



REPUBLIC OF KENYA



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Basco Products (K) Limited & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested Party) (Petition E 286 of 2021) [2022] KEHC 168 (KLR) (Constitutional and Human Rights) (24 February 2022) (Judgment)

Basco Products (K) Limited & 5 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested Party) [2022] eKLR

Neutral citation: [2022] KEHC 168 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E 286 OF 2021

JA MAKAU, J

FEBRUARY 24, 2022

**IN THE MATTER OF ARTICLES 22(1), 23(1), 23(3), 258(1) AND 259 OF
THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10, 35, 40, 93, 109, 118,
124, 201 AND 232 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 5(1) AND (2) OF THE EXCISE DUTY
ACT, 2015**

AND

**IN THE MATTER OF PART 1, SECOND TABLE OF THE FIRST
SCHEDULE TO THE EXCISE DUTY ACT, 2015 AS AMENDED BY THE
FINANCE ACT, 2021**

AND

JUDGMENT IN CONSTITUTIONAL PETITION NO. E 286 OF 2021 PAGE 1 OF 59

**IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF PERSONS ENGAGED IN BUSINESS IN
KENYA**



BETWEEN

BASCO PRODUCTS (K) LIMITED 1ST PETITIONER
CROWN PAINTS (K) LIMITED 2ND PETITIONER
MAROO POLYMERS LIMITED 3RD PETITIONER
GALAXY PAINTS AND COATINGS LIMITED 4TH PETITIONER
SUPER MANUFACTURERS LIMITED 5TH PETITIONER

AND

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

AND

KENYA ASSOCIATION OF MANUFACTURERS INTERESTED PARTY

JUDGMENT

THE PETITION

1. The Petitioners through a Petition dated 21st July 2021 supported by supporting affidavit by Patrick Mwati sworn on even date prays for the following reliefs:-
 - a) This Honourable Court be pleased to hold and declare that the Impugned Amendments introduced in Section 32 of the Finance Act, particularly relating to: (a) 3907.91.00 unsaturated polyester; (b) 3907.50.00 Alkyd; (c) 3905.91.00 Emulsion VAM; (d) 3903.20.00 Emulsion-styrene Acrylic; (e) 3905.19.00 Homopolymers; and (f) 3906.90 Emulsion B.A.M. are 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.
 - b) This Honourable Court be pleased to hold and declare that the Impugned Amendments introduced in Section 32 of the Finance Act, particularly relating to: (a) 3907.91.00 unsaturated polyester; (b) 3907.50.00 Alkyd; (c) 3905.91.00 Emulsion VAM; (d) 3903.20.00 Emulsion-styrene Acrylic; (e) 3905.19.00 Homopolymers; and (f) 3906.90 Emulsion B.A.M. are unlawful, unconstitutional, null and void as they infringe on the Petitioners, manufacturers in Kenya and their customers right to property; and contravene the provisions of Article 40(1) (a) and (2)(a) of the Constitution.
 - c) This Honourable Court be pleased to hold and declare that the Impugned Amendments introduced in Section 32 of the Finance Act, particularly relating to: (a) 3907.91.00 unsaturated polyester; (b) 3907.50.00 Alkyd; (c) 3905.91.00 Emulsion VAM; (d) 3903.20.00



Emulsion-styrene Acrylic; (e) 3905.19.00 Homopolymers; and (f) 3906.90 Emulsion B.A.M. are unlawful, unconstitutional, null and void as they impose an unfair tax burden on the Petitioners, manufactures in Kenya and their customers; and contravene the provisions of Article 201(a)(b)(i) of the Constitution.

- d) The Costs consequent upon this Petition be provided for.
 - e) Any other remedy or such orders as this Honourable Court may deem just and expedient in the circumstances to remedy the violation of the fundamental constitutional rights and freedoms.
2. The Petitioner in support of the Petition relies on supporting affidavit by Bipin Shah sworn on 21st July 2021, Patrick Mwati's affidavit sworn on 21st July 2021, Gurmukh Panesar affidavit sworn on 21st July 2021, Dineshkumar K. Shah affidavit sworn on 21st July 2021, Iqbal Karmali affidavit sworn on 21st July 2021, Mayur Shah Affidavit sworn on 21st July 2021 and written submissions and authorities filed herein.

RESPONSES TO THE PETITION

3. The Respondents are opposed to the Petition and in doing so soon filed response to the Petition

THE 1ST RESPONDENT'S RESPONSE

4. The 1st Respondent herein filed grounds of opposition raising 16 grounds of opposition. Additionally the 1st Respondent rely on affidavit by Mr. Michael Sialai sworn on 22nd September 2021 in which issue it is deponed that:-
- a) On 5th May, 2021, the Finance Bill 2021 was published in Kenya Gazette and read a first time on 11th May 2021 and thereafter committed to the Departmental Committee on Finance and National Planning to scrutinize by way of requesting for memoranda from the public.
 - b) The Bill sought to amend inter alia, the Excise Duty Act.
 - c) The Finance Bill, 2021 was tabled before the National Assembly on 22nd June 2021 when it was read a second time.
 - d) Various amendments were proposed to the Bill and the debates on the second reading of the Bill proceeded on the 23rd June 2021.
 - e) The National Assembly facilitated extensive public participation on the bill on 21st May 2021 by placing advertisements in print media calling for comments on the bill from the members of the public and relevant stakeholders. (see a copy of invitation for public participation at page 148 and list of stakeholders at page 17 marked as MS-1 in the Mr. Sialai's affidavit).
 - f) Between 2nd and 3rd of June 2021 the Committee held public hearings on the Bill, where 31 stakeholders made oral presentations before the Committee. (See minutes and attendance sheet at page 136 – 147 marked as MS-1 in the Mr. Sialai's affidavit).
 - g) Based on the views and concerns of the different stakeholders, the Committee compiled a report which was laid before the National Assembly on 22nd June 2021. (See a copy of the committee report on the Finance Act, 2021 at page 1 – 147 marked as MS-1 in the Mr. Sialai's affidavit).
 - h) In the said report at paragraph 420 of the Report on Clause 25, the Committee recommended insertion of new items including excise duty on 3907.91.00 unsaturated polyester; 3907.50.00



