



**Kabata & 4 others v National Assembly & 3 others; Law Society of Kenya & 16 others
(Interested Parties) (Petition E338, E342, 372, 373 & E407 of 2022 (Consolidated))
[2023] KEHC 481 (KLR) (Constitutional and Human Rights) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E338, E342, 372, 373 & E407 OF 2022 (CONSOLIDATED)**

**HI ONG'UDI, J
JANUARY 30, 2023**

BETWEEN

**MWAURA KABATA 1ST PETITIONER
VIVA AFRICA CONSULTING LLP 2ND PETITIONER
LAW SOCIETY OF KENYA 3RD PETITIONER
OKIYA OMTATA OKOITI 4TH PETITIONER
DIGITAL FINANCIAL SERVICES ASSOCIATION OF KENYA .. 5TH PETITIONER**

AND

**THE NATIONAL ASSEMBLY 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT
THE COMMISSIONER, KENYA REVENUE AUTHORITY 3RD RESPONDENT
CABINET SECRETARY NATIONAL TREASURY & PLANNING
MINISTRY 4TH RESPONDENT**

AND

**LAW SOCIETY OF KENYA INTERESTED PARTY
KENYA ASSOCIATION OF MANUFACTURERS (KAM) . INTERESTED PARTY
ALCOHOLIC BEVERAGES ASSOCIATION OF KENYA (ABAK) .. INTERESTED
PARTY
PUBS, ENTERTAINMENT AND RESTAURANTS ASSOCIATION OF KENYA
(PERAK) INTERESTED PARTY**



KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)	INTERESTED PARTY
KENYA PRIVATE SECTOR ALLIANCE PARTY (KEPSA)	INTERESTED PARTY
CONSUMERS FEDERATION OF KENYA	INTERESTED PARTY
SPEAKER OF THE NATIONAL ASSEMBLY	INTERESTED PARTY
KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY	INTERESTED PARTY
ALCOHOLIC BEVERAGES ASSOCIATION OF KENYA ..	INTERESTED PARTY
DIGITAL LENDERS ASSOCIATION	INTERESTED PARTY
KENYA REVENUE AUTHORITY	INTERESTED PARTY
COMMUNICATIONS AUTHORITY OF KENYA TELKOM LIMITED	INTERESTED PARTY
AIRTEL NETWORKS KENYA LTD	INTERESTED PARTY
SAFARICOM LTD	INTERESTED PARTY
AIRFLO LIMITED	INTERESTED PARTY
DUTCH FLOWER GROUP KENYA LIMITED	INTERESTED PARTY

New amendments can be introduced to a Bill after the first reading provided the amendment is in line with the original intent of the Bill

Reported by Kakai Toili

Constitutional Law – legislative process – enactment of statutes – enactment of the Finance Act, 2022 – procedure to be followed in the enactment of the Finance Act – whether new amendments could be introduced to a Bill after the first reading where such amendments were not in line with the original intent of the Bill – Constitution of Kenya, articles 114 and 124(1).

Statutes – commencement – effective dates of statutes – rationale for clear time frames within which statutes are to take effect.

Jurisdiction – jurisdiction of the High Court – scope of jurisdiction to determine policy questions – whether the High Court had jurisdiction to adjudicate on policy issues such as the imposition of taxes by the Legislature— Constitution of Kenya, articles 165(3)(d) and 259.

Words and Phrases – double taxation agreement – definition – an agreement between two or more countries designed to reduce the amount of tax payable by an international worker or company so that the same income is not taxed twice – Cambridge Dictionary.

Brief facts

The petitioners challenged the validity of the Finance Act, 2022 and certain of its provisions. The Act was assented to and published in the Kenya Gazette on July 8, 2022, with some sections scheduled to come into operation on January 1, 2023. A key ground of challenge was the discrepancy between the publication date and the effective date. The petitioners contended that the Act purported to come into force on July 1, 2022, a date preceding its publication, contrary to article 116(1) of the Constitution. They argued that this retroactive commencement rendered the Act unconstitutional. The petitioners also impugned the legislative process, claiming that amendments were introduced after the first reading that were inconsistent with the original intent



of the Bill. Additionally, they questioned whether the court could pronounce itself on the policy rationale underpinning certain tax measures introduced by the Legislature.

Issues

- i. What was the rationale for having clear time frames within which a statute was to come into effect?
- ii. What was the prescribed procedure for the enactment of a Finance Act?
- iii. Whether new amendments could be introduced to a Bill after the first reading where such amendments were not consistent with the original intent of the Bill.
- iv. Whether the High Court had jurisdiction to make determinations on policy issues such as the imposition of taxes by the Legislature.

Held

1. The drafters of article 116 of the Constitution envisioned two scenarios when a statute could come in force:
 1. Where a tentative date was not provided that the lapse of the 14 days after gazettelement automatically would vest the law with legal force.
 2. A definite date as stipulated in the Statute itself.
2. The essence of the time clarity was to cure the past legislative making process mischief. With clear time frames the Legislature was held accountable on the completion of the legislative process definitively. In the instant case, the Legislature chose the second time frame option by making its provision based on section 1 of the Finance Act, 2022. The effective date was constitutional. Moreover, the court took judicial notice of the fact that a complete financial year in Kenya which the Finance Act was based on commenced on July 1st of the new calendar year and ended on June 30th of the following year.
3. The guiding principles upon which courts made findings on the question of *sub judice* were premised on the Civil Procedure Act, cap 21 under section 6. The instant petition and the cited petitions had no correlation in the issues. That was because the cited petitions were challenging the mandate of the 3rd respondent with reference to section 10 of the Excise Duty Act in relation to Legal Notice No.217. The instant petition on the other hand challenged the 1st respondent's legislative mandate as enshrined in article 209 of the Constitution.
4. The 1st and 3rd respondents were separate legal entities with distinct constitutional mandates. Therefore, the claim that the enactment of the Finance Act, 2022 was actualized in violation of existing court orders was unfounded. The claim failed to satisfy the elements of the *sub judice* rule as encapsulated under section 6 of the Civil Procedure Act, cap 21 to estop the court from considering the issues raised in the petition.
5. One of the hallmarks of the Constitution was involvement of the public in its affairs so much so that it formed one of the national values and principles as envisaged in article 10 of the Constitution. The Government was obligated under article 118 of the Constitution to facilitate public participation and involvement in the legislative and other business of the National Assembly and its committees. Public participation was a key element in the legislative functions of the Government at all levels.
6. An examination of the evidence presented before the court revealed that the 1st respondent invited the public and the relevant stakeholders to submit memoranda and views for the purposes of public participation on the Finance Bill. Further there was uncontroverted evidence of the public participation exercise contained in the report of the Departmental Committee of Finance and Planning on the Finance Bill. The public participation principle as envisaged under article 118 of the Constitution was conducted.
7. One of the roles of Parliament in exercise of its legislative authority under article 94 of the Constitution was making of laws. That was actualized through the Bills passed by the House and assented to by the President as envisaged under article 109(1) of the Constitution.



8. A Bill of the instant nature was introduced in Parliament in the manner encapsulated under article 114 of the Constitution. The article dealt with money bills such as taxes. It was the opinion of the Speaker of the National Assembly that where a motion made provision for a matter listed in the definition of a money Bill, the Assembly may proceed only in accordance with the recommendation of the relevant committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance. That was in essence the beginning of the legislative process. The Bill at that juncture was subjected to the legislative procedure which comprised of the first reading; committal of the Bill to the departmental committee; the second reading; committee stage; the report stage; the third reading of a Bill and finally the Bill was passed and presented to the President for assent. In carrying out that legislative role, Parliament was guided by its own standing orders as required under article 124(1) of the Constitution.
9. The Finance Bill was submitted to public participation by the Departmental Committee on Finance and National Planning after the first reading of the Bill. Upon conclusion of those deliberations, the Committee prepared its report containing the public participation views and its own recommendations on the Bill. That went on to inform the House's Committee stage deliberations on the Bill.
10. The impugned amendment was made during the Committee of the Whole House (committee stage) held on June 2, 2022. The court was guided by standing order 132(b) which informed that the sequence of the Bill presented in the second reading may include new clauses. Standing order 133(5) and (6) however distinguished those new amendments from those that would change the subject matter of the Bill by introducing a different topic expanding its subject or that was inconsistent with any part of the Bill already agreed to.
11. New amendments could be introduced to a Bill under consideration after the first reading so long as the amendment was in line with the original intent of the purposes and objects of the Bill. The whole purpose and intent of the Finance Bill was to amend tax laws which were specifically listed for avoidance of doubt. All the cited impugned amendments fell within the scope of that bracket and hence could not be deemed to have been new introductions contrary to the purposes and objects of the Bill.
12. The impugned amendments were in line with the set parameters of what had been presented to the public and the scope of the Finance Bill. Furthermore, the amendments adhered to the legislative process as outlined in the National Assembly's standing orders and did not fall in the restricted amendments cited under standing order 132(5) and (6). In the circumstances, the impugned amendments did not violate the principle of public participation and were accordingly constitutional.
13. One of the constitutional functions of the National Government was its power to impose taxes and charges as envisaged under article 209 of the Constitution. The petitioners' question before the court involved the rightness and adequacy of Parliament to impose taxes. The court being a creature of the Constitution was required to exercise its jurisdiction within the set confines. While the Constitution empowered the National Government to impose taxes, it did not disclose or define how high or low the imposed taxes should be. In essence, that would reveal the threshold of what rational taxation ought to be. It was however discernable that that mandate at article 209(2) was left to the Legislature to decide. Therefore, the Constitution purposefully intended that the power and decision to impose tax laws be vested in National Government.
14. The decision as to whether or not to impose a tax and at what rate was within the legislative authority as provided in the Constitution. Evidently, that question revolved around policy issues that were specifically set out for the Parliament by the Constitution. That in effect would prohibit the court from making a finding that revolved around a political question owing to the doctrine of separation of powers.
15. An examination of the court's jurisdiction under article 165(3)(d) of the Constitution made it clear that the court did not have jurisdiction to make determinations on policy issues. It would not be



- prudent for the court to assume such jurisdiction. Furthermore, it would run foul to the dictates of article 259 of the Constitution. Accordingly, allowing the petitioners argument that the imposition of the impugned taxes was unconstitutional, when imposition of taxes in and of itself is Parliament's constitutional mandate would be an error and untenable in light of the purposes of the Constitution, unless it was otherwise shown that due process was not followed. The inclusion of the impugned amendments in the Finance Act, 2022, was constitutional.
16. Kenya, by virtue of article 2(5) and (6) of the Constitution applied the dictates of international law such as double taxation agreements through treaties to avoid double taxation at international level. As such the claim for double taxation in two jurisdictions failed.
 17. The 5th petitioner's claim that section 30 of the Finance Act, 2022 would occasion double taxation and discrimination against it in view of other financial institutions and section 32 of the Finance Act on the powers granted to Kenya Revenue Authority *vis-a-vis* the powers of the cabinet secretary, those averments were merely speculative and a product of the petitioner's apprehensions as no evidence was tabled to ascertain that claim.
 18. The petitioner had failed to show how the impugned amendments were contrary to the constitutional mandate of Parliament in enactment of laws or that the enactment violated the laid down principles of the legislative process. Likewise, the petitioners had failed to demonstrate how the increase of the taxes would inhibit access to the stated services in turn violating the alleged rights such as those under article 43 and 46 of the Constitution.
 19. On the issue of the two third (2/3) gender rule in respect of the composition of Parliament at the time of passing the Bill, the petitioners did not substantiate the same. They did not also submit on it. Without any substantiation and with the conservatory orders in force Parliament went ahead carrying on its constitutional mandate. Therefore, there was no merit in that argument.
 20. The standard of proof placed the onus of proof on the petitioners. They were required to prove the elements that constituted the violation of those rights and asserted facts which included adducing sufficient facts and evidence to justify a finding that the rights were indeed violated and that the Finance Act, 2022 was unconstitutional. The petitioners had not proved their case against the respondents in that regard.

Consolidated petitions dismissed with costs.

