



**Ithagi v Energy & Petroleum Regulatory Authority & another (Constitutional
Petition E005 of 2023) [2024] KEHC 483 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E005 OF 2023**

OA SEWE, J

JANUARY 23, 2024

**IN THE MATTER OF THE DECISION BY THE ENERGY & PETROLEUM REGULATORY
AUTHORITY COMMUNICATED VIDE THE PRESS RELEASE DATED 14TH JANUARY
2023 TO ‘CROSS-SUBSIDIZE’ THE PRICE OF DIESEL WITH THAT OF SUPER PETROL**

AND

**IN THE MATTER OF THE FAILURE BY THE ENERGY & PETROLEUM REGULATORY
AUTHORITY TO ADHERE TO THE PRINCIPLE OF PROCEDURAL FAIRNESS,
TRANSPARENCY, ACCOUNTABILITY AND CREDIBILITY AS REQUIRED BY
ARTICLES 24,27,40,201 AND 210 OF THE CONSTITUTION OF KENYA, 2010,
SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

IN THE MATTER OF ARTICLES 27,40,201 AND 210 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE PETROLEUM ACT,
2019, FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

**IN THE MATTER OF CONTRAVENTION OF REGULATION,
7 OF THE PETROLEUM (PRICING) REGULATIONS, 2022**

BETWEEN

KEVIN TURUNGA ITHAGI PETITIONER

AND

**THE ENERGY & PETROLEUM REGULATORY AUTHORITY 1ST
RESPONDENT**

**THE CABINET SECRETARY IN CHARGE OF ENERGY &
PETROLEUM 2ND RESPONDENT**



Decision by EPRA to cross-subsidize diesel prices with super petrol was neither unlawful nor discriminatory.

The petitioner challenged the Energy and Petroleum Regulatory Authority's (EPRA) January 2023 decision to cross-subsidize diesel prices with super petrol, alleging violations of procedural fairness, transparency, and constitutional rights under Articles 10, 27, 40, and 47. The court examined whether EPRA acted within its statutory mandate and upheld constitutional principles, considering the petitioner's claims of discrimination and lack of public participation. Ultimately, the court dismissed the petition, finding the cross-subsidy scheme lawful, justified, and supported by statutory provisions.

Reported by John Ribia

Jurisdiction – jurisdiction of the High Court vis-à-vis the jurisdiction of the Energy and Petroleum Tribunal – where the dispute was on the body with the mandate to implement cross subsidies and on alleged violation of constitutional provisions - whether the High Court lacked jurisdiction to deal with a dispute on the mandate of the Energy and Petroleum Regulatory Authority to implement subsidies and alleged violations of constitutional provisions due to the Energy Act referring disputes under it to Energy and Petroleum Tribunal - Constitution of Kenya, articles 10, 27, 40, 118, 159, 201, and 210; Energy Act (cap 314) sections 23, 24, and 25.

Oil and Gas Law – subsidies – subsidy schemes – mandate to implement oil/gas subsidy schemes – where the Energy and Petroleum Regulatory Authority to cross-subsidized diesel prices with super petrol – legality - whether the decision to cross-subsidize diesel prices with super petrol amounted to the imposition of taxes or levies without legislation - whether the cross subsidy scheme which cross-subsidized diesel prices with super petrol was inconsistent with the legal framework, including the Petroleum Development Levy Order and the Petroleum Development Fund Act - whether the Energy and Petroleum Regulatory Authority acted beyond its mandate under the Energy Act and the Petroleum Act in implementing the cross-subsidy scheme which cross-subsidized diesel prices with super petrol – Constitution of Kenya, article 210; Energy Act (cap 314) sections 9(2), 10, 23, 24, 25, and 36; Petroleum Development Fund Act (cap 426) section 3(1), and 4; Petroleum Development Levy Order, 2020 (cap 426 Sub Leg) order 4; Petroleum (Pricing) Regulations, 2022 (cap 314 Sub Leg) regulation 8.

Constitutional Law – fundamental rights and freedoms – freedom from discrimination - where the Energy and Petroleum Regulatory Authority to cross-subsidized diesel prices with super petrol – where a user of super petrol viewed the decision to be discriminatory - whether a cross-subsidy scheme which cross-subsidized diesel prices with super petrol constituted unfair discrimination against consumers of super petrol as compared to consumers of diesel – Constitution of Kenya article 27; Energy Act (cap 314) sections 9(2), 10, 23, 24, 25, and 36; Petroleum Development Fund Act (cap 426) section 3(1), and 4; Petroleum Development Levy Order, 2020 (cap 426 Sub Leg) order 4; Petroleum (Pricing) Regulations, 2022 (cap 314 Sub Leg) regulation 8.

Constitutional Law – national values and principles of governance – public participation - where the Energy and Petroleum Regulatory Authority to cross-subsidized diesel prices with super petrol – legality - whether decision by the Energy and Petroleum Regulatory Authority to cross-subsidize diesel prices with super petrol was unconstitutional for lack of public participation – Constitution of Kenya article 10; Energy Act (cap 314) sections 9(2), 10, 23, 24, 25, and 36; Petroleum Development Fund Act (cap 426) section 3(1), and 4; Petroleum Development Levy Order, 2020 (cap 426 Sub Leg) order 4; Petroleum (Pricing) Regulations, 2022 (cap 314 Sub Leg) regulation 8.

Brief facts

In April 2021, the Kenyan government introduced fuel subsidies to cushion consumers against rising international petroleum prices. On September 13, 2022, the President announced a policy shift to end the fuel subsidy program. Subsequently, subsidies on super petrol were fully removed, while partial subsidies on diesel and kerosene were retained.



