorded an opportunity to participate in formulation, adoption and implementation of laws, policies and programs.

In public participation, there are two principal duties of public entities which are; the duty to provide meaningful opportunities for public participation and the duty to take measures to ensure that people have the ability to take

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<sup>25</sup> National Assembly of Kenya, *Public Participation Bill No.2 of 2019*.

<sup>26</sup> CCT12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

<sup>27</sup> *Doctors for Life Case*, ibid.

<sup>28</sup> Antony Mbithi, Damiana Ndambuki and Fredrick Owino Juma, ‘Determinants of Public Participation in Kenya County Governments’, 2018, *Journal of Asian and African Studies*. Available on <https://journals.sagepub.com/doi/full/10.1177/0021909618794028> (Accessed on 7th June 2022).



advantage of the opportunities provided. Thus, public participation is a continuum that ranges from providing information and building awareness, to partnering in decision-making.<sup>29</sup> The centrality of the 'public' in public participation was underscored by Odunga J. in *Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others*<sup>30</sup> where he stated as follows:

*"Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words, the end product ought to be owned by the public"*

## **2.0 Legal Framework on Public Participation in Kenya**

Currently there is no stand-alone law on public participation in Kenya. This void has left to speculation many aspects of meaningful public participation such as the questions as to what constitutes adequate public participation, nature of participation that meets constitutional threshold, effective public participation mechanisms and processes, etc.<sup>31</sup> Nevertheless, the Parliament has taken fundamental steps towards enactment of a legislation to govern implementation of the principle of public participation in Kenya and this effort has culminated into enactment of the Public Participation Bill 2019 which is currently pending at the National Assembly. Similar efforts have been made by various County Governments which have enacted laws on public participation although implementation remains a challenge largely due to lack of regulations to operationalize them, inadequate institutional set up and budgetary constraints.

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<sup>29</sup> *Doctors for Life Case*, op.cit.

<sup>30</sup> (2014)eKLR.

<sup>31</sup> GOK, Intergovernmental Relations Technical Committee, op.cit

Consequently, in determining cases challenging lack of public participation, courts have invoked the provisions of the Constitution 2010, statutes such as the County Government Act, 2012 and sectoral laws that embody provisions on public participation as well as precedents.

## **2.1 The Constitution 2010**

The Constitution 2010 establishes the normative framework for public participation, prescribes mandatory provisions for public participation in policy formulation and law making, establishes institutions for public participation and directs on the enactment of legislation and establishment of statutory agencies for effective public participation.<sup>32</sup> Within the Constitutional dictates and international law, public participation has been construed as a right of the people to participate in governance.<sup>33</sup> This right confers the public with an entitlement to participate in decision making where their interests may be affected and any breach thereof is enforceable by courts of law or tribunals. In order to sufficiently safeguard the public's right to give inputs in decision making, the Constitution has identified key areas where public participation must be undertaken including, governance,<sup>34</sup> law and policy making processes, involvement of persons with disabilities,<sup>35</sup> environmental management,<sup>36</sup> petitioning Parliament,<sup>37</sup> public finance management (budgeting and development of finance bills), planning, infrastructural developments, service delivery etc.

In recognition of the fact that public participation is embedded on the sovereignty of the people, Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Indeed, the courts have reiterated this by observing that public participation is anchored on the principle of the

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<sup>32</sup> GOK, *ibid.*

<sup>33</sup> Muigua Kariuki, 'Towards Meaningful Public Participation in Natural Resources Management in Kenya', 2014 available on [https://kmco.co.ke/?page\\_id=1464](https://kmco.co.ke/?page_id=1464) (Accessed on 1<sup>st</sup> July 2022).

<sup>34</sup> Constitution 2010, Article 10

<sup>35</sup> Constitution 2010, Articles 54, 55, 56, and 57

<sup>36</sup> Constitution 2010, Article 69

<sup>37</sup> Constitution 2010, Article 119,

sovereignty of the people “that permeates the Constitution and in accordance with Article 1(4) of the Constitution is exercised at both national and county levels”. Under Article 10, public participation has been entrenched as a national value and a principle of governance which binds all State organs, State Officers, Public Officers and all persons whenever any of them—(a) applies or interprets the Constitution;(b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.<sup>38</sup>

In order to empower people to participate in the law making process, Article 118 of the Constitution obligates Parliament to conduct its business in an open manner, ensure that its sittings and those of its committees are open to the public and facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

Other provisions for public participation under the Constitution 2010 include Article 201 which enumerates public participation as one of the principles of public finance, Article 221(5) which requires the National Assembly budget committee to undertake public participation in discussing and reviewing annual budgetary estimates and Article 232 where public participation is listed as one of the values and principles of public service. Further, under Article 174, one of the objects of devolution is to give powers of self-governance to the people and enhance their participation in governance as well as empowering communities to manage their own affairs. Article 196 enjoins County Assemblies to facilitate public participation and involvement in the legislative process as well as other business of the County Assembly and its Committees.