Alkyd; 3905.91.00 Emulsion VAM; 3903.20.00 Emulsion-styrene Acrylic; 3905.19.00 Homopolymers; and 3906.90 Emulsion B.A.M – Excise Duty rate of 10%

- i) The amendment was within the parameters of what was submitted to the public for input, and did not touch new issues.
- j) Moreover, the chairperson of the Committee duly moved the amendments to the Finance Bill, 2021 introducing excise duty of 10% on 3907.91.00 unsaturated polyester; 3907.50.00 Alkyd; 3905.91.00 Emulsion VAM; 3903.20.00 Emulsion-styrene Acrylic; 3905.19.00 Homopolymers; and 3906.90 Emulsion B.A.M. at the sitting of the National Assembly held on 24th June 2021. (see a copy of the Hansard at page 149 – 224 marked as MS-1 in the Mr. Sialai’s Affidavit).
- k) The House considered the amendments and passed them.
- l) The deponent deposed that Clause 25 which introduced the amendments existed in the Finance Bill, 2021, published on 5th May, 2021, was subject to public participation by the National Assembly.

THE 2ND RESPONDENT’S RESPONSE

5. The 2nd Respondent filed grounds of opposition dated 27th July 2021 setting out 23 grounds of opposition. In addition the 2nd Respondent relies on replying affidavit sworn by Maurice Oray on 14th October 2021 and Replying Affidavit sworn by Michael Sialai dated 22nd September 2021.

THE 3RD AND 4TH RESPONDENTS’ RESPONSE

6. The 3rd and 4th Respondents are similarly opposed to the Petitioners Petition and have filed grounds of opposition dated 5th August 2021 setting out 11 grounds of opposition.

BRIEF BACKGROUND

7. The Departmental Committee on Finance and National Planning invited stakeholders vide letter Ref: NA/DDC/F&NP/2021/19 dated 26th May, 2021 for a stakeholders’ engagement retreat on the Bill which was held at the Trademark Hotel, Village Market from 2nd to 4th June, 2021 with thirty-four (34) stakeholders including the Kenya Association of Manufacturers, making oral and written presentations before the Committee including the 6th Interested Party herein.
8. The Committee having considered the submissions from the various stakeholders recommended the rate 10% be levied on unsaturated polyester, alkyd, Emulsion VAM, Emulsion-styrene acrylic, Homopolymers and Emulsion B.A.M. (See annexed and marked KRA 3 is the Committee on Finance Bill report and minutes).
9. The committee also held a meeting with the National Treasury and the Kenya Revenue Authority in line with the requirements of Article 114 of the Constitution with regard to the Amendments.
10. The parliamentary committee having considered all submission made by the various stakeholders observed that: In order to promote the local industry, excise duty on unsaturated polyester, alkyd, Emulsion VAM, Emulsion-styrene acrylic, Homopolymers and Emulsion B.A.M. be levied at 10% and at the same time recommended the paint manufacturers main raw material which is illuminating kerosene be exempted from Excise Duty. See annexed KRA 3 is the Report by the Parliamentary Committee on Finance and Planning.
11. The Bill was on 24th June, 2021 subjected to the Committee of the whole House where it was debated and the members of parliament who are the representatives of the public debated on the Bill as



amended by the Departmental Committee on Finance and National Planning and it provided as follows:-

“ 32.

the First Schedule to the Excise Duty Act, 2015 is amended – (a) in paragraph 1 of Part 1 –

3907. 91.00 unsaturated polyester 10%

3907. 50.00 Alkyd 10%

3905. 91.00 Emulsion VAM 10%

3903. 20.00 Emulsion-styrene Acrylic 10%

3905. 19.00 Homopolymers 10%

3906. 90 Emulsion B.A.M 10%”

12. At the floor of the House, the members of the National Assembly were granted sufficient time to debate on the issues and further the members of the National Assembly who spoke on the issue out lighted clearly why the amendment to impose excise was necessary.
13. On 24th June, 2021, the National Assembly passed the Finance Bill, 2021. Thereafter, the Bill was presented for Assent to H.E. the President 29th June, 2020 in accordance with the provisions of the Constitution and the National Assembly Standing Orders. (annexed and marked KRA 4 is the Finance Act, 2021 and the Hansard).

ANALYSIS AND DETERMINATION

14. Having carefully perused the pleadings, rival submissions the following issues arise for consideration:-
 - a) Whether there was violation of the principle of public participation and transparency in enacting the law.
 - b) Whether the imposition of taxes under the impugned provisions is a breach of Article 40 of the Constitution.
 - c) Whether the Petitioners are entitled to reliefs sought.

