



**Kiragu & 2 others (Suing on behalf of, as the Chairperson, Secretary and Treasurer respectively of the Association of Gaming Operators of Kenya) v Attorney General & 2 others; Betting Control and Licensing Board (Interested Party) (Constitutional Petition E406 of 2021) [2023] KEHC 386 (KLR) (Constitutional and Human Rights) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 386 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**CONSTITUTIONAL PETITION E406 OF 2021**  
**AC MRIMA, J**  
**JANUARY 31, 2023**

**BETWEEN**

**JUDITH KARIGU KIRAGU ..... 1<sup>ST</sup> PETITIONER**  
**DANIEL MASI MOGENI ..... 2<sup>ND</sup> PETITIONER**  
**NICKSON MWANGI MAINA ..... 3<sup>RD</sup> PETITIONER**  
**SUING ON BEHALF OF, AS THE CHAIRPERSON, SECRETARY AND**  
**TREASURER RESPECTIVELY OF THE ASSOCIATION OF GAMING**  
**OPERATORS OF KENYA**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**  
**KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**  
**NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**BETTING CONTROL AND LICENSING BOARD ..... INTERESTED PARTY**

**No jurisdiction for the Court of Appeal and Supreme Court to hear election petitions concerning the election or nomination of members of a County Assembly.**

*Neither the Court of Appeal nor the Supreme Court had jurisdiction to hear appeals arising from election disputes concerning members of a County Assembly. That applied equally to election disputes involving both directly elected and nominated members of a County Assembly.*

Reported by John Ribia



**Jurisdiction** – jurisdiction of the Supreme Court – jurisdiction of the Court of Appeal – jurisdiction to determine election disputes of members of County Assembly - whether the Court of Appeal and the Supreme Court had jurisdiction to hear election petitions concerning the election or nomination of members of a County Assembly - whether the Court of Appeal's decision to strike out the appeal for want of jurisdiction was a violation of the applicants' constitutional right to appeal – Constitution of Kenya, 2010 article 164(3)(a); Elections Act (cap 7) section 25, and 85A; Supreme Court Act (Cap 9B) section 23A and 24; Supreme Court Rules, 2020 (Cap 9B Sub Leg), rule 31.

**Civil Procedure and Practice** – conservatory orders – conditions precedent - whether the applicants satisfied the test for the grant of conservatory orders pending the hearing of the intended appeal.

### **Brief facts**

The applicants sought conservatory orders staying the execution of the Court of Appeal's decision that struck out their Election Petition Appeal for want of jurisdiction. The appeal involved nominated members of the Kwale County Assembly. The Court of Appeal held that it lacked jurisdiction to entertain the appeal. The applicants argued that the decision violated their constitutional rights to appeal under article 164(3)(a) of the Constitution and that the decision was contrary to constitutional provisions related to electoral disputes. They also contended that the appeal raised substantial constitutional questions, including the scope of appellate jurisdiction in election disputes.

The respondents opposed the application, arguing that the issue of jurisdiction had already been settled by the Supreme Court in previous cases which determined that there was no appellate jurisdiction for election petitions concerning County Assembly members.

### **Issues**

- i. Whether the Court of Appeal and the Supreme Court had jurisdiction to hear election petitions concerning the election or nomination of members of a County Assembly.
- ii. Whether the applicants satisfied the test for the grant of conservatory orders pending the hearing of the intended appeal.
- iii. Whether the Court of Appeal's decision to strike out the appeal for want of jurisdiction was a violation of the applicants' constitutional right to appeal under article 164(3)(a) of the Constitution.

### **Held**

1. Neither the Court of Appeal nor the Supreme Court had jurisdiction to hear appeals arising from election disputes concerning members of a County Assembly. That applied equally to election disputes involving both directly elected and nominated members of a County Assembly.
2. The applicants had failed to demonstrate that their appeal was arguable or that it raised substantial constitutional issues. There was no positive order from the Court of Appeal capable of execution, and the appeal would not be rendered nugatory even if conservatory orders were not granted.
3. The Court of Appeal's decision did not violate the applicants' right to appeal under article 164(3)(a) of the Constitution. The constitutional right to appeal did not extend to election disputes concerning County Assembly members.

*Application dismissed.*

### **Orders**

- i. *The petition of appeal No. E014 of 2024 and the Notice of Motion dated March 28, 2024 were struck out for want of jurisdiction.*
- ii. *The security deposit of Kshs. 6,000/= lodged as security for costs was ordered to be refunded to the applicants.*
- iii. *No order as to costs*