Citations

Cases

Kenya

1. *Adieno, Wycliff Indalu v Attorney General, Nairobi City County Government & Nairobi City County Assembly* Petition 315 of 2014; [2014] KEHC 3051 (KLR) - (Mentioned)
2. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] KLR 154; (1976 - 1986) KLR 1272 - (Mentioned)
3. *British American Tobacco Kenya PLC 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)
4. *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* Petition 397 of 2017; [2017] KEHC 9419 (KLR) - (Mentioned)
5. *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (interested parties)* Advisory Opinion Reference 1 of 2017; [2020] KESC 54 (KLR) - (Mentioned)
6. *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudbeiba Workers Union) v Kenya Revenue Authority, Commissioner of Domestic Taxes, Attorney General & Kenya Association of Hotel Keepers and Caterers* Petition 544 of 2013; [2014] KEHC 6984 (KLR) - (Mentioned)



7. *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* Petition 254 of 2019; [2020] KEHC 8819 (KLR) - (Mentioned)
8. *Konchellah, Leina & others v Chief Justice & President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties)* Petition E291, E300 of 2020; [2021] KEHC 12609 (KLR) - (Mentioned)
9. *Martin Nyaga Wambora County Government of Embu v Speaker, County Assembly of Embu, Clerk, County Assembly of Embu, County Assembly of Embu, Speaker, Senate Parliament of Kenya & Attorney General* Petition 1 of 2014; [2014] KEHC 7029 (KLR) - (Mentioned)
10. *Mugenda, Olive Mwihaki & another v Okiya Omtata Okoiti & 4 others* Civil Appeal 3 & 11 of 2016; [2016] KECA 663 (KLR) - (Mentioned)
11. *Munya v Kitbinji & 2 others* (Petition 2B of 2014) [2014] KESC 38 (KLR) - (Mentioned)
12. *Obuya, Mark & 2 others Acting for or on Behalf of Association of Kenya Insurers & 5 others v. Commissioner of Domestic Taxes & 2 others* Petition 383 of 2013; [2014] KEHC 4336 (KLR) - (Mentioned)
13. *Odando & another v Kenya Revenue Authority & 6 others; Law Society of Kenya (interested party)* Constitutional Petition E374 of 2021; [2023] KEHC 22375 (KLR) - (Mentioned)
14. *Okiya Omtata Okoiti & 4 others v Attorney General & others* Petition 7 of 2019; [2019] KEHC 9110 (KLR) - (Mentioned)
15. *Pevans East Africa Limited & another v Chairman Betting Control & Licensing Board & 7 others* Civil Appeal 11 of 20 of 2018; [2018] KECA 332 (KLR) - (Mentioned)
16. *Pubs, Entertainment & Restaurants Association of Kenya & others v National Assembly & others* Constitutional Petition E024 of 2021; [2023] KEHC 1914 (KLR) - (Mentioned)
17. *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning, Attorney General, Centre for Human Rights and Civic Education, Njonjo Mue & Kenya National Commission for Human Rights* Petition 351 of 2015; [2017] KEHC 8755 (KLR) - (Mentioned)
18. *Wambora, Martin Nyaga v County Assembly of Embu & 37 others* Civil Appeal 194 of 2015; [2017] eKLR - (Mentioned)

South Africa

Merafong Demarcation Forum & others v President of the Republic of South Africa & others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC) - (Mentioned)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
2. OECD (2014), *Addressing The Tax Challenges of the Digital Economy* Chapter 2
3. Organization for Economic Co-operation and Development (Ed) (2011), *OECD International VAT/ GST Guidelines on Neutrality, 2011* Centre for Tax Policy and Administration

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 6 - (Interpreted)
2. Constituencies Development Fund Act (cap 414) In general - (Cited)
3. Constitution of Kenya, articles 2(1)(4); 3; 10; 19(1)(2); 20(1); 21(1); 22(2); 23; 27(1)(6); 28; 35; 47(1); 48; 73(2); 81(b); 94(1); 109(1); 114; 116(1); 118; 124(1); 174; 201; 227; 232; 258; 259(1) - (Interpreted)
4. Excise Duty Act (cap 472) sections 8, 10; part 2; schedule 21; paragraphs 4, 6 - (Interpreted)
5. Fair Administrative Action Act (cap 7L) sections 3, 4, 5 - (Interpreted)
6. Finance Act, 2022 sections 1, 3, 6, 10, 15, 16, 22(b)(ii); 30; 32; 35 - (Interpreted)
7. Income Tax Act (cap 470) In general - (Cited)
8. Kenya Revenue Authority Act (cap 469) section 5; part 1; schedule 1 - (Interpreted)
9. Public Finance Management Act (cap 412A) sections 25(5); 39A; 40(3); 77, 78 - (Interpreted)



10. Statutory Instruments Act (cap 2A) sections 4, 5, 5A, 6, 7, 8, 10, 11 - (Interpreted)
11. Supreme Court Act (cap 9B) section 3 - (Interpreted)
12. Value Added Tax Act (cap 476) schedule 1; section 2 - (Interpreted)

Instruments

Vienna Convention on the Law of Treaties, 1980

Advocates

M/s Kabata Mwaura & Partners Advocates for the 1st petitioners

M/s Mema Advocates LLP for the 2nd petitioner

M/s Okwach & Company Advocates for the 3rd petitioner

M/s Anjarwalla & Khamma LLP for the 5th petitioner

Mbarak Awadh Ahmed for the 1st respondent

Marwa Christopher for the 2nd and 4th respondents

Lilian Moraa Nyaringita for the 3rd respondent

Winnie Otieno & Pius Nyaga for the 12th interested party

M/s Manyonge Wanyama & Associates LLP for the 13th interested party

M/s Majanja Luseno & Co Advocates for the 14th interested party

Kaplan & Stratton Advocates for the 15th interested party

Odero Olonde & Co Advocates for the 16th and 17th interested party

JUDGMENT

Introduction

1. The petitioners herein filed separate petitions namely;
 - a. Petition No E338 of 2022 of *Mwaura Kabata v The National Assembly of Kenya & 10 others*;
 - b. Petition No E342 of *VIVA Africa Consulting LLP v the Attorney General & 9 others*; Petition No E372 of 2022 of *Law Society of Kenya v The National Assembly & 5 others*;
 - c. Petition No E372 of 2022 *Law Society of Kenya v The National Assembly & 2 others*;
 - d. Petition No E373 of 2022 of *Okiya Omtatah Okoiti v the National Assembly & 6 others*; and
 - e. Petition No E407 of 2022 of *Digital Financial Services Association of Kenya v the National Assembly & 3 others*.
2. The petitioners challenge the [Finance Act, 2022](#) and some of its provisions. This Act came in force on July 8, 2022 with some of its sections in particular sections 3, 6, 10, 15, 16, 22(b)(ii) and 32 slated to come in operation on January 1, 2023.
3. The petitions were on September 23, 2022 consolidated by this Court owing to the fact that they raise similar issues with regard to the [Finance Act 2022](#). Upon consolidation, Petition No E338 of 2022 became the lead file and parties instructed to appear as outlined above.

The 1st Petitioner's Case

4. Through a petition dated July 2, 2022 filed under articles 21,22(1),46 and 47 of the [Constitution](#) for the alleged contravention of the rights under articles 2(1) & (4), 3, 10, 19(1) & (2), 20(1), 21(1), 22(2),



- 23, 27(1), 27(6), 28, 35, 47(1), 48, 73(2), 81(b), 201 and 259(1) of the Constitution, the 1st petitioner seeks the following orders:
- a. Declaratory orders declaring that the actions of the respondents violated the Constitution and are null and void ab initio.
 - b. Declaratory orders declaring that the actions of the respondents and or the omissions of the 1st respondent including committee deliberations in the Finance Act violated the Constitution and are null and void *ab initio* by disregard for section 5, 5A, 10, and 11 of the Statutory Instruments Act.
 - c. An order of *certiorari* to bring into this court and quash the Finance Act, 2022 for failing to adhere to foundational tenets of law making and for being made in breach of existing court orders so far as various rates of excise duty are concerned.
 - d. An order of prohibition directed at the 3rd respondent prohibiting it from implementing the Finance Act.
 - e. An order of mandamus be issued directing and compelling the 1st respondent to adhere to the laid down procedures of law making upon directions from this honourable court and determination of pending court disputes touching on various elements of tax and sections 5, 5A, 10 and 11 of the Statutory Instruments Act.
 - f. That such further orders and directions be issued to facilitate just, expeditious and fair determination of this application and the petition.
5. This petition is supported by the 1st petitioner's affidavit of even date and a further affidavit dated July 23, 2022 with annexures thereto. His case is that the Finance Act, 2022 was enacted in violation of orders issued in Constitutional Petition No E374 of 2021 Isaiya Luyara Odando & another v Kenya Revenue Authority & 6 others touching on the Legal Notice No 194 on the question of the increase of the price of petroleum products. Secondly, Petition No E491 of 2021 now Consolidated Petition No E24/2021 Pubs Entertainment and Restaurants Association of Kenya, Mwaura Kabata, and the Kenya Human Rights Commission v National Assembly & 6 others. The said petition touches on the adjustment of excise duty rates *vide* Gazette Notice Supplement No 199 which is dated November 2, 2021 under Legal Notice No. 217 dated November 19, 2021.
6. Thirdly, an existing contempt of court application in Consolidated Petition E24/2021 Pubs Entertainment and Restaurants Association of Kenya, Mwaura Kabata, and the Kenya Human Rights Commission v National Assembly & 6 others filed on January 7, 2022 seeking to cite and punish the 1st respondent herein for contempt of the issued status quo orders. It is on this premise that the 1st petitioner argues that the Finance Act 2022 was founded on an illegality from its onset.
7. He deposed that the cited suits revolve around complaints against the increase in the Excise duty rates in Legal Notice No 194 from Legal Notice No 217 with reference to section 35 of the Finance Act. As such, the implementation of these rates was the subject matter of the ongoing suits wherein the court issued *status quo* orders dated November 19, 2021.
8. It was further deposed that at the time of the enactment of the impugned Finance Act, 2022 the National Assembly was not properly constituted for purposes of executing its constitutional mandate for failing to enact it in accordance with the two-thirds gender rule.
9. The 1st petitioner while relying on sections 5, 5A, 10 and 11 of the Statutory Instruments Act No 23 of 2013 deposed that the enactment of the Act failed to uphold the principle of public participation.



This is since the agreements, deliberations, reports and opinions of stakeholders that were settled upon in the 1st and 2nd Committee meetings of the National Assembly were not incorporated in the Act. Furthermore, they were completely disregarded upon the 3rd tabling before the house committee.

10. In closing he deposed that the implications of the *Finance Act* is an exorbitantly high cost of living for the general public and diminished returns for the business owners and manufacturers. He urged the court to restrain the respondents from their actions.

The 2nd Petitioner's Case

11. Through a petition dated July 8, 2022 filed under articles 2, 10,19, 21, 22, 35, 40,47, 73,118, 174, 201,227, 232, and 258 of the *Constitution*, the 2nd petitioner seeks the following orders:
 - a. A declaration that the provisions of section 30(b) of the *Finance Act 2022* is unconstitutional, illegal and void and contrary to articles 2(1), (5) & (6), 3, 10, 22, 27, 28, 35, 40, 46, 47, 73, 118, 201, 232 and 258 of the *Constitution*.
 - b. A mandatory injunction directing the Kenya Revenue Authority to refund any monies collected from any person in pursuance to the application, implementation, administration, imposition, collection and/or enforcement of VAT on exported services in Kenya section 30(b) of the *Finance Act, 2022*.
 - c. An order for costs as appropriate.
 - d. Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of upholding and protecting the *Constitution*.
12. This petition is supported by the 2nd petitioner's Managing Partner, Kairo Thuo's affidavit dated July 4, 2022. On a similar premise as that of the 1st petitioner, the 2nd petitioner's case is that section 30(b) of the *Finance Act* amended the First Schedule to the *VAT Act* in part ii, by deleting paragraph 32 which exempted imposition of value added tax on the exportation of taxable services. This means that exported services are now subjected to VAT at 16% both in and outside of Kenya which amounts to double taxation by multiple jurisdictions. In view of this it is deposed that the impugned provision is in violation of the *Vienna Convention on the law of Treaties* (VCLT), the *OECD International VAT/ GST Guidelines on Neutrality, 2011* and Kenya's Bilateral Agreements with France, Germany, India, Iran, Norway, South Africa, Sweden, United Kingdom, Zambia, United Arab Emirates, Qatar, South Korea, Denmark and Canada.
13. It is deposed that the impugned provision which places a heavy burden on tax payers was not subjected to public participation. It was therefore sneaked into the *Finance Act 2022*, in clear violation of the *Constitution*.

The 3rd Petitioner's Case

14. Through a petition dated July 19, 2022 filed under articles 19, 20, 21, 22, 23, 165 and 258 of the *Constitution* for the alleged violation of articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 43, 46, 47, 93, 94, 109, 110, 118, 124, 129, 201, 258, 259 and 260 of the *Constitution*, the 3rd petitioner seeks the following orders:
 - a. A declaration that the *Finance Act, 2022* be deemed to have come to force on July 8, 2022.