Beginning October 14, 2022, EPRA introduced a cross-subsidy scheme, where the price of super petrol was increased to subsidize diesel prices. The petitioner, a regular super petrol consumer, filed a constitutional petition challenging the Energy and Petroleum Regulatory Authority's (EPRA) decision, communicated via a press release dated January 14, 2023, to cross-subsidize the price of diesel with that of super petrol and maintain a subsidy on Kerosene. The petitioner alleged that the decision was made without consultation or adherence to principles of procedural fairness, transparency, and accountability. The petitioner sought various reliefs, including declarations of illegality, orders of certiorari, prohibition, and mandamus, and an accounting of funds collected and applied under the scheme.

Issues

- i. Whether the High Court lacked jurisdiction to deal with a dispute on the mandate of the Energy and Petroleum Regulatory Authority to implement subsidies and alleged violations of constitutional provisions due to the Energy Act referring disputes under it to Energy and Petroleum Tribunal.
- ii. Whether the decision to cross-subsidize diesel prices with super petrol violated article 210 of the Constitution, which prohibited the imposition of taxes or levies without legislation.
- iii. Whether decision by the Energy and Petroleum Regulatory Authority to cross-subsidize diesel prices with super petrol was unconstitutional for lack of public participation.
- iv. Whether a cross subsidy scheme which cross-subsidized diesel prices with super petrol was inconsistent with the legal framework, including the Petroleum Development Levy Order and the Petroleum Development Fund Act.
- v. Whether a cross-subsidy scheme which cross-subsidized diesel prices with super petrol constituted unfair discrimination against consumers of super petrol as compared to consumers of diesel.
- vi. Whether the Energy and Petroleum Regulatory Authority acted beyond its mandate under the Energy Act and the Petroleum Act in implementing the cross-subsidy scheme which cross-subsidized diesel prices with super petrol.

Held

1. Jurisdiction was everything. Without it, a court had no power to make one more step. Jurisdiction was donated either by the Constitution or Statute and was therefore not left to conjecture.
2. The Constitution championed alternative dispute resolution. Sections 23, 24 and 25 of the Energy Act could not be interpreted to mean complete ouster of jurisdiction. What it meant was that there ought to be a postponement of approach to the court in the interest of expediency by pursuing the alternative dispute resolution mechanisms available; hence the doctrines of exhaustion and avoidance. Moreover, section 9 of the Fair Administrative Action Act provided for judicial review upon exhaustion of all internal administrative processes.
3. Where an alternative dispute resolution mechanism was provided for, the same ought to be followed first; and that the court's jurisdiction be invoked only as a last resort. That did not however imply that the jurisdiction of the High Court was completely ousted; for the court could not be said to be powerless. Where a party took the view that the remedy sought could only be obtained from the court, nothing stopped such a party from instituting the suit as deemed appropriate to the specific circumstances of his/her case.
4. Since the petitioner had, in the main, alleged violations or threatened violations of their rights under articles 10, 27 and 46 of the Constitution and had accordingly prayed for declaratory and other reliefs from the court, it could not be said that the instant dispute was one that ought to have been referred either to the Energy and Petroleum Regulatory Authority (the 1st respondent) or to the Energy and Petroleum Tribunal (the Tribunal) for resolution. The High Court had jurisdiction to hear and determine the petition.
5. Insofar as the petitioner had alleged violations or threats of violations of the Constitution against the respondents, the requisite jurisdiction existed for the High Court to entertain and determine the petition.



6. There was sound legal basis for the decision to impose the cross-subsidy scheme. The petitioner's argument that the cross-subsidy scheme was not the same as the Petroleum Development Levy as contemplated under the Order (Legal Notice No. 124 of 2020) was entirely misconceived.
7. Policy, without more, could not override express provisions of the law. The Petroleum Development Levy Order was made pursuant to the law; in particular, section 3(1) of the Petroleum Development Fund Act. There was a general presumption of constitutionality of statute.
8. Subsidization was typically given to alleviate some type of burden, and was often done in the overall interest of the public, with a view of promoting social good or an economic policy. The 1st respondents mandate to determine the fuel prices on a monthly basis was provided for under section 101(y) of the Petroleum Act as well as Legal Notices No. 26 of 2012 and No. 192 of 2022.
9. The petitioner was, at all material times aware of the mandate, and thus could not claim to have lacked prior notice to the various press releases. Thus, in terms of public participation and prior notice, it could not be said that the respondents acted in violation of articles 10 or 47 of the Constitution.
10. The cross-subsidy scheme could not be faulted. In particular, the 2nd respondent explained that the Government spent Kshs. 114 Billion between April 2021 to February 2023 to subsidize Super Petrol, Diesel and Kerosene to cushion Kenyans from high pump prices and that, had the scheme not been implemented in the October November 2022 pricing cycle, there would have been adverse effects on the economy because diesel consumption averages 230 million litres and was used in transportation, agricultural and industrial sectors.
11. The burden was on the petitioner to so demonstrate discrimination in a more convincing manner as to displace the justification presented by the respondents. Based on the evidence, the court was unable to conclude that the rights of the petitioner under articles 27 were violated.

Petition dismissed.

Orders

Each party to bear its own costs.