### **Citations**

### **Cases**



1. Basco Products (K) Limited & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested Party) (Petition E 286 of 2021; [2022] KEHC 168 (KLR)) — Explained
2. British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017; [2019] KESC 15 (KLR)) — Explained
3. Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others (Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated)) — Explained
4. Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others & Others ((CCT 27/01) [2001] ZACC 6; 2002 (2) BCLR 113; 2002 (2) SA 693; [2002] 2 BLLR 119 (CC) (4 December 2001)) — Explained
5. George Lesaloi Selelo & Blue Jay Limited (t/a Betway) v Commissioner – General, KRA, Cabinet Secretary, National Treasury, Attorney General, National Assembly & Speaker of the Senate; Pevans EA Limited (t/a Sportpesa), Bluejay Limited (t/a Betway), Acumen Communication Limited (t/a Cheza) & Chairman, Betting Control & Licensing Board (Constitutional Petition 9 & 10 of 2018; [2019] KEHC 4787 (KLR)) — Explained
6. Institute of Social Accountability & another v National Assembly & 4 others (Petition 71 of 2013) — Explained
7. Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties) (Constitutional Application 426 of 2018; [2019] KEHC 5184 (KLR)) — Explained
8. Judicial Service Commission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained
9. Kenya Bankers Association v Attorney General & another; Central Bank of Kenya (Interested Party) (Petition 427 of 2018; [2019] KEHC 6374 (KLR)) — Explained
10. Kenya Bankers Association v Attorney General & another; Central Bank of Kenya (Interested Party) (Petition 427 of 2018; [2019] KEHC 6374 (KLR)) — Explained
11. Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (Civil Appeal 46 of 2017; [2018] KECA 381 (KLR)) — Mentioned
12. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 Others (Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR)) — Explained
13. National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission, Attorney General & Jubilee Party of Kenya (Civil Appeal 258 of 2017; [2017] KECA 342 (KLR)) — Explained
14. Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties) (Petition 413 of 2016; [2019] KEHC 10895 (KLR)) — Explained
15. Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board and 7 others (Civil Appeal 11 of 2018) — Explained
16. Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti (Miscellaneous Civil Application 617 of 2017) — Explained
17. Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others (Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (Consolidated)) — Explained
18. Doctors for Life International vs. Speaker of the National Assembly & Others ((CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)) — Explained
19. Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) ((CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)) — Explained



20. President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others ((CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999)) — Explained
21. Harrkinson -vs- Attorney General of Trinidad and Tobago ([1980] AC 265) — Explained

### Statutes

1. Constitution of Kenya, 2010 (Const2010) — article 2,3,10,27,43,46(1); 47; 114; 165(2)(b)(d); 201,209,210,221 — Interpreted
2. Excise Duty Act (No. 23 of 2015) — section 2,5(1)(b); 9; 23; 24; 32; Schedule 5; part II; paragraph 4B,4D — Interpreted
3. Fair Administrative Action Act (No. 4 of 2015) — section 2 — Interpreted
4. Finance Act (No 8 of 2020) — section 4A,4B 4C, 4D — Interpreted
5. Kenya Revenue Authority Act (No. 2 of 1995) — section 5(2) — Interpreted
6. Public Finance Management Act (No. 18 of 2012) — section 37,39A(4) — Interpreted

### Advocates

- \*\*Mr. Amoko, \*\* Learned Counsels** for Petitioners.
- \*\*Miss. Kiramana, \*\* Learned Counsel** for 1st Respondent.
- \*\*Miss Sega\*\* , Learned Counsel** for 1st Respondent.
- \*\*Mr. Kuyoni\*\* , Learned Counsel** for 3rd Respondent.

## JUDGMENT

### Background

1. The Petitioners, Judith Karigu Kiragu, Daniel Masi Mogeni and Nickson Mwangi Maina are the Chairperson, the Secretary and Treasurer of The Association of Gaming Operators of Kenya (hereinafter ‘AGOK’) respectively. They represent the interests of the players within the gaming and lotteries industry.
2. Through the Amended Petition dated 6<sup>th</sup> October 2021, supported by the Affidavit and Supplementary Affidavit of Judith Kiragu deposed to on 6<sup>th</sup> October 2021 and 27<sup>th</sup> June 2022 respectively, the Petitioners challenged the amendments introduced to the Excise Duty Act 2015 by section 32 of the Finance Act.
3. It is the Petitioners case that process leading up to the introduction of excise duty on betting, gaming, price competitions and lotteries and the provision raising the tax to 30% and apportioning it at 7.5% on betting, gaming, price competitions and lotteries, fell short various constitutional edicts and other statutory provisions.
4. In a synopsis, the Petitioners pleaded that on 5<sup>th</sup> May 2021, the National Assembly’s (3<sup>rd</sup> Respondent herein) Departmental Committee on Finance and National Planning introduced the Finance Bill, for enactment of an ‘Act of Parliament to amend the law relating to various taxes and duties; and for matters incidental thereto’.
5. Is it their case that following its first reading on 11<sup>th</sup> May 2021, the Finance Bill was committed the National Assembly’s Committee for consideration and facilitation of public participation.
6. To that end, the Petitioners pleaded that the 3<sup>rd</sup> Respondent took out advertisements on print media on Thursday 29<sup>th</sup> May 2021 inviting comments on the Bill and sent out invitations to stakeholders vide their letter dated 26<sup>th</sup> May 2021.



7. It is their case that the 3<sup>rd</sup> Respondent received representations, views and memoranda from stakeholders across the board who would be affected by the Bill and subsequently held a stakeholders' engagement forum in Nairobi at Trademark Hotel on 2<sup>nd</sup> to 4<sup>th</sup> June 2021.
8. The Petitioners posited that the 3<sup>rd</sup> Respondent received representations from sectors which would be affected by the proposed introduction of paragraph 4B and 4D of Part II of the First Schedule to Excise Duty Act (hereinafter 'the impugned amendment')
9. The impugned amendment provided as follows;
  32. The First Schedule to the Excise Duty Act, 2015 is amended; -
    - (a) ...
    - (b) ...
    - (c) ...In part II by inserting the following new paragraph immediately after paragraph 4.
      - 4A. ...
      - 4B. Excise Duty on gaming shall be seven-point five percent of the amount wagered or staked.
      - 4C. ...
      - 4D. Excise Duty on lottery (excluding chargeable lotteries) shall be seven-point five percent of the amount paid or charged to buy the lottery ticket.
10. The Petitioners pleaded that two concerns were raised by the stakeholders on the foregoing provisions.
11. Firstly, that gaming and lottery was not an excise as no good was being supplied nor was any service being provided.
12. Secondly, that the tax proposed to be imposed was too high and would drive investors out of the market.
13. It is the Petitioner's case that, without considering the objection that there were no services nor goods supplied upon which excise could be levied, the 3<sup>rd</sup> Respondent proposed to amend the Finance Bill by raising the tax to 30% and apportioning it across betting, gaming, price competition and lottery at 7.5 each.
14. The Petitioners posited that subsequent upon the foregoing, no notice was given to any of those who would be affected by the proposed amendments to extend excise duty to gaming, lotteries and prize competitions, nor were the industry players given an opportunity to make any representations to the 3<sup>rd</sup> Respondent's Committee.
15. The Petitioners pleaded that the Finance Bill was presented for 2<sup>nd</sup> Reading on 22<sup>nd</sup> and 23<sup>rd</sup> June 2021 and for 3<sup>rd</sup> reading on 24<sup>th</sup> June 2021 where it was passed and subsequently assented to by the President on 29<sup>th</sup> June 202.
16. It is their case that the impugned amendment came into operation on 1<sup>st</sup> July 2021 and to that end, Kenya Revenue Authority, the 2<sup>nd</sup> Respondent herein, was in the process of enforcing the impugned amendment by writing to various casinos operators requiring the filing of returns and payment of the excise.