A. WHETHER THERE WAS VIOLATION OF THE PRINCIPLE OF PUBLIC PARTICIPATION AND TRANSPARENCY IN ENACTING THE LAW.

15. The Petitioners as regards public participation, including facilitating, the public to do so refer to Article 118 and Article 201 of the Constitution. Article 201 of the Constitution provides for the principles that guide all operations of public finance in Kenya which include and is not limited to operations, accountability and public participation in financial matters. In particular, Article 201 (b) (i) provides that the public finance system shall promote an equitable society by ensuring that the burden of taxation is being shared equally.
16. Further under Article 232 (1) (d) of the Constitution provides the values and principles of public service which include the involvement of the people in the process of policy making and (f) transparency and provision to the public of timely and accurate information.
17. It is worthy noting the essential steps in organizing public participation which include identifying key stakeholders including those directly affected and can offer solutions, making contact with key



stakeholders and inviting them for meetings or to make submissions, holding meetings including making site visits where this is necessary.

18. In support of the proposition in respect of the steps required to be satisfied in organizing public participation the Petitioners place reliance in a persuasive authority of the South African Case of *International vs. Speaker of the National Assembly & others (CCT 12/05) (2006) ZACC 11, 2006(12) BCLR 1399 (CC)* in which the said basic elements of public participation were stated and adopted by the Court of Appeal in Kenya in *Kiambu County Government vs. Robert Gakuru & Others [2017] eKLR* (the Kiambu county Government case).
19. The Petitioners herein contend that the impugned Amendments were illegally and unlawfully introduced to the Amending Act, as the same were not subjected to public participation, contrary to the provisions of the Constitution and the Standing Orders.
20. The Petitioner has in support of the contention that the impugned Amendments were not subjected to public participation set out a chronological law making process in Kenya as set out in the Standing Orders 122 -153 of the National Assembly being thus:- Publication and circulation of the Bill; determination through concurrence of speakers of both houses on whether the Bill concerns County Governments; First reading of the Bill; committal of the Bill Committees and public participation, Second Reading of the Bill; Committal of the Bill to Committee of the whole House, and Report stage. The Petitioner contend that the First reading of the Finance Bill took place on 11th May 2021, and the version that was read before the National Assembly did not contain the impugned Amendments.
21. It is further Petitioners' case that after committal the Departmental Committee was required to facilitate public participation on the Bill through appropriate mechanism including:- (a) inviting submissions of memoranda; (b) holding public hearings; (c) consulting relevant stakeholders in the sector; and (d) consulting experts on technical subjects.
22. It is additionally urged by the Petitioners that a call for public participation was sent out to the public on 21st May 2021 and stakeholders for comments. The Petitioners however reiterate that the draft of the Finance Bill that was sent for public participation and comments did not contain the Impugned Amendments. Simply put it is Petitioners' contention that the, the Impugned Amendments were not subjected to public participation.
23. It is Petitioners contention that public participation takes place between the First Readings and the Second Reading. At this stage, the Impugned Amendments were not part of the Finance Bill subjected to public participation.
24. The Petitioners aver that the Bill on the Second Reading is presented to the National Assembly and at that stage no amendments are made, save for minor amendments with respect to minor grammatical issues. The bill is then committed to the committee of the whole house. The Petitioners submit that the Impugned Amendments were not part of the Faience Bill presented to the National Assembly on 22 June 2021.
25. The Petitioners urge that on 22nd June 2021, the Departmental Committee presented its report to the Whole House (the Report) for consideration. This is admitted at paragraphs 15 and 19 of the 1st Respondent's Replying Affidavit.
26. In the Report it is Petitioners case that the Departmental Committee recommended the addition of the Impugned Amendment under Part V of the Report – Schedule of Proposed Amendments. In the Report, the Departmental Committee expressly stated regarding the Impugned Amendments that “these are new amendments to the Bill”. This it is urged that there was an admission by the Committee



that the Impugned Amendments were not part of the Finance Bill subjected to public participation. Indeed, the title to Part V confirms as much “Schedule of Proposed Amendments.”

27. The Petitioners submit that the 1st Respondent admitted at paragraph 16 of its Replying Affidavit, that it was the Departmental Committee that recommended the insertion of the Impugned Amendments to the Finance Bill and not the stakeholders in the affected Industry.
28. It is urged further that if it had been a proposal of the stakeholders of the paint, ink, and fibre glass manufacturing industry (the affected Industry) the said proposal would have been indicated in Part III of the Report which outlines the proposals made by various stakeholders, that are affected by various clauses, that had been featured in the Finance Bill, that was published on 5 May 2021. It is no doubt that the Impugned Amendments appear under Part V – Schedule of Proposed Amendments of the Report as recommendations by the Departmental Committee to be considered by the National Assembly.
29. The Respondents contention in response is that the process of preparation and enactment of Finance Act, 2021 begun in 2020 whereby a public notice was published in local newspapers requesting for proposals to be considered during the preparation of the Finance Bill, 2021. That the proposals from various stakeholders were received after which the 4th Respondent invited stakeholders for meetings to discuss their respective proposals and the finalized proposals submitted to the 1st Respondent for consideration and enactment.
30. The Finance Bill, 2021 was published on 5th May 2021 on Special Issue of the Kenya Gazette, Supplement No. 86 as bill for introduction into the National Assembly. The Finance Bill, 2021 was an omnibus bill that sought to amend laws relating to various taxes and duties and matters incidental to. Part IV of the Bill dealt with amendments to the Excise Duty Act.
31. On 11th May 2021, the Finance Bill was read a First time and committed to the Departmental Committee on Finance and National Planning (the Committee) pursuant to Standing Order 127. The Clerk of the 1st Respondent published a notice in local newspapers on 21st May 2021 inviting members of the public and relevant stakeholders to submit their respective memoranda on the Finance Bill, 2021.
32. On 26th May 2021, the Committee also invited stakeholders for a stakeholders’ engagement retreat on the Finance Bill held on 2nd to 4th June 2021. It is important to note that the Interested Party was one of the stakeholders in the retreat. Pursuant to Article 114 of the Constitution, the 1st Respondent submitted to the 4th Respondent for comments, a matrix containing stakeholders’ proposals with respect to the proposals contained in the Finance Bill, and the 4th Respondent responded with comments to each proposal in the matrix.
33. The Respondents submit that as regards the Finance Bill, 2021, the National Assembly conducted extensive public participation. The public participation included the following:-
 - i. Publication of the Bill in the Kenya Gazette;
 - ii. Calling the public’s attention to the Bill through newspaper advertisements as well as through the website of Parliament, www.parliament.go.ke;
 - iii. Meetings of the Departmental Committee on Finance and National Planning with various stakeholders on the Bill;
 - iv. Receipt of memoranda from the public on the Bill
 - v. Consideration by the committee of the views received from the public and stakeholders on the Bill and determination of whether to take the views or reject them with reasons for the same given; and



