Association of Micro-finance Institutions- Kenya v The Central Bank of Kenya & 3 others (Constitutional Petition E008 of 2022) [2022] KEHC 13053 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13053 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CONSTITUTIONAL PETITION E008 OF 2022

GV ODUNGA, J

SEPTEMBER 22, 2022

IN THE MATTER OF ARTICLES 2, 10, 22, 23, 24, 27, 47, 165, 258 & 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE PETITIONERS UNDER ARTICLES 24, 27 & 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: RULES 3, 4, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) (PRACTICE & PROCEDURE) RULES, 2013

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

BETWEEN

ASSOCIATION OF MICRO-FINANCE INSTITUTIONS- KENYA PETITIONER

AND

THE CENTRAL BANK OF KENYA ..... 1ST RESPONDENT

CABINET SECRETARY, THE NATIONAL TREASURY & PLANNING MINISTRY ..... 2ND RESPONDENT

THE NATIONAL ASSEMBLY ..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner is an association of Micro – finance institutions in Kenya whose membership, according to the petition, comprise of, among others, the non – deposit taking micro – finance institutions also known as Credit Only Micro – Finance Institutions which offer a variety of services to their customers that include but not limited to financial services, financial education, business management among many others. It has lodged the instant petition on behalf of its members.

2. The 1st Respondent is the Central Bank of Kenya (hereinafter referred to as the CBK) which enacted the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 (hereinafter referred to as "the Regulations") pursuant to section 57 of the *Central Bank of Kenya (Amendment) Act*, 2021.

3. The 2nd Respondent is the Cabinet Secretary in charge of the Ministry of Treasury and National Planning who is mandated under section 3 of the Micro – Finance Act 2006 to make regulations applicable to specified non – deposit taking micro – finance institutions. He is hereinafter referred to as the CS.

4. The 3rd Respondent is the National Assembly that enacted the *Central Bank of Kenya (Amendment) Act*, 2021 that has had the effect of directing any person in digital credit business and not regulated under any other law to apply for a licence under the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 within six months of the publication of the regulations.

5. The 4th Respondent is the holder of the office of the Attorney General established under Article 156 of the *Constitution of Kenya*, 2010 (hereinafter referred to as the AG). He is sued in his capacity as the Legal Representative and Advisor to the Government of Kenya.

The Petition

6. According to the petition, the CS enacted the *Central Bank of Kenya (Amendment) Act*, 2021 (hereinafter referred to as the Amendment Act) that received presidential assent on 7th December 2021 and commenced on 23rd December 2021. The said *Act* amended section 57 of the Principal Act (*The Central Bank of Kenya Act*) and gave the CBK power to make regulations to give effect to the provisions of the *Amendment Act*. Further, the *Amendment Act* inserted section 59 into the *Principal Act* that required the said regulations to be made within three months of the coming into force of the *Amendment Act* enjoined persons in digital credit businesses not regulated under any other law to take out licences under the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 (hereinafter referred to as DCP Regulations) within six months of publication of such regulations.

7. It was pleaded that on 23rd December 2021, being the date of commencement of the said *Amendment Act*, the CBK announced through a press release the development of draft regulations and invited comments on the same. On 21st March 2022, the CBK through a press release announced publication of the *DCP Regulations* vide Legal Notice No. 46 of 18th March, 2022. Vide the said press release, the CBK stated that all previously unregulated Digital Credit Providers (hereinafter referred to as the DCPs) are required to apply to it for a licence within six months of the publication of the regulations, i.e by September 17, 2022, or cease operations. On 17th May 2022, the CBK issued a further press release reiterating the contents of the press release dated March 21, 2022.

8. According to the Petitioner, all this happened notwithstanding the fact that on 31st August 2021, the CS constituted an inter – agency committee whose sole mandate was to develop regulations for non – deposit taking Micro – Finance Businesses as mandated by section 3 of the *Micro – Finance Act*, 2006 which Committee met several times and developed a 1st draft of the regulations to regulate the sector. A second draft was subsequently worked on and submitted to the CS who is to finalize the process of making and eventual enactment of the regulations.

9. The Petitioner lamented that its members who include non – deposit taking micro – finance institutions have since found themselves being subjected to the requirement to take out licences under the *Regulations* since they are yet to be regulated as contemplated under *Microfinance Act* 2006. It was contended that the Petitioner's members are at the brink of suffering untold prejudice as they will unfairly and illegally be subjected to regulations whose net effect is to lump them up with digital credit providers thus limiting their operations and or completely closing them down.