Citations

Cases

Kenya

1. *Consumer Federation of Kenya (COFEK) v Attorney General & 4 others* Petition 88 of 2011; [2012] KEHC 5492 (KLR) - (Mentioned)
2. *Council of County Governors v Attorney General & Independent Electoral and Boundaries Commission* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Explained)
3. *CR (Suing through father and next friend) & 130 others v Kenya National Examinations Council* Petition 175 of 2016; [2017] KEHC 9233 (KLR) - (Mentioned)
4. *Geoffrey Muthinja & Robert Banda Ngombe v Samuel Muguna Henry, John Jembe Mumba, John Maroo, John Columbus Gikunda M'mwanjab, Bernard Njiru Arozon, Samuel Chivatsi Munga, James Marangu M'muketha & 1750 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Explained)
5. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR) - (Applied)
6. *Jacqueline Okeyo Manani & 5 others v Attorney General & another* Petition 36 of 2018; [2018] KEHC 9395 (KLR) - (Explained)
7. *Kenya Human Rights Commission v Attorney General & Law Society of Kenya* Constitutional Petition 87 of 2017; [2018] KEHC 9656 (KLR) - (Explained)
8. *Kenya Ports Authority v Threeways Shipping Services (K) Limited* Civil Appeal 18 of 2013; [2019] KECA 472 (KLR) - (Explained)
9. *Leonard Otieno v Airtel Kenya Limited* Petition 218 of 2017; [2018] KEHC 9063 (KLR) - (Explained)



10. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Explained)
11. *Mohamed Ali Baadi and others v Attorney General & 11 others* Petition 22 of 2012; [2018] KEHC 5397 (KLR) - (Explained)
12. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Followed)
13. *Republic v Kenya Revenue Authority Ex-Parte: Cosmos Limited* Judicial Review Miscellaneous Application 478 of 2014; [2016] KEHC 4712 (KLR) - (Mentioned)
14. *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya, Al Ghurair Printing and Publishing LLC, Attorney General, Jubilee Party, Ekuru Aukot & Third Party Alliance, Samuel Waweru & Stephen Owoko Oganga* Judicial Review 378 of 2017; [2017] KEHC 4663 (KLR) - (Followed)
15. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR) - (Explained)
16. *Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties)* Constitutional Petition E005 & E001 (Consolidated) of 2021; [2021] KEHC 9748 (KLR) - (Mentioned)
17. *William Odhiambo Ramogi, Asba Mashaka Omar & Gerald Lewa Kiti v Attorney General, Cabinet Secretary, Ministry of Transport and Infrastructure, Kenya Ports Authority, Kenya Railways Corporation, Muslims for Human Rights & Maina Kiai* Constitutional Petition 159 of 2018; [2018] KEHC 9327 (KLR) - (Explained)

Uganda

Tinyefuza v Attorney General (Constitutional Petition No 1 of 1996) [1997] UGCC 3 (25 April 1997) - (Explained)

India

Hamdrddawa Khana v Union of India AIR 1960 AIR 554, 1960 SCR (2) 671, AIR 1960 SC 554, 1960 SCJ 611, 1960 2 SCR 671, 1960 MADLJ (CRI) 358 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 24(1);27; 40(2); 46;47; 118, 159(2)(c); 201; 210 — (Interpreted)
2. Energy Act (cap 314) sections 9 (2); 10(a)(ii)(hh); 11(b);23; 24; 25; 36 — (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 4 (3)(a) — (Interpreted)
4. Petroleum (Amendment) Rules, 2012 (cap 214 Sub Leg) In general -(Cited)
5. Petroleum Development Fund Act (cap 426) sections 3(1); 4 — (Interpreted)
6. Petroleum Development Levy Order, 2020 (cap 426 Sub Leg) order 4 — (Interpreted)
7. Petroleum (Pricing) Regulations, 2022 (cap 314 Sub Leg) regulation 8 — (Interpreted)

Texts

Garner, BA., Black, HC., (Eds) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

Instruments

WTO Agreement on Subsidies and Countervailing Measures, 1994 — article 1

Advocates

None mentioned



JUDGMENT

1. The petitioner, Kevin Turunga Ithagi, described himself in his Petition filed herein on January 27, 2023 as a male adult Kenyan working for gain in Nairobi within the Republic of Kenya. He averred that, in his inaugural speech on September 13, 2022, the President of the Republic of Kenya promised to end the fuel subsidization programme initiated by his predecessor. He was therefore surprised to learn through a Press Release by the 1st respondent, dated on January 14, 2023, that the price of diesel would be cross-subsidized with that of super petrol; and that a subsidy of Kshs 25.13/litre would be maintained for Kerosene to cushion customers from the otherwise high pump prices.
2. The petitioner further complained that the act of cross-subsidization was carried out by the respondents without any consultation or opportunity to be heard; and therefore was done in violation of section 4(3) of the *Fair Administrative Actions Act* which requires that persons likely to be affected by such a decision be given prior notice and an opportunity to be heard before implementation. At paragraphs 10, 11, 12, 13, 14 and 15 of the Petition, the petitioner also averred that, in blatant contravention of its mandate, the 1st respondent added an arbitrary mark-up on the prices of petroleum products referred to as Price Stabilization Surplus/Deficit. He accordingly averred that the 1st respondent has not only been acting in abuse of the Pricing Regulations but also in violation of articles 10, 27, 40, 201 and 210 of the *Constitution of Kenya*.
3. Thus, the petitioner prayed for the following reliefs at Paragraph 29 of his Petition:
 - (a) A declaration that the respondent's decision to impose cross-subsidy on the price of diesel with that of super petrol is illegal and unconstitutional.
 - (b) An order of certiorari to remove into this court and quash the Press Release dated January 14, 2023 issued by the Director General of the 1st respondent.
 - (c) An order of prohibition against the 1st respondent to prohibit it from imposing cross-subsidy scheme on the price of diesel with that of super petrol.
 - (d) An order of mandamus to compel the 1st and 2nd respondent to provide the records of the amounts collected from the onset of the scheme to the date of the filing of this Petition.
 - (e) An order of mandamus to compel the 1st and 2nd respondents to utilize the amounts so far collected in the cross-subsidy scheme to offset the price of petrol in the coming months.
 - (f) The costs of the Petition.
 - (g) Any other order or direction that the court may deem fit to meet the ends of justice.
4. The Petition was supported by the petitioner's own affidavit sworn on January 25, 2023, in which he averred that he is a regular consumer of super petrol, as it is the recommended fuel for his car. He acknowledged that every 14th day of a new month, the 1st respondent is mandated to communicate the prices of petroleum products to the general public, to subsist for the intervening 30-day period. He was however aggrieved that beginning October 14, 2022, the 1st respondent, through its Press Release for the month, introduced an alien concept of cross-subsidization where the price charged for super petrol would be used to subsidize the price of diesel.
5. At paragraph 7 of his affidavit, the petitioner averred that by January 2023, the cross-subsidization scheme was further confirmed without any consultation with the stakeholders, and notwithstanding



