



# AN EVALUATION OF PUBLIC PARTICIPATION IN THE REFUGEES BILL, 2017 ENACTEMENT PROCESS

*By Andrew Maina  
Project Manager  
Research & Knowledge Management*



## List of acronyms

ACHPR – African Charter on Human and Peoples’ Rights

DCANS – Departmental Committee on Administration and National Security

DRA – Department of Refugee Affairs

eKLR – Electronic Kenya Law Reports

ICCPR – International Covenant on Civil and Political Rights

KLRC – Kenya Law Reform Commission

KEPHRA – Kenya Parliamentary Human Rights Association

MP – Member(s) of Parliament

RAS – Refugee Affairs Secretariat

RCK – Refugee Consortium of Kenya

TF – Task Force

UDHR – Universal Declaration on Human Rights

## Contents

List of acronyms .....	i
Introduction.....	1
Issue .....	1
Method .....	1
Limitation.....	1
Legal analysis.....	2
Constitutional and legal foundation .....	2
Definition of public participation.....	3
Reasonableness of public participation.....	3
Access to information .....	4
Opportunity to be heard .....	6
Factual analysis.....	8
Pre-parliamentary phase.....	8
Parliamentary phase .....	9
Conclusion .....	11
Recommendations.....	12
References.....	14
Cases .....	14
Other texts.....	16

## Introduction

This paper discusses the nature of public participation in Kenya in the context of the Refugee Bill, 2017. The Bill was rejected by the President of the Republic of Kenya. His Excellency Uhuru Kenyatta concluded that it had not gone through public participation as required under article 118 of the Constitution. However, the process of public engagement involved a wide array of stakeholders from refugee and host communities to refugee and government agencies. Therefore there was a need to interrogate the meaning of public participation with a view of reviewing the approach in enacting the rejected Bill.

## Issue

This brief investigates whether the Refugees Bill, 2016 met the requisite public participation threshold. It interrogates the definition and essential elements of public participation. Armed with this information, it evaluates the pre-legislative and legislative processes to provide a valid conclusion about the process by which the bill was made.

## Method

The primary method used in this brief is content analysis of judicial decisions. This approach was favoured as the courts interpret the law and therefore is a source of law. A total of 37 cases were reviewed for this brief. The cases were selected from the Kenya Law Reports website using a purposive and snowballing approach. Cases reported in this portal are based on rulings and judgments made from the High Court, Court of Appeal and Supreme Courts whose decisions are authoritative and binding in order of seniority. A list of the cases reviewed is included in the list of references.

## Limitation

Cases studied under this analysis are drawn from the Kenya Law Reports online database. This means that only those cases reported in that database were accessed and reviewed. Therefore, there is a possibility that there are cases decided by courts of record (High Court, Court of Appeal and Supreme Court) that yet to be entered into this database. Be that as it may, the likelihood that these cases were decided markedly differently from those on the website are slim. This is because Kenyan courts follow the principle of precedent. This means that decisions made at one court are often applied by other courts unless such decisions are manifestly bad in law.

## Legal analysis

### *Constitutional and legal foundation*

1. The right to political participation is the foundation of public participation. Article 1(2) of the Constitution of Kenya enunciates this point on sovereignty of the people. It states that Kenyans may exercise their sovereign power either directly or through their democratically elected representatives. The language of this provision resonates with article 21 of the Universal Declaration on Human Rights (UDHR), article 13 of the African Charter on Human and People's Rights (ACHPR) and article 25 of the International Covenant on Civil and Political Rights (ICCPR). It has been held that by dint of article 1(2) of the Constitution of Kenya, Kenya is both a representative and participatory democracy.<sup>1</sup>
2. Article 10 of the Constitution of Kenya includes public participation as a national value and principle of governance. Clause 2 (a) of the article explicitly mentions 'participation of the people' as such. This value and governance principle is supposed to be adhered to whenever a '...state organ, state officer, public officer and all persons...enacts, applies or interprets any law...'<sup>2</sup>Therefore the process of enacting the Refugees Bill, 2016 was bound by this provision of the Constitution.
3. The Court of Appeal in *Independent Electoral and Boundaries Commission v. National Super Alliance Kenya and 6 others* (2017) eKLR made a firm determination that Article 10(2) of the Constitution is justiciable and enforceable. The court held that a person can sue another on account of an infringement of these provisions of the Constitution. In other words, a 'violation can found a cause of action'<sup>3</sup>
4. Article 118 of the Constitution directly invokes public participation in legislative process. The provision states 'Parliament shall...facilitate public participation and involvement in the legislative and other business of Parliament and its committees.' By dint of this constitutional provision, Parliament is compelled to engage the public in the process of law making or other legislative business. This is only limited where the Speaker of the relevant house of Parliament determines that there are justifiable reasons for the exclusion of the public.<sup>4</sup>