## **2.2 County Governments Act, 2012**

In the Fourth Schedule of the Constitution 2010, County Governments are tasked with ensuring and coordinating participation of communities in

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<sup>38</sup> The national values and principles of governance under Article 10 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.

governance and building their capacities to get involved in meaningful public participation.<sup>39</sup> The County Governments Act 2012 provides for the principle of public participation and processes of participation at the County level and has dedicated Chapter VIII as the framework for public participation at the County level. To this end, sections 87 to 115 provides for the principle of public participation and stipulates the mechanisms and processes for effective public participation at the Counties.<sup>40</sup>

### **2.3 Public Finance Management Act, 2012**

The Public Finance Management Act 2012(PFMA) provides mechanisms through which citizens can engage the national and county governments on matters concerning public finance. Section 10(2) enjoins the Parliamentary Budget Office to undertake public participation in the budgeting process while section 137 establishes County Budget and Economic Forum which is mandated to provide a means for consultation in development of County plans, County Fiscal Strategy Paper and County Budget review and Outlook Paper.

### **2.4 Intergovernmental Relations Act, 2012**

The purpose of this Act is to establish mechanisms for consultation and cooperation between the National and County Governments pursuant to Articles 6 and 189 of the Constitution. Under section 3, public participation is stated as one of the objects of the Act so as to provide for consultation between the two levels of government through their representatives subject to consultation with the public. Section 4 reiterates public participation as one of the national values and principles of governance under Article 10 of the Constitution and as a principle of intergovernmental relations. Other provisions for public participation in various matters under the Act include sections 5(d), 20(g), 29 and 38.

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<sup>39</sup> Constitution 2010, Fourth Schedule.

<sup>40</sup> See generally Chapter VIII of the County Government Act, 2012 which embodies provisions on principles of citizen participation in counties; citizen rights to petition and challenge; duty to respond to citizen's petitions or challenge; matters subject to local referenda and establishment of modalities and platforms for citizen participation.

## **2.5 Sectoral Laws and Policies**

As a principle of good governance, public participation has been entrenched in sectoral laws such as the Wildlife Conservation and Management Act, 2013(WCMA), Environmental Management and Coordination Act 1999(EMCA), Forests Conservation and Management Act 2016(FCMA), Urban Areas and Cities Act, 2012, etc.

## **2.6 Public Participation Bill, 2019**

The objective of this Bill is to give effect to the provisions of the Constitution regarding public participation,<sup>41</sup> provide for the parameters for public participation and define the obligations of State Organs and Public Offices in conducting public participation and connected purposes.

Under section 5, the guiding principles for public participation are well stipulated. Accordingly, in conducting public participation a State Organ or Public Office shall be guided by the following principles, (a)the need to provide timely access to relevant information relating to Public Offices and State Organs policy formulation and implementation; (b) the national values and principles of governance as provided for under Article 10 of the Constitution; (c) the values and principles of public service as set out under Article 232 of the Constitution; (d) principles of public finance as set out under Article 201 of the Constitution; (e) recognition and promotion of the role of non-state actors participation in decision making processes; (f) the values and principles of leadership and integrity under Chapter Six of the Constitution; (g) promotion of partnerships between Public Offices and State Organs and the non-state organs in decision making processes; and (h) the participation of the women, youth and persons with disabilities in decision making processes.

Section 6 stipulates the obligations of State Organs and Public Offices in regard to public participation which include: establishing structures for public participation as may be required for effective participation; ensuring

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<sup>41</sup> Articles 10(2) (a), 69(1) (d), 118, 174 (c), 184(1) (c), 196(1) (b), 201(a) and 232 (1) (d) of the Constitution 2010 makes provisions for public participation in various aspects of governance.

that public participation activities are inclusive and not limited to sector stakeholders; providing the public with information on how public participation is to be undertaken and how decisions shall be made; allocating adequate financial resources for undertaking public participation; ensuring that clear and reasonable timelines are established for public involvement at every stage of decision making and inform the public on the timelines.

Moreover, State Organs and Public Offices are required to: establish a monitoring and evaluation framework for public participation processes; enhance participation through civic education for purposes of creating an enlightened and empowered citizenry; request by formally inviting sector stakeholders to make submissions through memoranda on issues under deliberation; implement set standards and guidelines regarding public participation and publish notices inviting the public to provide input on comments on a matter under deliberation in accordance with section 10.

Further, public institutions should ensure that public inputs are analyzed and the decision made is communicated to the public including a summary of the inputs made and the reasons for the decisions within reasonable timelines; ensure that all persons have fair and equal access to the public participation processes; ensure timely access to information by the public on the subject matter under deliberation and the issues to be addressed and that information on public participation is tailored to meet the needs of persons with disabilities, older members of the society and the less educated citizens and may include the use of Braille and local languages.

Under Section 8, the Bill provides for the rights of the members of public to attend public participation fora; make presentations either orally or by way of written submission to a State Organ or Public Office, to be accorded a reasonable time to make a presentation and to make presentations without interruption or influence by a State or Public Officer.

Section 11 provides for notification to the public where State Organs or Public Offices are obligated to ensure that a notice of at least twenty one days is given to the public through advertisement in at least two local dailies of wide circulation in the country, radio or any other mechanisms for

dissemination of information. Under section 12, public institutions are required to take affirmative measures to ensure that marginalized groups participate in policy formulation including creating mechanisms that ensure that marginalized groups have timely access to information relating to Public Offices and State Organs. The right of review is provided for under section 13 which states that a person aggrieved by a decision of a State Organ or Public Office on any matter relating to public participation may petition a State Organ or Public Office for review of the decision while section 14 invalidates decisions made in absence of public participation.