that the price of diesel in the international market had significantly reduced by USD 101.99 while that of super petrol had gone down only marginally. He consequently asserted that no justification had been provided for the reliance on a part of the general population whose fuel choice only reduced a little to subsidize that of users whose fuel price had reduced significantly. In his view, the whole cross-subsidization scheme as structured, applied and promoted by the respondents, is arbitrary, unilateral and devoid of openness.

6. The petitioner concluded his averments by stating that there is an expectation, borne by the reading of the Petroleum Regulations and the formula provided thereunder for retail pricing of petroleum products, that whenever world prices drop, the retail prices would follow suit. He therefore posited that the respondents have wholly failed to act in accordance with the law, and in particular, the provisions of section 4(3)(a) of the *Fair Administrative Action Act*, and thereby failed to take into account relevant matters before the implementation of the cross-subsidy scheme.
7. The petitioner annexed several documents to his affidavit to buttress his averments. They included copies of the 1st respondent's Press Releases for 15th September to October 14, 2022, 15th October to November 14, 2022, 15th November to December 14, 2022 and December 15, 2022 to January 14, 2023, as well as cash sale receipts for fuel purchase transactions incurred in December 2022 and January 2023. He accordingly urged that the Petition be allowed and the orders prayed for by him granted by the Court.
8. The respondents relied on their affidavits filed on February 20, 2023 in opposition to both their interlocutory application as well as the Petition. Accordingly, the 1st respondent relied on the replying affidavit sworn on February 17, 2023 by Eng Edward Kinyua. It accordingly averred that its mandate is derived from section 9 of the *Energy Act*, No 1 of 2019; which mandate entails technical and economic regulation of the energy, petroleum and renewable energy sectors. Reference was also made by the 1st respondent to sections 10(hh) and 11(b) of the *Energy Act* which give it the mandate to protect and balance the interests of consumers, investors and other stakeholders and to set, review and approve contracts, tariffs and charges for common user petroleum logistics facilities and products.
9. The respondent further averred, at paragraphs 8, 9 and 10 of the replying affidavit, that the importation of Super Petrol, Diesel and Kerosene is undertaken through Open Tender System in accordance with the *Petroleum (Amendment) Rules, 2012 (Legal Notice No 24 of 2012)* at prices which reflect the prices of petroleum products in the international markets. It explained that the computation of petroleum pump prices takes into account the following key cost components:
 - (a) The landed cost which is the weighted average costs per product of imported Super Petrol, Diesel and Kerosene;
 - (b) Storage and distribution costs;
 - (c) Gross margins; and
 - (d) Applicable taxes and levies.
10. The 1st respondent also explained that, under regulation 8 of the *Petroleum (Pricing) Regulations, Legal Notice No 192 of 2022*, it has the responsibility to publish applicable pricing elements for Super Petrol, Diesel and Kerosene which includes the storage and distribution costs as well as the applicable gross margins from time to time. With regard to the contentious stabilization scheme, the 1st respondent made reference to Paragraph 4 of the *Petroleum Development Levy Order (Legal Notice No 124 of 2020)* and asserted that stabilization of local petroleum pump prices is provided for in law; and that the subsidization has been ongoing since April 2021 when the petroleum prices in