- vi. Tabling of this report to the National Assembly and adoption of the same with the requisite amendments.
34. It is further stated that the Departmental Committee on Finance and National Planning also held a meeting with the National Treasury and the Kenya Revenue Authority in line with the requirements of Article 114 of the Constitution. This has been adequately evidenced in Mr. Sialai's Replying Affidavit at page 136 to 247 of the annexure marked MS-1.
35. In addition it is submitted that the National Assembly's Departmental Committee on Finance and National Planning compiled its report having taken into account the nature of the views concerns of the different stakeholders. The said report was laid before the National Assembly on 22nd June, 2021. This has been adequately evidenced in Mr. Sialai's replying affidavit at page 1 to 147 of the annexure marked MsS-1. That the House considered the report of the Departmental Committee on Finance and National Planning and passed the same.
36. It is further urged that it is common ground that Clause 25 which introduced amendments to the second schedule of Excise Duty Act was in the Finance Bill, 2021 published on 5th May, 2021. The impugned section relates to amendments already contained in the Bill which was subjected to public participation by the National Assembly. As can be seen from the Committee's report, Clause 25 is not one of the new clauses recommended by the Committee.
37. The Petitioners have raised the issue as to whether at the committee state of National Assembly there can be amendment of the Finance Bill and impose exercise duty on goods which were not on the Bill presented to it. It should be noted that this was a public participation forum wherein the amendments originated and as such it cannot be said that such an amendment did not go through public participation having been raised during a public participation and deliberated upon.
38. It is important to start by noting that the impugned amendments were contemplated in the Memorandum of objects of the Finance Bill, 2021 and all stakeholders were aware that the Bill which was being subject to public participation sought to amend the provisions of the Excise Duty Act. (see the Memorandum of objects of the Finance Bill) Further the invitation for public comments clearly indicated that the public were to submit comments on amendment of the Excise Duty Act.
39. It is clear from the aforesaid that contrary to the Petitioners contention, the amendment effected was within the parameters of what was submitted to the public for input. It did not touch on new issues neither did it come out of the blue. It was contemplated in the Memorandum of objects of the Finance Bill, 2021. It is paramount for the Petitioners to note that "new clauses' have clearly been marked as so in the Committee's report. Additionally, after taking into account views from the public, the Committee recommended that some goods be exempted from taxation. For example;
- a) Clause 21 deleted the proposal to apply VAT at 16% on syringes
 - b) Clause 23 was amended to include food preparation suitable for infants under exempt status to make it cheaper;
 - c) Cleaning items, fishing supplies and plant and Machinery used for manufacture of goods were included under exempt status;
 - d) A new clause 22 was introduced to zero rate items listed under paragraph 20, 21 and 22;
 - e) Clause 25 included a proposal to delete Excise Duty on motor cycles at a specific rate of 15%;



- f) The Committee also introduced a new clause to exempt manufacturers of paint resin & shoe polish from excise duty.
40. It should also be noted that in any case, the memorandum and Objects and Reasons of the Finance Bill, 2021 stated as follows:-
- “AN ACT of Parliament to amend the law relating to various taxes and duties, and for matters incidental thereto.”
41. It is therefore evident that the Bill placed before the public domain was meant to amend the law relating to various taxes and duties. The impugned amendment dealt with things contemplated in the Memorandum and Objects of the proposed Bill. As such, the impugned clause is not contrary to the object and purpose of the Bill.
42. Further it is important to bear in mind that a committee, being an extension of the House, is informed by views collected and deliberated on during public participation, reserves the right to recommend amendments to a Bill under its consideration. The Committee cannot abandon its duty to recommend such amendments where it legitimately considers them to be important in order to have a sound legislation that passes the muster and is eventually enacted.
43. In addition the Constitution recognizes that a House of Parliament can amend bills and thus Article 124 allows Parliament to make Standing Orders to provide for its procedures for conducting House business.
44. A look at Standing Order 133 of the National Assembly’s Standing Orders, clearly provides that during the legislative process, amendments to the Bill can be moved during the Committee Stage. As such, there is nothing unconstitutional where the National Assembly amends a legislative proposal from the initial form; because as a Bill goes through debate and public participation, the House co-opts proposed amendments and drops some clauses as the House deems fit.
45. To buttress the above-mentioned proposition reliance is placed in the case of *Kenya Bankers Association vs. Attorney General & Another; Central Bank of Kenya (Interested Party) (2019) eKLR* where it was held as follows:-
- “67. Article 94 vests legislative authority in Parliament and therefore the National Assembly House is allowed to amend a legislative proposal as Bill goes through the various stages of enactment of legislation. Such that the final statute passed by the National Assembly and which the President assented to is different from the Bill published at the first instance.
68. Once a Bill is published and read in the House, it goes through First Reading, Second Reading, Committee stage and Third Reading and the purpose of all these stages of the reading of a Bill is to allow the members of the House who represent different constituencies of the electorate to negotiate on their behalf and represent their varying interests.
69. The constitution recognizes that a House of Parliament can amend Bills and hence Article 124 allows Parliament to make Standing Orders to provide for its procedures for conducting House business.
70. Pursuant to Standing Order 133 of the National Assembly’s Standing Orders, during the legislative process, amendments to the Bill can be moved during the Committee Stage.” (Emphasis mine)



