



**Okoti & 2 others v Cabinet Secretary, National Treasury & 4 others (Petition 303 of 2018)
[2022] KEHC 13213 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 303 OF 2018

HI ONG'UDI, J

SEPTEMBER 30, 2022

BETWEEN

**OKIYA OMTATAH OKOITI 1ST PETITIONER
WYCLIFE GISEBE NYAKINA 2ND PETITIONER
CENTRAL ORGANIZATION OF TRADE UNIONS 3RD PETITIONER**

AND

**CABINET SECRETARY, NATIONAL TREASURY 1ST RESPONDENT
COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY 2ND
RESPONDENT
ENERGY REGULATORY COMMISSION 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
NATIONAL ASSEMBLY 5TH RESPONDENT**

High Court dismisses petition challenging imposition of 16% value added tax on petroleum products for being moot

The instant petition challenged the imposition of 16% value added tax (VAT) on petroleum products. The court held that while making a determination in the context of the other arms of Government, the court had to consider the system of checks and balances within the doctrine of separation of powers. The court noted that the petitioner's question before the court involved the rightness and adequacy of Parliament to enact the impugned tax. The court thus held that it was required to refrain from making a determination on the question which was best suited for Parliament to answer. The court also noted that the enactment of the Finance Act, 2018 after the lawful intervention by the President brought the petitioners claims to a standstill and thus the matter was foreclosed and rendered moot.



Reported by Kakai Toili

Jurisdiction – *jurisdiction of the High Court - jurisdiction to determine the rightness and adequacy of Parliament to impose a tax – whether the High Court had jurisdiction to determine the rightness and adequacy of Parliament to impose a tax - of Kenya, 2010, articles 94, 95, 209 and 165(3).*

Brief facts

The petitioners deposed that in August 2013 the , 2013 (, 2013) was enacted with section 5(2)(b) providing that the tax rate would be 16% of the taxable value of the taxable supply, the value of imported taxable goods or the value of a supply of importable taxable services. Pursuant to section B of Part 1 of the First Schedule to the , 2013, petroleum products were classified as exempt supplies for a period of 3 years from the commencement date of the , 2013 which was September 2, 2013. That period was further extended for 2 years (from September 1, 2016).

Following the lapse of the extension period the Cabinet Secretary, National Treasury informed the public that value added tax (VAT) would be imposed on petroleum products in line with the , 2013 and that was later on confirmed by the commissioner general, Kenya Revenue Authority who stated that from September 1, 2018 VAT would be chargeable on all petroleum products at the rate of 16% transaction value. The petitioners were aggrieved that whereas it was Parliament that enacted the Act, 2013, the 1st, 2nd and 3rd respondents defied Parliament’s decision to defer the imposition of the VAT on petroleum products vide the Finance Bill, 2018.

The instant petition sought among others declarations that: the imposition of VAT on petroleum products vide the , 2013 was unconstitutional; petroleum products ought to be classified as VAT exempt; the imposition on September 1, 2018 of VAT on petroleum products at 16% of transaction value and not of the taxable base value was tantamount to double taxation and therefore was invalid, null and void; and that the Executive branch of Government had to defer to Parliament.

Issues

Whether the High Court had jurisdiction to determine the rightness and adequacy of Parliament to impose a tax.

Held

1. The court’s jurisdiction to entertain matters flowed from article 165 of the of Kenya, 2010 (Constitution). The court’s ability to entertain constitutional matters was confined to the framework in article 165(3). Where a petition raised matters outside those parameters, the court’s jurisdiction would be found to be lacking.
2. The devolution of power was one of the constitutional hallmarks of the Government system under article 1(3) of the which was protected by the doctrine of separation of powers. Separation of powers did not only proscribe organs of Government from interfering with the other’s function, but also entailed empowering each organ of Government with countervailing powers which provided checks and balances on actions taken by other organs of Government. It also warned that such powers were, however, not a license to take over functions vested elsewhere and recommended that there had to be judicial, legislative and Executive deference to the repository of the function. The doctrine of separation of powers in addition operated in tandem with the principle of checks and balances.
3. The court while making a determination in the context of the other arms of Government had to consider the system of checks and balances within the doctrine of separation of powers. In essence the court’s jurisdiction lay in protecting against exercise of power that was blatantly unconstitutional or that had not been enacted or was excess or was not adopted in accordance with the proper constitutional procedure. On the other hand, where the exercise of power by the other arms was found to be in line with the constitutional mandate and principles, the court was required to cease from inquiring further.
4. One of the constitutional functions of the National Government was its power to impose taxes and charges as envisaged under article 209 of the as read with article 94 and 95 of the . The petitioner’s



question before the court involved the rightness and adequacy of Parliament to enact the impugned tax. That was a challenge on the Government's decision to impose the VAT. The decision whether or not to impose a tax was within legislative authority as provided for in the . The court as a consequence was required to refrain from making a determination on the question which was best suited for Parliament to answer.

5. One of the principles of statutory interpretation dictated that all statutes were presumed to be constitutional unless the contrary was proved. The petitioners did not challenge the constitutionality of the but rather the imposition of the impugned tax. Parliament in enacting the subscribed to the constitutional principles of imposition of taxes.
6. The questions as raised by the petitioners revolved around policy issues that were specifically set out for Parliament by the . That in effect prohibited the court from making a finding that revolved around a political question. An analysis of the court's jurisdiction under article 165(3)(d) of the made it clear that the court did not have jurisdiction to make determinations on policy issues. It was not prudent for it to assume such jurisdiction. Consequently, the nature of the instant petition presented a situation where the doctrine of separation of powers had been invoked in essence affecting the court's jurisdiction to entertain the petition.
7. The enactment of the after the lawful intervention by the President brought the petitioners claims to a standstill. The VAT imposed was 8% and not 16% which the petitioners were agitating against. The matter was therefore foreclosed and rendered moot. There was no justifiable ground for the court to proceed to make a determination on the petition.
8. The court lacked the requisite jurisdiction to interfere with what was done within Parliament's mandate. The only thing to do was for the court to down its tools which the court did.

Petition dismissed.

Orders

Each party to bear their own costs.