- the international markets spiked. The 1st respondent explained that the subsidy scheme was aimed at cushioning consumers from high inflationary pressure that could have resulted had price increases been effected.
11. The 1st respondent also deposed that, in line with the Presidential Directive issued on September 13, 2022, and in consultation with the policy maker, the Ministry of Energy & Petroleum, subsidies on Super Petrol were removed in full while those on Diesel and Kerosene were partly removed effective September-October 2022 pricing cycle. The explanations given for the subsidization of the Diesel pump price were, firstly, that the landed cost for the product was yet to reduce and, secondly, the adverse economic impact that continued pump price increases of Diesel and Kerosene would have created.
 12. At paragraphs 19 to 24 of the 1st respondent's replying affidavit, it was deposed that, in the October-November pricing cycle, the landed costs of Super Petrol had registered a significant decline, while that of Diesel continued to increase, as driven by global market dynamics; and therefore, a cross-subsidy was necessary to cushion the economy from high inflation that would have set in if the trend continued. The 1st respondent explained that it was on that account that, guided by policy, it implemented the cross-subsidization of Diesel with Super Petrol in the October-November 2022 pricing cycle. Accordingly, the 1st respondent asserted that it acted in good faith to balance the interests of consumers and other stakeholders, including the petitioner, and in furtherance of the function given to it under section 10(hh) of the [Energy Act](#). Thus, the 1st respondent posited that, had it not undertaken the action of cross-subsidy, high Diesel pump prices would have further exacerbated the cost of living in the country as industries, farmers and transporters would have passed the burden of the extra cost to consumers, thereby adversely affecting the citizenry including the petitioner.
 13. The 2nd respondent's replying affidavit was sworn on its behalf by the Principal Secretary, Mr Mohamed Liban. The 2nd respondent explained that he is responsible for policy formulation for the energy and petroleum sectors in Kenya; and that the Ministry draws its mandate, functions and powers from the [Constitution of Kenya](#), the [Energy Act](#), No 1 of 2019, and the [Petroleum Act](#), No 2 of 2019, among other legal instruments. The 2nd respondent further averred that following a high level review of the Petroleum Development Levy in September 2022, it was observed that the levy was having a negative impact on consumers of petroleum products and the economy. Accordingly, the President directed the 2nd respondent to take necessary steps to ensure that the levy and its application to stabilize petroleum pump prices was reviewed so as to cushion the public from the high pump prices. In consequence thereof, administrative measures were taken in the September-October 2022 pricing cycle, including the removal in full of the subsidies on Super Petrol and the partial removal of the subsidies on Diesel and Kerosene pump prices.
 14. The 2nd respondent therefore deposed that, the 1st respondent was guided by policy and the law in applying the cross-subsidy scheme in the October-November 2022 pricing cycle; and added that, had this not been done, the pump price of Diesel would have increased by 18.15 per litre, resulting in adverse economic effects. He asserted that the cross-subsidization is a necessary measure made with public interest in view and with the full backing of the law as provided for in sections 10(a)(ii), 10(hh) and 11 of the [Energy Act](#), section 4 of the [Petroleum Development Fund Act, 1991](#) and Paragraph 4 of [Legal Notice No. 124 of 2020](#). The 2nd respondent consequently denied any violation of the [Constitution](#) or the [Fair Administrative Action Act](#), and added that, in any case, the Petition has been overtaken by events as the December 2022-January 2023 cycle had come to an end.
 15. With the leave of the court, the petitioner filed a Further Affidavit on March 6, 2023 to demonstrate that, as of February 14, 2023, the 1st respondent was still implementing the cross-subsidization scheme;



and therefore that the Petition had not been overtaken by events as averred by the respondents. He annexed a copy of the relevant Press Release in proof of his averment.

16. The parties were thereafter given an opportunity to file their final submissions. In the petitioner's written submissions dated May 3, 2023, his case was summarised thus:

"The crux of the Petition is that the Respondents through the 1st respondent are imposing an illegal and unconstitutional cross-subsidization scheme where the price of Diesel is cross-subsidized with that of super petrol."

17. The 1st respondent therefore cited articles 40 and 210 of the *Constitution* to support his argument that the cross-subsidy scheme also referred to as the stabilization deficit/surplus scheme is an affront to the Constitution. He submitted that, a quick perusal of the *Petroleum Development Levy Order (LN No. 124 of 2020)* reveals that the cross-subsidy scheme as implemented by the 1st respondent is not sanctioned therein and is therefore not the same as the Petroleum Development Levy contemplated under the Order.

18. Further to the foregoing, the petitioner contended that the implementation of the cross-subsidy scheme is an affront to article 10 of the *Constitution* and is therefore unlawful. He referred to *Waweru & 3 others (suing as officials of Kitengela Bar Owners Association & another v National Assembly & 3 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) Constitutional Petition No E005 & E001 (Consolidated) of 2021* [2021] KEHC 9748 (KLR) and *Republic v Kenya Revenue Authority, Ex Parte Cosmos Limited* [2016] eKLR, for the proposition that public policy cannot, without more, override the express provisions of the law. Thus, the posturing of the petitioner was that it is in the public interest that the *Constitution* and the law are respected and followed; and therefore, an allegation that the *Constitution* has been violated or is threatened with violation ought not to be lightly taken. The petitioner accordingly urged that the Petition be allowed and the orders sought granted.

19. The respondents relied on the written submissions dated May 15, 2023 in which the following issues were proposed for determination:

- (a) Whether the cross-subsidization scheme is unconstitutional; and
- (b) Whether the Petition before the Court is merited.

20. The respondents submitted that the impugned scheme is properly anchored in law, namely, the *Energy Act*. Reliance was accordingly placed on section 10 of the Act as well as regulation 8 of *Legal Notice No. 192 of 2022*, which grants the 1st respondent the authority to publish pricing elements for Super Petrol, Diesel and Kerosene; and order 4 of the *Petroleum Development Order, 2020 (Legal Notice No. 124 of 2020)* that provides for stabilization of local petroleum pump prices in cases of high landed costs. The respondents relied on *CR (suing through father and next friend) & 130 others v Kenya National Examinations Council* [2017] eKLR and *Consumer Federation of Kenya (COFEK) v Attorney General & 4 Others* [2012] eKLR for the submission that they acted honestly and applied honest means in connection with the cross-subsidy scheme.

21. On whether the Petition before the court is merited, the respondents relied on *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 to support the argument that the petitioner had the option of approaching the Energy and Petroleum Tribunal to challenge the decision of the 1st respondent before seeking the intervention of the court. In this regard, the respondents relied on article 159 of the *Constitution*, sections 9(2) as well as sections 24 and 36 of the *Energy Act* and the cases of *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 thers* [2015] eKLR



and Constitutional Petition No 159 of 2018, consolidated with Constitutional Petition No 201 of 2019 [2020] eKLR to support the submission that the petitioner ought to have exhausted the dispute resolution mechanisms provided for in the *Energy Act* before invoking the jurisdiction of this court. On that account, the respondents urged the court to down its tools for want of jurisdiction.

22. There is no dispute that the 1st respondent has the mandate of fixing the applicable prices for petroleum products on the 14th day of each month pursuant to rule 3(1) of the *Petroleum (Pricing) Regulations, 2022*. The provision states:

“The Authority shall determine and publish the maximum wholesale and retail prices of petroleum products on the 14th day of every calendar month.”