46. It has been clearly stated that the requirement for public participation as envisaged under the Constitution should not be given a rigged or artificial interpretation to avoid distorting the spirit ideals and aspirations of the people. Reliance in support is placed in the case of *Mhlungu and 4 others vs. The State (South Africa)* wherein Mohamed J. stated that:-

“International culture of Constitutional jurisprudence which has developed to give to constitutional interpretation a purposive and generous focus. It seeks to avoid what Lord Wilberforce called “the austerity of tabulated legalism” (*Minister of Home Affairs (Bermuda) v Fisher 1980 AC 319 at 328H*). This is because “A Constitution is an organic instrument. Although it is enacted in the form of a statute it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid “the austerity of tabulated legalism” and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.” (*Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994 (1) SA 407 at 418*).

47. Further it is no doubt that the centrality of public participation was underscored in *Matatiele Municipality v President of the Republic of South Africa (2) (CCT7305A)* quoted with approval by the Court of Appeals of Quebec, Canada, in *Caron v R 20 Q.A.C. 45 [1988] R. J.Q. 2333* thus:-

“A commitment to a right to... public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...”

48. The High Court dealing with issue of public participation in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others Machakos, High Court Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR* developed the following principles to be taken into account whenever the application of the doctrine of public participation comes into issue. The Court stated that:-

“Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot



merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.” (Emphasis mine)

49. Once again it is clear in this Petition and I repeat that the impugned amendments emanated from public participation forum which was attended by the various stakeholders as evidenced by the minutes of the Committee. (See page 139 to 147 of the 1st Respondent’s Replying Affidavit). The public participation requirement was therefore met as those present had sufficient opportunity to give views on what they want Excise Duty to be levied on.

50. The Courts are guided on issue of public participation and on how public participation should be applied and how it can be implemented by decision in the case of *Simon Mbugua & another v Central Bank of Kenya & 2 others [2019] eKLR* where it was stated that:-

“It is thus well settled that there are no hard and fast rules on how public participation is to be applied or implemented. The parameters depend on the unique circumstances of each case.”

51. I find that in the instant Petition, the Committee stage having considered the Public opinions amended Section 32 of the Finance Bill and placed exercise duty on the contested paint material.

52. Order 131 of the National Assembly Standing Order states that:-

“Where after a Bill has been read a second time and before commencement of Committee of the whole, amendments have been proposed to it, which in the opinion of the whole, amendments have been proposed to it, which in the opinion of the speaker require harmonization the speaker may direct any member proposing an amendment to the Bill to appear before the relevant Departmental Committee dealing with the subject matter of the Bill to present his or her proposed amendment and the Committee of the Whole House is taken.

53. On the other hand Order 32 of the National Assembly Standing Order provides:-

- “ 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.”

54. It should therefore be noted that Order 131, 132 and 133 of the National Assembly Standing Order provide and it is clear that the Committees are empowered in law to consider the public views and make amendments to the Finance Bill.



55. In the responses by the Respondents it is clear that the Kenya Revenue Authority and National Treasury were consulted before the amendments were introduced. (See Communication from Chair at page 225 of the 1st Respondent's Replying Affidavit). This was in line with Article 114(2) of the Constitution of Kenya which provides:-

“If in the opinion of the Speaker, 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 after taking into account the views of the Cabinet Secretary responsible for finance.”

56. Further to the above under Section 39 of the *Public Finance Management Act, 2021* states that in submission and consideration and passing of the Finance Bill-

“(4) Any recommendations made by the relevant committee of the National assembly or resolution passed by the National Assembly on revenue matters shall-

(c) Consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes.

(e) Consider the impact on development, investments, employment and economic growth.

(f) Take into the recommendations of the Cabinet Secretary as provided for under Article 114 of the Constitution.

(g) Take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under East African Community Treaty.”

57. To buttress the aforesaid support is placed in the Court of Appeal decision in the case of *Pevans East Africa Ltd and Another vs. Chairman, Betting Control and Licensing Board and others (Civil Appeal No. 11 of 2018)* where the Court of Appeal held as follows:-

“It must be appreciated that the National Assembly has heard the views of the Members of Public and industry stakeholders on a Bill. It is not precluded from effecting amendments to the Bill before finally passing it. Those amendments do not necessarily have to agree with the views expressed by the people who have been heard so long as the views have been taken into account. 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.”

58. Similarly in *Kenya Bankers Association v Attorney General & Another; Central Bank of Kenya (Interested Party) (2019) eKLR* it was held that:-

“The averment that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. However where major



amendment is introduced and where is contrary to the purpose of the Bill the position may be different.”