- b. An order of prohibition be issued restraining the 2nd respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of the [Finance Act, 2022](#) prior to the date of July 8, 2022.
 - c. A declaration that section 35(c), (6) and (7) of the [Finance Act, 2022](#) is illegal and unlawful and contrary to the provisions of article 2(2), 10, of the [Constitution](#) due to lack of public participation and as such null and void *ab initio*.
 - d. A declaration that section 35(b)(iii)(iv)(v) of the Finance Act, 2022 is illegal and unlawful and contrary to the provisions of article 2(2), and 10 of the [Constitution](#) due to lack of meaningful public participation and as such null and void *ab initio*.
 - e. A declaration that section 35(b)(iii)(iv)(v),(c), (6) and (7) of the Finance Act, 2022 is illegal and unlawful and contrary to the provisions of article 2(2), 10, 27(1) & (4), 46, 47, 201 of the [Constitution](#) and as such null and void *ab initio*.
 - f. A declaration that section 32 of [Finance Act, 2022](#) contravenes the provision of article 2(2), 10 and 210 of the [Constitution](#) and as such null and void *ab initio*.
 - g. An order of prohibition be issued restraining the 2nd respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of sections 35 (b)(iii)(iv)(v), (c), (6) and (7) of the [Finance Act, 2022](#).
 - h. The costs of this petition be borne by the respondents.
 - i. Any other or further order or relief that this honorable court deems fit to grant.
15. This petition is supported by the 3rd petitioner’s Chief Executive Officer, Florence Muturi’s supporting affidavit dated July 19, 2022. It’s case is that the [Finance Act 2022](#) adjusted the rates of excise duty on excisable goods with reference to schedule 1 of the [Excise Duty Act, 2015](#), as amended by section 35 of the Act 2022. She deposed that this action threatens the survival of the alcohol subsector business due to the increased cost of manufacturing the affected products in total violation of their rights to economic protection. This will further affect the telecommunications and digital lenders business to the detriment of the manufacturers, importers of mobile phones and sim cards, digital lenders as well as other innocent third parties.
16. It was deposed that article 116(1) of the [Constitution](#) states that a Statute assumes the force of law only upon gazettment. Considering this, it was argued that there was a procedural defect in enactment of the [Finance Act 2022](#) since it was published in the Kenya Gazette on July 8, 2022 with an effective date of July 1, 2022.
17. It was deposed that pursuant to section 35 of the [Finance Act, 2022](#), the First schedule of the [Excise Duty Act](#) was amended by adjusting the rates on excise duty upwards on various items compared to those originally published in the Finance Bill, 2022. This was despite the Finance and Planning Committee vide their report dated May 20, 2022 agreeing to retain the previous rates. In view of this it was stated that this amendment violated the principle of public participation. Furthermore that it was contrary



to the provisions of article 114 of the Constitution which requires that if a motion makes provision for a matter mentioned in the definition of a money bill, the National Assembly may proceed only in accordance with the recommendation of the relevant committee of the Assembly.

18. It was further stated that the impugned adjusted tax rates on excisable goods contravenes the well-settled principles governing taxation such as the principle of equity and fairness in distribution of tax the burden, equality and non-discrimination in distribution of all these, and access to justice including tax justice as enshrined in article 201 of the Constitution. Moreover that the impugned adjusted tax rates threaten the sanctity of the right to life as well as the right to human dignity as enshrined under article 26, 28 and 43 of the Constitution. This is due to the imposition of burdensome and oppressive taxes designed to drive businesses out of operation hence unconstitutional.
19. She further deposed that section 32 of the Finance Act which amends section 10 of the Excise Duty Act, 2015 is a usurpation of the role of the Cabinet Secretary-Treasury and National Planning who have been given a clear mandate pursuant to section 77 of the Public Finance Management Act. This provision gives the Cabinet Secretary the power to waive national taxes as envisaged under article 210 of the Constitution. Secondly that its import is in violation of the rule of natural justice with reference to the decision making process. This he adds is because section 32 grants KRA power to adjust the inflation rates of excise duty and to exempt certain products from the adjustment of inflation. This she deposed would raise conflict of interest as well as being discriminatory making it unconstitutional.

The 4th Petitioner's Case

20. Through a petition dated July 20, 2022 filed under articles 3(1), 22(1) & (2)(c), 23, 48, 50(1), 159 and 258(1) & (2)(c) of the Constitution for the alleged violation of articles 1(1), 2(1), (2) & (3), 3(1), 10, 19, 20, 21, 24, 73, 93(2), 94(4), 95, 109(1), 114(2), 118, 124, 201, 209 and 259(1) & (3) of the Constitution, the 4th petitioner seeks the following orders:
 - a. A declaration that:
 - i. The National Assembly sneaked the at Kes 50.00 per SIM card into the Finance Bill, 2022, and the same was enacted without public participation.
 - ii. The National Assembly had no capacity in law, at the Committee of the Whole House when the Bill was read a Third and final time, to effect the new substantive amendment to the Finance Bill 2022, imposing excise duty at the rate of 10% on imported cellular mobile phones and on imported SIM cards at KES 50.00 per SIM card.
 - iii. By sneaking the impugned excise duties into the Finance Bill, 2022, the National Assembly violated articles 1(1), 2(1) (2) & (3), 3(1), 10, 24, 27, 40, 43, 46, 47, 73, 93, 94, 109(1), 114, 118, 124, 201, 209 and 259(1) & (3) of the Constitution; sections 3, 4 and 5 of the Fair Administrative Action Act, 2015; and sections 4, 5, 6, 7, and 8 of the Statutory Instruments Act, 2013.
 - iv. The imposition through the Finance Act, 2022 of excise duty at the rate of 10% on imported cellular mobile phones and on imported SIM cards at KES 50.00 per SIM card is unlawful and unconstitutional and, therefore, invalid, null and void *ab initio*.



- v. The respondent should pay the petitioner's costs of this suit.
- b. An order:
 - i. Quashing the imposition of excise duty at the rate of 10% on imported cellular mobile phones and on imported SIM cards at KES 50.00 per SIM card through the [Finance Act, 2022](#).
 - ii. Permanently prohibiting the imposition of excise duty at the rate of 10% on imported cellular mobile phones and on imported SIM cards at KES 50.00 per SIM card through the [Finance Act, 2022](#).
 - iii. Compelling the respondent to pay the petitioner's costs of this suit.
 - c. Any other relief the court may deem just to grant.
21. This petition is supported by the 4th petitioner's affidavit sworn on July 20, 2022. His case is that the [Finance Act, 2022](#) imposed excise duty at the rate of 10% on imported cellular mobile phones at Kes 50.00 per SIM card on imported SIM cards, yet it was not part of the Finance Bill and hence was not subjected to public participation.
 22. He noted that the National Assembly's Departmental Committee on Finance and National Planning's report on the consideration of the Finance Bill, 2022 made no reference to the imposition of the impugned excise duties in the comments/memoranda it received from the public and stakeholders on the Bill. Further, that the amendments were not approved by the Cabinet Secretary in compliance with article 114(2) of the [Constitution](#), and were introduced in violation of the National Assembly Standing Order No 133(5) which prohibits the introduction of substantive amendments to Bills at that stage.
 23. The 4th petitioner further averred that the impugned excise tax would dramatically increase the cost of the affected goods and put their access out of reach for many of Kenyans, who depend on them, thus harming their economic interests.

The 5th Petitioner's Case

24. Through a petition dated August 11, 2022 and filed under articles 22(1), 22(2) (d), 23(1), 23(3), 258(1), 258 (2) (d) and 259 of the [Constitution](#) for the alleged contravention of the rights under articles 10, 27,40 and 201 of the [Constitution](#), the 5th petitioner seeks the following orders:
 - a. This honourable court be pleased to hold and declare that the impugned amendment introduced in paragraph 6 of part II to the first schedule to the [Excise Duty Act, 2015](#) as amended by section 35(d)(ii) of the Finance Act, 2022 is unlawful, unconstitutional, null and void as it is discriminatory, contrary to articles 10(2) and 27 of the [Constitution](#).
 - b. This honourable court be pleased to hold and declare that the impugned amendment introduced in paragraph 6 of part II to the first schedule to the [Excise Duty Act, 2015](#) as amended by section 35(d)(ii) of the Finance Act, 2022 is unlawful, unconstitutional, null and void as it imposes an unfair tax burden on the petitioner's members contrary to article 201(1)(b)(i) of the [Constitution](#).



- c. This honourable court be pleased to hold and declare that the impugned amendment introduced in paragraph 6 of part ii to the first schedule to the [Excise Duty Act, 2015](#) as amended by section 35(d)(ii) of the [Finance Act, 2022](#) is unlawful, unconstitutional, null and void as it exposes the Petitioner’s members to double taxation, contrary to articles 10 and 201(1)(b) of the [Constitution](#).
 - d. This honourable court be pleased to hold and declare that the impugned amendment introduced in paragraph 6 of Part II to the first schedule to the [Excise Duty Act, 2015](#) as amended by section 35(d)(ii) of the Finance Act, 2022 is unlawful, unconstitutional, null and void as a result of vagueness, imprecision and ambiguity contrary to the principles of legality and rule of law enshrined in article 10(2) of the [Constitution](#).
 - e. This honourable court be pleased to hold and declare that the impugned amendment introduced in paragraph 6 of part ii to the first schedule to the [Excise Duty Act, 2015](#) as amended by section 35(d)(ii) of the [Finance Act, 2022](#) is unlawful, unconstitutional, null and void for failing to comply with the national values of inclusiveness, openness, transparency and public participation and the right to access of information and contravene the provisions of article 10, article 35, article 118(1)(b), article 201 and 232(1)(d) of the [Constitution](#).
 - f. The costs consequent upon this petition be provided for.
 - g. Any other remedy or such other orders as this honourable court may deem just and expedient in the circumstances to remedy the violation of the Petitioner’s members fundamental constitutional rights and freedoms.
25. The petition is supported by the affidavit of Kevin Mutiso the 5th petitioner’s Chairperson of the Board of Directors dated August 11, 2022 and further affidavits dated September 7, 2022 and October 31, 2022 in reply to the respondents’ response to the petition. He deposed that Part V of the Finance Bill 2022 published on April 8, 2022 contained amendments to various Sections of the [Excise Duty Act](#) and in particular, clause 34(d) which proposed multiple amendments to part ii of the first schedule to Act. It was deposed that at the time the Bill was subjected to public participation, it did not include any provisions expected to impact the 5th petitioner and its members. As such the 5th petitioner and its members did not take part in the public participation process. Further the Departmental Committee’s report did not contain any recommendations concerning the taxation of digital lenders.
26. It is deposed that when the [Finance Act 2022](#) was published, the 5th petitioner discovered the addition of new and substantial amendments to the relevant provision which imposed excise duty at the rate of 20% on fees chargeable by digital lenders under section 35(6) of the Act. It is averred that the additional amendment was made during the Whole House committee stage held on June 2, 2022 and so the critical players of the financial services industry in Kenya, the stakeholders and the general public did not participate to provide their input on the same. This was contrary to the principle of public participation violating articles 10, 35, 93(2), 109(3), 118(1)(b), 201 and 232 (1)(d) of the [Constitution](#).
27. In addition, it was deposed that the impugned amendment violates various rights of the petitioner’s members. First, it unfairly discriminates against digital lenders *vis-à-vis* other financial institutions in violation of articles 10(2) and 27 of the [Constitution](#). This is since paragraph 4 of part ii of the first schedule to the [Excise Duty Act](#) provides for the charge of 20% excise duty on “other fees” charged



by financial institutions. It was deponed that the definition of the term “other fees” in relation to financial institutions excludes interest on loans or return on loans from the scope of excise duty. Secondly, it subjects the petitioner’s members to double taxation and imposes an unfair tax burden upon the petitioner’s members contrary to article 201(b)(i) of the Constitution. Thirdly the provision is inherently vague and ambiguous contrary to the principles of legality and rule of law as enshrined in article 10(2) of the Constitution.

The Respondents’ Case

28. The respondents’ responses to the consolidated petition are hereunder summarized as filed in each respective petition. For ease of reference, the respondents’ titles are as appearing in the consolidated petition not the individual petitions. Lastly, it should be noted that some respondents did not file any responses in the individual petitions.

a) Petition No E338 of 2022

The 1st respondent’s case

29. The 1st respondent in reply filed its replying affidavit dated July 21, 2022 sworn by Serah Kioko, the deputy clerk of the National Assembly. She begun by informing that a Finance Bill is an annual Bill that is enacted mainly to facilitate revenue collection by the National government based on the approved annual Budget Policy Statement (the “BPS”) and the Budget Estimates (the “Estimates”). This is codified under section 40 (3) of the Public Finance Management Act, 2012 (PFMA) which provides that the Cabinet Secretary responsible for the National Treasury shall submit to Parliament the Finance Bill, setting out the revenue raising measures for the National government together with a policy statement expounding on these measures.
30. She noted that the preparation and approval of the BPS is preceded by robust stakeholder engagement and public participation as provided under section 25(5) and (7) of the Public Finance Management Act. The 2022 BPS was accordingly approved by the National Assembly and formed the basis for finalization of the 2022/2023 budget for the National and County governments under section 25(8) of the Act. She informed that the 2022 BPS was submitted to Parliament and tabled on the floor of the National Assembly on December 2, 2021. This BPS was considered and approved by the Budget and Appropriations committee and the National Assembly after extensive public participation.
31. She further deposed that following the adoption of the 2022 BPS by Parliament, the Cabinet Secretary for Treasury presented budget highlights for the Fiscal Year 2022/23 on April 7, 2022 under the theme “Accelerating Economic Recovery for Improved Livelihood” alongside the revenue raising measures to finance the government’s approved expenditure for the period July 1, 2022 to June 30, 2023. That in accordance with the revenue ceilings approved through the 2022 BPS, the estimates for 2022/2023 for the Executive, Parliament, and the Judiciary were tabled before the National Assembly on May 24, 2022, then reviewed by the Budget and Appropriation Committee and approved by the National Assembly after robust public participation and stakeholder engagement.
32. She further deponed that in a nutshell the Finance Act 2022 sanctioned a raft of tax policy measures which aim at yielding additional revenue of Kshs 51.607 billion for the Fiscal Year 2022/23 which is part of the Kshs 2,141.6 billion projected revenues for the fiscal year. She added that the Finance Act 2022 amended various tax laws and non-tax laws to enhance efficiency and administration in national revenue mobilization. In its making, she informed that the Finance Bill 2022 was read for the first time in the National Assembly on April 12, 2022 and thereafter committed to the Departmental Committee on Finance and National Planning.