Under the Bill, it is an offence for a public institution to fail to adhere to the principles and obligations of public participation, punishable by a fine not exceeding three hundred thousand shillings or imprisonment for a term not exceeding six months or to both.

### **3.0 The Test of Public Participation in Kenya: An Analysis of Case Law**

Since the promulgation of the Constitution 2010, questions of the rationale, scope and application of public participation as a principle of governance has been subject of litigation resulting in landmark decisions by Kenyan courts. The legal conundrums in public participation involve major questions as to what constitutes legitimate and meaningful public participation, who should be involved in public participation (matters of representation, inclusivity, power and authority/control), knowledge and information dynamics as well as challenges of designing adequate public participation processes.

In the landmark ruling of Odunga J in *Robert Gakuru Case*, the Judge dealt with some of these questions as follows;

*“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in*

*general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”*

In terms of the qualitative and quantitative aspects of public participation the Judge observed;

*“the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is 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 a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.<sup>42</sup> The reasonableness test as propounded by Odunga J above requires that a reasonable opportunity and facilitation to participate is accorded to the public. By this test, it is not mandatory that views so generated must prevail. From South African jurisprudence in *Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others*<sup>43</sup>, the court*

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<sup>42</sup> In arriving at this decision the judge cited the judgement of South African Court in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*.

<sup>43</sup> (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)



was of the view that being involved does not mean that one's views must necessarily prevail especially where they are in direct conflict with government policies. A similar position was taken by Lenaola J. in *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others*<sup>44</sup> where he stated that public participation is not the same as saying that public views must prevail. From the judgement of Odunga J above, the reasonableness test depends on the circumstances of each case. Majanja J. concurs with this view in *Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 5 Others*<sup>45</sup> where stated that "the National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public."

Similarly, in *Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance(NASA) Kenya & 6 others*<sup>46</sup>, the court observed that allegations of lack of public participation must be considered in the peculiar circumstances of each case and the mode, degree, scope and extent of public participation should be determined on a case by case basis. The court expressed the need for the public to be informed as to the length of consultations and the issues for consultation as well as provision of mechanisms to enable the widest reach possible to the public.

Essentially, what the Courts are saying is that whereas the views expressed by the public are not necessarily binding on the public institutions, due consideration must be given to them before they are dismissed. In terms of the degree of participation the test is that of reasonableness which is an objective standard sensitive to the facts and circumstances of a particular case.

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<sup>44</sup> Petition No. 486 of 2013.

<sup>45</sup> Petition No.454 of 2012(2013) eKLR

<sup>46</sup> Civil Appeal No. 224 of 2017; [2017] eKLR

## Supreme Court Jurisprudence

The Supreme Court of Kenya is the highest court in the country and its judgements are binding to lower courts in accordance to the Constitutional hierarchy and the doctrine of *Stare Decisis*<sup>47</sup>. The Supreme court of Kenya has dealt with appeals from lower courts challenging decisions made in absence of adequate public participation and in discharge of its mandate, the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs. Cabinet Secretary of the Ministry of Health & 4 Others*<sup>48</sup> delimited the guiding framework for public participation in Kenya to guide lower courts in determining cases challenging decisions made in absence of public participation.

In this case, the appellant vide a petition dated 31<sup>st</sup> March 2017 appealed against the judgment of the Court of Appeal in *Civil Appeal No. 112 of 2016* for upholding the judgment of the High Court in High Court Petition No. 143 of 2015, *British American Tobacco Kenya Limited vs. Cabinet Secretary for Ministry of Health & 4 Others*. At the High Court, the applicant alleged that the Cabinet Secretary for Health and the Tobacco Control Board did not consult with the tobacco industry stakeholders in developing the Tobacco Control Regulations 2014 and that where there was such engagements, the same were limited and entirely unsatisfactory.

Briefly, the facts of the case was that upon enactment of the Tobacco Control Regulations 2014, the appellant who is a stakeholder in the tobacco sector was aggrieved by the provisions of the Regulations and filed a petition in the High Court on 15<sup>th</sup> April 2015, challenging the lawfulness of the Regulations and section 7(2) of the Tobacco Control Act 2007 on the grounds, *inter alia*, that they were enacted in contravention of the provisions of Statutory Instruments Act(SIA) and violated the Constitutional requirement of public participation. The High Court, through Mumbi J, held that there was

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<sup>47</sup> *Stare Decisis* means 'to stand by things decided' and is essentially the doctrine that courts will adhere to precedent in making their decisions.

<sup>48</sup> *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* Sup Ct. Pet. 5 of 2017; [2019] eKLR.

sufficient public participation and consultation in the formulation of the Tobacco Control Regulations 2014<sup>49</sup> and that, except for Regulations 1, 13(b) and 45, the provisions were neither unconstitutional nor unlawful nor did they violate any right of the appellant, the affected party or the tobacco industry players.<sup>50</sup>

Having not been satisfied with the judgement of the High Court, the appellant filed their memorandum of appeal to the Court of Appeal raising 17 grounds of appeal. In its judgement delivered on 17<sup>th</sup> February 2017, the Court of appeal concurred with the High Court that there was sufficient public participation and consultation conducted in developing the Regulations and buttressed that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation.

The appellant case before the Supreme Court was anchored on Article 163(4)(a) of the Constitution claiming that the matter involved issues of constitutional interpretation and application. The appellant alleged breach of section 5(1)<sup>51</sup> and 6<sup>52</sup> of the Statutory Instruments Act(SIA) and Article 10 of the Constitution. In regard to SIA, the appellant submitted that there was non-compliance with section 5(1) SIA which requires that where a proposed Regulation is likely to have a substantial direct or indirect impact upon business or restrict competition, the regulatory authority is required to consult with persons likely to be affected. In reliance to section 6 of the SIA,

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<sup>49</sup> Published in the Kenya Gazette 5th December 2014 as Legal Notice No. 169 (Legal Supplement No. 161). These Regulations were enacted pursuant to Section 53 of the Tobacco Control Act, 2007 which gives the Cabinet Secretary powers to make Regulations prescribing or prohibiting anything required by the Act to be prohibited, or for the better carrying out of the objects of the Act.

<sup>50</sup> See High Court ruling in High Court Petition No. 143 of 2015, *British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 4* for details.

<sup>51</sup> Section 5(1) of the Statutory Instruments Act(SIA) requires a Regulation making authority to make appropriate consultations with persons who are likely to be affected by a proposed statutory instrument before making the statutory instrument.

<sup>52</sup> Section 6 of the SIA imposes an obligation on a Regulation making authority to prepare a Regulatory Impact Statement if a proposed Regulation is likely to impose significant costs on the community or part of a community.

the appellant submitted that the implementation of the Regulations would impose significant costs on the tobacco industry and the community at large yet there was no Regulatory Impact Statement obtained by the Board pursuant to section 6 of the Statutory Instruments Act.

The petition raised 15 points of law<sup>53</sup> from which the Supreme Court delimited five issues for determination. Regarding public participation, the Supreme court was called upon to determine *whether the process leading to the making of the Tobacco Control Regulations 2014 was unconstitutional for lack of public participation.*

On 26<sup>th</sup> November 2019, the Supreme Court upheld the judgement of the Court of appeal by finding that there was adequate public participation in the making of Tobacco Control Regulations 2014 as evidence adduced indicated that *the stakeholder meetings, discussions and communications undertaken constituted adequate public participation under the Constitution of Kenya 2010.*

### **Guiding Principles**

In this case, the Supreme Court in exercise of its mandate under section 3 of the Supreme Court Act delimited a framework for public participation based on the following guiding principles:

1. *As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.*
2. *The Public Officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.*

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<sup>53</sup> The following points of law were raised as regards public participation\_\_1. *What do the principles of 'public participation' under Article 10 of the Constitution and 'appropriate consultations' under Section 5 of the Statutory Instrument Act 2013 (SIA) require in respect of the development of the Regulation?;* 2. *Was there compliance with the requirement for consultation under the SIA and/or public participation under the Constitution in making the Regulations?;* and 3. *What is the effect of non-compliance with the requirements for public participation and consultation; and/or the preparation of a proper RIS on the Regulations?*

3. *The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.*
4. *Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement.*
5. *There is need for both quantitative and qualitative components in public participation.*
6. *Public participation is not an abstract notion; it must be purposive and meaningful.*
7. *Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.*
8. *Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.*
9. *Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.*
10. *Components of meaningful public participation include the following:*
  - a. *clarity of the subject matter for the public to understand;*
  - b. *structures and processes (medium of engagement) of participation that are clear and simple opportunity for balanced influence from the public in general;*
  - d. *commitment to the process;*
  - e. *inclusive and effective representation;*
  - f. *integrity and transparency of the process;*
  - g. *capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.*

In conclusion, the test of public participation in Kenya therefore is the *reasonability test/test of reasonableness* which depends on the circumstances of each case. This reasonability test has been applied widely by Kenyan courts including the Supreme Court in the recently concluded appeal challenging the legality of Constitutional amendments proposed in the Constitution of Kenya (Amendment) Bill 2020, popularly known as the Building Bridges Initiative (BBI).<sup>54</sup>

#### **4.0 The Role of Public Participation in Governance**

Public Participation is a fundamental tenet of a functioning democracy. Such democracy must be founded on sound decisions that correspond to the needs of the society and a reasonable level of involvement in decision making. Sovereignty of the people comprises all citizens and requires citizen participation in order to achieve legitimate objectives. Indeed, public participation arises out of necessity for the need to promote the overall good amidst multiple interests. This section discusses the key roles of public participation in promoting good governance in Kenya.

#### **4.1 Safeguarding the Sovereignty of the People**

In *British American Tobacco Case*, the Supreme Court observed that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of sovereignty of the people. Through public participation, Kenyans are empowered to continue to find their sovereign place in governance which they have delegated to both the National and County Governments. The role of public participation in safeguarding the sovereignty of the people was aptly captured by Supreme Court while reiterating the words of the Retired Chief Justice, Dr. Willy Mutunga who stated as follows;

*“ In the entire history of constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya's Constitution 2010 is a story of ordinary citizens striving to overthrow, and succeeding in*

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<sup>54</sup> See generally the Supreme Court judgement in *Supreme Court Petition No.12 of 2021, Attorney General & 20 Others vs. David Ndii & 79 Others*, para.582 and 583.

*overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens have a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation.<sup>55</sup>*

Indeed, as Mwilu DCJ observed in *Supreme Court Petition No.12 of 2021, Attorney General & 2 Others vs. David Ndi & 79 Others*, public participation enables the people to safeguard their sovereignty by participating in all aspects of governance. In her words;

*“[577] A common thread that emerges is that under our constitutional dispensation, the sovereignty of the People takes a vital centre stage. Since all sovereign power belongs to the people, they must play a significant constitutional role as contemplated under the Constitution. Participation of the people is one of the recognised national values and principles of governance listed in Article 10 of the Constitution. Public participation permeates the sphere of governance and legislative processes, public access and participation including conduct of Parliament and County Assembly business must all have a measure of public participation.”*

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<sup>55</sup> See the Supreme Court judgement in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* Sup Ct. Pet. 5 of 2017; [2019] eKLR

## 4.2 Compliance with Laws and Regulations

In Kenya, public participation is a legal requirement both under the Constitution 2010 and certain statutes. Thus, State Organs and Public Offices must discharge their legal obligation of undertaking public participation in matters that the Constitution or statutes require to be subjected to public participation. A breach of this obligation renders the decision null and void. In *Republic vs. Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others*<sup>56</sup> the court of Appeal emphasized on the need to comply with public participation under Article 10 of the Constitution by stating, “*Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles..., the reading of the express provisions of Section 3 of the Public Procurement and Asset Disposal Act, 2015 as read with Articles 10 (2)(b) and 227 of the Constitution lead us to find that as a general principle (subject to limited exceptions) public participation is a requirement in all procurement by a public entity.*”

The need for compliance with the law on public participation was also buttressed by Supreme Court in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others*<sup>57</sup> as follows;

*“Public participation is the cornerstone of sustainable development and it is so provided in the Constitution...Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both*

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<sup>56</sup> No. 378 of 2017; [2017]

<sup>57</sup> [2014] eKLR



*political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted.”*

### **4.3 Enhancing Legitimacy and Responsiveness of Public Institutions**

The consideration and inclusion of views of the public in decisions is an indicator that public institutions are responsive to the needs of the people. This way, government institutions are accountable to the public. Through public participation, public institutions are able to respond to the needs of the people rather than imposing their own ideas. In *Doctors for Life International vs. Speaker of the National Assembly and Others*<sup>58</sup> the South African court was of the view that participation by the public on a continuous basis provides vitality to the functioning of representative democracy as it encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made and enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.

### **4.4 Achieving Ideals of Democracy**

A meaningful participation of citizens in governance is the distinguishing feature of a democratic society which is judged by the extent to which it provides opportunities for citizen participation and the space accorded to hold governments accountable.<sup>59</sup> Democracy requires that people have a right to determine what affects them hence public participation leads to responsive and democratic governance as public ideas, values and issues are considered in decision making.<sup>60</sup> Through involvement of the people in decision making process, public agencies are able to work directly with the people by ensuring that public concerns and aspirations are understood and considered in decision making. This empowers the people as the decision making power is derived from them. Therefore, by involving the public in

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<sup>58</sup> [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

<sup>59</sup> Open Society Initiative, op.cit.

<sup>60</sup> Jordy Horntvedt, ‘Five Reasons to involve Others in Public Decisions’, 2022, University Of Minnesota Extension Available at <https://extension.umn.edu/public-engagement-strategies/five-reasons-involve-others-public-decisions> {Accessed on 27th May 2022}.

decision making, public institutions become more legitimate due to close links with citizens hence increased reputation and opportunities for active public engagements.<sup>61</sup>

#### **4.5 Entrenching Social Justice**

Involvement of the public in projects that affect the society ensures equity and fairness in decision making as the members of the society are accorded an opportunity to give their input. Given the complexities of community issues, collaborative decision making ensures that the decision making agencies are able to understand community needs and aspirations rather than imposing unilateral decisions that may not lead to sustainable solutions.<sup>62</sup> Moreover, well designed public participation mechanisms and processes ensures consultation with marginalized groups into the mainstream decision making hence strengthening social cohesion and inclusivity.<sup>63</sup>

#### **4.6 Facilitating Oversight, Checks and Balances on Public Institutions**

Public participation gives an opportunity to members of the public to play a watchdog role in public administration hence ensuring transparency and accountability in governance. This reduces instances of corruption and bad governance. Through public participation, decision making agencies are open to public scrutiny as to the objectives and considerations for making various decisions hence entrenching transparency and accountability in the process.<sup>64</sup> Similarly, through public participation people are informed of various aspects and consideration in decision making and provided with the relevant information, they are empowered to challenge outcomes that fall short of effective public participation, for instance where public views are unjustifiably ignored. Public participation therefore supplements the formal centralized means of conducting checks and balances by ensuring that

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<sup>61</sup> Involve.Org, 'The True Cost of Public Participation' 2005 available on [https://www.involve.org.uk/sites/default/files/field/attachemnt/True-Costs-Full-Report2\\_3.pdf](https://www.involve.org.uk/sites/default/files/field/attachemnt/True-Costs-Full-Report2_3.pdf) (Accessed on 27th May 2022).

<sup>62</sup> Oliver Bates, 'Six Reasons Why Public Participation and Community Engagement are Important', 2019, available on <https://www.socialpinpoint.com/blog/6-reasons-to-participate-community-engagement/> {Accessed on 27<sup>th</sup> May 2022}.

<sup>63</sup> Involve.Org., op.cit.

<sup>64</sup> Oliver Bates., op.cit.

oversight over decision making on public matters is conducted at the community level.<sup>65</sup>

#### **4.7 Informing the Public**

Through public participation, members of the public are provided with balanced and objective information that is fundamental in understanding problems, alternatives, opportunities and solutions.<sup>66</sup> Public Participation promotes moral and intellectual growth of citizens due to their active involvement in decision making and levels the playing ground by granting citizens an equal opportunity to influence decisions. This was noted by the South African Constitutional Court in *Poverty Alleviation Network and Others vs. President of the Republic of South Africa & 19 Others*<sup>67</sup> where the court stated:

*“... engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears, and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”*

#### **4.8 Understanding Public Problems and Generating Mutually Agreeable Solutions**

Through meaningful public participation, public interests, values, expectations and needs are identified and considered in decision making process. Similarly, public participation forums gives an opportunity to public agencies to understand a problem more deeply from a perspective of affected groups as well as the role and contributions of the community towards generating solutions.<sup>68</sup>

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<sup>65</sup> Involve.Org.,op.cit.

<sup>66</sup> Government of New Zealand, ‘Benefits and Disadvantages of Public Participation’ available on <https://www.doc.govt.nz/Documents/science-and-technical/sfc308a.pdf> {Accessed on 27th May 2022}.

<sup>67</sup> CCT 86/08 [2010] ZACC 5.

<sup>68</sup> Wouters M.,et.al., ‘Evaluating Public Input in National Management Plan Reviews: Facilitators and Barriers to Meaningful Public Participation in Statutory Processes’, 2011 available on

#### **4.9 Giving Legitimacy to Public Decisions**

The top-down approach to decision making reduces the legitimacy of decisions as the public are informed of the decision 'after the event' hence they can easily boycott such unilateral decisions. On the other hand, decisions reached through public participation are appreciated and accepted by the public hence reducing conflicts; are sufficiently informed and there is public support and good will hence ease of implementation and cooperation and trust between the public body and citizens.<sup>69</sup> Through public participation, public agencies are able to tap on a wide variety of skills and experiences from the members of the public hence enriching decisions.

Moreover, involvement of the public in project design to implementation ensures that the public understand the objectives and purpose of government projects and programs. Ultimately, programs and projects established pursuant to adequate public participation bears the approval and ownership of the people hence sustainability and successful implementation. Once projects are owned by the people, public institutions are able to save on cost and time as there are reduced instances of conflicts and unnecessary litigation. At the individual level, public participation promotes patriotism and trust in public administration.<sup>70</sup>

Illustratively, in *Doctors for Life International vs. Speaker of the National Assembly and Others*<sup>71</sup> it was observed that in the legislative process "*If legislation is infused with a degree of openness and participation, this minimizes dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality*

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[https://www.researchgate.net/publication/294520100\\_Evaluating\\_public\\_input\\_in\\_national\\_park\\_management\\_plan\\_reviews\\_Facilitators\\_and\\_barriers\\_to\\_meaningful\\_participation\\_in\\_statutory\\_processes](https://www.researchgate.net/publication/294520100_Evaluating_public_input_in_national_park_management_plan_reviews_Facilitators_and_barriers_to_meaningful_participation_in_statutory_processes) {Accessed on 27th May 2022}.

<sup>69</sup> Muigua Kariuki, op.cit.

<sup>70</sup> Anthony Mbithi.,op.cit.

<sup>71</sup> (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

*of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.”*

#### **4.10 Promoting Equitable Distribution of Resources**

In a top-down approach to governance, there is wastage of public resources as public investments are made in projects or areas that are not viable to the needs of the people. Public participation in budget making process plays important roles of setting and aligning government priorities, projects implementation, monitoring and evaluation and impact assessment.<sup>72</sup> By involving the public in resource allocation, they are able to understand the rationale for prioritizing one project over another, issues of resource constraints, benefits and other considerations hence reducing the likelihood of conflicts regarding resource allocation.

### **5.0 Challenges in Implementing Public Participation in Kenya**

#### **5.1 Lack of an Enabling Legal, Policy and Institutional Framework**

Lack of an enabling policy, legal and institutional framework is the major setback against achieving meaningful public participation in Kenya. This is because the absence of prescribed norms and standards for effective public participation hinders effective implementation of constitutional requirements for public participation. Similarly, this gap has largely affected enforcement of the constitutional right of the people to participate in decision making as courts have had to rely on precedent to give life to the word and spirit of the Constitution.

#### **5.2 Inadequate Civic Education**

Civic education equips the public with knowledge and skills to enable them participate actively in decision making. Currently, there is low civic education at the County level which accounts for low turnout in public

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<sup>72</sup> GOK, Intergovernmental Relations Technical Committee, op.cit.

participation fora since members of the public have not been sensitized on the importance of public participation and mechanisms for participation.<sup>73</sup>

### **5.3 Inadequate Capacity**

Lack of adequate capacity to undertake meaningful public participation concerns many aspects such as lack of financial capacity, human resource, inadequate institutional capacity, etc. The capacity of institutions to conduct meaningful public participation can be enhanced through partnerships between both levels of government, development partners and the private sector.

### **5.4 Corruption**

One of the major roles of public participation is to curb corruption by entrenching transparency and accountability in decision making. Conversely, some dishonest public officers have been involved in acts of corruption in public participation forums whereby money is advanced to certain individuals with a view to rubber stamp the process.

### **5.5 Unfavorable Cultural Attitudes and Practices**

In some communities, public participation by women is minimal as cultural norms require them to occupy themselves with domestic matters rather than public affairs. Indeed, it has been reported from some counties that women who attend public participation forums cannot raise their voices due to fear of speaking in public. To empower women to have their voices heard, counties have been encouraged to enact affirmative action policies to ensure that women are capacitated to air their views. Moreover, there are mixed attitudes towards public participation with critics arguing that public involvement in policy making disrupts the operation of the social system, is costly, time consuming, disregards private interests and triggers conflicts.

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<sup>73</sup> Ndegwa S.N and Minja D., 'The Influence of Civic Education on Public Participation in Governance of Devolved Governments: The Case of Naivasha Sub County, Nakuru County, Kenya', 2018 *The Strategic Journal of Business & Change Management* December 27, 2018 Volume 5, Issue 4, Article 144, pg 2246-2258.

## 5.6 Inadequate Information

Members of the public often have little access to critical information needed for effective public participation such as information concerning policy, plans, budgets, programs and services to be subjected to public consultations.<sup>74</sup> In addition, information on matters such as legislation may be provided in advanced language which may sound intimidating to ordinary members of public hence hindering effective participation. Thus, it is the duty of public agencies to provide relevant information on a timely manner and in a form that is easily understood by the public.<sup>75</sup> The centrality of Access to Information in public participation was underscored by Mrima J. in *KAPs Limited Parking & Another vs. County Government of Nairobi & Another*<sup>76</sup> where he stated as follows;

*“The manner in which public participation is carried out depends on the matter at hand. There is no straight jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded time to interrogate the information and to come up with its views. Fourth, there must be a*

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<sup>74</sup> Ministry of Devolution and Planning, Kenya, ‘Devolution and Participation in Kenya’, 2016 *Civic Education Handout for Participants, 2016*. Available on [https://countytoolkit.devolution.go.ke/sites/default/files/resources/CIVIC\\_EDUCATION\\_TRAINERS\\_MANUAL\\_FOR\\_LEARNING\\_INSTITUTIONS\\_6\\_WEEKS\\_PROGRAMME.pdf](https://countytoolkit.devolution.go.ke/sites/default/files/resources/CIVIC_EDUCATION_TRAINERS_MANUAL_FOR_LEARNING_INSTITUTIONS_6_WEEKS_PROGRAMME.pdf) {Accessed on 27th May 2022}.

<sup>75</sup> Ministry of Devolution and Planning.,.ibid.

<sup>76</sup> Nairobi High Court Constitutional Petition No.104 of 2020.

*defined manner in which the public or stakeholders will tender their response on the matter.”*

From this judgement, it is clear that the role of access to information is critical in achieving meaningful public participation.

### **5.7 Time Constraints**

Due to the high cost of living, many Kenyans spend time on earning a living rather than participating in matters of governance. In addition, it has been argued that due to the need to consult multifaceted groups, it is difficult to reach a consensus hence rendering the process a vicious cycle of disagreements. However, there is need for Kenyans to be sensitized on their civic duty of public participation so that they can create time to attend and participate. This is because decisions on governance affect their day to day lives hence the need to be involved. In terms of issuing notices for public participation fora, public agencies should provide sufficient notice to enable members of the public prepare to attend the meetings.

### **5.8 Inaccessibility of Venues**

Most public participation forums are held in town centres hence it becomes difficult and costly for the rural folk to participate as they incur costs and time accessing venues. In addition, some venues are not physically accessible for persons living with disabilities.

### **5.9 Expectation of Payment**

There has been a trend in most public participation forums for the members of public to expect compensation from public agencies. This undermines the objectives and purpose of public participation as members of the public are not eager to contribute to matters at hand.<sup>77</sup>

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<sup>77</sup> Ministry of Devolution and Planning, *ibid*



### **5.10 Elite Capture**

Due to low awareness by the ordinary members of the public, most public participation forums are dominated by the elite who end up influencing the direction of decision making to secure their interests.<sup>78</sup>

### **Conclusion**

Public participation is critical for good governance in Kenya. Whereas the Constitution 2010 as well as a number of statutes have embodied provisions on public participation, there is no national law to provide a framework for implementation of this fundamental constitutional principle. The courts have done their part by delimiting a guiding framework for determining cases challenging lack of public participation but the buck stops with Parliament to enact a 'one-stop shop' law on public participation. As discussed above, the Parliament has made significant milestones in enacting the Public Participation Bill 2019 but there is an urgent need for the Bill to crystalize into law. Until this is done, the implementation of public participation remains a contentious topic as there are no parameters to guide public institutions on how to undertake meaningful public participation.