17. The Petitioners faulted the foregoing process of enactment of the impugned amendment stating that there was no public participation at all in respect to the 7.5% Excise Duty on Gaming and 7.5% Excise Duty on Lottery nor could there be any such participation as it was introduced as an amendment in the 3<sup>rd</sup> Respondent's Committee Report on the floor of the House during the 2<sup>nd</sup> reading of the Finance Bill.
18. They posited that the Respondents failed to directly engage industry organizations/associations such as the Petitioners who have been at the forefront of the development of the Regulatory framework for the gaming Industry.
19. Further to that foregoing, the petitioners posited that in enacting the impugned amendment, the 3<sup>rd</sup> Respondent failed to discharge the duties expected of it under section 39A(4) of *Public Finance Management Act*, 2012 which requires the National Assembly to take into account the principles of equity, certainty and ease of collection, the impact of the proposed changes on the composition of tax revenue and its impact on development, investment, employment and economic growth, among other factors.
20. In particular, the Petitioners posited that given the manner in which casinos operate, it is impossible for operators to collect the proposed excise duty in the sums wagered or staked since customers purchase chips which is then wagered for a specific sum in a specific game.
21. The Petitioners further pleaded that it was impossible to collect or implement the collection of taxes based on amounts wagered and or staked on slot machines as it is impossible for casinos operators to determine the process of wagers. They contended that slots use digital technology that generates random numbers which determine the outcome of the game.
22. The Petitioners made the same case for lottery stating that participants purchase tickets for a specific amount so as to participate in a predetermined lottery prize.
23. It was their case that gaming and lottery industry is already heavily taxed with corporate tax, at 30%, gaming tax at 15% and withholding tax of 20% on gross winnings imposed on gamers and participants.
24. It was its case that a 7.5% tax if enforced will have the effect of discouraging customers from participating in gaming and lotteries thus affecting investment, employment and overall revenue collection.
25. Lastly, the Petitioners asserted that the impugned Amendment was statutorily incongruent since there no services or goods supplied upon which excise duty may be charged.
26. They pleaded that unlike betting, the *Excise Duty Act* makes no provision at all for the levying of excise duty on gaming.
27. It posited further that neither gaming nor lotteries constitute the provision of services or the supply of goods which excise duty may be levied.
28. Based on the foregoing factual and legal matrix, the Petitioners prayed for the following reliefs;
  - a. A declaration that paragraph 4B and 4D of Part II of the First Schedule to the *Excise Duty Act*, 2015 introduced by section 32 of the Finance Act, 2021, are unconstitutional and therefore null and void and of no legal effect.
  - b. Such other and/or further relief as this Honourable Court may deem fit to grant.



- c. An order that the Costs of and occasioned by this Petition be borne by the Respondents.

### **The Submissions**

29. The Petitioners further urged their case through written submissions dated 22<sup>nd</sup> June 2022.
30. In giving a historical account regarding the bid to impose tax on betting, it was submitted that amendments to section 23 and 24 of the Excise Duty Act was set at 20% on the amount wagered by the Finance Act 2019.
31. It was their case that the provision was subsequently deleted by section 15 of the Finance Act 2020 but, was revived on 29<sup>th</sup> April 2021 upon presentation of the Budget statement and Finance Bill for that year on account of betting having caused widespread negative effects in the society.
32. It was submitted that all those who commented on the impugned amendment called for its elimination due to its deleterious effect.
33. It was submitted further that ICPAK in its representation proposed new amendment in clause 4A in subclause 25 because betting industry was one of the most heavily taxed sectors in Kenya.
34. It was submitted further that Anjarwalla & Khanna made its input stating that the proposed reintroduction of Excise Duty of betting at the rate of 20% of the amount wagered or staked by punters ought to be deleted as it will discourage punters from placing bets which may lead to investors exiting Kenyan Betting Industry.
35. The Petitioners made further reference to the input by Milestone and Gaming Limited Sportpesa which made submissions to the National Assembly by opposing to the provision under subclause 25(b) as it was contrary to section 9 of the Excise Duty act which provides that the excisable value of excisable service shall be the fee, commission or charge payable for the service open market value for the services.
36. It was their case further that Grant Thornton Taxation Services Limited gave their feedback proposing amendment of section 25 of the Finance Act by deleting the proposal to introduce 20% of excise duty on betting because the sector was overburdened by different tax obligations.
37. Based on the foregoing views opposed to introduction of the impugned amendments, the Petitioners submitted that the impugned amendments did not emanate from the public.
38. It was submitted that the proposal to amend the Finance Bill by raising the tax to 30% and apportioning it across betting, gaming, price competitions and lotteries at 7.5% emanated from the Finance Committee in response to the three representations it received.
39. It was the Petitioners case that as far as excise on gaming and lotteries and those affected goes, they were never given reasonable and or any meaningful opportunity to have a say to those aspects of the Finance Bill 2021 in violation of Article 10 and 201 of the Constitution.
40. It was reiterated that during public engagement on Finance Bill 2021, there were no proposals in respect to Excise Duty on gaming and lotteries nor was any prior information given as to the basis for introducing excise on gaming and lotteries.
41. It was their case that the amendments were not within the parameters of what was submitted to the public for their comments.