33. It was deposed that the National Assembly facilitated extensive public participation and stakeholders' consultation through an advertisement in the print media calling for memoranda from the public on April 20, 2022 and a letter dated May 5, 2022 inviting stakeholders for a meeting. Due to the enormous public interest in the Bill, the Committee received and considered extensive submissions and memoranda from over 50 stakeholders and members of the public (all outlined in the affidavit). As such it was noted that the allegation of lack of public participation was baseless. In the end, the Finance Bill 2022 was debated and passed by the National Assembly on June 7, 2022 and assented to by the President on June 21, 2022.
34. She deposed further that laws enacted by Parliament are presumed constitutional and fair and so the burden falls on the person who alleges otherwise to rebut this presumption. That declaring the impugned Act unconstitutional would have grave ramifications as it will impact on the entire budget for the year 2022/2023 and affect operations of the government.

The 2nd & 4th Respondent's Case

35. The 2nd and 4th respondents in reply to the petition filed grounds of opposition dated July 18, 2022 and a replying affidavit dated November 15, 2022. The grounds of opposition are as follows:
- i. The petition, as filed does not raise any constitutional issues for deliberation as envisaged under the cited articles and as such should be dismissed with costs.
 - ii. Until the contrary is proved, legislation is presumed to be constitutional.
 - iii. Article 23 of the Constitution does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation. The only rider is that the case must be one which falls under article 22 of the Constitution.
 - iv. In order for the High Court to grant the conservatory orders sought, the applicant/petitioner must establish that there is an arguable case that if the order sought is not granted the applicant/petitioner is likely to suffer an irreparable harm.
 - v. Laws enacted by Parliament are presumed constitutional and fair and the burden falls on the person who alleges otherwise.
 - vi. In determining the constitutionality of the Finance Act, 2022, the honourable court should look at the purpose and effect of the impugned Finance Act and if the purpose and/ or the effect of the statute do not infringe on a right guaranteed by the Constitution, the Act is not unconstitutional.
 - vii. article 209 of the Constitution permits the national Government to impose taxes as a means of raising national revenue hence cannot be deemed unconstitutional.
 - viii. Parliament is mandated to enact the Finance Act every year as a measure of raising National revenue.
 - ix. "Conservatory orders" bear a more decided public-law connotation since these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest as held in Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others [2014] eKLR.
 - x. An applicant seeking conservatory orders must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the



Constitution as held in Martin Nyaga Wambora v Speaker of The County Assembly of Embu & 3 others Petition No 7 of 2014.

- xi. Further that an applicant must go further and show that his or her allegations bring him or her within the provisions of article 22 of the Constitution as held in Wylyff Atieno v Attorney General & 2 others [2014] eKLR.
 - xii. The applicant must further demonstrate that unless the conservatory order is granted it stands to suffer real danger or prejudice, all of which the petitioner has failed to do.
 - xiii. Under article 94(1) of the Constitution the legislative authority of the Republic is derived from the people and, at the National level, is vested in and exercised by Parliament hence Parliament acted in accordance with the law and within the limits of the Constitution.
 - xiv. The courts, are required by the Constitution to strive to achieve an appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law, including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand as held in Okiya Omtatah Okioti & 4 others v Attorney General & 5 others; Council of Governors & 4 others (Interested Parties) [2019] eKLR.
36. In their replying affidavit sworn by Dr Julius Monzi Muia, Principal Secretary of the National Treasury it is deposed that the process of preparing and enacting the Finance Bill which begun in 2021 was an all-inclusive process involving all stakeholders. He averred that the National Treasury invited stakeholders for meetings to discuss their respective proposals before finalization of the proposals and submission to the Cabinet Secretary for consideration and approval. The Finance Bill 2022 was then published in the Kenya Gazette No 67 as National Assembly Bill No 22 of 2022.
37. It was deposed that during consideration of the Finance Bill, 2022, the National Assembly submitted to the National Treasury comments and a matrix containing stakeholders' proposals with respect to the proposals contained in the Finance Bill, 2022. The National Treasury responded with comments on each proposal in the Matrix in accordance with the provisions of article 114 of the Constitution. Further that at the Committee stage amendments, comments and proposals received from stakeholders were incorporated in the Bill in line with article 118 of the Constitution on public participation. It was further deposed that contrary to the 1st petitioner's assertion, the status quo orders issued by this court dated September 27, 2021 were with respect to inflationary adjustment of the specific rates of excise duty which was in respect of petroleum products and so the rates were not increased in the Finance Act, 2022.
38. To that end, it was deposed that the Finance Act, 2022 enjoys the presumption of constitutionality and so this court ought to determine if the purpose and/or the effect of the statute infringes on a right guaranteed by the Constitution, and if not the Act should be presumed to be constitutional. Further that article 209 of the Constitution vests the National government with the exclusive power to impose taxes and hence the petition is against public interest.

The 3rd Respondent's Case

39. The 3rd respondent filed the following grounds of opposition dated July 12, 2022:
- i. The conservatory orders sought by the 1st petitioner are final in nature and should not be granted at the interlocutory stage.



- ii. The 3rd respondent avers that there was public participation in the implementation of the [Finance Act, 2022](#).
 - iii. The conservatory orders sought by the petitioner to stay the implementation of the [Finance Act, 2022](#) have adverse effects as they will stifle the implementation of government operations at an interim stage.
 - iv. The petitioners have sought a blanket stay that has the effect of crippling Government's ability to finance its operations by seeking stay of the entire Finance Act, 2022.
 - v. The illegality alleged in the petition in the implementation of the Legal Notice 217 of 2021 and Legal Notice No 194 of 2021 has not been determined by the court thus the issue raised is sub judice.
 - vi. The issues raised by the petitioner in Petition No 24 of 2021: [Pubs Entertainment & Restaurant Association of Kenya v National Assembly, KRA and CS, National Treasury](#) are pursuant to implementation of a Legal Notice which has a different implementation process to the Finance Act.
 - vii. All legislation is presumed constitutional hence sought orders cannot be granted at the interim stage.
 - viii. A provision imposing tax cannot be said to be unconstitutional for reasons that the same is deemed oppressive or unfair.
 - ix. The [Finance Act 2022](#) was passed by a simple majority of the members present through voting and until the National Assembly is declared to be illegally constituted, any acts passed by it are deemed constitutional.
40. The 3rd respondent in addition filed a replying affidavit dated July 22, 2022 sworn by Josephine Mugure, it's officer. She deposed that according to part i of the first schedule to the [Kenya Revenue Authority Act](#), the 3rd respondent is mandated to enforce the provisions of the [Income Tax Act](#) cap 470, [Value Added Tax Act](#), East African Community Customs Management Act and the [Excise Duty Act, 2015](#). It was her further deposition that since every year costs of goods and services increase, excise duty which is charged as a percentage on the value of goods, automatically increases so as to maintain the real value of tax. In view of this, Parliament enacted section 10 of the [Excise Duty Act, 2015](#) and Paragraph 2 of its First Schedule which provides for adjustment of the specific rates of excise duty every year to protect the value against erosion by inflation. She averred that section 78 of the [Public Finance Management Act, 2012](#) mandates it to do so as the collector of National government revenue and so it is required to implement the provisions of the [Finance Act, 2022](#) by law.
41. She deposed that the illegality alleged by the petitioner in Legal Notice Number 217 of 2021 and 194 of 2021 in relation to [Pubs Entertainment and Restaurants Association of Kenya](#), (*supra*) [Isaiya Luyara Odando & another](#) (*supra*) and is sub judice as the matters are pending before the court. She averred that the impugned section 35 of the Finance Act 2022 had not adjusted the excise duty rates on petroleum products affected by Legal Notice No. 194 of 2021 due to the conservatory orders issued by the court hence the 1st petitioner's allegation to that effect was not true.
42. It was further deposed that the Finance Bill, 2022 was subjected to public participation before being assented into law by the President on June 21, 2022. It is her deposition that the 1st petitioner has not demonstrated how the 3rd respondent has not complied with the constitutional provisions under article 10, 73, 210 of the [Constitution](#) with reference to carrying out its mandate. She added that



the [Finance Act, 2022](#) has an elaborate implementation process distinct from implementation of a Statutory Instrument and stay of its implementation will have negative economic implications.

b) Petition No.E342 of 2022

The Respondents' Case

43. The 2nd and 4th respondents in the consolidated petitions who were named as respondents in the Petition No E342 of 2022 did not file responses to the petition. If they did so, the same together with the submissions to this petition are not in the court file nor CTS.

c) Petition No E372 of 2022

The 1st Respondent's Case

44. The 1st respondent in response filed its replying affidavit dated September 19, 2022 sworn by Serah Kioko MBS the Deputy Clerk of the National Assembly. She deposed that the Finance Bill 2022 first read in the National Assembly on April 12, 2022 and thereafter committed to the Departmental committee on Finance and National Planning. The committee went on to call for public participation through an advertisement in the print media on April 20, 2022 and a letter dated May 5, 2022 inviting stakeholders for a meeting on the proposed amendments to the [Excise Duty Act](#) No 23 of 2015.
45. She deposed that the Committee received and considered memoranda on the Bill from seventy-four (74) stakeholders. It then invited stakeholders *vide* letter REF: NA/DDC/F&NP /2022/22 dated May 5, 2022 for an engagement retreat held at Hilton Garden Inn Hotel on 11th to May 13, 2022 where forty-two (42) participants made oral presentations before it. She deposed that the impugned section 35(b)(iii)(iv)(v) of the [Finance Act,2022](#) was clause 34(b)in the Bill and evidently was subjected to public participation. Further that the amendment was within the parameters of what was submitted to the public for input and so did not contain new issues. She noted that this was confirmed by the object of the memorandum and objects and reasons of the Finance Bill 2021.
46. She averred that it was a misrepresentation of the law for the petitioner to state that the National Assembly was obligated to adopt each and every recommendation made during public participation. This she stated would fly in the face of article 94 and 95 of the [Constitution](#). Further that the [Constitution](#) recognizes that a House of Parliament can amend bills hence the provision in article 124 of the [Constitution](#) allowing Parliament to make standing orders to provide for its procedures for conducting House business.

The 3rd Respondent's Case

47. The 3rd respondent filed its replying affidavit dated August 20, 2022 and a further supplementary affidavit dated September 19, 2022 both sworn by Josephine Mugure, the 3rd respondent's officer. She deposed that under part I of the first schedule to the [Kenya Revenue Authority Act](#), cap 469 Laws of Kenya, the Kenya Revenue Authority (KRA) is mandated to enforce the provisions of the [Income Tax Act](#) cap 470, [Value Added Tax Act](#), East African Community Customs Management Act and the [Excise Duty Act, 2015](#).
48. She deposed that the Cabinet Secretary for National Treasury and Planning submitted the Finance Bill, 2022 to the 1st respondent on April 7, 2022 in accordance with sections 39A and 40 of the [Public Finance Management Act, 2012](#). Further that on April 8, 2022, the 1st respondent published the Finance Bill, 2022 (National Assembly Bill No. 22 of 2022) which underwent the First Reading on



April 12, 2022. The Bill was then committed to the Departmental committee on Finance and National Planning which called for public comments and views on April 20, 2022, through print media.