Citations

Cases

1. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) 1) — Mentioned
2. Bichage, Chris Munga v Richard Nyagaka Tong'i & 2 others (Petition 17 of 2014; [2016] KESC 11 (KLR)) — Mentioned
3. Bidco Oil Refineries Ltd v Attorney General & 3 others (Petition 177 of 2012; [2013] KEHC 4587 (KLR)) — Mentioned
4. Doctors for Life International v Speaker of the National Assembly and others ((CCT12/05) [2006] ZACC 11) — Explained
5. Gikonyo, Wanjiru & 2 others v National Assembly of Kenya & 4 others (Petition 453 of 2015; [2016] KEHC 5536 (KLR)) — Mentioned
6. In the Matter of the Interim Independent Electoral Commission (Constitutional Application 2 of 2011; [2011] eKLR) — Explained
7. Kaguru, Susan Wambui & others v Attorney General & another (Petition 545 of 2012; [2012] KEHC 551 (KLR)) — Mentioned
8. Kaminja, Daniel & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi (Judicial Review 441 of 2018; [2019] KEHC 2059 (KLR)) — Explained
9. Kamuru, Marilyn Muthoni & 2 others v Attorney General & another (Petition 566 of 2012; [2016] eKLR) — Mentioned
10. Kariithi & another v Attorney General & another (Constitutional Petition 30 of 2013; [2021] KEHC 308 (KLR)) — Mentioned



11. Katiba Institute & another v Attorney General & another (Constitutional Petition No. 209 of 2016 [Formerly Kisumu Petition Number 9 of 2016]; [2017] eKLR) — Mentioned
12. Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (Civil Appeal 218 of 2014; [2016] KECA 432 (KLR)) — Mentioned
13. Kenya Association of Stock Brokers and Investment Banks v Attorney General & another (Petition 22 of 2015; [2015] KEHC 3794 (KLR)) — Mentioned
14. Kenya Pharmaceutical Association & another v Nairobi City County & 46 others County Government & another (Constitutional Petition 97 of 2016; [2017] eKLR) — Mentioned
15. Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others (Petition 1174 of 2007; [2013] eKLR) — Mentioned
16. Kenya Union Of Domestic, Hotels, Education Institutions And Hospital Workers (Kudheihwa Workers Union) v Kenya Revenue Authority & 3 others (Petition 544 of 20 of 2013; [2014] KEHC 6984 (KLR)) — Mentioned
17. Law Society of Kenya v Kenya Revenue Authority & another (Civil Appeal 91 of 2006; [2017] KECA 494 (KLR)) — Explained
18. Maliti, Francis v County Assembly of Machakos & 2 others; Governor, Machakos County (Interested Party) (Constitutional Petition 17 of 2018; [2019] KEHC 8811 (KLR)) — Mentioned
19. Matemba v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Explained
20. Obuya, Mark & 7 others v Commissioner of Domestic Taxes & 2 others (Petition 383 of 2013; [2014] KEHC 4336 (KLR)) — Explained
21. Okeyo, Erick v County Government of Kisumu & 2 others (Petition 1 'A' of 2014; [2014] KEHC 5380 (KLR)) — Mentioned
22. Okoiti, Okiya Omtatah v Attorney General & 4 others (Petition 311 of 2019; [2020] KEHC 4711 (KLR)) — Explained
23. Okoiti, Okiya Omtatah v Commissioner General, Kenya Revenue Authority & 2 others (Petition 532 of 2017; [2018] KEHC 8263 (KLR)) — Mentioned
24. Okutoyi, Geoffrey Paul v Habil Olaka & another (Petition 457 of 2015; [2018] eKLR) — Mentioned
25. Onyango, Patrick Ouma & 12 others v Attorney General and 2 others (High Court Misc. Civil Application No. 677 of 2005(0S) ; [2005] eKLR) — Mentioned
26. Otieno, Leonard v Airtel Kenya Ltd (Petition 218 of 2017; [2018] eKLR) — Mentioned
27. Pevans East Africa Ltd & another v Chairman, Betting Control & Licensing Board & 7 others (Civil Appeal 11 of 20 of 2018; [2018] KECA 332 (KLR)) — Mentioned
28. Republic v Cabinet Secretary for Transport, Infrastructure Housing and Urban Development & another Ex parte Kenya National Union of Co-operatives Staff & Ethics and Anti-Corruption Commission (Miscellaneous Application 485 20 of 2016; [2017] KEHC 7773 (KLR)) — Mentioned
29. Republic v Judicial Commission of Inquiry into the Goldenberg Affair, Honourable Mr Justice of Appeal Bosire and another Ex parte Honourable Professor Saitoti (? 102 of 2006; [2006] KEHC 1413 (KLR)(2007) 2 EA 392 (2006) 2 KLR 400) — Mentioned
30. Republic v Minister For Finance & 2 others (Civil Misc Cause 133 of 2006; [2006] eKLR) — Mentioned
31. Rev Dr Timothy M Njoya & 6 others v The Hon attorney General & 4 others (? 82 of 2004; [2004] KEHC 1467 (KLR)) — Mentioned
32. Selelo, George Lesaloi & another v Commissioner – General, KRA, & 4 others; Pevans EA Ltd (t/a Sportpesa) & 3 others (Constitutional Petition 9 & 10 of 2018; [2019] KEHC 4787 (KLR)) — Mentioned
33. Speaker of the Senate & another v Attorney-General & 4 others (Advisory Opinion Reference 2 of 2013; [2013] eKLR) — Mentioned