42. The Petitioners contended that it is on the foregoing basis that no representations were made to the 3<sup>rd</sup> Respondent.

43. The Petitioners relied on the case of *Kenya Bankers Association -vs- Attorney General & Another; Central Bank of Kenya (Interested Party)* (2019) eKLR where clause 57A was successfully challenged for being introduced after the Finance Bill had undergone public participation. It was observed;

“There was no public participation in the enactment of the impugned section. The alleged amendment was not a minor but a major or substantive amendment which was against the purpose of the Bill and which required public participation.”

44. It Petitioners urged the Court to allow the reliefs as prayed.

### **The 1<sup>st</sup> Respondent’s Case**

45. The Attorney General opposed the Petition through Grounds of Opposition dated 18<sup>th</sup> June 2022.

46. It was its case that the Petition does not disclose any violation occasioned by the 1<sup>st</sup> Respondent and as such no remedy may be imposed against it.

47. It asserted further that the Petitioners allege lack of public participation and in the same breath acknowledge that the 3<sup>rd</sup> Respondent conducted it.

48. It urged that it is in public interest that the Petition is dismissed for lack of merit.

### **The Submissions**

49. In its written submissions dated 27<sup>th</sup> June 2022, the 1<sup>st</sup> Respondent identified the issues for determination as being; whether the impugned provisions of the law are unconstitutional; and whether the orders sought can be granted.

50. On the issued regarding incongruence of the impugned amendment, the 1<sup>st</sup> Respondent submitted that according to Article 209 and 210 of *the Constitution*, National Government has the power to impose tax, including excise duty in line with legislation.

51. It was their case that since the impugned amendment were introduced by a body constitutionally authorized, the same was done properly and statutory congruence is achieved f the law if properly passed by parliament.

52. On the issue regarding adequacy of public participation it was its case that such is a question of fact.

53. It asserted that the 3<sup>rd</sup> Respondent produced documents showing that public participation was conducted a fact not in dispute.

54. On the aspect regarding introduction of amendments on the floor of the house, after public participation having been done, the 1<sup>st</sup> Respondent asserted that Courts determined the issue.

55. To that end reliance was place on the decision in *Kenya Bankers Association v Attorney General & another; Central Bank of Kenya (Interested Party)* [2019] eKLR where the Learned judge observed that-

“I have upon perusal of the relevant documents and affidavits as well as the annexure thereto, noted what was introduced as clause 57A was not what was in the bill at the time the bill underwent public participation and I find upon amendment of the bill, it introduced a substantive amendment affecting the rights of the petitioners, it was therefore mandatory



for the 2<sup>nd</sup> Respondent to have resubmitted the Bill to the public to obtain their views. I note this was not a minor amendment such as adding a comma and full stop. In view of the above, I find and hold that there was no public participation in the major enactment of section 63 of the Finance Act, 2018 and that the National Assembly violated Article 10(2) and Article 118 of the constitution in introducing clause 57A during the committee of the whole house stage”

56. In seeking to distinguish the foregoing, the 1<sup>st</sup> Respondent submitted from the documents adduced by the 3<sup>rd</sup> Respondent, the issue of Excise duty on wagered amount was part of the discussion with the stakeholders during the public participation.

57. It was its submission that all that was done by the National Assembly, was to adjust the percentage of the said excise duty downwards to 7.5% from 20%.

58. The 1<sup>st</sup> Respondent submitted that the circumstances of the case do not conform with the decision in Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties) [2019] eKLR, where the Court declared an amendment unconstitutional on the basis that the same was not in the Bill that was presented to the public. It was observed;

“It is therefore important to note that any amendments effected at the committee stage should be within the parameters of what was submitted to the public for their input. Otherwise allowing the legislature to pass legislation touching on new matters on the floor of the House will result in the negation of the constitutional principle that requires public participation in the enactment of laws.”

59. Further to the foregoing, the 1<sup>st</sup> Respondent, place reliance on the Court of Appeal decision in Nairobi in Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board and 7 others [2018] eKLR; Civil Appeal No. 11 of 2018, and the one in Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR, where it was observed;

“...after national assembly has heard the views of the members of public and industry stakeholders on a Bill, it is not precluded from effecting amendments to the Bill before finally passing it. Those amendments do not necessarily have to agree with the views expressed by the people who have heard, so long as the views have been taken into account.”

60. On the issue on whether the Petitioners were deserving of the orders sought, it was submitted that the impugned provisions were passed by parliament in fulfilment of its Constitutional mandate. Reliance to that end was sourced from the decision in Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties) [2019] eKLR, where it was observed;

“...Whatever our views of the impact of interest rate regulation, the Court must recognize that the law was reached by the Country's democratically elected representatives and what was decided must be taken to reflect the conscience of a majority of Kenyans...”

