



Legal Commentary

**Public Participation Prevails:
Civil Appeal No. E003 of 2024**

by GW Rifa Consulting

Introduction: Case Background and the Threshold of Public Participation

The Finance Bill 2023 was assented to on 26 June 2023. This confirmed its status as law and set the wheels in motion for amendments to 12 different legislations, with many of the provisions set to ultimately raise taxes. 11 Constitutional petitions that sought to challenge the process leading to the enactment and constitutionality of the new provisions quickly followed. The petitions were consolidated and upon hearing the matter, several provisions of the Act were found to be unconstitutional. The appeals that arose to challenge the decision of the High Court regarding the unconstitutionality of various sections eventually led to Civil Appeal E003 of 2024.

The rationale of public participation is to **afford the public a meaningful opportunity to participate in the legislative process and strengthen the legitimacy of laws in the eyes of the people**. The principle of public participation is that **those affected by a decision have the right to be involved in the decision-making process**. In Kenya and most other jurisdictions, Parliament has a constitutional obligation to facilitate public involvement in legislative processes.

Issues for Determination by the Court of Appeal

The Court was requested to address three (3) key issues on public participation:

- **If a Bill which has undergone First and Second Reading, including participation, can be altered or amended at the Committee stage or on the House floor beyond the original Bill's scope by introducing substantive new provisions.**
- **Whether Parliament is obligated to give reasons for adopting or rejecting views given by members of the public during public participation.**
- **Whether public participation in enacting the Finance Act of 2023 was meaningful and reasonable.**

Issue I

The Court of Appeal made several determinations regarding these issues. The Finance Act of 2023 was illegal as its enactment failed to meet the constitutional threshold required of the law-making process. The court ruled that amending the Finance Bill, 2023,

after public participation to include 18 entirely new provisions that had not been subjected to public scrutiny was unconstitutional. The Court deemed the exercise a serious legislative flaw that cannot be allowed and which made the legislative process contemplated in the Constitution and the Standing Orders imperfect. Consequently, the enactment of these amendments, which resulted from a flawed constitutional process, was deemed invalid. These new provisions should have been presented for fresh public participation, in line with constitutional requirements.

Issue II

The Court ruled that Parliament is constitutionally required to provide reasons for accepting or rejecting proposals from the public. This obligation arises from the principles of transparency and accountability enshrined in Article 10 of the Constitution. These principles mandate that public bodies, including Parliament, must be open and accountable in their decision-making processes. Transparency involves communicating why certain public views were not adopted, while accountability requires explaining the reasons for the chosen decisions. This approach ensures that the exercise of public power adheres to democratic values, enhances public confidence, and aligns with the rule of law, reflecting the aspirations for good governance and participatory democracy outlined in the Constitution.

Issue III

The Court's outplay was that public participation is a crucial element of democracy and should not be treated as a mere formality or an inconsequential process. The principles of participatory democracy must be upheld throughout the legislative process, not just when gathering public input. The Court's finding that Parliament did not give reasons for adopting and rejecting the views offered by members of the public during their participation indicated that the public

participation undertaken was not proper and meaningful.

What, therefore, counts as proper public participation?

Proper public participation in the legislative process is a fundamental constitutional requirement. This process must be both genuine and meaningful, extending beyond a mere procedural formality. According to the judgment, public participation should be infused with transparency and accountability, reflecting the core principles of democratic governance outlined in Article 10 of the Constitution. This includes ensuring the public's views are not only solicited but also given proper consideration.

There are also set out components of public participation including:

- clarity of the subject matter for the public to understand;
- structures and processes (medium of engagement) of participation that are clear and simple;
- opportunity for balanced influence from the public in general;
- commitment to the process;
- inclusive and effective representation;
- integrity and transparency of the process;
- capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

Any significant amendments to legislation, such as those made post-public participation, must undergo a fresh round of public engagement. This requirement stems from the constitutional mandate to involve the public in decision-making processes that impact their rights and lives. The failure to adhere to these principles, such as the incorporation of new provisions without further public input, constitutes a breach of constitutional duties.

Parliament is obligated to provide reasons for adopting or rejecting public proposals. This duty ensures the legislative process remains transparent and accountable, aligning with the constitutional values of democracy, good governance, and respect for public contributions. Insulating Parliament from the need to justify its decisions would undermine the purpose of public participation and could render it superficial.

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