34. Stephen, Ndoria v Minister for Education & 2 others (Petition 464 of 2012; [2015] KEHC 3437 (KLR)) — Mentioned
35. Wa Ngugi, Kiriro & 19 others v Attorney General & 2 others (Petition 254 of 2019; [2020] KEHC 8819 (KLR)) — Explained
36. Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) (Constitutional Petition E005 & E001 (Consolidated) of 2021; [2021] KEHC 9748 (KLR)) — Mentioned
37. Biowatch Trust v Registrar Genetic Resources & others ((CCT 80/08) [2009] ZACC 14) — Mentioned
38. President of the Ordinary Court Martial v Freedom of Expression Institute ((1999) 4 S A 682 (CC) 16, 17 and 18) — Followed
39. Cantonment Board, Poona v Western India Theatres Ltd (AIR 1954 Bom 261) — Mentioned
40. Govindasaran Gangasaran v Commissioner of Income Tax (155 ITR 144) — Mentioned
41. Hambardda Dawakhana v Union of India Air ((1960) AIR 554) — Mentioned
42. Olum & another v Attorney General ([2002] 2 EA 508) — Mentioned
43. Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG (AG /1975) AC) — Mentioned
44. Partington v Attorney General ((1869) LR 4HL 100) — Mentioned
45. Billings v US (232 US 261, at P 265, 34 S Ct 421 (1914)) — Mentioned
46. United States v Merriam (263 US 179, 44, S Ct 69 (1923)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 — Article 3(1); 22(1)(2)(c); 23, 24, 27, 28, 35(3); 43, 46(c); 47, 48, 50(1); 258(1); — Interpreted
2. Energy Act, 2019 (Act No 1 of 2019) — In general — Cited
3. Energy (Petroleum Pricing) Regulations, 2010 (Act No 12 of 2006 of sub leg) — In general — Cited
4. Evidence Act (cap 80) — Section 107 — Interpreted
5. Finance Act, 2016 (Act No 38 of 2016) — Section 30(c)(ii); — Interpreted
6. Finance Act, 2018 (Act No 10 of 2018) — In general — Cited
7. Public Finance Management Act, 2012 (Act No 18 of 2012) — Section 9, 40(5); — Interpreted
8. Value Added Tax Act, 2013 (Act No 35 of 2013) — Section B, 5(2)(b); Part 1; Schedule first — Interpreted

Texts

1. Black, HC., (Ed) (1994), Black's Law Dictionary (Springer; 1st edition (March 2, 1994))

Advocates

None mentioned

JUDGMENT

1. The petition dated September 3, 2018 was amended on September 4, 2018. The amended petition was brought under articles 3(1), 22(1) & (2)(c), 23, 48, 50(1) and 258(1) of the [Constitution](#) for the alleged contravention of rights and freedoms under articles 24, 27, 28 35(3), 43, 46(c) and 47 of the [Constitution](#).
2. Accordingly the petition seeks the following orders:
 - a. A declaration that:



- i. The imposition of VAT on petroleum products vide the [Value Added Tax Act 2013](#) is unconstitutional and therefore null and void.
- ii. Petroleum products ought to be classified as VAT exempt.
- iii. The imposition on September 1, 2018 of VAT on petroleum products at 16% of transaction value and not of the taxable base value is tantamount to double taxation and therefore is invalid, null and void.
- iv. The executive branch of government must defer to parliament.
- b) An order:
 - v. Of prohibition permanently prohibiting the respondents and their agents and any persons howsoever acting from giving effect howsoever to the imposition of VAT on petroleum products under the [Value Added Tax Act, 2013](#).
 - vi. Quashing section B of part 1 of the first schedule to the VAT Act No 35 of 2013.
 - vii. Compelling the respondents to exempt petroleum products from VAT.
 - viii. Compelling the respondents to pay to the petitioners the costs of this suit.
 - ix. Any other appropriate relief the court may deem just to grant.

The Petitioners' Case

3. The crux of this petition as supported by the 1st petitioner's affidavit of September 3, 2018, is the challenge on the constitutionality and legality of the imposed VAT on petroleum products vide the [Value Added Tax](#) No 35 of 2013. In addition, is the alleged double taxation in the imposition of VAT on petroleum products at 16% of transaction value and not of the taxable base value. Lastly is the executive's refusal to defer the issue to parliament. According to the petitioners imposition of VAT on petroleum products is inconsistent with the [Constitution](#) and hence should be declared null and void. The petitioners also filed further affidavits dated September 10, 2018 and November 5, 2018.
4. The petitioners deposed that in August 2013 the [Value Added Tax Act, 2013](#) was enacted with section 5(2)(b) providing that the tax rate would be 16% of the taxable value of the taxable supply, the value of imported taxable goods or the value of a supply of importable taxable services. Pursuant to section B of part 1 of the first schedule of the Act, petroleum products were classified as exempt supplies for a period of 3 years from the commencement date of the Act which was September 2, 2013. This period was further extended for 2 years (from September 1, 2016) by an amendment of section 30(c) (ii) of the [Finance Act, 2016](#) which introduced paragraph 2 of section B of the first schedule to the VAT.
5. The petitioners averred that due to the public's concern on the impending imposition of VAT on petroleum products at the lapse of the stated period, the national assembly proposed further amendments to the then Finance Bill, 2018 to extend the period to September 1, 2020. It is their averment that the executive through the president did not assent to the bill, and pushed for the implementation of VAT on petroleum products.
6. Following the lapse of the extension period the cabinet secretary, national treasury on August 31, 2018 informed the public vide press statements that VAT would be imposed on petroleum products in line with the VAT Act, 2013. This was later on confirmed on September 2, 2018 by the commissioner general, KRA who stated that from September 1, 2018 VAT would be chargeable on all petroleum



products at the rate of 16% transaction value. The Energy Regulatory Commission followed suit by increasing the pump prices.

7. In light of this, the petitioners were aggrieved that whereas it is parliament that enacted the VAT Act, 2013, the 1st, 2nd and 3rd respondents defied parliament's decision to defer the imposition of the VAT tax on petroleum products vide the Finance Bill, 2018. Further that the decision was unconstitutional since it subjected Kenyans to double taxation by imposing VAT on petroleum products at 16% of transaction value and not of the taxable base value.
8. In view of this and its implication on the socio-economic welfare of the public, the petitioners averred that section B of part 1 of the first schedule of the VAT Act, 2013 is inconsistent with the Constitution. Moreover that the impugned provision is not in line with article 24 of the Constitution which provides for the threshold for limitation of enjoyment of fundamental freedoms in this case, article 20(5), 40,43 and 47(1), of the Constitution.