61. In the end the 1<sup>st</sup> Respondent urged the Court to allow the 2<sup>nd</sup> Respondent collect revenue and find the Petition to be without merit.

### **The 2<sup>nd</sup> Respondent's Case**

62. Kenya Revenue Authority opposed the Petition through the affidavit of Josephine Mugure, the Chief Manager Corporate Policy Unit, deposed to on 24<sup>th</sup> June 2022.



63. She deposed that the 2<sup>nd</sup> Respondent is an agency of the Government for collection of all revenue and to that end, under section 5(2) of [Kenya Revenue Authority Act](#), it is required to administer and enforce all provisions of the written law set out in part 1 and 2 of the First Schedule for purposes of assessing, collecting an accounting of all revenue.
64. In speaking to the process that led up to enactment of the impugned amendment, it was her case that the Budget policy statement, (Finance Bill, 2021) commenced with the Cabinet Secretary National Treasury inviting for proposals from the general public through invitations dated 16<sup>th</sup> January 2021.
65. She deposed that presentations were made by government departments, agencies and Authorities both private and public companies and other stakeholders and it is after receiving proposals that the Cabinet Secretary National Treasury drafted the Finance Bill 2021.
66. It is therefore her deposition that adequate public participation took place before the drafting of the Finance Bill 2021.
67. In respect to constitutionality of [Excise Duty Act](#), she deposed that the Petitioners have misconstrued Article 210(1). It was her case that the term legislation in the Article encompasses any statutory instruments such as rules, orders, regulations, By-laws among others ordained by the National Assembly.
68. On the foregoing, she deposed that the Finance Bill was in tandem with Article 201(1) of [the Constitution](#) having been tabled by the Cabinet Secretary Treasury, adopted and sanctioned by the National Assembly.
69. The 2<sup>nd</sup> Respondent opposed the orders sought in the Petition stating that it has not denied any members of the Petitioners Tax Compliance Certificate.
70. It was her deposition further that the 2<sup>nd</sup> Respondent did not violate Article 221 of [the Constitution](#) and section 37 of [Public Finance Management Act](#) having met the process set out by [the Constitution](#) and the said Act.
71. It was her case that excise duty on gaming and excise Duty on Lottery should be implemented as enacted by the National Assembly for preservation of the environment and public health.
72. In the end she urged the Petition to be dismissed and in the event Court finds the amendment did not meet the threshold of public participation, the legislation be referred to Parliament for consideration.

### **The submissions**

73. The 2<sup>nd</sup> Respondent urged their case further through written submission dated 28<sup>th</sup> June 2022.
74. In a bid to lend credence to the propriety of the amendment, it was submitted that according to section 5(1)(b) of the [Excise Duty Act](#), imposition of excise duty is charged on excisable services supplied in Kenya by a licenced person.
75. On the foregoing, it was its case that the Petitioner's services have been added to the First Schedule of the [Excise Act](#) by dint of Section 2 which defines excisable services to mean services specified in part II of the First Schedule.
76. In demonstrating that the taxes levied on betting was proper, the 2<sup>nd</sup> Respondent gave a run down the process of betting in Kenya.



77. It was its submission that once a punter (person making a bet) opens an account with the Bookmarkers using their phone numbers, the punter then makes a deposit into his mobile money account after which the money is transferred into their (punter's) betting account created with the Bookmarkers.
78. It is then that a punter has the discretion of either placing a bet manually or online.
79. It was submitted that once a bet is placed, the Bookmarker sends a message to the punter as a confirmation that the bet is successfully placed and it shows a possible win which is the whole amount inclusive of the stake. At this point, the 2<sup>nd</sup> Respondent submits, the punter has lost the stake and it belongs to the Betting Company as the consideration for assessing the betting service.
80. It was its case that the amount wagered is what allows the others to enjoy the betting service.
81. On the foregoing explanation the 2<sup>nd</sup> Respondent submitted that the stake is a charge for participating in a bet, lottery or a game under the Gaming and Lotteries Act. As such, the impugned amendments being the excise Duty on stakes, is a consumption tax and it is borne by the Punters collected by the Bookmarker which is the Casino.
82. It was its case that if a bet is successful, the punter gets a confirmation message showing the amount staked. For example the Punter places Kshs. 1000, and the odds for the game is at 2.58, he makes an amount of 2380.50, the excise duty based on excise duty per Finance Act 2021 is 7.5% (Kshs. 75; withholding tax on winnings under the income Tax of 20% (292.30), leaving the payout to be Kshs. 2,094/-.
83. It was its submission that the above represent the only taxes charged on a punter in a betting transaction and not any other taxes.
84. The 2<sup>nd</sup> Respondent asserted that the Petition is not about taxes and duties levied to the Bookmarks like the Corporation Tax and gross Gaming revenue.
85. It was its case that the Excise Duty Act as amended by the Finance Act at section 4A,4B 4C and 4D, betting is an excisable service within the Act and properly brought to charge and that the taxing point for excise is the time of supply of the service.
86. It was its submission that once a betting company enable a punter to wager a bet service has been provided.
87. It was its case that section 16(1)(c) of the Excise Duty Act requires all Bookmarkers to register in order to be able to supply betting service.
88. Further to the foregoing it was submitted that section 9 of the Excise Duty Act provides that a stake is a charge that allows a punter to participate in a bet, lottery or a game under the Betting, Gaming and Lotteries Act and as such, it is proper to levy excise duty on the stake for betting, gaming and lottery.
89. It was submitted that the 2<sup>nd</sup> Respondent does not seek to tax money that is held in the betting wallet but only the amount which is staked or wagered.
90. It was submitted further that since bookmarkers are licensed to supply the betting service, section 5(3) (b) as read with section 4(1A) and 6(3) requires Bookmarkers to collect and pay the excise duty at the point the punter wagers or places the stake.
91. Based the foregoing explanation on betting, lotteries and gaming, it was the 2<sup>nd</sup> Respondent's case that the Petitioners failed to comprehend the legal regime on excise on betting and who remits taxes.