23. It is also common ground that at the international level, the prices of petroleum products went up in April 2021; and that as a result, the Government of Kenya took a decision to subsidize the pump prices of petroleum products to cushion consumers from the high inflationary pressure that would have ensued. The subsidies were therefore in effect from April 2021 until September 13, 2022 when a Presidential Directive was issued that resulted in the lifting in full of subsidies on Super Petrol. There is consensus that subsidies on Diesel and Kerosene pump prices were removed only partially in the September-October 2022 pricing cycle. The justification given at paragraph 17 of the 1st respondent’s replying affidavit was that, while the landed cost of Super Petrol had reduced significantly, the landed cost for Diesel was yet to come down.

24. Thus, the two respondents averred that it was the mandate of the 1st respondent to intervene and put in place measures that would ensure pump price stabilization. To that end, the 1st respondent implemented the contentious cross-subsidization scheme. The petitioner’s supplementary affidavit confirms that the scheme was yet to be lifted as of February 23, 2023 when the deposition was made. In the premises, the issues for determination are:

- (a) Whether the court has the jurisdiction to hear and determine this Petition granted the provisions of sections 23, 24 and 25 of the *Energy Act*; and if so,
- (b) Whether the cross-subsidy scheme is unconstitutional;
- (c) Whether the petitioner’s rights under articles 27, 40 and 47 of the *Constitution* were violated by the respondents;
- (d) Whether the petitioner is entitled to the reliefs sought.

A. On the jurisdiction of the Court:

25. The centrality of jurisdiction cannot be overemphasized. Thus, in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, it was held:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction...”



26. Accordingly, jurisdiction is donated either by the Constitution or Statute and is therefore not left to conjecture. The Supreme Court made this clear in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, thus:

...A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law..."

27. In this instance, the 2nd respondent's argument is that the court lacks jurisdiction on account of the doctrine of exhaustion. Their argument was premised on section 24 of the Energy Act, which provides:

- (1) A person aggrieved by a decision of the Authority may appeal to the Tribunal within thirty days of receipt of the decision.
- (2) Notwithstanding subsection (1), the Tribunal may entertain an appeal after the expiry of the thirty-day period if it is satisfied that there was sufficient cause for not filing it within that period."

28. There is no gainsaying that the Constitution champions alternative dispute resolution. Hence, article 159(2)(c) dictates that:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles...alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)."

29. Thus, in Speaker of National Assembly v Karume [1992] KLR 21 it was held that:

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

30. Likewise, in Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal restated its position thus:

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial



consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte applicants argue that this accords with article 159 of the *Constitution* which commands courts to encourage alternative means of dispute resolution.”

31. Bearing the foregoing in mind, I have paid attention to the procedure provided for in sections 23, 24 and 25 of the *Energy Act*. To my mind, the provisions cannot be interpreted to mean complete ouster of jurisdiction as was argued by learned counsel for the 2nd respondent. What it means is that there ought to be a postponement of approach to the court in the interest of expediency by pursuing the alternative dispute resolution mechanisms available; hence the doctrines of exhaustion and avoidance. Moreover, section 9 of the *Fair Administrative Action Act*, is explicit that:

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution*.
- (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under subsection (1).”

32. Hence, in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* (supra) it was held that:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution*.”

33. There is no gainsaying, therefore, that where an alternative dispute resolution mechanism is provided for, the same ought to be followed first; and that the court’s jurisdiction be invoked only as a last resort. That does not however imply that the jurisdiction of the court is completely ousted; for the court cannot be said to be powerless. Indeed, in *Kenya Ports Authority v Threeways Shipping Services (K) Ltd* [2019] eKLR, the Court of Appeal held (at paragraph 30) that:

“...We also bear in mind that access to justice as enshrined in article 48 of the *Constitution* is a fundamental right, that cannot be derogated from. Whereas Alternative Dispute Resolution (ADR), such as arbitration, is crucial in expeditious disposal of disputes, by its very nature ADR is inferior to the principle of access to justice...”

34. Thus, where a party takes the view that the remedy sought can only be obtained from the court, nothing stops such a party from instituting the suit as deemed appropriate to the specific circumstances



of his/her case. For good reason then, it was held thus in the case of *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR:

"While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See The *Speaker of National Assembly v James Njenga Karume* {1992} KLR 21), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of *Dawda K. Jawara v Gambia* it was held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

35. The same posturing was articulated in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, thus:

"46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake..."

36. The Energy and Petroleum Tribunal is provided for in section 25 of the *Energy Act* thus:

"There is established the Energy and Petroleum Tribunal, hereinafter referred to as the Tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law."

37. The Act circumscribes the jurisdiction of the Tribunal as follows in section 36 thereof:

- (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
- (2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.
- (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
- (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.



- (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
- (6) The Tribunal shall hear and determine matters referred to it expeditiously.
38. Accordingly, since the petitioner has, in the main, alleged violations or threatened violations of their rights under articles 10, 27 and 46 of the Constitution and has accordingly prayed for declaratory and other reliefs from the court in that regard pursuant to articles 22 and 23 of the Constitution, it cannot be said that this is a dispute that ought to have been referred either to the 1st respondent or to the Tribunal for resolution. Looked at from that perspective, there can be no doubt that this court has jurisdiction to hear and determine the Petition. This is because article 165(3)(b) of the Constitution is explicit that:
- "Subject to clause (5), the High Court shall have—(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;"
39. In the same vein, Sub-Article (3)(d)(ii) clothes the High Court with jurisdiction:
- (d) ...to hear any question respecting the interpretation of this Constitution including the determination of—
- ...
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
40. Accordingly, in so far as the petitioner has alleged violations or threats of violations of the Constitution against the respondents, the requisite jurisdiction exists for this court to entertain and determine the Petition. I deem it pertinent to also mention that although the issue of jurisdiction can be raised at any stage, where parties intend to do so, the same ought to be taken at the earliest possible opportunity for purposes of expediency. I need not say more on this, save to reiterate the comments of Hon. Nyarangi, JA. in the Owners of Motor Vessel Lillian S (*supra*) that:
- I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it..."