The 1st Respondent's Case

9. The 1st respondent filed a replying affidavit dated September 21, 2018 sworn by Dr Kamau Thugge, the 1st respondent's principal secretary. He averred that the imposition of the VAT tax on petroleum products was in compliance with articles 209 & 210 of the Constitution and the Value Added Tax Act, 2013. That the directive on the imposition of the 16% VAT on petroleum products was based on the lapse of the transitional period on August 31, 2018 in line with the law.
10. He deposed that the 1st respondent tabled the Finance Bill, 2018 before the national assembly on June 19, 2018 and that the bill did not contain any proposal of VAT on petroleum products and neither did various amendments in the bill touch on petroleum products. That the national assembly in discussing the bill amended it by introducing clause 18(c) which stopped the exemption of VAT on petroleum products from expiring on August 31, 2018. He added that a bill is not law until assented to by the president.
11. With reference to double taxation, he averred that article 209 of the Constitution allows imposition of other levies in addition to VAT hence imposition of other levies on petroleum products is legal and not double taxation. As such he concluded by stating that prevention of the government from imposing the impugned VAT would have had disastrous consequences to the government's recurrent and development expenditure.

The 2nd Respondent's Case

12. The 2nd respondent filed the following grounds of opposition dated September 7, 2018.
 - i. The application and petition are baseless, frivolous and without merit hence an abuse of the court process.
 - ii. The petition seeks the court to confer on itself with executive and legislative powers in contravention of the doctrine of separation of powers.
 - iii. Article 209 of the Constitution grants the national government powers to impose income tax, value added tax, excise tax, customs duty and other duties on import and export goods.
 - iv. Article 210 of the Constitution makes the imposition of tax under article 209 to be subject to legislation.
 - v. The imposition of VAT on petroleum products is per legislation to wit:



- vi. Provisions of the first schedule section B (Exempt Goods on Transition) of the VAT Act No 35 of 2013 provided exemption for the goods therein for a period of 3 years as from September 1, 2013 which was to run until September 1, 2016.
- vii. Paragraph 30 (c) of the [Finance Act, 2016](#) extended the period by two years from September 1, 2016. This period ran up until August 31, 2018. Upon the lapse of this period the goods specified at section B of the first schedule subjected the goods therein to 16% VAT in line with section 5(2) of the VAT Act, No 35 of 2013.
- viii. At all times the respondents drew their powers to levy taxes from the national assembly which is the body mandated to make and enact laws as per article 94, 95, 109 and 116 of the [Constitution](#).
- ix. A provision imposing tax cannot be said to be unconstitutional for reasons that the same is deemed oppressive.
- x. The petitioner's petition is tantamount to asking this court to suspend the operation of a law even before the court can satisfy itself that the said law is unconstitutional.

The 3rd Respondent's Case

13. The 3rd respondent filed a replying affidavit dated September 17, 2018 sworn by Edward Kinyua, the 3rd respondent's acting director petroleum & gas. He averred that its mandate under the [Energy Act, 2006](#) is to regulate the generation, transmission, distribution and supply of electrical, petroleum and renewable energy source.
14. He deposed that one of the factors that guides the 3rd respondent in setting prices is the taxes that are levied pursuant to various laws and hence do not levy the taxes only but applies the taxes as enacted by parliament. In view of this, he noted that upon the lapse of the grace period on August 31, 2018, the goods that were exempt became subject to VAT at the rate of 16% as required under section 5(2) of the [VAT, Act, 2013](#) which has not been varied or annulled.
15. He deposed that following this development, the 3rd respondent in compliance with the law and the 1st & 2nd respondents' directive it was accordingly required to apply VAT in determination of petroleum prices in Kenya. Moreover, that this decision was also in line with the [Energy Act](#). Taking this into consideration he deposed that lifting of the VAT imposition at that point would have resulted in dire implementation difficulties.

The 4th Respondent's Case

16. The 4th respondent did not file any responses in this matter.

The 5th Respondent's Case

17. In opposition to the petition, the 5th respondent filed the following grounds of opposition dated September 14, 2018:
 - i. The speaker of the national assembly *vide* gazette notice No 9380 recalled the national assembly for a sitting to consider the president's reservations pursuant to article 115 of the [Constitution](#) with regard to the Finance Bill, 2018.



- ii. The petition was premature as the Finance Bill, 2018 at the time of filing the application and petition was still under the legislative process and hence not complete for this court to make a determination.
- iii. The enactment of legislation is not an administrative action within the context of article 47 of the Constitution.
- iv. Under article 94(5) of the Constitution, only parliament has the power to make provisions having force of law in Kenya.
- v. Article 209 of the Constitution permits the national government to impose taxes as a means of raising national revenue and authorizes the national government to impose taxes hence the enactment of the Finance Act by the parliament each year.
- vi. The Value Added Tax Act, 2013 was in line with the requirement under article 210 of the Constitution that the imposition of taxes should only be done through legislation.
- vii. All statutes enacted by the parliament are presumed to be constitutional and thus taxes levied under the Value Added Tax Act, 2013 are constitutional unless the presumption is rebutted.
- viii. The rate of taxation is a policy decision solely within the mandate of the executive and enacted by parliament and hence the court should decline to make policy decisions. Moreover that the court is ill equipped to determine matters of policy, the economy and the rate of taxation as the petitioner seeks.
- ix. The mere imposition of taxes cannot be unconstitutional as the Constitution allows the national government to impose taxes as a means of raising revenue.
- x. In determining the constitutionality of a statute the court ought to look at the purpose and effect of the impugned statute.
- xi. The petition did not disclose how the Constitution was violated by the government by raising revenue through taxation.