92. In the end it was submitted that the Petitioner did not indicate the manner in which the Article 10, 27, 43, 46(1) and 201(b)(i) of the constitution were violated. It urged that the Petition be dismissed with costs.

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

93. The National Assembly opposed the Petition through the Replying Affidavit of Samuel Njoroge, the Director Legislative and Procedural Services, deposed to on 16<sup>th</sup> June 2022.

94. From the onset, he deposed that under Article 209 as read with Article 210 of the Constitution, the National Assembly retains the legislative authority to define the scope of tax which include income tax, value added tax, custom duties and other duties on import and export of goods and excise tax.

95. He deposed that following adverts on the print media on 20<sup>th</sup> May 2021 requesting for comments on the Bill from members of the Public and relevant stakeholders, the Committee on Finance and National Planning received memoranda from fifty-six (56) stakeholders.

96. He deposed that on 2<sup>nd</sup> and 3<sup>rd</sup> June 2021, public hearing was conducted at Trademark Hotel, Village Market where the Committee heard further views from stakeholders and the public.

97. He deposed further that the Committee compiled its report having considered the nature of the views of the stakeholders.

98. In reference to the Hansard of 22<sup>nd</sup> June 2021, it was his deposition that subsequently, the report was laid before the National Assembly on 22<sup>nd</sup> June 2021 where legislators proposed that taxation on betting activities be increased and spread out on all areas of betting to ensure the even distribution of taxation burden amongst all users and beneficiaries of the services.

99. He deposed that at paragraph 420(h) of the Report, the Committee recommended insertion of the provision on excise duty for gaming of the amount wagered or staked, price competition and lottery (excluding charitable lottery) at 7.5% each, a percentage which the committee reduced from the proposed 20%.

100. It was his case that, contrary to the Petitioner's allegations, the amendments were effected within the parameters of what was submitted to the public for public participation and that it did not mean that each individual's view would be taken into account.

101. He deposed that the justification for introducing the amendment was to divide excise duty on all transactions including gaming and lottery.

102. It was case that the Bill placed in the public domain read; "An Act of Parliament to amend the law relating to various taxes and duty and for matters incidental thereto"

103. He deposed that Article 94 vests legislative authority in Parliament and as such, it is allowed to amend a legislative proposal as the Bill goes through the various stages of enactment of legislation.

104. It was further its case that the one of the intentions of imposing an excise duty is to discourage the use of a service that is deemed to be harmful to the consumer.

105. He urged Court not to overstep its bounds by directing parliament on which goods or services to tax or not to.

106. The 3<sup>rd</sup> Respondent case was that contrary to the Petitioner's averments, excise duty can be charged upon consumption of goods or services as is the case with the impugned amendments and that the



Petitioner has failed to appreciate that the excise duty imposed shall be remitted by the supplier and not the consumer.

107. He further deposed that the taxation has not subjected the Petitioners to double taxation.
108. In the end it was his deposition that The Finance Act is a crucial piece of legislation that impacts the entire budget and if interfered with the operations of government will be affected. He urged the not to exercise discretion in favour of the Petitioners by dismissing the Petition.

### **The Submissions**

109. The 3<sup>rd</sup> Respondent filed written submissions dated 27<sup>th</sup> June 2022. It identified the issues for determination as; whether there was public participation, whether there was violation of section 39(a) of *Public Finance Management Act* 2012, and whether there is statutory incongruence.
110. On public participation, the 3<sup>rd</sup> Respondent reiterated its case as in the Replying Affidavit of Mr. Njoroge.
111. To buttress its case, reliance was placed on the decision in Petition No. E286 of 2021, *Basco Products (K) Limited & 4 Others -vs- National Assembly & 3 Others; Kenya Association of Manufacturers (interested Party)* where it was observed that the Memorandum of Object of Finance Bill informed the Public that the National Assembly intended to amend the excise Duty by imposing duty n various commodities and the invitation for public comments to the committee clearly informed the public as much.
112. The 3<sup>rd</sup> Respondent distinguished the decision in *Kenya Bankers Association -vs- Attorney General & Another; Central Bank of Kenya (Interested Party)* (2019) eKLR relied upon by the Petitioners by submitting that the Court relied on the Memorandum and Objects and reasons of the Bill and found that the Bill placed in the public domain what was meant to enhance the powers of the Central Bank of Kenya and the impugned amendment dealt with other things altogether.
113. It was submitted further that the Court found that the impugned section was not contemplated in the Memorandum and Objects and reasons of proposed Bill and was introduced at Committee Stage.
114. On the issue regarding violation of section 39A of *Public Finance Management Act*, it was the 3<sup>rd</sup> Respondent's case that the Petitioners' concerns are about implementation, enforcement and or application of the impugned provisions as opposed to Constitutionality.
115. Support of the foregoing position was found in the case of *George Lesaloi Selelo & Another -vs- Commissioner General, KRA & 4 Others; Pevans EA Limited (t/a) Sportpesa) & 3 others* where it was observed that;

Any practical difficulty in collection of the withholding tax that may come to light will not amount to constitutionalism. It will be a matter to be taken up with Kenya Revenue Authority for better management of the tax.