59. Further on the same issue the Court in case of *Institute of Social Accountability & another vs. National Assembly & 4 others (2015) eKLR* where the Court held that:-

“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.”

60. In the instant Petition, I find that the Memorandum of Object of Finance Bill clearly informed the public that it intended to amend the Excise Duty Act by imposing duty on various commodities, that the invitation for public comments to Committee clearly also informed the public that the intention was to amend Excise Duty Act and impose Excise Duty on commodities; that from the minutes of the Committee during the public participation forum, the impugned amendments were proposal of the general public to the Committee during the public participation forum and were presented to the Committee of the whole house for debate; that it is also admitted by the speaker (see the speakers introductory speech to the whole house committee) that the Kenya Revenue Authority and the National Treasury were properly consulted and the amendments were placed before the whole house with the approval of the Kenya Revenue Authority and the National Treasury; and that the National Assembly rightly considered the amendments allowed the members of Parliament opportunity to comment or debate on the same before they were approved for Presidential approval.
61. I further find that from the pleadings and evidence, the National Assembly did conduct Public Participation on the impugned provisions and took the views of the public into account as well as the views of all members of the National Assembly as representatives of various constituencies. The impugned provisions having been subjected to the public participation I find that they are properly enacted.

B. WHETHER THE IMPOSITION OF TAXES UNDER THE IMPUGNED PROVISIONS IS A BREACH OF ARTICLE 40 OF THE CONSTITUTION.

62. The Petitioners contention is that the impugned Amendments infringe on the right to property contrary to Article 40(1) (a) and (2) (a) of the Constitution which provides that every person has the right to acquire and own property. Sub-article (2)(a) further provides that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over any property of any description.
63. It is the contention of the Petitioners that the excise duty is a consumption tax that should be borne by the final consumer of the supply. Effectively, the 10% excise duty introduced vide the Impugned Amendments will have to be passed to the Petitioners’ Customers. In view whereof the Petitioners contend that they have 2 options available as a result of the Impugned Amendments, namely:
- a) To pass the costs to their customers; or
 - b) Shoulder the costs at their own financial peril



64. It is urged further by the Petitioners that irrespective of the option, if this Honourable Court makes a determination that the Impugned Amendments are unconstitutional, illegal, null and void, then the Petitioners and/or their customers will be unable to recover any amounts paid towards the excise tax.
65. The Petitioners further aver while they are aware that Section 29 of the *Excise Duty Act* provides for refunds, the same is subject to specific conditions being met, namely:-
- “(1) If excise duty has been paid by a person on excisable goods manufactured in, or imported into, Kenya, the Commissioner shall, on written application by the person, refund the excise duty paid if satisfied that-
- a) Before being consumed or used in Kenya –
- (i) The goods have been damaged or stolen during the voyage or transportation to Kenya;
- (ii) The goods have been damaged or destroyed while subject to excise control.
- (iii) The buyer has returned the goods to the seller in accordance with the contract of sale; or
- b) The excise duty has been paid in respect of spirits or illuminating kerosene that have subsequently been used by a licensed or registered manufacturer to manufacture unexcisable goods.
- (2) A licensed person may apply to the Commissioner for a refund of excise duty if the person has accounted for and paid excise duty on excisable goods or excisable services but has not received any payment from the purchaser for the goods or services, and the Commissioner may refund the excise duty if satisfied that payment for the goods or services has not been received.”
66. Additionally the Petitioners contend that Section 47 of the *Tax Procedures Act, 2015* only provides for refunds of taxes which have been overpaid by a taxpayer. From the above it is Petitioners contention that the express wording of Section 29 of the Excise Duty Act, is evident that neither the Excise Duty Act nor the Tax Procedures Act provide for refund mechanisms to recover taxes paid.
67. The Petitioners further urge that even if the law had expressly provided for recovery mechanisms of the Impugned Amendments, the Petitioners and/or tax payers (depending on who will shoulder the taxes) will be unable to recover their refunds – as the KRA is notorious for not processing refunds, and even when they do, the refunds can take decades to be processed.
68. The Petitioners in support of their submissions placed reliance in the decision in *Ericsson Kenya Limited v Attorney General & 3 others [2014] eKLR*, which was cited with approval by the East African Court of Justice in *Kioo Limited vs. The Attorney General of the Republic of Kenya, 2020*, where the Court, in finding that the Kenya Revenue Authority had unreasonably delayed in processing a tax refund claim, acknowledged that “The issue of VAT refunds is not novel [...] the issue of VAT refunds has been a sour issue between the business community and KRA.” (Refer to page 137 of the Petitioners List and Bundle of Authorities)
69. The Petitioners urge, they and/or their customers will have been arbitrary deprived of their right to the remitted monies which would have otherwise been utilized towards re-investing and growing their



business(es) in the case of the Petitioners and other manufacturers; or would have been at the disposal of the customers for their own private use.