49. She deposed that the Bill underwent a second reading on May 25, 2022 where the National Assembly discussed in plenary the merits and the demerits of the Bill. On June 2, 2022, the committee of the whole house convened and debated on the Finance Bill, 2022 wherein the same was approved with the amendments. It is deposed that it is at this point that the impugned Sections were proposed, particularly section 35(c), 6 & 7 which imposed excise rates on imported ready to use sim cards at Kshs. 50 per sim card, excise duty of fees charged by digital lenders at 20% and excise duty on the importation of cellular phones at 10% of the excisable value. The Finance Bill then proceeded for the third reading on June 7, 2022 and was passed. The Bill was eventually signed to law on June 21, 2022.
50. She further deposed that the *Finance Act, 2022* was published on June 23, 2022 through a Kenya Gazette Supplement No 106 hence the effective dates provided for in the Act came into force after the publication of the Act. In particular the impugned section 35 of the *Finance Act, 2022* which amended the first schedule to the *Excise Duty Act, 2015* by revising various excise rates of tax for some of the products listed under the schedule, took effect on July 1, 2022. It was deposed ultimately that the 3rd petitioner had failed to demonstrate with specificity the alleged violation, infringement and/or contravention of articles 10, 43, 46(1)(c) of the *Constitution*.
51. It was deposed in closing that the petition was a threat to the doctrine of separation of powers since the rate of taxation is a policy decision within the mandate of the executive and the court ought to decline to make policy decisions. In the same vein she averred that the petitioner had failed to demonstrate the constitutional infractions committed by the respondents to warrant judicial intervention. As such it was averred that this court must shun any invitation to dabble in matters of national economic policy on the basis of generalized assertions of unfairness and unsustainability.

d) Petition No E373 of 2022

The 1st Respondent's Case

52. The 1st respondent in response filed replying affidavit dated September 19, 2022 which was the same affidavit that was filed in the 3rd petitioner's case.

The 2nd Respondent's Case

53. The 2nd respondent's response in this petition was not in the court file nor the CTS.

e) Petition No.E407 of 2022

The 1st Respondent's Case

54. In response, the 1st respondent filed grounds of opposition dated August 22, 2022 stating as follows:
 - i. The petitioner had failed to meet the test for issuance of conservatory orders set by the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.
 - ii. The impugned provisions were introduced through the Finance Act, 2022, an Act of Parliament which is presumed to be constitutional unless rebutted through the substantive hearing and determination of the petition.



- iii. The petition and the application for conservatory orders is misconceived and without any basis in law as the orders sought violate the constitutional and statutory mandate of the National Assembly.
 - iv. The petitioner has not demonstrated in its application that the 1st respondent acted contrary to the Constitution or any statute in enacting the impugned provisions hence the petitioner has not met the threshold for the grant of conservatory orders.
 - v. The impugned tax is a consumption tax which is deducted from payments made by the final consumers who cannot be traced by the 2nd respondent. Therefore, the suspension of the impugned provision will result in lost taxes which may not be recoverable in the event the petition is dismissed.
 - vi. Suspending the enforcement of a consumption tax which cannot later be recovered not only causes irrevocable loss on the 2nd respondent but also strains the financing of the Government operations which are dependent on the taxes.
 - vii. The petitioner has failed to show to the satisfaction of the court that any rights are under threat of violation or are being violated to warrant the immediate grant of conservatory orders. This is a minimum requirement that has not been met as stated in the case of Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017] eKLR.
 - viii. Additionally the orders sought by the petitioner have the effect of barring the 2nd respondent from exercising its mandate and this shall have an effect on the overall target projections on collection of revenue of the state. The imposition of taxes is a policy decision solely within the exclusive mandate of the executive.
 - ix. Laws enacted by the 1st respondent are presumed constitutional and fair and the burden falls on the person who alleges otherwise to rebut this presumption. The Petitioner has failed to do so.
 - x. Public interest militates against the suspension of the impugned taxes at this stage as the taxes to be collected therefrom have already been factored into the budget for the current financial year.
55. Further, the 1st respondent relied on its affidavit dated September 19, 2022 filed in the 3rd and 4th petitioner's petitions as sworn by Serah Kioko, the Deputy Clerk of the National Assembly.

The 2nd Respondent's Case

56. The 2nd respondent made its reply to this petition by filing the following grounds of opposition dated August 29, 2022.
- i. The petitioners have failed to disclose any violations or threatened violation of their rights by the Attorney General.
 - ii. The petition fails to meet the set test for grant of conservatory orders as held by the Supreme Court in the case of Gatirau Peter Munya v. Dickson Kithinji Mwenda & 2 others (2014) eKLR where one is required to prove that he will suffer real prejudice as a result of the alleged violation of the Constitution.
 - iii. The prayers sought in the application, would have a lasting impact if granted. This would basically skew the outcome of the petition since KRA would have no way of finding the gamers



upon whose wagers the excise duty accrues, and the statutory mandate of KRA would be irreversibly affected.

- iv. The impugned Finance Act, 2021 enjoys the undisputed and unrebutted presumption of constitutionality, and therefore granting the prayers sought in the Application would be tantamount to upholding the argument that the same is unconstitutional, in the interim.
- v. In the event that the petition succeeds, the Applicants have an avenue of recovering the amounts remitted to KRA as Excise duty in compliance with the impugned provisions of the Act. On the other hand, in the event that the petition fails, the 2nd respondent and the people of Kenya, have no way of recovering the excise duty owed as the same is a consumption tax. Therefore, on account of public interest, the scale falls in favour of not granting the prayers in the application.
- vi. The petitioner has failed to specify the rights that have been violated or threatened as per the requirement in the *locus classicus* case of Anarita Karimi Njeru (1976-1980) KLR 1272.
- vii. The petition if allowed, will interfere with the statutory and constitutional mandate of the 1st and 2nd respondents, especially the mandate to legislate and the mandate to collect revenue respectively.
- viii. The petition does not disclose any cause of action against the Attorney General.
- ix. The petition is frivolous, vexatious and an abuse of the court process.

The Interested Parties' Case

57. The interested parties responses to the consolidated petition are summarized as filed in each respective petition. For ease of reference, the interested parties' titles are as appearing in the consolidated petition not the individual petitions. Lastly, it is noted that the responses of the 1st, 2nd, 3rd, 4th, 5th, 7th, 9th, 10th and 11th interested parties were not in the court file nor the CTS.

The 6th Interested Party's Case

58. The 6th interested party in response to the 1st petitioner's case filed a replying affidavit dated July 25, 2022 sworn by Aphline Agina, the Head of Operations at KEPISA. It was deposed that the challenge to the composition of Parliament at the time of passing the Finance Act, 2022 due to the two thirds gender rule could not stand because Justice Weldon Korir had suspended implementation of the RTD Hon Chief Justice David Maraga's opinion on dissolution of Parliament, pending the hearing and determination of the matter. With reference to the Finance Bill, 2022, she averred that the 6th interested party sent its written submissions to the National Assembly Departmental committee on Finance & National Planning via email, and specifically asked the National Assembly to comply with the court order on matters of revision of excise duty rates. Further that on May 11, 2022, the 6th interested party on invitation by the said committee made oral submissions before it.
59. She further deposed that the Finance Act, 2022 was enacted with some of its sections in violation of the existing orders dated November 19, 2021 and December 15, 2021 in Consolidated Petition E024/ 2021 Pubs Entertainment and Restaurants Association of Kenya, and 2 others (*supra*) where conservatory orders were issued in the interim quashing the decision by the Commissioner General of KRA, to adjust rates for petroleum products through Legal Notice No 217 and maintaining of the status quo. She added that section 35 of the Finance Act, 2022 is in breach of the doctrine of *sub-judice* because variance of the rates of excise duty is a matter of active litigation.



60. She finally deposed that the [Finance Act, 2022](#) has serious ramifications on businesses and Kenyans at large and so the 6th interested party implored this court to compel Parliament to consider submissions made during public participation, the recommendations of the departmental committee and the high cost of living. Further that Parliament should comply with existing court orders in discharge of its legislative functions.

The 8th Interested Party's Case

61. In response to the 2nd petitioner's case, the 8th interested party filed its replying affidavit dated July 29, 2022 sworn by Serah Kioko the Deputy Clerk of the National Assembly. This affidavit reiterated the contents of the 1st respondent's reply to the consolidated petitions.

The 12th Interested Party's Case

62. The KRA in response to the 2nd petitioner's petition filed its replying affidavit dated September 20, 2022 as sworn by Maurice Oray, the Deputy Commissioner in KRA's Strategic Innovation and Risk Management Department Corporate Policy Unit. He deposed that KRA is empowered under sections 5 of both the [KRA Act](#) and the [VAT Act, 2013](#), to enforce and administer all provisions for the assessment and collection and accounting of revenue on behalf of the government. Further that VAT is a consumption tax whose burden is borne by the final consumers and not the traders as alleged by the petitioner.
63. He further deposed that imposition of VAT on exported services or goods is guided by two principles; the origin principle and the destination principle. He informed that the origin principle advocates for taxation of goods or services within the jurisdiction where the goods or services are produced while on the other hand the destination principle places taxing rights on exported goods or services in the country where the recipient of the supplies is located. He therefore deposed that the government in charging VAT on exported services adopted the origin principle. That in passing the [Finance Act, 2022](#), the 1st respondent adhered to its own internal procedures and constitutional requirements while considering the amendments. Further no reasons were given for this court to interfere with the manner in which the House conducted its business.
64. He further deposed that the imposition of VAT on exported services cannot be unconstitutional as the [Constitution](#) permits the National government to impose taxes as a means of raising revenue. Likewise, that the Statute cannot be rendered unconstitutional merely because it does not meet the economic interest of the petitioners. He urged the court in determining the constitutionality of the Statute to look at the purpose and effect of the impugned statute and whether it had infringed on a right guaranteed by the [Constitution](#). He further cautioned that the rate of taxation is a policy decision solely within the mandate of the Executive and enacted by parliament and so this court ought to decline to make policy decisions which are solely within the realm of the other arms of government. He additionally deposed that the 2nd petitioner had failed to demonstrate how articles 10, 43 and 46(1) of the [Constitution](#) were violated by section 30(b) of the [Finance Act, 2022](#) by imposing VAT at 16% on exported Services.
65. In response to the 4th petitioner's petition, the 12th interested party filed the following grounds of opposition dated September 14, 2022:
- i. The interim/ conservatory orders sought by the petitioner are final in nature and should not be granted at the interlocutory stage.



- ii. The Interim/ conservatory orders sought by the petitioner in the application dated July 20, 2022 are exact replicas of the prayers sought in the petition and granting such orders at the interlocutory stage is akin to driving the 12th Interested Party from the seat of justice.
 - iii. The issues and orders sought by the petitioner raise grave and novel issues whose impact would not only be the loss of revenue to the Government but would also stall projects whose implementation is dependent on the impugned sections of the [Finance Act, 2022](#) and so such orders should not be granted at the interlocutory stage.
 - iv. Granting the orders sought in the application would negate the legislative authority exercised by the National Assembly under articles 94 and 95 without granting the parties an opportunity to ventilate their case.
 - v. The petitioner has not established a prima facie case warranting the granting of the conservatory orders sought.
 - vi. The petitioner seeks the court to bequeath itself with both executive and legislative powers in total contravention of the doctrine of separation of powers.
 - vii. article 209 the [Constitution](#) grants the National government power to impose income tax, value added tax, excise tax, customs duty and other duties on import and export goods.
 - viii. At all times the 12th interested party drew its powers to levy taxes from legislation as enacted by the National Assembly, the body mandated to make and enact laws as per article 94, 95, 109, and 116 of the [Constitution](#).
 - ix. All legislation is presumed constitutional hence sought orders cannot be granted at an interim stage without the court hearing the petition.
 - x. A provision imposing tax cannot be said to be unconstitutional for reasons that the same is deemed oppressive or unfair.
 - xi. The application is tantamount to asking the court to suspend the operation of a law even before the Court can satisfy itself that the said law is unconstitutional.
66. Further, in its replying affidavit dated September 20, 2022, also sworn by Josephine Mugure, the 12th interested party made a similar response as its reply in the 3rd petitioner's case. In the same manner, in reply to the 5th petitioner's petition (Petition No E407 of 2022) the 12th interested party filed a replying affidavit dated September 6, 2022, sworn by Josephine Mugure that encapsulated the averments in its other affidavits in response to the consolidated petitions.

The 13th Interested Party's Case

67. The 13th interested party opposed the 4th petitioner's petition by filing its grounds of opposition dated October 31, 2022 as follows:
- i. Section 40(3) of the [Public Finance Management Act, 2012](#) provides that the Cabinet Secretary responsible for the National Treasury shall submit to the Parliament the Finance Bill, setting out the revenue raising measures for the National Government together with policy statement expounding on these measures.
 - ii. Article 124 of the [Constitution](#) allows the Parliament to make standing orders to provide for its procedures in conducting house business.