116. It was submitted further that the claim by the Petitioners that the tax would have the effect of discouraging customers from participating in gaming and lotteries and therefore negatively affect investment, and employment is speculative.
117. On the issue of statutory congruence, the 3<sup>rd</sup> Respondent submitted that the decision to determine items or services to be taxed lies with the policy makers and Parliament



118. The 3<sup>rd</sup> Respondent urged its case as the 1<sup>st</sup> Respondents and reiterated that at Part II of the first schedule to the Excise Duty act and amended by the Finance Act, 2021 section 4B lists gaming as one of the excisable services.
119. Reference was further made to section 5(3)(b) of the Excise Duty Act which provides that excise duty payable shall be payable by the licensed person making supply.
120. In the conclusion the 3<sup>rd</sup> Respondent urged the Court to dismiss the Petition with cost for lack of merit of any constitutional violation.
121. The Interested Party did not take part in the dispute.

**Analysis:**

122. Having intently perused the Petition and the respective responses alongside the parties' written submissions and decisions referred to, two main issues for consideration come to the fore. They are as follows: -
  - a. Whether the Impugned Amendment is in violation of Articles 10(2), 201(a) and 47 of the Constitution for want of public participation, stakeholder engagement and fair administrative procedures.
  - b. Whether Section 39A of the Public Finance Management Act, 2012 was infringed by the enactment of the impugned amendment.
123. A consideration of the twin issues follows hereunder.

**a. Whether the Impugned Amendment is in violation of Articles 10(2), 201(a) and 47 of the Constitution for want of public participation, stakeholder engagement and fair administrative procedures:**

34. The Petitioners' contention under this issue is simply that whereas the proposed amendment in the Finance Bill 2021 was for imposition of Excise Duty on betting at 20% of the amount wagered or staked and that is what was discussed at the public engagement fora, the Finance Act, 2021 not only introduced the proposed tax on betting, but went ahead and provided further taxes on gaming and lotteries which aspects had not been part of the Finance Bill and consequently not discussed during the public engagement.
35. The genesis of the concept of public participation is the Constitution. Article 2 inter alia declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution.
36. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.



37. Expressing itself on Article 10 of *the Constitution*, the Court of Appeal in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal No. 224 of 2017; [2017] eKLR held that:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

38. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in *Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others* [2014] eKLR while referring to the South African decision in *Doctors for Life International vs. Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006(12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

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

39. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10<sup>th</sup> Edition defines 'consultation' as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

40. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature



to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

41. Speaking to stakeholders' engagement, a Three-Judge bench the High Court in consolidated Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR the Court had the following to say: -

.... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

(emphasis added)

42. In delineating the parameters for public participation, the Supreme Court in Petition No. 5 of 2017 *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR, upon reviewing several decisions of the High Court and the Court of Appeal on the subject summed up the aspect of public engagement as follows: -

- (96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:

#### Guiding Principles for public participation

- (i) As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.



- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
  - (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
  - (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
  - (ix) Components of meaningful public participation include the following:
    - a. clarity of the subject matter for the public to understand;
    - b. structures and processes (medium of engagement) of participation that are clear and simple;
    - c. opportunity for balanced influence from the public in general;
    - d. commitment to the process;
    - e. inclusive and effective representation;
    - f. integrity and transparency of the process;
    - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.
126. Having laid down the above legal framework on public participation, this Court will now proceed to consider whether the impugned amendment is unconstitutional for want of public participation in the process leading to its enactment.
127. There is no doubt that the Finance Bill made proposal for the introduction of Excise Duty on betting at 20% of the amount wagered or staked. The issue was discussed during the public engagement fora and it eventually found its way into the Finance Act, 2021. That led to the enactment of the impugned amendment. That explains why the Petitioners did not contest the taxation on betting in these proceedings.
128. That is, however, not the position in respect of the taxation levied on gaming and lottery. This Court has carefully gone through the provisions of the Finance Bill, the record of the public engagements as well as the Finance Act, 2021. The Finance Bill and the public participation that followed thereafter did not deal with any proposal to levy taxes on gaming and lottery. The first time the impugned taxation appeared was after the public engagement and eventually in the Finance Act.
129. From the record on the public engagement meetings, there were robust representations by various stakeholders on the proposed levy on betting. None of them addressed the aspect of taxation on gaming and lottery. Going by the gravity of the submissions made by the participants during the public meetings on betting, there is no doubt that the public ought to have been accorded an opportunity to also express themselves on the issues of gaming and lottery. That opportunity was, however, not accorded.
130. The upshot is, therefore, that there was no iota of public engagement or at all towards the subsequent enactment of the impugned amendment.



131. The impugned amendment is, also, for the same reasons, a violation of Article 47 of *the Constitution*. By the Respondents' own admission, the Finance Act did not propose the introduction of any taxes on gaming and lottery, but only the Finance Act. As such, no efforts whatsoever were taken to ensure compliance with Article 47 of *the Constitution* and the Fair Administrative Actions Act.
132. Article 47 of *the Constitution*. Sub-articles (1), (2) and (3) states that: -
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
  3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
    - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
    - b. promote efficient administration
133. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. Section 5(1) thereof provides that: -
- (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—
    - a. issue a public notice of the proposed administrative action inviting public views in that regard;
    - b. consider all views submitted in relation to the matter before taking the administrative action;
    - c. consider all relevant and materials facts; and
    - d. where the administrator proceeds to take the administrative action proposed in the notice—
      - i. give reasons for the decision of administrative action as taken;
      - ii. issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and
      - iii. specify the manner and period within which such appeal shall be lodged.
134. Section 2 of the *Fair Administrative Act* defines an 'administrative action' and an 'administrator' as follows: -



‘administrative action’ includes -

- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

135. Addressing itself to these provisions, the Court of Appeal in Civil Appeal 52 of 2014 *Judicial Service Commission vs. Mbalu Mutava & Another* (2015)eKLR held that: -

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

136. The South African Constitutional Court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* CCT16/98) 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows:

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

137. The High Court in *Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti* [2018] eKLR had the following to say:

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.



These are: -

- a. Illegality - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.
- b. Fairness - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.
- c. Irrationality and proportionality - The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*: -

*Provincial Picture Houses Ltd vs Wednesbury Corporation*: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

138. From the foregoing discussion, there is no doubt the decision to introduce the impugned amendment after public participation was an administrative action. In sum, it was an administrative action because it affected the legal rights and interests of the Petitioners among members of public. As such it had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.
139. The decision to introduce the impugned amendment after public participation did not conform to the requirements of Article 47 of *the Constitution* and Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the 3<sup>rd</sup> Respondent had to do the following: -
  - a. Give notice of the intended amendments to the Petitioners and the public at large;
  - b. Afford an opportunity for the Petitioners and the public to be heard on the question; and
  - c. Give reasons for the decisions made – in this case, the impugned amendment.
140. None of these happened. For this reason alone, the impugned amendment is constitutionally infirm.
141. In the end, the impugned amendment infringed Articles 10(2), 201(a) and 47 of *the Constitution* for failure to undertake any form of public participation, stakeholders' engagement and fair administrative procedures.

**b. Whether Section 39A of the *Public Finance Management Act, 2012* was infringed by the enactment of the impugned amendment:**

142. Section 39A of the *Public Finance Management Act* provides as follows: -

39A. Submission, consideration and passing of Finance Bill



- (1) The Cabinet Secretary shall submit to the National Assembly, on or before 30th April, the Finance Bill setting out the revenue raising measures for the National Government.
- (2) Following submission of the Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly.
- (3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, in time for it to be presented for assent by 30th June each year.
- (4) Any recommendations made by the relevant committee of the National Assembly or resolution passed by the National Assembly on revenue matters shall—
  - (a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework;
  - (b) take into account the principles of equity, certainty and ease of collection;
  - (c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;
  - (d) consider domestic, regional and international tax trends;
  - (e) consider the impact on development, investment, employment and economic growth;
  - (f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of *the Constitution*; and
  - (g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

143. The Petitioners did not, however, challenge the constitutionality of the above provision. Instead, they contended that the provision was not complied with during the process of enactment of the impugned amendment.

144. The position established by Courts, which I fully associate myself with, is that failure of an entity to comply with the provisions of a statute does not ipso facto result to an infringement of *the Constitution*. There must be a demonstrated nexus between the statutory provision and specific Article(s) of *the Constitution* on one hand, and the actions complained of manifesting the constitutional contravention or infringement on the other hand. That is the only way a constitutional issue for determination will arise. If the complaint only rests on the infringement of a statutory provision, then that cannot amount to a constitutional issue to be determined under Article 165(2)(b) and (d) of *the Constitution*.

145. As stated by the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR, the link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened and the manifestation of contravention or infringement must be clearly demonstrated in a Constitutional Petition.



146. In delimiting what a constitutional issue entails and the jurisdiction of a Constitutional Court, the Constitutional Court in South Africa in *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others & Others* (2002) 23 ILJ 81 (CC) had the following to say: -

*The Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too .... is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

147. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

148. Speaking to the issue in *Harrkinson -vs- Attorney General of Trinidad and Tobago* [1980] AC 265, the Court observed as follows: -

The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of *the Constitution* is fallacious. The right to apply to the High Court under Section 6 of *the Constitution* for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.

149. Resulting from the above, the manner in which the alleged non-compliance with Section 39A of the *Public Finance Management Act* by the 3<sup>rd</sup> Respondent was pleaded, did not establish a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened and the manifestation of contravention or infringement. As such, the contention does not amount to a constitutional issue and this Court hereby declines the invitation to express itself over the same.

#### **Disposition:**

150. Drawing from the above, it is apparent that the Petition is successful.
151. As I come to the end, this Court wishes to profusely apologize for the late delivery of this judgment. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest. The Court was also transferred in July 2022, on need basis, to a new station which had serious demands that called for urgent attention. The totality of it all yielded to the delay herein. Galore apologies once again.
152. In the end, the Petition herein is determined as follows: -



- a. A Declaration hereby issue that paragraphs 4B and 4D of Part II of the First Schedule to the *Excise Duty Act*, 2015 introduced by section 32 of the Finance Act, 2021, are in violation of Article 10(2), 201(a) and 47 of *the Constitution* for want of public participation, stakeholder engagement and fair administrative procedures.
- b. A Declaration hereby issues that paragraphs 4B and 4D of Part II of the First Schedule to the *Excise Duty Act*, 2015 introduced by section 32 of the Finance Act, 2021 are unconstitutional, null and void and of no legal effect. They are hereby quashed.
- c. There shall be no order as to costs as the Petition is a public interest litigation.

153 Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 31<sup>TH</sup> DAY OF JANUARY, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr. Amoko, Learned Counsels for the Petitioners.

Miss. Kiramana, Learned Counsel for the 1<sup>st</sup> Respondent.

Miss Sega, Learned Counsel for the 1<sup>st</sup> Respondent.

Mr. Kuyoni, Learned Counsel for the 3<sup>rd</sup> Respondent.

Regina/Chemutai – Court Assistants