Parties' Submissions

The petitioner's submissions

18. The 1st petitioner on his own behalf and on behalf of the other petitioners filed written submissions dated July 26, 2019 identifying the issues for determination as:
 - i. Whether the imposition of VAT on petroleum products through the VAT Act, 2013 is unconstitutional and therefore invalid, null and void.
 - ii. Whether the imposition on September 1, 2018 of VAT on petroleum products at 16% of transaction value and not of the taxable base value is tantamount to double taxation and therefore null and void.
 - iii. Whether costs are payable.
19. The petitioners on the first issue noted that pursuant to section B of part 1 of the first schedule of the VAT Act, 2013 Act, petroleum products were classified as exempt supplies for a period of three years. This was subsequently extended by an amendment to the Finance Act, 2016 up until August 31, 2018. According to the petitioners the impugned tax is unconstitutional as it constitutes arbitrary imposition of tax contrary to article 40 and 47 of the Constitution as read with article 24(1) of the



- Constitution. In their view taxation is supposed to improve the general welfare of the society not diminish it.
20. They argued that tax laws were a clear derogation of personal and property rights and as such any ambiguity must be resolved against imposition of the tax as held in; Billings v US, 232 US 261, at P 265, 34 S Ct 421 (1914). Similar reliance was placed on the cases of United States v Merriam 263 US 179, 44 S Ct 69 (1923); Govindasaran Gangasaran v Commissioner of Income Tax 155 ITR 144; Partington v Attorney General (1869) LR 4HL 100 and Okiya Omtatab Okoiti v Commissioner General, Kenya Revenue Authority & 2 others (2018) eKLR.
 21. The petitioners urged this court while determining this matter to adopt a purposive approach in its interpretation of the Constitution in the context of this case as seen in the case of Marilyn Muthoni Kamuru & 2 others v Attorney General & another (2016) eKLR. To this end the petitioners argued that the imposition of VAT on petroleum products is unreasonable yet article 47(1) of the Constitution requires that an administrative action be reasonable. This is because its imposition raised the cost of living, and the government ought to have used excise duty in the case of petroleum products since it is flexible. They advocated for other means that the government ought to have used to raise revenue instead of the impugned tax.
 22. Turning to the second point the petitioners submitted that the imposition of the impugned tax on September 1, 2018 amounted to double taxation. They argued that the 3rd respondent computes VAT on petroleum products at a percentage of the transaction value which already consists of other various taxes and not at a percentage of the taxable base value.
 23. On the final issue, the petitioners submitted that costs follow the event. In their view the petition is merited and so should be allowed with costs to be borne by the respondents as is the general case as seen in the case of Erick Okeyo v County Government of Kisumu & 2 others (2014) eKLR. They however differed with this view owing to the public interest nature of the matter. They urged the court not to award costs to the respondents, in the event they were unsuccessful. To support this point reliance was placed on the case of Biowatch Trust v Registrar Genetic Resources and others (CCT 80/08) [2009] ZACC 14.

DIVISION - The 1st & 4th Respondents' Submissions

24. The 1st and 4th respondents through senior principal state counsel, Kepha Onyiso filed written submissions dated November 2, 2018. Counsel submitted the issues for determination to be:
 - i. Whether the petition has been overtaken by events.
 - ii. Whether the imposition of 16% VAT was lawful.
 - iii. Whether the imposition of 16% VAT on petroleum products was double taxation.
 - iv. Whether the imposition of 16% VAT on petroleum products was in defiance of parliament.
 - v. Whether the imposition of 16% VAT on petroleum products should have been preceded by public participation.
 - vi. Whether the imposition of 16% VAT on petroleum products was against public interest.
25. On the first issue, counsel submitted in the affirmative. This is because, when parliament passed the Finance Bill, 2018 the same was forwarded to the president who declined to sign it into law. The president in his memorandum to parliament recommended that the VAT on petroleum products be



- reduced from 16% to 8%. This recommendation was debated by parliament and passed. The president then proceeded to assent to the bill.
26. In view of this it is argued that the petition premised on the 16% VAT has since been overtaken by events and thus moot and academic. Counsel explained that mootness meant that the dispute no longer existed for determination as held in the case of *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* (2018) eKLR. Similar reliance was placed on the cases of *Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others* (2017) eKLR and *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR.
 27. Moving on to the second issue, counsel answered in the affirmative while relying on article 209 of the *Constitution*. He urged that parliament is permitted to impose income tax, value-added tax, excise tax, custom duty and duties on import and export goods. As such he argued that parliament passed the *VAT Act, 2013* for the purposes of collecting taxes. He therefore noted that the burden to prove the contrary falls on the one who alleges otherwise as required under section 107 of the *Evidence Act*. This was also emphasized by the court in the case cited in support of *Republic v Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and another ex parte Kenya National Union of Cooperatives Staff* (2018) eKLR where it was noted that whether one likes it or not, the burden of proof is consciously or unconsciously the acid test applied when coming to a decision in a particular case. It was contended that the petitioners had failed to discharge their burden of proof that the imposition of 16% VAT on petroleum products was unlawful.
 28. On the third issue, he submitted that article 209 of the *Constitution* allows imposition of other levies in addition to VAT. In light of this it was contended that the imposition of other taxes being excise duty, road maintenance levy, petroleum development levy, fuel levy tax and railway development levy on petroleum products is essentially legal. As such it does not amount to double taxation which means taxing the same income twice as seen in the case of *Kenya Pharmaceutical Association and another v Nairobi City County & 46 others County Government & another* (2007) eKLR.
 29. Counsel on the 4th issue submitted that the argument had no basis as the bill had not at that point been assented into law. It reasonably follows that a bill is not law unless assented to by the president and published in a gazette notice as a statute.
 30. On the issue of public participation, counsel noted that this argument acknowledged the existence of the law making process of a statute. In view of this he contended that the principle of public participation is not a prerequisite after a law has been enacted in this case the *VAT Act, 2013*. He added that the VAT on petroleum products had already been captured in the Act and it's only its imposition which had been postponed.
 31. On the final issue, it was submitted that this allegation was incorrect as the impugned tax was meant to enable the government satisfy its recurrent and development expenditure. It is noted that in the financial year of 2018/2019, the government had projected to raise revenue to the tune of 36 billion per year with the imposition of the 16% VAT on petroleum products. This was to be used to meet its budgetary needs. In view of this counsel noted that failure to levy the impugned tax would have been against public interest on the contrary.