---

<sup>1</sup>See *Kenya Small Scale Farmers Forum and 6 others v. Republic of Kenya and 2 others* (2013) eKLR, paragraph 47; *John Muraya Mwangi and 501 others v. Minister for State for Provincial Administration and Internal Security and 4 others* (2014) eKLR, paragraph 76 to 79 and *Milly Glass Works Ltd and 3 others v. County Government of Mombasa and 2 others* (2016) eKLR, paragraph 17

<sup>2</sup>*Constitution of Kenya*, 2010

<sup>3</sup>*Independent Electoral and Boundaries Commission v. National Super Alliance Kenya and 6 others* (2017) eKLR, paragraph 213

<sup>4</sup>Article 118(2), *Constitution of Kenya*, 2010

5. The Constitution is silent on what public participation means. There is also no national legislation that specifically provides a comprehensive legal position on public participation binding both the national and county levels of government. Although there are some clear provisions on principles public participation at the county level in Part VIII of the County Government Act, 2012 and the County Public Participation Guidelines,<sup>5</sup> these neither define the term nor give guidance for its use at the National Assembly level. To evaluate the definition and what can legally amount to public participation, a review of the case law is necessary.

#### *Definition of public participation*

6. Public participation refers ‘...to the process by which the public participates in something.’<sup>6</sup>The court in this case heavily relied on a South African case: *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006). In that case the South African Constitutional Court also pronounced itself on the meaning of facilitation, involvement and participation. These are the same words used in article 118 of the Constitution of Kenya (see paragraph 4 supra). It defined facilitation as making things easier, promoting or helping to bring forward; involvement as bringing a person into a matter and participation as taking part with others. The court uses the ordinary meaning of the constitutive words to construct the meaning of the term public participation.
7. Be that as it may, the definition of public participation in itself is not sufficient. It does not reveal the essential features of public participation. For instance how much involvement is sufficient for public participation to be present? What level of participation is necessary? To what extent is facilitation necessary? Answers to these questions can be found by further reviewing case law to unearth what they deem to be sufficient public participation.

#### *Reasonableness of public participation*

8. All the case laws reviewed revealed a reliance on a reasonable test to evaluate the sufficiency of public participation. This test is predicated on the notion that Parliament is free to choose the manner of facilitating public participation. In *Kenya Small Scale Farmers Forum and 6 others v. Republic of Kenya and 2 others* (2013) eKLR the High Court held

---

<sup>5</sup>Government of Kenya. (2016). *County Public Participation Guidelines*. Nairobi: Ministry of Devolution and Planning & Council of Governors.

<sup>6</sup>*Robert N. Gakuru and Others v. Governor of Kiambu County and 3 others* (2014) eKLR, paragraph 56. See also *Martin Nyaga Wambora v. County Assembly of Embu and 37 others*, (2015) eKLR, paragraph 42

that the National Assembly has a broad measure of discretion in how it achieves the objective of public participation (paragraph 63). This decision has been upheld by 8 other cases at the High Court and the Court of Appeal. A corollary of this decision is that the public cannot dictate to Parliament the modalities of conducting public participation.<sup>7</sup>In other words, whatever modality Parliament decides to use will not be questioned if it fits into the essential ingredients of public participation as enunciated in the reasonable test.<sup>8</sup>

9. This reasonable test dictates that the public must be given an opportunity to know the issues and have adequate say therein.<sup>9</sup> The National Assembly has the duty to facilitate meaningful opportunities to participate in the legislative process as well as take measures to ensure that the public participates.<sup>10</sup>Therein lies the two most important ingredients: access to information about the process and adequate opportunity to be heard. These two ingredients are further discussed in the succeeding paragraphs.
10. One curious decision to note is that public participation need not take place at the pre-legislative phase. In *Kenya Association of Stock Brokers and Investment Banks v. Attorney General and Another* (2015) eKLR (paragraph 90) and *Kenya Small Scale Farmers Forum and 6 others v. Republic of Kenya and 2 others* (2013) eKLR (paragraph 47) the High Court held that public participation need not take place at the pre-legislative phase. The court laid emphasis on the conformity of the actions of the legislature with the rules of public participation that it laid for itself. This is limited to a legislative process. However, this does not excuse non-legislative bodies that are making legislative proposals from ensuring public involvement in the process.