- iii. The proposal by the National Assembly to impose excise duty on the imported sim cards was to encourage the local manufacturing industry and to safeguard the interest of consumers in line with Communication Authority of Kenya (CA).
- iv. Article 209 of the Constitution gives the national government the powers to impose income tax, value added tax, excise tax, custom duty and other duties on various goods and services
- v. This court has a limited role when it comes to legislative framework which is the mandate of the Legislature.
- vi. The 1st respondent incorporated and adopted all the comments made by key stakeholders in the telecommunication sector when they were invited to give their views on the proposed Bill.
- vii. The Communication Authority of Kenya (CA) has the mandate to regulate telecommunication sector and ensure compliance with the said laws.
- viii. If the application is allowed, the legislative role of the National Assembly to enact and amend laws where necessary and the principle of separation of powers which militates against the granting of orders at this point will be rendered nugatory as was emphasized by the Supreme Court in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR and the Court of appeal, in the case of *Mumo Matemu v Trust Society of Human Rights Alliance & 2 others*, Civil Appeal No 290 of 2012, [2013] eKLR.
- ix. The petitioners application and petition seeking interim and conservatory orders is an abuse of court's process. it does not meet the threshold for grant of interim and conservatory orders as was elaborated in the Supreme Court case of *Gatirau Peter Munya v Dickson Mwendwa Kitbinji & 2 others* [2014] eKLR.
- x. The petitioner is seeking final orders at the interim stage which are too broad and unreasonable because one cannot seek temporary orders prohibiting parties from implementing their mandate at an interlocutory stage as was held in the Court of Appeal case in *Olive Muihaki Mugenda & another v Okiya Omtata Okiiti & 4 others* [2016] eKLR.
- xi. The entire nature of the suit is meant to constrain the role of the National Assembly contrary to article 94, 95, 109 and 116 of the Constitution.
- xii. The impugned provisions do not violate standing order 133(5) of the national assembly standing orders.
- xiii. The impugned provisions were lawfully and procedurally enacted and the petitioner has failed to prove that his constitutional rights have been infringed with the enactment of the Finance Act, 2022.
- xiv. The petitioner through his proxies is advancing his own selfish interest rather than pursuing the interest of the public at large and to enable the Government to generate its own revenue to run the affairs of the Kenyan people.

The 14th Interested Party's Case

68. The 14th interested party in support of the 4th petitioner's petition filed its affidavit dated September 9, 2022 sworn by Lillian Mugo, the Head of legal affairs. She deposed that the 14th interested party was aggrieved with the imposition of excise duty on imported cellular phones and imported sim cards in the Finance Act, 2022 for a number of reasons. First because the Finance Bill subjected to public



participation on April 20, 2022 did not have any provisions for the imposition of excise duty on imported cellular phones and imported sim cards hence the stakeholders were not consulted on this substantive amendment. Further it was deposed the impugned amendment was introduced on the floor of the House on June 2, 2022 during the committee meeting of the whole House when the Bill was read for a third and final time contrary to standing order 133(5) which prohibits introduction of an amendment that expands the scope of the law or introduces new subject. She thus deposed that section 35(c) and 35 (7) of the *Finance Act, 2022* are unlawful and contrary to articles 10, 118 and 201 of the *Constitution*.

The 15th Interested Party's Case

69. The 15th interested party in support of the petition filed an affidavit dated October 27, 2022 sworn by Daniel Ndaba, the Senior Manager – Litigation. He deposed that the 15th interested party is a mobile telecommunications company that imports over 20 million SIM cards. Further that the published Finance Bill did not contain any provision imposing excise duty on SIM cards or Cellular Phones. This however was not the case when the *Finance Act, 2022* was published on June 23, 2022. The said Act effected amendments to paragraph 1 of Part I of the *Excise Duty Act* which introduced excise duty on imported SIM cards and imported cellular phones. These amendments were effected through section 35(c) and 35(7) of the *Finance Act, 2022*.
70. For context he deposed that the current landed cost of an imported SIM card is Ksh 55.97 and with the kitting (branding) of the SIM card the cost is Ksh 61.87. However with the excise duty introduced on each SIM card being Ksh 53.15 the cost of the imported SIM cards has almost doubled to Ksh 115.02 which has a huge financial impact on the 15th interested party and members of the public. He thus deposed that stakeholders such as the 15th interested party ought to have been consulted before imposition of the excise duty. He averred that the amendments effected by section 35(c) and 35(7) of the *Finance Act* are therefore a violation of articles 10,118 and 201 of the *Constitution*.

The 16th Interested Party's Case

71. The 16th interested party in support of the 2nd petitioner's case filed an affidavit dated November 24, 2022 sworn by Peter Kristensen, the Managing Director of Airflo Limited. He averred that the 16th interested party is a leading logistics company in perishables that specializes in providing world-class fresh logistics solutions for fresh cut flowers, herbs, cuttings, produce and fruits moving through key international trade lanes. It thus deals in exported services, that constitute the exportation of taxable services within the meaning of section 2 of the *Value Added Tax (VAT) Act* (No 35 of 2013).
72. He deposed that the service contracts entered between the company and companies to which the services are rendered fall within the category of business-to-business agreements prescribed under the Organisation for Economic Co-operation and Development (OECD) guidelines. Relying on the destination principle and the OECD VAT guidelines, he deposed that VAT ought to be chargeable in the countries where the companies provided with the services are domiciled, and not in Kenya.
73. He further deposed that the Finance Bill, 2022 under part II did not contain any proposals on the amendment of the provisions of Paragraph 32 of Part II of the First Schedule to the *VAT Act* which exempted imposition of VAT on the exportation of taxable services. He added that during the stakeholders consultations on the Bill, it was variously proposed that paragraph 32 of part ii of the first schedule to the *VAT Act* be deleted and the same (the exportation of taxable services) be added to the Second Schedule which would then make exportation of taxable services zero rated. This proposal was accepted and adopted by the National Assembly Departmental committee on Finance and National Planning.



74. However on June 2, 2022, during the Second reading of the Bill, the Chairperson of the National Assembly Departmental committee on Finance and National Planning moved to amend Clause 29 of the Bill by inserting a new paragraph immediately after Paragraph (a) which reads in Part A by inserting the following paragraph immediately after Paragraph 22 - 23, “the exportation of taxable services in respect of ‘business process outsourcing” which according to him means that the exportation of taxable services, apart from business process outsourcing is now standard rated hence subject to VAT at 16%. He deposed that as a result VAT is being imposed both in Kenya at 16% and at the respective destinations where the services are used which is double taxation, and a violation of the Constitution and public policy.

The 17th Interested Party’s Case

75. The 17th interested party also in support of the 2nd petitioner’s case filed an affidavit dated November 24, 2022, sworn by Ronald De Vos, the Managing Director of Dutch Flower Group Kenya Limited. He deposed that the 17th interested party is a business that imports flowers to Companies domiciled in the Netherlands by providing logistical services. The contents of the affidavit reiterated the averments contained in the 16th interested party’s affidavit.

Parties Submissions

76. The petitioners filed written submissions and cited very many authorities which have been noted. The 1st petitioner’s submissions dated July 25, 2022 were filed by M/s Kabata Mwaura & Partners Advocates. The 2nd petitioner filed its submissions dated September 17, 2022 by M/s Mema Advocates LLP; The 3rd petitioner’s submissions are by M/s Okwach & company advocates and dated 14th September 2022; the 4th petitioner’s submissions were filed in person and are dated 20th November 2022; Those of the 5th petitioner were filed by M/s Anjarwalla & Khamma LLP and are dated September 7, 2022.

The Respondents Submissions

77. The 1st respondent’s submissions and authorities are dated September 2, 2022 and filed by counsel Mbarak Awadh Ahmed; The 2nd & 4th respondents’ submissions are by counsel Marwa Christopher and dated November 23, 2022; Those of the 3rd Respondent are dated July 26, 2022 and filed by counsel Lilian Moraa Nyaringita.

The Interested Parties Submissions

78. The 12th interested party’s submissions were filed by its counsel Winnie Otieno & Pius Nyaga. They are dated November 9, 2022; Those of the 13th interested party are dated November 9, 2022 and filed by M/s Manyonge Wanyama & Associates LLP. The 14th interested party filed submissions by M/s Majanja Luseno & Co Advocates dated November 27, 2022; Those of the 15th Interested Party are dated November 28, 2022 and were filed by Kaplan & Stratton Advocates; The 16th & 17th interested parties submissions are dated November 28, 2022 having been filed by Odero Olonde & Co Advocates.
79. The submissions by all counsel are basically reiterating the averments in the supporting affidavits, replying affidavits and/or grounds of opposition. They have also cited a number of authorities in support of or in opposition to the petitions. I will address these in my analysis of the material before me.



Analysis and Determination

80. I have carefully perused and considered the pleadings in each petition, the parties submissions, the numerous authorities cited, and evidence adduced herein. Unmistakably there is a common theme that runs through the consolidated petitions. In my considered view the central issues that arise for determination by this court are as follows:
- i. Whether the coming into operation date of the [Finance Act, 2022](#) is constitutional;
 - ii. Whether the instant petition invokes the principle of *sub judice*;
 - iii. Whether the [Finance Act, 2022](#) and the impugned sections 30(b); 32; 35(b)(iii)(iv)(v), (c), (6) & (7); 35(d)(ii) and imposition of excise duty at the rate of 10% on imported cellular mobile phones and on imported SIM cards were subjected to public participation and if so whether they are constitutional;
 - iv. Whether the imposition of the impugned taxes by the 1st respondent was unconstitutional; and
 - v. Whether the petitioners are entitled to the reliefs sought.

Issue No (i). Whether the coming into operation date of the Finance Act 2022 is constitutional

81. The 2nd and 3rd petitioners took issue with the effective date stipulated as to when the [Finance Act, 2022](#) came into force. According to the petitioners there was a procedural defect in enactment of the [Finance Act, 2022](#) since it was published in the Kenya Gazette on July 8, 2022 with an effective date of July 1, 2022. They stated this was contrary to article 116(1) of the [Constitution](#) hence unconstitutional. Article 116 of the [Constitution](#) which deals with the coming into force of laws provides as follows:

- (1) A Bill passed by Parliament and assented to by the President shall be published in the Gazette as an Act of Parliament within seven days after assent.
- (2) Subject to clause (3), an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force.

82. For context the [Finance Act, 2022](#) was assented into law by the President on June 21, 2022, published on June 23, 2022 as an Act of Parliament and subsequently gazetted on July 8, 2022. Of essence to this issue is the dictates of section 1 of the [Finance Act](#). This section provides as follows:

This Act may be cited as the [Finance Act, 2022](#) and shall come into operation or be deemed to have come into operation as follows —

- (a) Sections 3, 6, 10, 15, 16, 22(b)(ii) and 32, on the January 1, 2023; and
- (b) All other sections, on the July 1, 2022.

83. In interpreting this provision, this court is mindful of the rules of constitutional interpretation outlined in article 259 of the [Constitution](#) which provides:

This Constitution shall be interpreted in a manner that--

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and



(d) contributes to good governance.

84. The court in the case of *Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others* [2016] eKLR analyzing this article opined as follows:

“64. Article 116 of the *Constitution* makes it relatively clear when a Bill once assented to ought to come into operation. Unless it is an Act of Parliament conferring direct pecuniary interest on Members of Parliament qua members of Parliament, Acts of Parliament come “into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date or time at which it will come into force”.

65. The transformative nature of the *Constitution* dictates that history be considered even as one seeks to interpret the various provisions of the *Constitution*. History will reveal that the coming into force of statutes passed by Parliament prior to the 2010 *Constitution* was occasionally delayed by both Parliament and the executive. The executive would take a while to assent to and cause the Act to be gazetted. Parliament too would postpone the coming into operation of the law indefinitely. The retired Constitution under section 46 seemed to condone such approaches and was then accordingly abused.

66. the *Constitution* under article 116 sought specifically to address this mischief. It sought, by providing when Acts would come into force of law to ensure that the past was not repeated. It sought, in my view, to ensure that the legislative process once commenced followed the prescribed process to a reasonable and logical conclusion and within a reasonable period of time. That is the spirit of article 116 of the *Constitution*. Indeed time was prescribed in all the processes: see articles 115 and 116 of the *Constitution*.

67. Any interpretation of article 116 of the *Constitution* would dictate that a purposive approach is adopted. And, in my view, the rather implicit purpose of article 116 was to ensure that the legislative process is completed sooner than later.”

85. A reading of article 116 of the *Constitution* on the face of it evidently indicates that the effective date July 1, 2022 is in contrast to the requirement of the 14 days stipulated in the *Constitution*. However the dictates of this article do not end at that. The provision continues to inform that ‘...unless the Act stipulates a different date on or time at which it will come into force’.

86. In my understanding the drafters of this article envisioned two scenarios when a Statute could come in force. First where a tentative date is not provided that the lapse of the 14 days after gazettelement automatically would vest the law with legal force. Secondly, a definite date as stipulated in the Statute itself.

87. The essence of the time clarity was expounded by the late Hon. Justice Onguto in the above cited case as to cure the past legislative making process mischief. With clear time frames the legislature is held accountable on the completion of the legislative process definitively. It is my considered view that in the case before this court, the legislature chose the second time frame option by making its provision based on section 1 of the *Finance Act, 2022*.



88. Taking all this into consideration, I am inclined to disagree with the petitioners and state that the effective date was constitutional. Moreover, this court takes judicial notice of the fact that a complete financial year in Kenya which the Finance Act is based on commences on 1st July of the new calendar year and ends on 30th June of the following year.