The 2nd Respondent's Submissions

32. The 2nd respondent through its counsel Mr GO Ochieng filed written submissions dated June 3, 2022. He submitted the main issues for determination to be:



- i. Whether the VAT on petroleum products was properly levied as provided under the VAT principles and law;
 - ii. Whether the imposition of VAT on the transaction value amounted to double taxation;
 - iii. Whether court can declare unconstitutionality based on the grounds advanced in the petition ;
 - iv. Whether there is any infringement of the petitioner’s right to equality by the respondent.
 - v. Whether there is any infringement of the petitioner’s right to fair administrative action.
33. On the first issue, counsel submitted that petroleum products in 2013 upon enactment of *Value Added Tax Act* were placed under section B of exempt goods on transition for period of three years. Upon expiry of the transition period, the goods became taxable in line with section 5(2) of the *Value Added Tax Act* at the rate of 16% of the taxable value of the taxable supply. In view of this he stated that parliament had correctly levied value added tax on petroleum on the transaction value and not on any other amount.
34. Turning to the second issue, he argued that according to the *Black’s Law Dictionary*, 6th Edn double taxation was defined as the taxing of the same item or piece of property twice on the same person, or taxing it as the property of another person and again as the property of another. This does not however include the imposition of different taxes concurrently on the same property or income nor the taxation of the same property to different persons with different interests in it. Similarly relying on the case of *Kenya Pharmaceutical Association & another (supra)* he noted that the court had defined double taxation as taxing of the same income twice. He also relied on *Cantonment Board, Poona v Western India Theatres Ltd*, AIR 1954 Bom 261.
35. Counsel accordingly argued that for double taxation to exist, taxation must be carried out on the same person, same income, same tax head and within the same financial year. Absence of this component meant that the same was not double taxation. In view of this he noted that the petitioners had not shown which two taxing points would arise if the VAT was levied on the transaction value and not taxable base of the petroleum products.
36. According to counsel the petition was premised on the single ground that taxation of petroleum products is oppressive and burdensome on citizens. He submitted that the petition as such was simply challenging the decision of the legislature to levy tax on petroleum products which is purely a policy issue. To buttress this point reliance was placed on the case of *Kenya Association of Stock Brokers and Investment Banks v Attorney General & another* [2015] eKLR where speaking on the implication of the capital gains tax the court held that it was to be borne in mind that the court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. That those were matters of policy of which the court was not best suited to handle. He further relied on *Kariithi & another v Attorney General & another* (Constitutional Petition 30 of 2013) [2021] KEHC 308 (KLR), on this issue.
37. Counsel furthermore argued that the issue in effect invoked the political question doctrine which the courts have been cautioned on in several cases including *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR, *Ndora Stephen v Minister for Education & 2 others*, Nairobi High Court petition No 464 of 2012 and *Kenya Union Of Domestic, Hotels, Education Institutions And Hospital Workers (Kudbeiba Workers Union) v Kenya Revenue Authority & 3 others* [2014] eKLR. From the foregoing counsel argued hence that the available recourse for the petitioner was to invoke the provisions of article 119 of the *Constitution* as read together with the article 37 by petitioning parliament to enact, amend or repeal the said provision not this court.



38. Fourthly, counsel submitted that although the petitioners stated that the imposition of the tax would lead to breach of article 27 of the *Constitution* they failed to explain how, since the tax is to be charged on all persons who will be purchasing petroleum products. Accordingly he urged that a fundamental principle of law is that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts as held in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR. Additional reliance was placed on the cases of *Republic v Minister For Finance & 2 others* [2006] eKLR and *Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested parties)* (Constitutional Petition E005 & E001 (Consolidated) of 2021) [2021] KEHC 58 (KLR) (20 September 2021) (judgment).
39. On the final point, he submitted that the process of enactment of the VAT in this matter was not being challenged and the same had not been alleged to be unconstitutional in any manner. In view of this it could not thus be stated that there was any breach of fair administrative action when it had not been proved that any action existed in the first instance.
40. Counsel pointed out that the petitioners had only cited the articles of the *Constitution* but had not demonstrated the manner in which they were violated as stated in: *Anarita Karimi Njeru* No 1 of (1979) 1KLR; *Mumo Matemba v Trusted Society of Human Rights Alliance & amp; 5 others* [2013] eKLR, *Dr Rev Timothy Njoya v The Hon Attorney General and Kenya Review Authority* HC constitutional and human rights division petition No 479 of 2013 and *Leonard Otieno* (supra).

The 3rd Respondent's Submissions

41. The Firm of Munyai Muthama and Kashindi on behalf of the 3rd respondent filed written submissions and a list of authorities dated November 11, 2019. Counsel commenced by submitting that the 3rd respondent was not charged with the law making mandate save for enforcement of the law. He noted that the *Energy Act*, 2019 and the *Energy (Petroleum Pricing) Regulations, 2010* require the 3rd respondent to publish general information on the wholesale and retail prices of petroleum products as determined by the formulae set out in its regulations. As a consequence when the VAT was imposed on September 1, 2018, it was obligated to review the prices factoring in the impugned tax.
42. Counsel noted that the petitioners in stating their case had relied on the bill which had not yet been assented into law. Furthermore, it was submitted that parliament under article 94 of the *Constitution* is the only organ that has power to enact laws, in this circumstance imposition of taxes under article 210(1) of the *Constitution*. As a consequence he submitted that the court in entertaining the matter would be flaunting the cardinal rule of separation of powers.
43. In support reliance was placed on the case of *Republic v Judicial Commission of Inquiry into the Goldenberg Affair, Honourable Mr Justice of Appeal Bosire and another Ex parte Honourable Professor Saitoti* (2007) 2 EA 392 (2006) 2 KLR 400 where it was held that our constitution is founded on the rule of law and in order to maintain the intended constitutional balance, the three arms of government have separate and distinct roles. He further relied on *Katiba Institute & another v Attorney General & another* (2017) eKLR and *Mumo Matemba* (supra).
44. Counsel argued that this court lacked jurisdiction to strike down legislation on economic considerations as advanced by the petitioners. He contended that this court's mandate to strike down legislation was limited to considerations as to whether the legislation was constitutional or not as held in the *Katiba Institute case* (supra). Similar reliance was placed on the case of *Susan Wambui Kaguru & others v Attorney General & another* (2012) eKLR.