70. In considering this issue this Court has to start by pointing out that Articles 10, 201, 209, and 210 of the Constitution provides for imposition of tax as a mandatory obligation and it is itself a display of sovereignty. Reliance on this proposition is placed in the case of *Timothy Njoya & 17 others vs. Attorney General & 4 others [2013] eKLR* where it was stated:-

“The Constitution is the supreme law of this Country. It is the will of the people, or the mandate they give to dictate and direct the manner in which they ought to be governed. That is why Article 210 has no exclusion or exemption in matter of taxation. In my view, deviations are subject to judicial scrutiny. Any deviations must not be such as to deprive citizens of fair, transparent and effective tax regimes which are applicable to all in equal measure.” (Emphasis added)

71. Further this Court places guidance in an excerpt by Prof. Fareed Moosa in his paper Tax Administration Act: Fulfilling human rights through efficient and effective tax administration which stated that:-

“Section 7(2) of the Constitution obliges the State to “respect, protect, promote and fulfil” the rights entrenched in the Bill of Rights. To do so necessitates that the government has sustained access to adequate finance. Financial constraints in the public treasury will hinder the State’s ability to achieve social justice through the fulfilment of, inter alia, socio-economic rights.

Unless the problem of strained governmental resources is overcome, the aspiration of a fully transformed society with human dignity, freedom and equality for all will have a hollow ring.” (Emphasis mine)

72. It is clear therefore that taxation is a necessary evil and a vessel used by the Governments all over the world to respect, promote and fulfil the fundamental rights envisioned under the Bill of Rights under the Constitution & other recognized human rights instruments, and taxation itself cannot be said to be a breach or violation of ones rights.

73. In addition to the above the right to property under Article 40 of the Constitution is not absolute and it should be noted that it is subject to reasonable restrictions in the public interest. The taxes are in addition sanctioned by the Constitution and therefore will typically not be seen as equal to criminal penalty. This is to say, the penalty in the Tax Procedure Act is not a punishment of a crime.

74. To buttress the aforesaid reliance is placed in the case of *Wetch vs. Henry*, 305 U.S 134 (1938) quoted in the case *United States v. Carlton*, 512 U.S. 26, 30 – 31, 32 (1994) where the Court stated that:-

“As the Court has made clear, “tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.” In other words,

“Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process....”

75. It should be noted and considered as important paramount as imposition of tax by a statute cannot, of itself, amount to arbitrary deprivation of property contrary to Article 40 of the Constitution. The



1st Respondent places reliance in support of the proposition in the case of *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA Workers Union) vs. Kenya Revenue Authority & 3 others [2014] eKLR* where Majanja J held as follows:-

“34. Finally, the imposition of taxes is a constitutional imperative and the power to impose taxes is reposed in the legislature. The imposition of tax by statute cannot, of itself, amount to arbitrary deprivation of property contrary to Article 40 of the Constitution.” (Emphasis added)

76. Similarly in the case of *Bidco Oil Refineries Limited vs. Attorney General & 3 others [2013] eKLR* the Court held that:-

“It is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced. The arguments made by the Appellant concern how the customs duty is calculated, that is an issue of the application of the Act, rather than its constitutionality. Since statutory application is really the issue here, the consideration whether Article 47(1) has been violated is dispositive. In any case, the collection of taxes through the procedures provided by the law cannot, at least in the circumstances of this case, constitute an arbitrary deprivation of property.” (Emphasis mine)

77. It is imperative to take notice that citizenry in order to enjoy all the rights under the constitution surrenders a part of their property as taxes and duty and the said surrender cannot be said to be unconstitutional. It is clear that taxes are a form of raising revenue sanctioned by the Constitution and the imposition of taxes does not deprive the Petitioners of the right to property provided under Article 40 of the Constitution and as such the Petitioner’s allegations that they have been deprived of their property by paying taxes has no basis in law. The payment of taxes is an obligation imposed on all businesses and individuals. I am alive to the fact that if this Honourable Court was to uphold the Petitioners’ arguments, it would open the flood gates of litigation since nearly all businesses and individuals would raise similar issues about taxation with possible abandonment of the need to pay taxes which no country can do without levying taxes.

78. The levying of tax cannot be said to be a breach of the right to property as was held by Court of Appeal in *Pharmaceutical Manufacturing (K) Co. Ltd & 3 others vs. Commissioner General of Kenya Revenue Authority & 2 others [2017] eKLR* where the Court of Appeal stated that:-

“The unfettered power of the national Government under Article 209 to impose, waive or vary any form of taxation, be they income tax, value-added tax, customs duties and other duties on import and export goods or excise tax, is subject only to one qualification; that no tax may be imposed, waived or varied except as provided by legislation. It cannot be a violation of the Constitution if the Constitution itself has permitted it. It cannot, similarly constitute arbitrary deprivation or an infringement of a right to property if the deprivation, if any, is in accordance with the law.”

79. Further the Supreme Court of India in *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another* on 11th December, 1961 and Superior Court in India in *Raja Ram Kumar Bhargava (Decd., By ... Vs. Union of India (Uoi)* on 28 July, 1972 further held that taxation is not a deprivation of a man’s property as envisioned under the Constitution.



80. Locally in the case of Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheha Workers Union) vs. Kenya Revenue Authority & 3 others [2014] eKLR wherein the Court stated that:-

“The imposition of tax by statute cannot, of itself, amount to arbitrary deprivation of property contrary to Article 40 of the Constitution.”

81. The Petitioners further claim that if this Honourable Court makes a determination that the impugned amendments are unconstitutional, the Petitioners will not be able to recover any monies paid towards the excise tax and as such, their right under Article 40(1)(a) and 40(2)(a) will be violated. It is the 3rd and 4th Respondents’ submission that the Petitioners’ claims with respect, are misguided in law for various reasons.

82. The 3rd and 4th Respondents contend that the impugned amendments enjoy a presumption of legality. The Petitioners are obligated to fully comply with the provisions outlined in the impugned amendments. In this regard, I find that the enforcement of the impugned amendments cannot be said to be in violation of the Petitioners’ right to property as they are Constitutional and in accordance with the provisions of the law.