#### Access to information

11. The courts emphasise the need to provide information to the public to enable them to participate in the law making process. Access to information will allow the public to understand the issues and therefore able to make a meaningful contribution to the process.<sup>11</sup> Without this, the courts opine that the public cannot make a significant contribution on the matters under consideration. According to the courts, providing information is important to

---

<sup>7</sup>*Kenya Association of Stock Brokers and Investment Banks v. Attorney General and Another* (2015) eKLR, paragraph 90

<sup>8</sup>*North Rift Motor Bike Taxi Association v. Uasin Gishu County Government* (2014) eKLR, p.18

<sup>9</sup>*In the Matter of the Mui Coal Basin Local Community* (2015) eKLR, paragraph 168

<sup>10</sup>*Robert Gakuru case*, note 6 supra

<sup>11</sup>See *Republic v. Independent Electoral and Boundaries Commission ex parte National Super Alliance Kenya and 6 others* (2017) eKLR, paragraph 194; *In the Matter of the Mui Coal Basin Local Community* (2015) eKLR, paragraph 97; *Khelef Khalifa and 2 others v. Independent Electoral and Boundaries Commission and Another* (2017) eKLR, paragraph 69 and 70 and *Patrick Mukiri Kabindu v. Executive in charge of Tourism Development and Culture Mombasa County and 21 others* (2015) eKLR, paragraph 11

build the awareness of the public on decisions that affect them and encourage the public to partner in making the decisions.<sup>12</sup>

12. Moreover the courts consider this a right provided for by the Constitution of Kenya. Article 35 of the Constitution provides the right to access ‘*information held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom.*’ This section of the Constitution binds state and non-state actors as far as the protection of human rights is concerned.
13. There is consensus among the court decisions that information must be shared widely. In the Robert Gakuru case<sup>13</sup>, Odunga J. advocated for the use of churches, mosques, social halls or other places that the public are known to congregate. In another case<sup>14</sup> the court decided in favour of using loud speakers to notify the public of the issues in a proposed county bill and to invite them to a public forum. Use of adverts posted in newspapers that have a wide circulation and radio shows have also been viewed favourably by the courts. Essentially, the duty bearer has the discretion to use whatever means of circulating information at their disposal. However they should bear in mind the context of their audience and use a means that is likely going to reach a reasonable proportion of the public.
14. Information to the public should include two main parts. The first should be an explanation of the decision, law or policy that is intended to be passed.<sup>15</sup> The public should be made aware of the rationale of this decision in order to adjudge its efficacy or efficiency. Therefore, if it is a proposed law, the public should be informed of its purposes, key clauses and how it will likely impact their lives. Information provided about the decision should be sufficient to allow for reasonable dialogue and feedback by the public.
15. The second part of the information to be provided to the public is an invitation to participate to make themselves heard. They can be invited to provide their feedback in one of two ways: oral presentations or written submissions. The venue and time of the proposed public meetings should be clear to the public and afford them reasonable access<sup>16</sup> as well as time to prepare their views.<sup>17</sup>

---

<sup>12</sup>*Pevans East Africa Ltd and Another v. Chairman Betting Control Licensing Board and 7 others* (2017) eKLR, paragraph 78

<sup>13</sup>*Robert Gakuru case*, note 6 supra

<sup>14</sup>*Milly Glass Works Ltd and 3 others v. County Government of Mombasa and 2 others* (2016) eKLR, paragraph 33

<sup>15</sup>*Robert Gakuru case* note 6 supra, paragraph 67 and 79.

<sup>16</sup>Odunga J. in the *Robert Gakuru case* (paragraph 76) faulted the Kiambu County Government for huddling five people at a five star hotel and claiming that the public were consulted. According to him, the venue did not afford reasonable access to the public as not many residents of the county could have afforded to go to the venue.

<sup>17</sup>*Law Society of Kenya v Attorney General and Another* (2016) eKLR, paragraph 221



16. A key thing to note here is that access to information does not extend to provision of feedback by the decision maker. The court has held that such information as it relates to a legislation will be known to the public after the subsequent legislation has been passed.<sup>18</sup> An amendment to the law that was not subjected to public participation, however, can invalidate the law.<sup>19</sup> Therefore should an amendment that was not initially presented to the public be suggested, there is need to inform the public and allow the public to make their views known to the decision maker before that amendment is included in the law.<sup>20</sup>

#### Opportunity to be heard

17. An opportunity to be heard is the second level of the reasonableness test that the courts consider. It allows the public to express themselves on decisions, policies and laws that are proposed by the state or any other person exercising a state function. The courts have invoked article 33 of the Constitution in support of this level in the reasonableness test.<sup>21</sup> Article 33(1) (a) provides for the ‘freedom to seek, receive or impart information or idea. ‘The general idea is that the public have an adequate say in the decision making process.’<sup>22</sup>

18. Public hearings and submission of memoranda have been considered sufficient means to fulfil this right. In legislative processes, the courts have taken judicial notice of the rules governing the legislative branches of government at the national and county levels.<sup>23</sup> Courts have held that the procedure used by these state organs as prescribed in their standing orders are sufficient to make a finding of an opportunity to be heard. These standing orders provide for public hearing sessions before a committee of the relevant house or assembly. They also provide for submission of memoranda by the public where they are not able to attend the public hearing sessions.

19. The courts have determined that the duty bearer consider the quantity and quality<sup>24</sup> of the participation of these sessions. The quantitative aspect of participation refers to the number of people that would be invited to attend. The general rule is that as many of the public should be engaged in the process of decision making. However the courts do not require

---

<sup>18</sup>*Malindi North Resident Association and 6 others v. Kilifi County Government and 2 others* (2017) eKLR, p.7

<sup>19</sup>*Kiambu County Government and 3 others v. Robert N. Gakuru and others* (2014) eKLR, p.2

<sup>20</sup>*Tyson Ng'atich and Another v. Governor, Bomet County Government and 5 others* (2015) eKLR, paragraph 80

<sup>21</sup>*Kenya Small Scale Farmers Forum case note 1 supra*, paragraph 57

<sup>22</sup>*Commission for the Implementation of the Constitution v. Parliament of Kenya and 5 others* (2013) eKLR, paragraph 74; *Institute of Social Accountability and Another v. National Assembly and 4 others* (2015) eKLR, paragraph 76

<sup>23</sup>*Moses Munyendo and 908 others v. Attorney General and Another* (2013) eKLR, paragraph 20 and *Coalition for Reform and Democracy and 2 others v. Republic of Kenya and 10 others* (2015) eKLR, paragraph 188

<sup>24</sup>*Diani Business Welfare Association and Others v. County Government of Kwale* (2015) eKLR, paragraph 25

individual hearings<sup>25</sup> nor do they require that every member of the public be invited to the hearing sessions.<sup>26</sup> Therefore it is not necessary for a duty bearer to collect the views of every person that is likely to be affected by a decision. As long as the public has been given reasonable time and opportunity to be heard, the courts will uphold the outcome of the process.

20. A qualitative aspect of participation refers to the engagement of a wide array of citizens.<sup>27</sup> This determination is guided by the inclusivity and diversity principle.<sup>28</sup> Here the courts interrogate whether different sections of the community have been engaged in the decision making process. Inclusion of women, youth, and the elderly among other members of the society are a means of testing the quality of participation. Moreover, the qualitative aspect of participation includes the subsidiarity principle. This principle holds that *'those most affected by policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.'*<sup>29</sup> The courts have held that the views of such a section of the society should and must carry more weight than those further away from the effects of the decision.<sup>30</sup> Such a section of society is discerned from an analysis of a decision's nature and intensity impact.<sup>31</sup> This qualitative aspect of public participation can be evaluated by the nature, importance and intensity of the impact of the proposed decision.<sup>32</sup>
21. The public must be afforded this opportunity before a decision is made.<sup>33</sup> This allows room for the public views to influence the decision of the duty bearer.<sup>34</sup> Furthermore, participants in a public forum must be given sufficient time to prepare their views before the day of the forum.<sup>35</sup> The time to prepare for the public hearing must be reasonable taking into account the decisions importance, impact and urgency.<sup>36</sup>

---

<sup>25</sup> *Coalition for Reform and Democracy case* note 23 supra, paragraph 199

<sup>26</sup> *Republic v. County Government of Kiambu ex parte Robert Gakuru and Another* (2016) eKLR, paragraph 50

<sup>27</sup> *Diani Business Welfare Association case* note 24 supra

<sup>28</sup> *In the Matter of the Mui Coal Basin Local Community case* note 9 supra, paragraph 97. This decision was endorsed in *Republic v. Independent Electoral and Boundaries Commission ex parte National Super Alliance Kenya and 6 others* (2017) eKLR, paragraph 194. See also *Robert Gakuru case* note 6 supra, paragraph 77

<sup>29</sup> *Ibid*

<sup>30</sup> *Ibid*

<sup>31</sup> *Coalition for Reform and Democracy case* note 23 supra, paragraph 186

<sup>32</sup> *Law Society of Kenya case* note 17 supra, paragraph 223

<sup>33</sup> *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v. County of Nairobi Government and 3 others*, (2014) eKLR, paragraph 29

<sup>34</sup> *Ibid*

<sup>35</sup> Note 32 supra

<sup>36</sup> *Ibid*

22. Be that as it may, an opportunity to be heard does not translate to prevailing of views.<sup>37</sup>

This means that the duty bearer conducting the public forum is not under an obligation to include the views of the public in the final decision especially if the said views contradict a government policy.<sup>38</sup>This view is supported by how the courts see the utility of public participation. In three decided cases<sup>39</sup> the Kenyan courts agreed with the South African Constitutional Court in *Merafong Demarcation Forum and Others v. President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008). The court held that public participation is not merely instrumental but must be seen as necessary to preserve human dignity and self-respect. In other words, the courts see the ability to express oneself in such forums not only a means of communicating a view with the aim of influencing a decision but also as a way of asserting self-worth.

23. Just because public views need not necessarily prevail does not mean that the duty bearer must not make every effort to engage the public. The courts require the duty bearer to keep an open mind and provide the public an opportunity to influence the decision making process.<sup>40</sup>In other words the courts think that public views ought to be included in the final decision made but this is not must.<sup>41</sup>

## Factual analysis

### *Pre-parliamentary phase*

24. This phase of the legislative process entails the conceptualization and initial drafting of the Refugees Bill, 2017. It normally involves interest groups that propose changes to the law to address a specific gap. Ideally, this process is framed in the context of policy objectives that have been set out.

---

<sup>37</sup>*Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v. County Government of Nairobi and 3 others*, (2013) eKLR, paragraph 49. See also *Robert Gakuru case* note 6 supra, paragraph 67

<sup>38</sup>*Robert Gakuru case* note 6 supra, paragraph 67. See also *Samuel Thinguri Waruathie and 2 others v. Kiambu County Government and 2 others* (2015) eKLR paragraph 46; *Kenya Association of Stock Brokers and Investment Banks case* note 7 supra, paragraph 90 and *Law Society of Kenya case* note 17 supra, paragraph 228

<sup>39</sup>*Robert Gakuru case* note 6 supra, paragraph 71; *County of Kiambu ex parte Robert Gakuru case*, supra note 26, paragraph 52 and *Law Society of Kenya case* note 17 supra, paragraph 228

<sup>40</sup>*Ibid*

<sup>41</sup>*Samuel Thinguri Waruathie case* note 38 supra

25. The Department of Refugee Affairs (DRA) – as was formerly called<sup>42</sup> – constituted a multi-agency Taskforce (TF)<sup>43</sup> to undertake the review process of the Refugees Act, 2006. The TF began its sitting in 2014. It engaged Members of Parliament (MPs), officials from the executive branch of the National Government, refugees, host communities, and the Kenya Parliamentary Human Rights Association (KEPHRA).
26. At the beginning of the process, it was envisaged that selected amendments would suffice to address the gaps in the Act. However, after a fact finding mission at Dadaab refugee camp in March 2015, the TF decided to work towards a new Act. This meant that the 2006 Act would have to be repealed. This decision was informed by the fact that the number of proposed amendments after the mission surpassed the threshold for amendments allowed by the law in Kenya. A draft Bill was developed following two consultative meetings between the TF and KEPHRA whose Chair sponsored the Bill, as a private members Bill.<sup>44</sup>
27. It should be noted that there were no other fact finding missions before the Bill was tabled in the National Assembly for consideration. Whereas Dadaab held the largest number of refugees at the time<sup>45</sup>, there were other areas such as Kakuma and Nairobi<sup>46</sup> that also held a sizeable number of refugees. Moreover, the refugee community in Dadaab is more homogenous (predominantly Somali) than that in Kakuma or Nairobi. Therefore it can be argued that this engagement did not meet the inclusivity and diversity principle discussed herein (see paragraph 20 supra). The same argument can be made for members of the host community in Kakuma and Nairobi who were also not engaged in the pre-legislative process.

### *Parliamentary phase*

28. This phase involves the stages of legislative procedure. It includes the following stages: first reading, committee stage, second reading, committee of the Whole House and the third reading.<sup>47</sup> The first reading is when the Bill is officially introduced to Parliament. Thereafter it is committed to the relevant departmental committee that is tasked with the

---

<sup>42</sup>In 2016, the name was changed to Refugee Affairs Secretariat (RAS) through an amendment to the Refugees Act, 2006

<sup>43</sup>The Task force on the review of the Refugees Act 2006 and National asylum policy comprises of eight member organizations/agencies. The TF is chaired by RAS and members include United Nations High Commissioner for Refugees (UNHCR), Refugee Consortium of Kenya (RCK), International Rescue Committee (IRC), Danish Refugee Council (DRC), Heshima Kenya, HIAS Refugee Trust and Kituo Cha Sheria (KCS).

<sup>44</sup>Hon Agostinho Neto, former Member of Parliament for Ndhiwa Constituency

<sup>45</sup>347,980 as at 31<sup>st</sup> December, 2015. See UNHCR, Kenya registered refugees and asylum seekers brochure.

<sup>46</sup>184,550 and 61,351 respectively as at 31<sup>st</sup> December, 2015

<sup>47</sup>Government of Kenya, *The National Assembly Standing Orders*, 2013 pp.85-121

- issue the Bill proposes to address. For instance, if a Bill is a health bill, then it will be handled by the health committee. The relevant committee must subject the bill to public participation and present a report to Parliament. Thereafter the bill is committed to the Committee of the Whole House where amendments to the Bill are proposed, debated and either approved or rejected. Once the Bill passes this stage, it is submitted to Parliament which then votes whether to pass it or reject it. If passed, it goes to the President for assent.
29. The KEPHRA bill was submitted to the office of the Clerk and the Speaker of the National Assembly in December 2015. It was subsequently forwarded to the Parliamentary Budget Office for pre-publication scrutiny as per the requirements of the Parliamentary Standing Orders.
  30. Members of the TF organized another fact finding mission to Dadaab refugee camp from 18<sup>th</sup>- 21<sup>st</sup> March 2016 for members of Departmental Committee on Administration and National Security (DCANS) and KEPHRA. The purpose of the mission was to enable the members to contextualize the camp set up and interact with refugees, host community members, government officials and other stakeholders at the camp. At this stage members of various stakeholders were engaged and their views collected.
  31. In July 2016, the Bill was presented for 1<sup>st</sup> reading in the National Assembly. Thereafter it was committed to the DCANS for review and public participation. Members of the public were invited to give their opinion on the Bill on 9<sup>th</sup> August 2016 where various stakeholders gave oral and written memoranda on the Bill. The issues that came up during the fact finding mission and the public hearing included lack of adequate provisions dealing with terrorism, host community inclusion, access to land, employment and work permits, need for increased burden sharing, and the protracted nature of refugee hosting. This process followed the laid down rules in the National Assembly Standing Orders. As mentioned in above (paragraph 18 supra), the courts often find this as sufficient involvement of the public as per article 118 of the Constitution in the absence of evidence that Parliament breached its own rules.
  32. Moreover, Parliament provided an opportunity for the public to provide written memoranda as part of involving the public. Kenyan courts in this regard have adopted the reasoning of Ngcobo J. in the *Doctors for Life case* (paragraph 6 supra). The learned judge states thus:  

*“Moreover, it will often be the case that where the public has been given an opportunity to lodge written submissions, Parliament will have acted*

*reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings.*<sup>48</sup>

33. A report on the views presented by the public was presented in Parliament by the DCANS. There was some debate on the issues raised and the report was eventually adopted. The bill was thereafter committed to the Committee of the Whole House for a second reading. At this stage each section of the proposed law was interrogated and amendments proposed by the public incorporated where feasible. Evidence of this include specific provision on access to land and employment that were suggested to the committee by stakeholders. The final product was subjected to a 3<sup>rd</sup> and final reading on 13<sup>th</sup> June 2017.
34. The Speaker of the National Assembly Honourable Justin Muturi forwarded the Bill to the President for assent on 21<sup>st</sup> July, 2017. However the President referred the Bill back to the National Assembly for reconsideration pursuant to the provisions of article 115(1) (b) of the Constitution on 5<sup>th</sup> August 2017. The President sighted that there had been no public participation. This conclusion by the President did not provide any discernible reasons. Therefore it was not clear how public participation was not achieved in the mind of the President.

## Conclusion

35. Public Participation is the process of engaging the public in decision making. The courts have decided that members of the public have a right to be engaged directly in public affairs. This provision has been entrenched in the Constitution that requires public participation whenever any person makes policy or a law. Therefore public views must be sought and ought to influence the final decision made by a duty bearer. Additionally, the right to directly participate in public affairs by members of the public does not derogate from the representation principle. Participatory and representative principles of democracy are to be seen as complementary rather than competing.
36. There are no hard and fast rules of evaluating public participation. The courts have ruled that a duty bearer should do what is reasonable to attain public participation. What is reasonable would depend on the circumstances of each case. The courts have also ruled that what is reasonable must afford the public access to information and an opportunity to be heard. However, it is not mandatory to hear the views of every single member of the public nor is it mandatory to incorporate the views of the public in the final decision.

---

<sup>48</sup>*County Government of Kiambu ex parte Robert Gakuru case supra note 26, paragraph 58. See also North Rift Motor Bike Taxi Association v. Uasin Gishu County Government (2014) eKLR p.18*

37. Public participation has quantitative and qualitative aspects. Quantitatively, the courts have held that as many members of the public as possible should be involved. This does not necessarily mean that all members of the public should be involved. The qualitative aspect refers to the diversity of members of the public involved. The guiding principle is that those most affected by a decision or law should be sought after and their views considered. Moreover, the qualitative aspects of public participation also include full information of the decision or law being proposed. This allows the public to make useful contribution aimed at influencing the decision.
38. The Refugees Bill, 2017 arguably had sufficient public participation at the legislative phase. The courts have affirmed that the manner in which public participation is done by Parliament is at Parliament's discretion. In the same breath, the courts have emphasized that the public do not have the right to dictate how Parliament can conduct the process of public participation. Moreover, the courts are guided by the rules that Parliament has set out for itself that address public participation. This means that unless there is cogent proof that the rules on public participation in the National Assembly Standing Orders have been breached, the court will find that the process sufficiently involved the public. In the same breath, the courts have indicated that where written submissions were submitted to Parliament then it is deemed that public involvement has occurred.
39. Be that as it may, the process ought to have engaged refugees and host community members in Kakuma and Nairobi at the pre-legislative phase. Since the process of legislative review was commenced by the TF and not Parliament, there should have been broader pre-legislative public participation. The courts value the principle of diversity and inclusivity and as argued above (paragraph 27 supra), there was little of this in the pre-legislative phase.

## Recommendations

In light of the issues raised by the court, the TF should consider doing the following:

1. **Publicising the bill:** it may be useful to use all available media such as newspapers, radios, public address systems to publicise the bill. This will allow more people to become aware of the bill and its contents and thus meet the access to information threshold. Use of public forums such as churches, mosques, social halls can also be considered as a cost efficient means of engaging those among the public likely to be

most affected and implore them to share their views about the bill. The aim would be to make as many people as are likely to be affected by the bill aware of its provisions.

2. ***Inclusion of input from Kakuma and Nairobi stakeholders:*** stakeholders from Kakuma and Nairobi were not directly targeted in the process of making the Bill. In as much as the courts have held that not all voices need be heard on a decision, the fact that Kakuma and Nairobi have a more diverse national representation of refugees can be deemed important under the inclusivity and diversity principle discussed in paragraph 20 above. The lack of the voice of the host community in these areas is also an issue that should be addressed.
3. ***Clear stakeholder list/participation programme:*** The number and variety of stakeholders need to be critically examined. A list of stakeholders should be drawn up through an assessment of the provisions of the bill. Those to be included and closely involved would include those that would be impacted the most by the bill. The taskforce should also consider including those who have are legally mandated to support review of bills such as the Kenya Law Reform Commission (KLRC).
4. ***Consider random public forums:*** random public forums will eliminate conscious or unconscious bias that exists in mobilization of participants. Random public forums mean that all participants have an equal opportunity to be picked to participate in the forums. These should be carried out in areas that have a significant presence of refugees.



## References

### *Cases*

Andrew Ileri Njeru and 34 others v. County Assembly of Embu and 3 others (High Court May 14, 2014).

Coalition for Reform and Democracy and 2 others v. Republic of Kenya and 10 others (High Court February 23, 2015).

Coalition for Reform and Democracy and Another v. Republic of Kenya and Another (High Court January 2, 2015).

Commission for the Implementation of the Constitution v. Parliament of Kenya and 5 others (High Court February 7, 2013).

Consumer Federation of Kenya (COFEK) v. Public Service Commission and Another (High Court June 4, 2013).

Diani Business Welfare Association and Others v. County Government of Kwale (High Court October 23, 2015).

Dricon Transporters Savings and Credit Co-operative Society Ltd v. County Government of Machakos and Another (High Court April 22, 2016).

In the Matter of the Mui Coal Basin Local Community (High Court September 18, 2015).

Independent Electoral and Boundaries Commission v. National Super Alliance Kenya and 6 others (Court of Appeal July 20, 2017).

Independent Electoral and Boundary Commission v. National Super Alliance Kenya and 6 others, 224 (Court of Appeal July 20, 2017).

Institute of Social Accountability and Another v. National Assembly and 4 others (High Court February 20, 2015).

John Muraya Mwangi and 501 others v. Minister for State for Provincial Administration and Internal Security and 4 others (High Court May 8, 2014).

Kenya Association of Stock Brokers and Investment Banks v. Attorney General and Another (High Court March 20, 2015).

Kenya Small Scale Farmers Forum and 6 others v. Republic of Kenya and 2 others (High Court October 31, 2013).

Khelef Khalifa and 2 others v. Independent Electoral and Boundaries Commission and Another (High Court July 19, 2017).

Kiambu County Government and 3 others v. Robert N. Gakuru and others (Court of Appeal December 18, 2014).

Law Society of Kenya v Attorney General and Another (High Court May 26, 2016).

Law Society of Kenya v. Attorney General and 2 others (High Court March 19, 2013).

Malindi North Resident Association and 6 others v. Kilifi County Government and 2 others (High Court April 4, 2017).

Martin Nyaga Wambora v. County Assembly of Embu and 37 others (Court of Appeal December 11, 2015).

Meru Bar, Wines and Spirits Owners Self Help Group v. County of Government of Meru (High Court December 4, 2014).

Milly Glass Works Ltd and 3 others v. County Government of Mombasa and 2 others (High Court April 28, 2016).

Moses Munyendo and 908 others v. Attorney General and Another (High Court August 6, 2013).

Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v. County Government of Nairobi and 3 others (High Court December 18, 2013).

Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v. County of Nairobi Government and 3 others (Court of Appeal October 3, 2014).

North Rift Motor Bike Taxi Association v. Uasin Gishu County Government (High Court October 2, 2014).

Patrick Mukiri Kabindu v. Executive in charge of Tourism Development and Culture Mombasa County and 21 others (High Court October 13, 2015).

Patrick Musimba v. National Land Commission and 4 others (High Court March 29, 2016).

Pevans East Africa Ltd and Another v. Chairman Betting Control Licensing Board and 7 others (High Court December 27, 2017).

Republic v. Attorney General and Another ex parte Hon. Francis Chacu Ganya (High Court April 25, 2013).

Republic v. County Government of Kiambu ex parte Robert Gakuru and Another (High Court May 16, 2016).

Republic v. Independent Electoral and Boundaries Commission ex parte National Super Alliance Kenya and 6 others (High Court July 7, 2017).

Republic v. Transitional Authority and Another ex parte Kenya Medical Practitioners and Dentists Union and 2 others (High Court December 18, 2013).

Richard Dickson Ogendo and 2 others v. Attorney General and 5 others (High Court June 9, 2015).

Robert N. Gakuru and Others v. Governor of Kiambu County and 3 others (High Court April 17, 2014).

Samuel Thinguri Waruathe and 2 others v. Kiambu County Government and 2 others (High Court April 17, 2015).

Simeon Kioko Kitheka and 2 others v. County Government of Machakos and 3 others (High Court April 22, 2016).

Tyson Ng'atich and Another v. Governor, Bomet County Government and 5 others (High Court May 29, 2015).

#### *Other texts*

Government of Kenya. (2010). *Constitution of Kenya*. Nairobi: Government Printers.

Government of Kenya. (2013). *The National Assembly Standing Orders*. Nairobi: Government Printer.

Government of Kenya. (2016). *County Public Participation Guidelines*. Nairobi: Ministry of Devolution and Planning & Council of Governors.