45. He further submitted that the petitioners had presented their case in the wrong forum. This assertion was founded on article 119 of the Constitution that allows persons to petition the parliament to consider any matter within its authority including the enactment, amendment or repeal of any legislation.
46. Counsel submitted that the petitioners had not proved that section B of part 1 of the first schedule to the VAT Act is unconstitutional in line with *Anarita Karimi Njeru case (supra)*. In his view the petitioners were merely raising assertions that the section would lead to violation of the Constitution. It was his argument that the allegation that the imposition of the tax would violate the right to property under article 40 of the Constitution was unfounded since imposition of tax by legislation that has been duly enacted cannot amount to infringement of the right as held in the case of George Lesaloi Selelo & another v Commissioner General, KRA & 4 others: Pevans EA Limited (t/a Sportspesa) & 3 others (2019) eKLR.
47. Counsel additionally submitted that the petitioners had relied on newspaper articles which were inadmissible in court as held in the case of Geoffrey Paul Okutoyi v Habil Olaka & another (2018) eKLR. In conclusion he urged the court to remain alive to the principle of statutory construction on presumption of constitutionality of a statute until the contrary is proved as discussed in Katiba Institute & another v Attorney General & another (2017) eKLR, and Susan Wambui Kaguru & others v Attorney General & another (2012) eKLR.

The 5th Respondent's Submissions

48. Counsel for the 5th respondent, Kuyioni N Josphat on its behalf filed written submissions dated May 3, 2021. On the issue as to whether imposition of value added tax on petroleum products is unconstitutional, counsel submitted that the 5th respondent is obligated under the Constitution to legislate and take policy in accordance with articles 94 and 95 of the Constitution. Consequently it was noted that it has the constitutional power to determine or amend the VAT to be imposed on various goods in Kenya. Additionally it was submitted that it is apparent that the power to impose tax is vested upon the national assembly since article 210(1) of the Constitution divulges that no tax may be imposed, waived or varied except as provided for by legislation.
49. In view of this counsel urged the court to refrain from interfering with the mandate of the 5th respondent as 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 as held in the case of *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiba Workers Union) (supra)*.
50. On the second issue, which is the constitutionality of the impugned provision, it was submitted that when considering its constitutionality, the principle of presumption of constitutionality of statutes should be had in mind until the contrary is proved as espoused in the case of Hambardda Dawakhana v Union of India Air (1960) AIR 554. With this in mind counsel noted that the burden of proof is upon the person alleging constitutional invalidity of a statute. Moreover he submitted that the court is to consider whether the purpose and effect of implementing the statute or statutory provision would result in unconstitutionality as seen in the case of Olum & another v Attorney General [2002] 2 EA 508.
51. In view of this counsel submitted that the purpose of introduction of tax is to raise revenue to support public services and the needs of the larger society by aiding in generation of national funds pursuant to the constitutional requirement under article 209 and 210 of the Constitution. To support this he



relied on the case of *Law Society of Kenya v Kenya Revenue Authority & another* (2017) eKLR where the learned judge stated:

“as I understand it the principle of all fiscal legislation it is this: if the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be.”

This was also the case in *Bidco Oil Refineries Limited v Attorney General & 3 others* (2013) eKLR.

52. Counsel while submitting on the point of the duty of the national assembly in determining and imposing taxes noted that the imposition of taxes is a means of raising revenue sanctioned by the *Constitution* and hence it cannot be alleged that imposition of taxes deprives the petitioners of the right to property provided under article 40 of the *Constitution*. According to him this allegation by the petitioners has no basis in law and so cannot be justified. To buttress this point he relied on *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudbeiba Workers Union)* (*supra*) where it was held that 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*. He referred to *Patrick Ouma Onyango & 12 others v Attorney General and 2 others* (2005) eKLR; *Speaker of the Senate & another v Attorney-General & 4 others* (2013) eKLR; *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* (2013) eKLR.
53. Counsel submitted that the *Public Finance Management Act*, 2015 under sections 9 and 40(5) requires that the executive and the national assembly use their expertise to craft fiscal policy and determine the rate of taxation for the country. This way it was argued that the courts do not have the expertise nor the tools to determine fiscal policy or the appropriate rate of taxation for the country as such should shun an invitation to dabble in matters of national economic policy as held in the case *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR. Accordingly counsel submitted that the 5th respondent has a constitutional duty to enact legislation for imposition of tax and so urged the court to exercise judicial restraint and decline to violate the principle of separation of powers.
54. Discussing the final issue, as to whether the impugned provision is ambiguous and uncertain, counsel submitted that the provision as outlined in the act clearly expresses the intention, effect and purpose of its introduction. Counsel urged the court in making its interpretation to adopt one that enhances clarity by embracing its plain and literal meaning. To support this point counsel relied on the case of *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* /1975) AC where it was held that it is a well-established rule of construction that any ambiguity in the words of the Act should be resolved in favour of ascribing to them a meaning which would result in the performance of those obligations, not in their breach.
55. In conclusion counsel argued that the jurisdiction of this court can only be invoked in the event of an excess of jurisdiction by way of breach of then *Constitution*. In his view there was no violation of the *Constitution* in this matter and hence the petition lacks merit.

Analysis and Determination

56. Having carefully considered the pleadings, submissions, cited cases and the law I find the issues for determination to be:
- i. Whether this court has the requisite jurisdiction to entertain this matter.



- ii. Whether the imposition of VAT on petroleum products through the VAT Act, 2013 is unconstitutional.
- iii. Whether the petitioners are entitled to the reliefs sought.

Issue No (i). Whether this court has the requisite jurisdiction to entertain this matter

57. The petitioners’ dominant contention in this petition was parliament’s imposition of 16% VAT on petroleum products which they claim is unconstitutional. This assertion was strongly opposed by the respondents who relying on numerous authorities urged this court to refrain from interfering with parliament’s mandate based on the doctrine of separation of powers. This is since the question as framed by the petitioners invoked the political question doctrine as the petition is based on policy issues.