B. On whether the cross-subsidy scheme is unconstitutional:

41. The petitioner urged the court to find that the cross-subsidy scheme was implemented in disregard of the Constitution and the applicable law. In particular, he cited article 210 of the Constitution as the key provision that has been violated by the respondents. The provisions states:
- "No tax or licensing fee may be imposed, waived or varied except as provided by legislation."
42. The respondents' response was that there is in place a comprehensive legal framework that underpinned the cross-subsidy scheme. In this regard, reliance was placed by the respondents on section 10 of the Energy Act which sets the mandate and functions of the 1st respondent. Section 10(a) (ii) for instance gives the 1st respondent the authority to regulate the importation, refining, exportation, transportation, storage and sale of petroleum and petroleum products, with the exception of crude oil. In addition, section 10(hh) imposes on the 1st respondent the duty to protect consumer, investor and other stakeholder interests.



43. As for the contentious stabilization fund, Paragraph 4 of the [*Petroleum Development Levy Order, 2020*](#) ([*Legal Notice No. 124 of 2020*](#)) provides:

"The levy shall also be used for matters relating to the development of the oil industry including to stabilize local petroleum pump prices in instances of spikes occasioned by high landed costs above a threshold determined by the Authority. The Cabinet Secretary may by writing to the administrator, request for a draw down from the Petroleum Development Fund to stabilize local petroleum pump prices where he deems it necessary."

44. It is manifest therefore that there was sound legal basis for the decision to impose the cross-subsidy scheme. As to whether it was reasonable, the 1st respondent explained, at paragraph 17 of its replying affidavit that the subsidies on the Diesel pump price were partly maintained because the landed cost was yet to reduce. The 1st respondent supplied the trends of landed cost for the period October 2022 to January 2023 at paragraph 19 of its replying affidavit and added that the subsidy was necessary to cushion the economy from high inflation that would have otherwise set in. At paragraph 21 of its replying affidavit, the 1st respondent explained that Diesel is the major driver of the economy with an average monthly consumption of 230 million litres; and that it is mostly used in the transportation, agricultural and industrial sectors. It added that had the 1st respondent not taken the action of cross-subsidy, high Diesel pump prices would have further exacerbated the cost of living in the country as industries, farmers and transporters passed the burden of the extra cost to the consumers, thereby adversely affecting the citizenry, including the petitioner.

45. In terms of policy the 2nd respondent explained that, following a Presidential Directive dated September 13, 2022, a high level review of the Petroleum Development Levy was done with a view of stabilizing the petroleum products' pump prices so as to cushion the public from their adverse effects. It was then that the decision was taken to implement the cross-subsidy Scheme upon removing subsidy on Super Petrol. It is plain therefore that the petitioner's argument that the cross-subsidy scheme is not the same as the Petroleum Development Levy as contemplated under the Order ([*Legal Notice No. 124 of 2020*](#)) is entirely misconceived.

46. While I agree that policy, without more, cannot override express provisions of the law, there is no gainsaying that the Petroleum Development Levy Order was made pursuant to the law; in particular, section 3(1) of the [*Petroleum Development Fund Act*](#). Needless to mention that there is a general presumption of constitutionality of statute; both Acts of Parliament and subsidiary legislation made thereunder. Thus, the Supreme Court of India had the following to say in this regard in [*Hamdrddawa Khana v Union of India Air*](#) [1960] 554:

"In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

47. In [*Council of Governors v Attorney General*](#) [2017] eKLR, the position taken, which I entirely agree with, is that:

"There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.



(7) The court should start by assuming that the Act in question is constitutional).”

48. Likewise, in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, it was held:

“There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples’ representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In *Ndynabo v Attorney General of Tanzania* [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the contrary.”

49. Indeed, article 118 of the *Constitution* is explicit as to the manner in which Parliament conducts its business. It states:

(1) Parliament shall—

- (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and
- (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

(2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.”

50. In the case at bar, the petitioner did not challenge the constitutionality of the either section 3(1) of the *Petroleum Development Fund Act* or the Petroleum Development Levy Order made pursuant to the said provision of the law. Consequently, he did not adduce any evidence to demonstrate that the Petroleum Development Levy Order that provides for the stabilization of local petroleum pump prices in instances of spikes occasioned by high landed costs is unconstitutional. In the premises, it is my considered finding that the cross-subsidy scheme was implemented in accordance with the *Constitution* and the applicable statute.

C. On whether the Petitioner’s rights under Articles 10, 27, 40 and 47 of the *Constitution* were violated by the Respondents in the Implementation of the impugned cross-subsidy:

51. To begin with, a subsidy is defined by the *Black’s Law Dictionary* as follows: -

“A grant, usu. made by the government, to any enterprise whose promotion is considered to be in the public interest. • Although governments sometimes make direct payments (such as cash grants), subsidies are usu. indirect. They may take the form of research-and-development support, tax breaks, provision of raw materials at below-market prices, or low-interest loans or low-interest export credits guaranteed by a government agency”

52. It is also instructive that the World Trade Organization has an *Agreement on Subsidies and Countervailing Measures* which was adopted on the April 5, 1994 in respect of which Kenya is a Member state. Article 1 of the Agreement provides: -

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), ie



where:

- (i) a government practice involves a direct transfer of funds (eg grants, loans, and equity infusion), potential direct transfers of funds or liabilities (eg loan guarantees);
- (ii) government revenue that is otherwise due is foregone or not collected (eg fiscal incentives such as tax credits)¹;
- (iii) a government provides goods or services other than general infrastructure, or purchases goods;
- (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

- (a)(2) there is any form of income or price support in the sense of article XVI of Gatt1994;
- and
- (b) a benefit is thereby conferred.”