Issue No (ii). Whether the instant petition invokes the principle of sub judice

89. The 1st petitioner in contesting the [Finance Act, 2022](#) pointed out that it had been enacted in complete violation of the court orders issued by Hon Justice Makau on September 27, 2021 in Constitutional Petition No E374 of 2021 [Isaiya Luyara Odando & another](#) (*supra*), touching on the Legal Notice No 194 on the question of the increase of the price of petroleum products. Furthermore that the *status quo* orders also issued by Hon. Justice Makau in [Pubs Entertainment and Restaurants Association of Kenya, Mwaura Kabata, and the Kenya Human Rights Commission](#) (*supra*) touching on the adjustment of excise duty rates *vide* Gazette Notice Supplement No 199 dated November 2, 2021 under Legal Notice No 217 issued on November 19, 2021, applied to this petition.
90. Likewise he stated that the [Finance Act](#) runs afoul of a contempt of court application in Consolidated Petition E24/2021 [Pubs Entertainment and Restaurants Association of Kenya, Mwaura Kabata, and the Kenya Human Rights Commission v National Assembly & 6 others](#) filed on January 7, 2022 owing to the status quo orders. Essentially the 1st petitioner’s complaint is against an increase in excise duty rate from Legal Notice No. 194 to the hiked rates inflation in Legal Notice No 217. He stated that the status quo orders were to stall the application of Legal Notice No 217. Despite this the 2nd petitioner asserted that when the Finance Act was passed into law a reading of section 35 revealed that the rates had escalated from where the impugned Legal Notice No 217 had left.
91. The 3rd respondent opposed this averment stating that the issues raised by the petitioner in the cited cases were pursuant to implementation of the Legal Notice which has a different implementation process to a Finance Act. It was stressed that the implementation of the Legal Notices did not inform the implementation of the [Finance Act 2022](#) which is a policy paper on raising revenue and expenditure by government.
92. The guiding principles upon which courts make findings on the question of sub judice are premised on the [Civil Procedure Act](#), cap 21 under section 6. This section provides as follows:

Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

93. The Supreme Court while discussing the principle of sub judice in the case of [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR opined as follows:

“(67) The term ‘sub-judice’ is defined in [Black’s Law Dictionary](#) 9th Edition as: “Before the court or Judge for determination.” The purpose of the *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent



jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

94. To answer this question an examination of the court orders complained about is necessary so as to ascertain their scope and relationship if any to the [Finance Act 2022](#) challenge. The court orders dated September 27, 2021 in Constitutional Petition No E374 of 2021 in relation to this case provided as follows:
1. That prayer no. 3 of the notice of motion dated September 20, 2021 is hereby granted in the interim pending hearing and determination of the application interparties. To wit:
 - i. Pending the hearing and determination of the application inter-partes, conservatory orders in the interim quashing the decision by the Commissioner General of the Kenya Revenue Authority to adjust excise duty rates on petroleum products effective October 1, 2021 subject to approval by the Cabinet Secretary and National Planning be and is hereby issued.
95. The orders dated November 19, 2021 in Petition No E491 of 2021 stated as follows:
- a)
 - b)
 - c) ...
 - d) That in view of the fact that the effective date shall be on December 20, 2021 this court directs that status quo be maintained as of today.
 - e)
96. In the contempt of court application in consolidated petition E24/2021 the parties made known that they sought the following prayers:
- a. The application be certified as urgent to be heard *ex parte* in the first instance
 - b. Pending *inter-partes* hearing and determination of the application, this honourable court be pleased to order that the *status quo* remains as in its order of December 15, 2021 pending further directions on January 26, 2022.
 - c. That pending interpartes hearing and determination of this application, this honourable court be pleased to stay and or suspend the enforcement of Legal Notice 217 of 2021 in so far as it seeks to adjust the inflation rate for Excise Duty as in its order of December 15, 2021.
 - d. This honourable court be pleased to cite the 2nd respondent herein for contempt of this court's orders of June 10, 2021.
 - e. This honourable court be pleased to issue a sufficient custodial sentence as against the 2nd respondent or In the alternative a commensurate penal fine for contempt of court;



- f. This honourable court be pleased to quash the impugned adjusted rates of inflation of excise duty as at December 20, 2021 and order a refund for the same forthwith;
 - g. This honourable court be pleased to order that the respondents be and are hereby restrained from adjusting the inflation rates of excise duty in the purported enforcement of Legal Notice No 217 of 2021;
 - h. The costs of this application be provided for.
97. The power to adjust inflation rates as challenged above is provided for under the [Excise Duty Act, 2015](#). Section 10 provides as follows:
10. Adjustment for inflation
- (1) Despite section 8, the Commissioner may, with the approval of the Cabinet Secretary, by notice in the Gazette, adjust the specific rate of excise duty once every year to take into account inflation in accordance with the formula specified in part 1 of the first schedule.
 - (2) The notice under subsection (1) shall be laid before the National Assembly within seven days from the date of publication.
 - (3) The National Assembly shall, within twenty-eight sitting days of the receipt of the notice under subsection (2), consider the notice and make a resolution either to approve or reject the notice.
 - (4) The notice shall cease to have effect, if a resolution disapproving the notice is passed by the National Assembly.

On the other had the impugned section 35 of the [Finance Act, 2022](#) which is said to have been in contravention of the existing court orders amended the first schedule to the [Excise Duty Act, 2015](#).

98. It is discernable from reading the above context that the instant petition and the cited petitions, have no correlation in the issues. This is because the cited petitions are challenging the mandate of the 3rd respondent with reference to section 10 of the [Excise Duty Act](#) in relation to Legal Notice No.217. The instant petition on the other hand challenges the 1st respondent's legislative mandate as enshrined in article 209 of the [Constitution](#).
99. The two i.e 1st & 3rd respondents are separate legal entities with distinct constitutional mandates. It is my considered view therefore that the claim that the enactment of the [Finance Act, 2022](#) was actualized in violation of existing court orders is unfounded. The claim fails to satisfy the elements of the sub judice rule as encapsulated under section 6 of the [Civil Procedure Act](#), cap 21 to estop this court from considering the issues raised in this petition.

Issue No (iii). Whether the Finance Act 2022 and the impugned sections 30(b); 32; 35(b)(iii)(iv)(v), (c), (6) & (7); 35(d)(ii) and imposition of excise duty at the rate of 10% on imported cellular mobile phones and on imported SIM cards were subjected to public participation and if so whether they are constitutional

100. The petitioners herein argued that prior to the enactment of the [Finance Act, 2022](#) the 1st respondent introduced new amendments to the Finance Bill which were not subjected to public participation. Neither of the petitioners contended that the Finance Bill was not subjected to public participation. This exercise was acknowledged and the petitioners only took issue with the introduction of the impugned amendments after the public participation exercise. It was the petitioners' contention that



given the far reaching consequences of the impugned amendments on the relevant stakeholders and the general public, the respondents had a constitutional obligation to procure the public's views on the said amendments as required by the public participation principle, before passing the [Finance Act, 2022](#).

101. The respondents vehemently opposed this allegation stressing that public participation had been conducted even with reference to the impugned amendments. This they argue is because the Memorandum of objects and reasons for the Finance Bill had made clear the purpose of the Bill. They further asserted that the 1st respondent was mandated by the [Constitution](#) through legislation to enact tax laws with an aim of raising the nation's revenue. They pointed out that the legislature was empowered to introduce amendments to the Finance Bill as long as it kept with the object of the law. They also emphasized that the [Finance Act, 2022](#) enjoys the presumption of constitutionality and that the petitioners' prayers were offensive to the principle of separation of powers.
102. One of the hallmarks of the [Constitution of Kenya](#) is involvement of the public in its affairs so much so that it forms one of the national values and principles as envisaged in article 10 of the [Constitution](#). The Government is obligated under article 118 of the [Constitution](#) to facilitate public participation and involvement in the legislative and other business of the National Assembly and its committees. It is reasonable to conclude that public participation is a key element in the legislative functions of the government at all levels. The essence of public participation has also been captured in a plethora of cases that have made determinations on the matter.
103. The Court of Appeal in the case of [Martin Nyaga Wambora v County Assembly of Embu & 37 others](#) [2015] eKLR while addressing the element of public participation opined as follows:

“(42) I am in agreement with the *dicta* in the South African case *Doctors for Life International v Speaker of the National Assembly and others* (*supra*) that:

“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 participates in the legislative process.”

104. The parties in support of their cases cited a plethora of well-known cases on the importance of public participation that this court takes cognizance of and guided by. In addition, the Supreme Court in the case of [British American Tobacco Kenya, PLC](#) (*supra*) speaking to the principle of public participation and giving guidance on its determination guided as follows:

“(85) Public participation has been entrenched in our Constitution as a national value and a principle of governance under article 10 of the [Constitution](#) and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets the [Constitution](#); (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the appellate court, public participation is anchored on the principle of the Sovereignty of the People “that permeates the [Constitution](#) and in accordance with article 1(4) of the [Constitution](#) is exercised at both national and county levels”.



105. The court went on to issue the following guidelines:

“(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.

106. An examination of the evidence presented before this court reveals that the 1st respondent invited the public and the relevant stakeholders to submit memoranda and views for the purposes of public participation on the Finance Bill. Further there is uncontroverted evidence of the public participation exercise contained in the report of the Departmental Committee of Finance and Planning on the Finance Bill. It is my humble finding that the public participation principle as envisaged under article 118 of the Constitution was conducted.
107. The main contention however is whether the additional amendments that were introduced after the submissions of the stakeholders and the public violated the principle of public participation to make the amendments unconstitutional. This is since the public and relevant stakeholders did not get an opportunity to submit their views and comments on the additional amendments. The petitioners argued that the impugned amendments ought to have been re-submitted to the public for their views since they were not contained in the Bill.
108. One of the roles of Parliament in exercise of its legislative authority under article 94 of the Constitution is making of laws. This is actualized through the Bills passed by the House and assented to by the President as envisaged under article 109 (1) of the Constitution. With reference to this matter, a Bill of this nature is introduced in Parliament in the manner encapsulated under article 114 of the Constitution. The article deals with money bills such as taxes. It is the opinion of the Speaker of the National Assembly that where a motion makes provision for a matter listed in the definition of ‘a money Bill’, the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance.
109. This in essence is the beginning of the legislative process. The Bill at this juncture is subjected to the legislative procedure which comprises of the First Reading; committal of the Bill to the Departmental



Committee; the Second Reading; Committee Stage; the Report stage; the Third Reading of a Bill and finally the Bill is passed and presented to the President for assent.

110. In carrying out this legislative role, Parliament is guided by its own standing orders as required under article 124(1) of the *Constitution*. Part XIX of the national assembly standing orders which deals with Public Bills details the stages of the legislative process. Standing order 126 provides for the first reading of the Bill. Next is Standing Order 127 which provides the next process and what the departmental committee does. Standing order 127(3) provides:

“The Departmental Committee to which the Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes it report to the house.”

111. Standing order 128 which provides for the second reading of the Bill provides that no amendment is moved at this stage but rather the Bill is committed to the Committee of the whole House where the proposals and amendments are discussed at length under standing order 130. In considering a bill in the committee stage, standing order 132 divulges that the various parts of the Bill shall be considered in the following sequence –

- (a) clauses as printed, excluding the clauses providing for the citation of the Bill, the commencement, if any, and the interpretation;
- (b) new clauses;
- (c) schedules;
- (d) new schedules;
- (e) interpretation;
- (f) preamble, if any;
- (g) long title;
- (h) the clauses providing for the citation of the Bill and the commencement.

112. Furthermore standing order 133 provides the procedure of the committee of the whole house on a bill to be as follows:

133.

- (1) The Clerk shall call severally each part of the Bill in the sequence specified in Standing Order 132 (sequence to be observed on a Bill in committee) and if no amendment is proposed or when all proposed amendments have been disposed of, the Chairperson shall propose the question “That, ... (as amended) stand part of the Bill” and, when Members who wish to speak have spoken, the Chairperson shall put that question to the Committee for decision.
- (2) No amendment shall be moved to any part of a Bill by any Member, other than the Member in charge of the Bill, unless written notification of the amendment shall have been given to the Clerk twenty-four hours before the commencement of the sitting at which that part of the Bill is considered in Committee.
- (3) Despite paragraph (2), where an amendment has been moved to any part of a Bill in accordance with this paragraph, any Member may move an amendment to that



amendment on delivering to the Chairperson the terms of his or her amendment in writing.