58. I will commence by answering the question on jurisdiction as required by the law. The Supreme Court of Kenya *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR made a clear statement on jurisdiction as follows:

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”[30] The *Lillian ‘S’* case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

59. Accordingly, this court’s jurisdiction to entertain matters flows from article 165 of the Constitution. In line with this matter, sub-article 3(d) spells out as follows:

jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

- a. the question whether any law is inconsistent with or in contravention of this Constitution;
- b. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- c. any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- d. a question relating to conflict of laws under article 191;



60. From the above citation, it follows that this court’s ability to entertain constitutional matters is confined to the framework set out above. Where a petition raises matters outside these parameters, this court’s jurisdiction will be found to be lacking. The respondents in this matter have asserted that the issues raised fall within the docket of the legislature and executive. this devolution of power is one of the constitutional hallmarks of our government system under article 1(3) of the Constitution which is protected by the doctrine of separation of powers.
61. The constitutional court in South Africa while addressing the issue of separation of powers in the case of Doctors for Life International v Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11 stated that:
- “The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised’.. ..”
- But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on parliament. When it exercises its legislative authority, parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its values.”
62. Likewise the Court of Appeal in the case of *Mumo Matemu (supra)* speaking to this issue opined that:
- “Separation of powers does not only proscribe organs of government from interfering with the other’s function, but also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. It also warned that such powers are, however, not a license to take over functions vested elsewhere, and recommended that there must be judicial, legislative and executive deference to the repository of the function.”
63. This doctrine in addition operates in tandem with the principle of checks and balances as discussed in the case of Francis Maliti v County Assembly of Machakos & 2 others; Governor, Machakos County (Interested Party) [2019] eKLR.
64. Without a doubt this court while making a determination in the context of the other arms of government must consider the system of checks and balances within the doctrine of separation of powers. In essence this court’s jurisdiction lies in protecting against exercise of power that is blatantly unconstitutional or that has not been enacted or is excess or is not adopted in accordance with the proper constitutional procedure. On the other hand where the exercise of power by the other arms is found to be in line with the constitutional mandate and principles, the court is required to cease from inquiring further.
65. The issue before this court revolves around the imposition of VAT on petroleum products. 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](#) as read with article 94 and 95 of the [Constitution](#). Article 209 reads as follows:

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).

66. Further article 210(1) of the [Constitution](#) provides as follows:

No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

67. In the case of [Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others](#) [2014] eKLR the court held that:

“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.”

Also see *Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers* (supra) paragraphs 53 – 56.

68. I draw guidance from the authority cited above as well as those cited by the parties. It is worthy to emphasize that the petitioners question before this court involves the rightness and adequacy of parliament to enact the impugned tax. In my view this is a challenge on the government’s decision to impose the value added tax. Although already emphasized by the respondents in this matter, it is imperative to reiterate that the decision whether or not to impose a tax is within legislative authority as provided for in the [Constitution](#). This court as a consequence is required to refrain from making a determination on the question which is best suited for parliament to answer.

69. Similarly, one of the principles of statutory interpretation dictates that all statutes are presumed to be constitutional unless the contrary is proved. The petitioners in this case did not challenge the constitutionality of the [VAT Act, 2013](#) but rather the imposition of the impugned tax. In this context it is correct to state that parliament in enacting the [VAT Act, 2013](#) subscribed to the constitutional principles of imposition of taxes.

70. In the same way, I find the caution given in [Kiriro wa Ngugi & 19 others v Attorney General & 2 others](#) [2020] eKLR imperative in the circumstances of this case. The court 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.



The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.

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. [See generally Ariel L Bendor; *Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of Israeli and American experience?*]
100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of government. Such issues are handed over to other branches of government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the courts are doing in such situations is assigning discretion on the issue to another branch of government. [See generally Friez W Scharpf; *Judicial Review and the Political Question: A functional analysis and Herbert Weschler; Towards Neutral Principles of Constitutional law*]"
71. Evidently, the questions as raised by the petitioners revolve around policy issues that are specifically set out for parliament by the [Constitution](#). This in effect prohibits this court from making a finding that revolves around a political question. An analysis 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 not prudent for it to assume such jurisdiction. Consequently I find that the nature of the instant petition presents a situation where the doctrine of separation of powers has been invoked in essence affecting this court's jurisdiction to entertain the petition.
72. Moreover, the justifiability of this matter was correspondingly challenged by the 1st, 3rd and 4th respondents who termed the matter as having been overtaken by events. The Court of Appeal in the case of [Okiya Omtatab Okoiti & 2 others v Attorney General & 4 others](#) [2020] eKLR borrowing from the *Black's Law Dictionary* defined mootness as follows:
- "64. In *Black's Law Dictionary*, 8th edition, a "moot case" is defined as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights", and as a verb, as meaning "to render a question as of no practical significance".
73. Equally, expounding on this doctrine the court in the case of [Daniel Kaminja & 3 others \(Suing as Westland Environmental Caretaker Group\) v County Government of Nairobi](#) [2019] eKLR opined as follows:
- "26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling



constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.[17]”

74. From the above analysis and the facts of this case, it is apparent that the petition was premised on challenging the constitutionality of the imposition of 16% VAT on petroleum products vide the [VAT Act, 2013](#) that was to take effect from September 1, 2018. This challenge on the Finance Bill, 2018 sought to prolong the extension period. This was however challenged by the President under his mandate in article 115 (1) (b) of the [Constitution](#). The [Finance Act, 2018](#) was finally passed with different terms on the impugned VAT, Act. This is an imposition of 8% VAT instead of 16% on petroleum products, as had been earlier submitted.
75. As it stands the enactment of the [Finance Act 2018](#) after the lawful intervention by HE the president brought the petitioners claims to a stand still. The VAT imposed is 8% and not 16% which the petitioners are agitating against. The matter is therefore foreclosed and rendered moot. The court in [President of the Ordinary Court Martial v Freedom of Expression Institute](#) (1999) 4 SA 682 (CC) 16, 17 and 18, in this regard noted mootness is particularly likely to be a bar to relief where the constitutional issue is not merely moot as between the parties but is also moot as relates to society at large and no considerations of compelling public interest require the court to reach a conclusion. Taking this into consideration I find no justifiable ground for this court to proceed to make a determination on this petition.
76. Following my findings above I find that this court lacks the requisite jurisdiction to interfere with what was done within parliament’s mandate. The only thing to do is for the court to down its tools which I hereby do. The petition dated September 5, 2018 is found to have no basis and is hereby dismissed.
77. Having been brought in public interest I order each party to bear their own costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