53 It is therefore plain that subsidization is typically given to alleviate some type of burden, and is often done in the overall interest of the public, with a view of promoting social good or an economic policy. In this instance, the petitioner alleged not only unconstitutionality of the entire scheme but also violation of his rights articles 10, 27, 40(2) and 47 of the Constitution. Consequently, the court must approach the issue of interpretation in a holistic manner; a point emphasized by the Supreme Court in its Advisory Opinion Reference No 1 of 2012: In the Matter of the Kenya National Human Rights Commission [2014] at paragraph 26 as follows: -

...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

54. Similarly, in the Ugandan case of Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997) it was held:

“...the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution...”

55. It is also instructive that article 10 of the Constitution envisages a reading in of certain values when applying or construing its provisions. The provision is explicit that:



- (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.”
56. In the light of the foregoing, the contention of the petitioner was that the whole cross-subsidization scheme as structured, applied and promoted by the respondents is arbitrary, unilateral and devoid of openness is utterly unfounded. There is further no basis for his assertion that he was not afforded an opportunity to be heard in opposition to the application of the cross-subsidy scheme. Indeed, the respondents have demonstrated to the requisite standard that the cross-subsidization is backed by the law under the *Petroleum Development Fund Act*, *Petroleum Development Levy Order, 2020*, as read with Petroleum (Amendment) Rules, 2012 and *Petroleum (Pricing) Regulations, 2022*. They further demonstrated that the 1st respondent’s mandate under sections 10(a)(ii), (hh) and 11(b) of the *Energy Act* includes protection of consumer, investor and other stakeholder interests.
57. Additionally, the 1st respondents mandate to determine the fuel prices on a monthly basis is provided for in section 101(y) of the *Petroleum Act* as well as Legal Notices No 26 of 2012 and No 192 of 2022. Thus, *Regulation 3 of the Petroleum (Pricing) Regulations* (Legal Notice No 192) is explicit that:
- (1) The Authority shall determine and publish the maximum wholesale and retail prices of petroleum products on the 14th day of every calendar month.
 - (2) The published prices in sub-regulation (1) shall be effective on the 15th day of the calendar month and shall remain in force until the 14th day of the following calendar month.
 - (3) Notwithstanding sub-regulations (1) and (2), the Authority may compute and publish wholesale and retail prices of petroleum products to take into account changes in law impacting on costs of petroleum products.
 - (4) Except as otherwise provided, these Regulations shall apply to —
 - (a) Super Petrol;
 - (b) Illuminating Kerosene; and
 - (c) Diesel.
 - (5) The petroleum products listed in sub-regulation (4) shall be imported through the OTS and designated for consumption in Kenya.



58. There is no doubt, from his own averments at paragraphs 4, 5 and 6 of the supporting affidavit and paragraphs 4, 5 and 6 of the supplementary affidavit that the petitioner was, at all material times aware of the mandate, and thus cannot claim to have lacked prior notice to the various press releases. Thus, in terms of public participation and prior notice, it cannot be said that the respondents acted in violation of articles 10 or 47 of the Constitution.

59. In respect of article 27, the petitioner alleged discrimination against him and against consumers of Super Petrol as against the segment of the Kenyan Society whose fuel of choice is diesel. He relied on Sub-Article (2), which states:

"Equality includes the full and equal enjoyment of all rights and fundamental freedoms."

60. Accordingly, the petitioner attached receipts to demonstrate that he has been compelled to buy Super Petrol at a higher price than necessary. In particular, he averred that, by offering a subsidy on Diesel to Diesel consumers at the expense of Super Petrol users, the latter group have been treated differentially. He added that the arbitrary nature of the imposition of the cross-subsidy, the 1st respondent violated article 40 which protects the right to property. It must however be borne in mind that not every act which appears discriminatory amounts to discrimination for purposes of article 27 of the Constitution.

61. Thus, in Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR:

"...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups...the Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim."

62. Moreover, article 24(1) of the Constitution does provide that:

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right or fundamental freedom;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.



63. Thus bearing in mind the justification given by the respondents, I am satisfied that, in this instance, the cross-subsidy scheme cannot be faulted. In particular, the 2nd respondent explained that the Government spent Kshs 114 Billion between April 2021 to February 2023 to subsidize Super Petrol, Diesel and Kerosene to cushion Kenyans from high pump prices and that, had the scheme not been implemented in the October November 2022 pricing cycle, there would have been adverse effects on the economy because diesel consumption averages 230 million litres and is used in transportation, agricultural and industrial sectors.
64. In the premises, the burden was on the petitioner to so demonstrate discrimination in a more convincing manner as to displace the justification presented by the respondents. On the basis of the evidence presented before the court, I am unable to conclude that the rights of the petitioner under articles 27, were violated. I accordingly endorse the position taken in the case of *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR, by Hon Mativo, J (as he then was) that:
- "65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."

D. On whether the petitioner is entitled to the reliefs sought:

65. Having failed to prove violation of the article 210 of the *Constitution* or any fundamental right for purposes of articles 10, 27, 40 or 47 of the *Constitution*, it follows that the petitioner is not entitled to any of the reliefs prayed for in his Petition dated January 27, 2023.
66. In the result, I find no merit in the Petition. The same is hereby dismissed. Granted the public interest nature of the Petition, each party to bear their own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JANUARY 2024

OLGA SEWE

JUDGE