- (4) A member moving an amendment or a further amendment to any part of the Bill under paragraphs (2) and (3) shall explain the meaning, purpose and effect of the proposed amendment or further amendment.
- (5) No amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the bill
- (6) No amendment shall be moved which is inconsistent with any part of the Bill already agreed to or any decision already made by the Committee, and the Chairperson may at any time during the debate of a proposed amendment, withdraw it from the consideration of the Committee if in the opinion of the Chairperson, the debate has shown that the amendment contravenes this paragraph.
- (7) In the case of a Consolidated Fund Bill, an Equalization Bill or an Appropriation Bill, no amendment shall be moved whose effect would be to impose a charge or increase expenditure above that already resolved by the House or in the Committee of Supply unless the House first resolves to allow such a motion.
- (8) The Chairperson may refuse to propose the question upon any amendment which in the opinion of the Chairperson is frivolous or would make the clause or schedule which it proposes to amend unintelligible or ungrammatical.
- (9) Paragraph (4) of Standing Order 53 (Manner of debating Motions) shall apply, with necessary modifications, to the proceedings for amendment of a Bill in Committee.
- (10) The consideration of any part or a clause of a Bill may be postponed until such later stage of the proceedings in Committee on such Bill as the Committee may determine.
- (11) On any motion being made for the addition of a new clause, the clause shall be deemed to have been read a First Time and the question shall then be proposed "That, the new clause be read a Second Time" and if this is agreed, amendments may then be proposed to the new clause and the final question to be proposed shall be "That, the clause (as amended) be added to the Bill".
- (12) New schedules shall be disposed of in the same way as new clauses.
- (13) The question to be put on the preamble (if any) shall be "That, the preamble (as amended) be the preamble of the Bill."
- (14) The question to be put on the long title of the Bill shall be "That, the long title (as amended) be the title of the Bill".
- (15) No question shall be put on the enacting formula.
- (16) At the conclusion of the proceedings in Committee on a Bill, or, if more than one, on all such Bills the Member in charge shall move "That, the Bill(s) (as amended) be reported to the House", and the question thereon shall be decided without amendment or debate.

113. I have deliberately set out the law and the procedure of the legislative process so as to be able to marry the procedure and the facts presented in this case. It is not in dispute that the Finance Bill was submitted



to public participation by the Departmental Committee on Finance and National Planning after the First Reading of the Bill. Upon conclusion of these deliberations, the Committee prepared its report containing the public participation views and its own recommendations on the Bill. This went on to inform the House's Committee stage deliberations on the Bill.

114. At this point, the petitioners aver that the impugned amendments ought to have been re-submitted to the public and stakeholders for public participation. According to the Supreme Court's guideline 8 in the *British American Tobacco Kenya, PLC* case (*supra*) an 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.
115. The facts of this case make known that the impugned amendment was made during the Committee of the Whole House (Committee stage) held on June 2, 2022. To answer this question, I am guided by Standing Order 132(b) which informs that the sequence of the Bill presented in the Second Reading may include new Clauses. Standing Order 133(5) and (6) however distinguishes these new amendments from those that would change the subject matter of the Bill by introducing a different topic expanding its subject or that is inconsistent with any part of the Bill already agreed to.
116. Unquestionably, new amendments can be introduced to a Bill under consideration after the First reading so long as the amendment is in line with the original intent of the purposes and objects of the Bill. In my view the whole purpose and intent of the Finance Bill was to amend tax laws which were specifically listed for avoidance of doubt. All the cited impugned amendments fell within the scope of this bracket and hence cannot be deemed to have been new introductions contrary to the purposes and objects of the Bill.
117. Be that as it may, I am alive to the caution provided by the court in the case of *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) which I deem to be imperative in the circumstances of this case. The Court opined as follows:

“The passages from the Doctors for Life majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the *Constitution* envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them...”

118. In Kenya, the Court of Appeal on this issue in the case of *Pevans East Africa Limited & another v. Chairman Betting Control & Licensing Board & 7 others* [2018] eKLR guided as follows:

“It is common ground that up to the point when the National Assembly passed the Bill on May 30, 2017, it was preceded by adequate public participation. As published, the Bill proposed a tax rate of 50%. Proposals were made, ranging from adopting a tax of 50%, 35% and retaining the tax as it was under the 2016 *Finance Act*. With respect, we agree with the learned judge that there was no need for further public participation on the narrow issue of the percentage of the tax. It must be appreciated that after the National Assembly has heard



the views of members of the 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 been heard, so long as the views have been taken into account. (See *Nairobi Metropolitan PSV Saccos Union Ltd & 25 others v County of Nairobi Government & 3 others* [2013] eKLR). In our view, it would bring the legislative process to a complete halt and undermine Parliament’s ability to discharge its constitutional mandate if, after having facilitated public participation on a Bill, Parliament is required to adjourn its proceedings every time a member proposes an amendment to the Bill, so that further public participation can take place on the particular proposed amendment.

In *Institute for Social Accountability & 6 Another v National Assembly & 4 others* [2015] eKLR, the High Court considered the power of the National Assembly to amend Bills *vis-à-vis* the duty to ensure public participation and stated:

“We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the *CDF Act* through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation.”

With respect, we agree with the above reasoning of the High Court.”

119. I stand guided by the cited pronouncements and the law. It is my considered view that the impugned amendments were in line with the set parameters of what had been presented to the public and the scope of the Finance Bill. Furthermore, the amendments adhered to the legislative process as outlined in the National Assembly’s standing orders and did not fall in the restricted amendments cited under standing order 132(5) and (6). In the circumstances, I am persuaded to find that the impugned amendments did not violate the principle of public participation and are accordingly constitutional.

Issue No. (iv). Whether the imposition of the impugned taxes by the 1st Respondent was unconstitutional

120. The second main issue highlighted by the petitioners is that the impugned amendments are unconstitutional due to their burdensome and oppressive nature which is not in line with the principles of public finance as envisaged under article 201 of the *Constitution*. They argued that the impugned taxes were an affront to the interest of the public and relevant stakeholders.
121. Furthermore the 2nd and 5th petitioner asserted that the Finance Act, 2022 would subject them to double taxation. The 2nd petitioner averred that section 30 /(b) of the *Finance Act* amended the First Schedule to the *VAT Act* in part II, by deleting paragraph 32 which exempted imposition of value added tax on the exportation of taxable services which means that exported services are now subjected to VAT at 16% both in Kenya and outside of Kenya which amounts to double taxation by multiple jurisdictions. The 5th petitioner on the other hand submitted since paragraph 4 of part II of the first schedule to the *Excise Duty Act* provides for the charge of 20% excise duty on “other fees” charged by



financial institutions this meant that its members would be subjected to double taxation which is an unfair tax burden and contrary to constitutional dictates.

122. The respondents in opposing the petitioners averments stressed that other than the taxes being imposed as per the law, the oppressive nature of taxation could not be deemed as a ground for invalidating the law as taxation is sanctioned by the Constitution. Moreover the respondents frowned upon this issue contending that it was in a breach of the doctrine of separation of powers, and an interference against the respondents' constitutional mandate.
123. On double taxation, the 12th interested party in this regard explained that imposition of VAT on exported services or goods is guided by the origin principle and the destination principle. The origin principle advocates for taxation of goods or services within the jurisdiction where the goods or services are produced while on the other hand the destination principle places taxing rights on exported goods or services in the country where the recipient of the supplies is located. He therefore deposed that the government in charging VAT on exported services adopted the origin principle.
124. The 16th interested party while adding on to the 12th interested party's discussion noted that in relation to taxation in multiple jurisdictions the same is supposed to be guided by the Organization for Economic Co-operation and Development (OECD) Guidelines.
125. It is not in dispute that one of the constitutional functions of the National government is its power to impose taxes and charges as envisaged under article 209 of the Constitution which reads as follows:
- (1) Only the national government may impose --
 - (a) income tax;
 - (b) value-added tax;
 - (c) customs duties and other duties on import and export goods; and
 - (d) excise tax.
 - (2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).
126. This has also been appreciated by a number of authorities. The court in the case of Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and others Nairobi Petition No. 544 of 2013[2014]eKLR observed as follows:
- “(24) Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. article 209 of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax. (See Bidco Oil Refineries v Attorney General and others Nairobi Petition No 177 of 2012, paras. 53 – 56.)”



127. Furthermore in the case of *Mark Obuya, Tom Gitogo & Thomas Maara Gichubi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR the court pronounced itself as follows:

“ 32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional.”

128. It is worthy to emphasize that the petitioners question before this court involves the rightness and adequacy of Parliament to impose taxes. To begin with, this court being a creature of the Constitution is required to exercise its jurisdiction within the set confines. An interrogation of the Constitution and tax laws reveals that while the Constitution empowers the National government to impose taxes, it does not disclose or define how high or low the imposed taxes should be. In essence, this would reveal the threshold of what rational taxation ought to be. It is however discernable that this mandate at sub-article (2) of 209 is left to the legislature to decide. It is apparent therefore that the Constitution purposefully intended that the power and decision to impose tax laws be vested in National government.

129. It is imperative to reiterate that the decision as to whether or not to impose a tax and at what rate is within the legislative authority as provided in the Constitution. Evidently, this question as raised by the petitioners revolves around policy issues that are specifically set out for the Parliament by the Constitution. This in effect would prohibit this court from making a finding that revolves around a political question owing to the doctrine of separation of powers.

130. The court in the case of *Kiriwo wa Nguigi & 19 others v Attorney General & 2 others* [2020]eKLR held as follows:

“ 97. A court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine....

98. We shall commence with the political question doctrine. Black’s Law Dictionary, 10th Edition, Thomson Reuters Publishers, at page 1346 defines it as:

The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government. [underlining added]

99. The political question doctrine focuses on the limitations upon adjudication by courts of matters generally within the area of responsibility of other arms of Government...”

131. Likewise, an examination of this court’s jurisdiction under article 165(3)(d) of the Constitution makes it clear that this court does not have jurisdiction to make determinations on policy issues. It is my considered view that it would not be prudent for this court to assume such jurisdiction. Furthermore it would run foul to the dictates of article 259 of the Constitution.



132. It is my humble view accordingly that allowing the petitioners argument that the imposition of the impugned taxes is unconstitutional, when imposition of taxes in and of itself is Parliament's constitutional mandate would be an error and untenable in light of the purposes of the Constitution, unless it is otherwise shown that due process was not followed. I therefore find that the inclusion of the impugned amendments in the Finance Act 2022 was constitutional.
133. On double taxation in multiple jurisdictions, The OECD in its paper titled Addressing The Tax Challenges of the Digital Economy (2014) states in Chapter 2 (Fundamental principles of taxation) at paragraph 2.3.2 as follows:
- ‘The exercise of tax sovereignty may entail conflicting claims from two or more jurisdictions over the same taxable amount, which may lead to juridical double taxation, which is the imposition of comparable taxes in two (or more) states on the same taxpayer in respect of the same income. Double taxation has harmful effects on the international exchange of goods and services and cross-border movements of capital, technology and persons. Bilateral tax treaties address instances of double taxation by allocating taxing rights to the contracting states. Most existing bilateral tax treaties are concluded on the basis of a model, such as the OECD Model Tax Convention or the United Nations Model, which are direct descendants of the first Model of bilateral tax treaty drafted in 1928 by the League of Nations.’
134. A Double Taxation Agreement is defined in the Cambridge Dictionary as:
- An agreement between two or more countries that reduces the amount of tax that a international worker or company must pay, so they do not have to pay tax twice on the same income.
135. In this regard, Kenya by virtue of article 2(5) and (6) of the Constitution applies the dictates of international law such as Double Taxation Agreements through Treaties to avoid double taxation at international level. As such the claim for double taxation in two jurisdictions fails.
136. In addition to this, the 5th petitioner's claim that section 30 of the Act will occasion double taxation and discrimination against it in view of other financial institutions and section 32 of the Finance Act on the powers granted to KRA *vis-a-vis* the powers of the cabinet secretary, I am of the view that these averments are merely speculative and a product of the petitioner's apprehensions as no evidence was tabled to ascertain this claim. What's more the petitioner has failed to show how the impugned amendments were contrary to the constitutional mandate of Parliament in enactment of laws or that the enactment violated the laid down principles of the legislative process. Likewise the petitioners have failed to demonstrate how the increase of the taxes would inhibit access to the stated services in turn violating the alleged rights such as those under article 43 and 46 of the Constitution.
137. Finally on the issue of the two third ($\frac{2}{3}$) gender rule in respect of the composition of Parliament at the time of passing the bill, the petitioners did not substantiate the same. They did not also submit on it. The 1st respondent in tis submissions referred the court to the conservatory orders issued by Justice Korir (as he then was) in High Court Petition No E291 of 2020 as consolidated with Petition Nos E300/2020, E302/2020, E305/2020, E314/2020, E317/2020, E 337/2020, 228/2020, 229/2020 & JR 108/2020 Leinah Konchellah & others v Chief Justice & President of the Supreme Court of Kenya & others and Speaker of the National Assembly & others – interested parties which are still in force. Without any substantiation and with the conservatory orders in force Parliament went ahead carrying on its constitutional mandate. I therefore find no merit in that argument.



138. Evidently, the standard of proof places the onus of proof on the petitioners. They are required to prove the elements that constitute the violation of the said rights and asserted facts which include adducing sufficient facts and evidence to justify a finding that the said rights were indeed violated and that the *Finance Act 2022* is unconstitutional. I find that the petitioners have not proved their case against the respondents in this regard.

139. The upshot is that the consolidated petitions lack merit and are not deserving of the reliefs sought. They are dismissed with costs.

Orders accordingly.

DATED AND SIGNED THIS 30TH DAY OF JANUARY 2023 AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT.

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M. THANDE

JUDGE OF THE HIGH COURT

Delivered virtually this 31st day of January 2023 in open Court at Milimani, Nairobi