83. It is further contended that this Honourable Court has not pronounced itself on the legality of the impugned amendments or on the retrospective effect of the same, should it declare the impugned amendments invalid. Further it is urged, that it should not be assumed that a declaration of invalidity applies retrospectively. This Court is not precluded from considering the application of the principles of retroactivity or proactivity on a case-by-case basis. Reliance is placed in the holding of the Supreme Court in *Suleiman Said Shabbal v Independent Electoral and Boundaries Commission & 3 others* [2014] eKLR, where it was stated:-

“[42] The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law.”

84. It is further urged that Excise Duty is a form of consumption tax borne by the consumer at the point of purchase and not the supplier (in this case the Petitioners). There is no property to be enforced by the Petitioners in excise duty unless it is demonstrated by the Petitioners that they have accounted for and paid excise duty on excisable goods or services but have not received any payment from the purchaser for the goods or services. Input VAT makes taxable supply, whether in form of goods or services, which in the case of the impugned amendments would be the 3907.91.00 unsaturated polyester; 3907.50.00 Alkyd; 3905.91.00 Emulsion VAM; 3903.20.00 Emulsion-styrene Acrylic; 3905.19.00 Homopolymers; and 3906.90 Emulsion B.A.M.

85. In addition Section 29 of the Excise Duty Act provides for refunds. Section 29 (2) of the Excise Duty Act particularly provides:-

“(2) A licensed person may apply to the Commissioner for a refund of excise duty if the person has accounted for and paid excise duty on excisable goods or excisable services but has not received any payment from the purchaser for the goods or services, and the



Commissioner may refund the excise duty if satisfied that payment for the goods or services has not been received.”

86. In view of the aforesaid I find that it is incorrect and misleading the Honourable Court for the Petitioners to claim violation of their rights to property when the same has not been demonstrated.
87. In considering the Petition, this Court is required in its determination to balance the interest of society with those of individuals and groups. I find that it is in public Interest that taxes must be paid and as such the impugned legislation does not infringe on the Petitioners rights to property as it is aimed at serving a legitimate public interest.
88. Upon consideration of the rival submissions, authorities relied upon, and relevant provisions of the relevant laws and provisions of the Constitution referred to hereinabove, I am satisfied that the imposition of taxes by the impugned provision does not in any way amount to deprivation of Petitioners right to property as alluded to by the Petitioners.

C. WHETHER THE PETITIONERS ARE ENTITLED TO RELIEFS SOUGHT.

89. The Petitioners urge that they are entitled to reliefs sought and places reliance in support under the provisions of Articles 20(1), 22(1), 23(1) and 165(3)(d)(i) and (ii) of the Constitution. It is further submitted by the Petitioners that they have demonstrated that the impugned Amendments did not meet the Constitutional test as set out in the letter and spirit of the Constitution, urging that they were *inter alia*; passed without undergoing public participation.
90. The elementary principle of law is that he who alleges must prove. The Petitioners herein have in this Petition failed to demonstrate the unconstitutionality of the impugned amendments. I find that the reliefs sought are unwarranted and a grant of the same would be contrary to the Interest of the greater public.
91. It is on the other hand clear that under Articles 94(1), 109 and 210 (1) of the Constitution, Parliament, in every year, enacts the Finance Act to sanction measures and impose taxes to raise national revenue. As such, the Finance Act is a crucial piece of legislation that impacts on the entire budget of a particular year, if it is interfered with, then the government will have no option than to abandon part of the already approved expenditure, potentially affecting government operations and development programs.
92. I have already in this Judgment found that the National Assembly, did conduct public participation on the impugned amendments and took the views of the public into account, as well as, the views of all members of the National Assembly as representatives of various constituencies. Clause 25 which introduced amendments to the second schedule of Excise Duty Act was in the Finance Bill, 2021 published on 5th May, 2021. The amendments introduced did not come out of the blues. Further there is no dispute that it is within the authority of the 1st Respondent to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced. Consequently the 1st Respondent did not breach its Parliamentary role in enacting the impugned provisions.
93. In addition to the above the collection of taxes through the procedures provided by the law cannot, constitute an arbitrary deprivation of property. The Finance Act, 2021 and the rate of taxation which is a policy decision solely within the mandate of the Executive and enacted by Parliament take precedence over the provisions of the COMESA Treaty alluded to by the Petitioners.
94. I find that from the evidence adduced by the Petitioners herein other than general assertions, no unfair tax burden, as understood in law was disclosed by the Petitioners. In view whereof I find that the Petitioners have not demonstrated how they have been subjected to unfair tax burden. Further it is



clear that the imposition of tax by legislation that has been duly enacted, and the collection of such tax, cannot amount to infringement of the constitutional right to taxation that is fair, or any other constitutional right or freedom. In addition thereto the mere fact that impugned amendments imposes burdensome consequences does not require, that a Court find such legislation to be unconstitutional. In view wherein I find that the Petitioners have not disclosed how the Constitution has been violated by the state raising revenue through enactment of taxation measures.

95. I find from the foregoing that Section 32 of the *Finance Act, 2021* was properly enacted and that there was no violation of Articles 10, 27, 35, 40, 47(1), 118 and 201 of the Constitution or any other provisions of the Constitution. I therefore find that the Petition unmerited.
96. The upshot is that the Petition herein dated 21st July 2021 lacks merit and is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF FEBRUARY, 2022.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA