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<sup>78</sup> County Government Toolkit, "Challenges of Public Participation" Available on <https://countytoolkit.devolution.go.ke/challenges-of-public-participation> (Accessed on 7th June 2022).

## References

### International Legal Instruments

1. Universal Declaration of Human Rights
2. International Covenant on Civil and Political Rights (ICCPR)
3. United Nations Convention Against Corruption
4. Declaration on the Right to Development
5. African Charter on Human and People's Rights (the Banjul Charter),
6. Aarhus convention

### National Laws

1. Constitution of Kenya 2010
2. County Governments Act, 2012
3. Public Finance Management Act, 2012
4. Intergovernmental Relations Act, 2012
5. Public Participation Bill No.1 of 2019
6. Public Participation Bill No.2 of 2019
7. Environmental Management & Coordination Act 1999 (EMCA)
8. Wildlife Conservation and Management Act 2013
9. Forest Conservation and Management Act 2016

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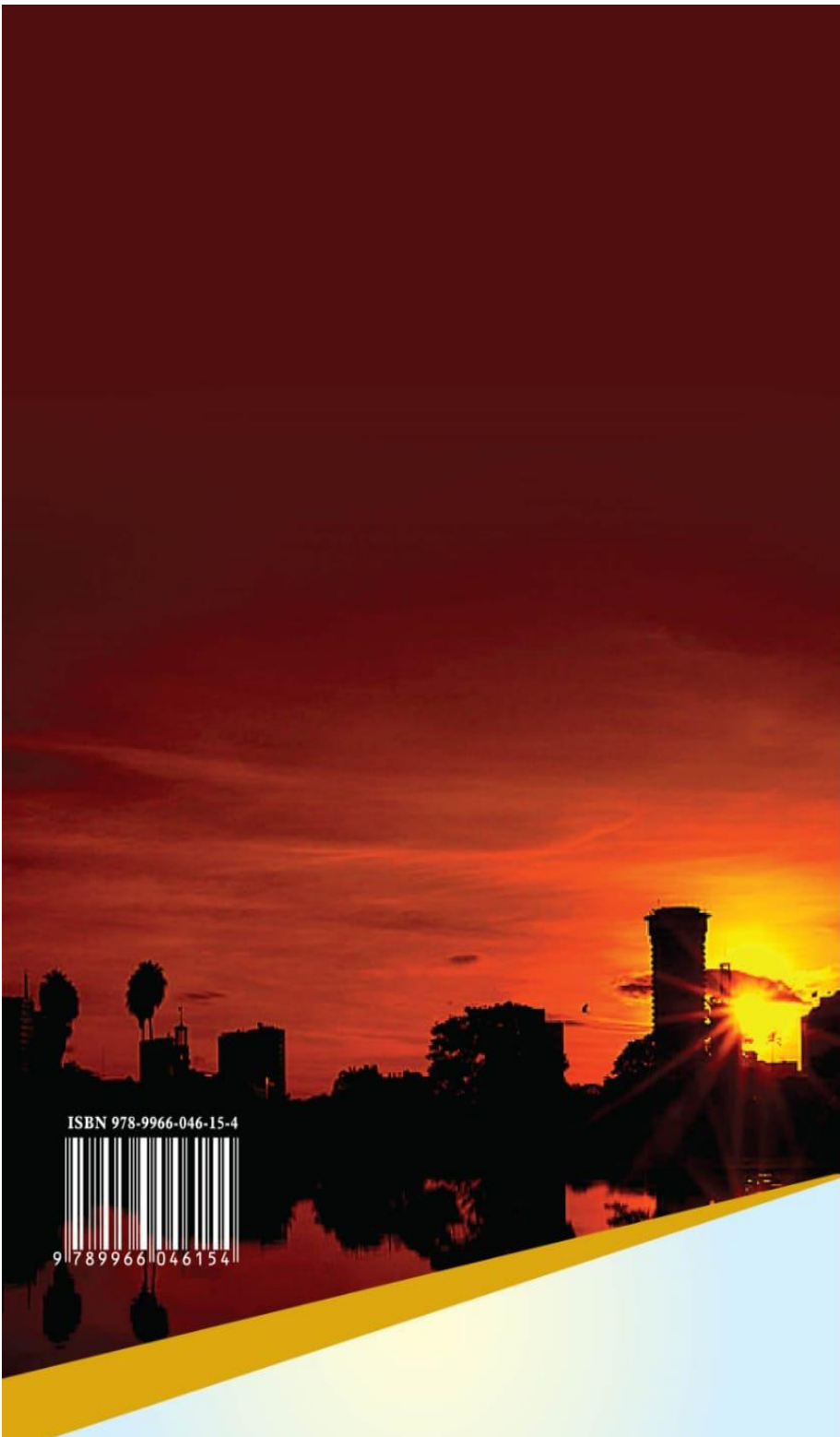
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