10. This petition was premised on Articles 2, 10, 20, 21, 22, 23, 159(2)(e), 165, 258 and 259 of the *Constitution*.

11. The Petitioner contended that the *Amendment Act* is unconstitutional for failure to meet the public participation threshold. According to it, public participation is one of the key national values and principles set out under Article 10 of the *Constitution of Kenya* and therefore must be strictly observed by all persons, state organs and public officer in discharging their duties and therefore the National Assembly which enacted the said *Act* was bound to observe the said values and principles in ensuring that the process was inclusive, transparent and accountable. This, according to the Petitioner, would be in tandem with the provisions of Articles 118 and 295 which enjoins the National Assembly to conduct its business in a manner that is open to the public, facilitates public participation and involvement in the legislative process.

12. The Petitioner therefore invited the Court to declare section 59 of the *Central Bank of Kenya Act* and/or the entire *Amendment Act* unconstitutional for the reasons stated above therefore null and void.

13. It was further contended that in so far as the Regulations exempt institutions licensed under the Banking, *Micro – Finance Act*, *Sacco Societies Act* among others but fail to exempt non – deposit taking Micro – Finance businesses who are yet to be regulated under the *Microfinance Act*, the same are discriminatory against non – deposit taking micro finance institutions whose nature of business is similar to banks and institutions licenced under the *Micro – Finance Act*. According to the Petitioner, its members who are non – deposit taking micro - finance institutions just like banks, saccos and other institutions licensed under the *Micro – Finance Act* 2006 offer financial and non – financial services to their customers that include financial education and business management services which exposes them to human interactions with their customers and only use digital platforms as one of the platforms used to delivers financial services to their customers. It contended that it is the same understanding and principle that was applied by the National Assembly when it enacted the *Finance Act* 2022 that exempted non – deposit taking micro – finance businesses from the application of section 16 (2) (j) of the *Income Tax Act* that equally exempts Banks and micro and small enterprises. To the Petitioner, the exemption and the rationale negate the provisions of section 3 of the *Micro – Finance Act* 2006 which contemplates regulations to be made by the CS to regulate specified non – deposit taking micro – finance businesses.

14. It was its view that there is therefore no justifiable explanation that can be offered as to why the impugned regulations exempt banks, institutions licensed under the *Microfinance Act* 2006, Saccos among others and fail to exempt non – deposit taking micro – finance institutions yet they undertake the similar businesses. The Petitioner asserted that section 2 of the *Regulations* discriminate against

non – deposit taking micro – finance institutions who are members of the Petitioner and fails to accord them equal protection and benefit before the law contrary to Article 27 of the *Constitution*.

15. According to the Petitioner, its members right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was infringed upon by the Respondents. It was its case that the CS having been mandated by section 3 of the *Microfinance Act* to make regulations to regulate specified non – deposit taking businesses but failed to do so expeditiously and efficiently exposed the said business to the risk of being compelled to take out licences under regulations that are not fit for their businesses. Further, the decision of the CBK and the National Assembly to enact a law and make regulations that compel the non – deposit taking businesses to take out licences under the impugned regulations is unreasonable and adversely affects the said businesses warranting intervention from the Court. It was the Petitioners' position that section 59(2) of the *Central Bank of Kenya Act*, as introduced by the *Amendment* violates the Petitioners right to fair administrative action as it is unreasonable due to the following reasons:

    a. It seeks to place any other business that touches on digital credit and is not regulated under any other law under the ambit of the impugned regulations without considering the effects on the nature of people's businesses.

    b. It fails to appreciate the fact that all business currently run on digital platforms as one of the ways of delivering their services.

    c. It fails to recognize the fact there are business that touch on digital credit but offer others services alongside.

16. Consequently, it was pleaded, the impugned regulations under regulation 8 limit the activities of digital credit providers to provision of credit only through digital channels as contained in section 2 of the *Amendment Act* which essentially means if the non – deposit taking businesses were to be brought under the ambit of the said regulations, the businesses will have to collapse. Further, regulation 8(2) of the impugned *regulations* prohibits taking of cash collateral which acts as the only and main security of non – deposit taking micro – finance institutions therefore exposing them to the risk customers' breaches.

17. The Petitioner therefore invited the Court to find that Section 59(2) of the *Central Bank of Kenya Act* as introduced by the *Amendment Act* is unreasonable and therefore violates the Petitioners' members' right to fair administrative Action.

18. The Court was further invited to find that the actions and/or omissions of the 2nd Respondent in failing to expeditiously and efficiently enact regulations to regulate non – deposit taking micro – finance businesses as provided for under section 3 of the *Microfinance Act* 2006, violates the Petitioner's members' right to fair administrative action as protected by Article 47. It was the Petitioner's contention that it, on behalf of its members, sought audience with the CBK but it has been unsuccessful. The Petitioner's is therefore that it is not shielded from the requirements of section 9(2) of the *Fair Administrative Action Act*.

19. In support of its case, the Petitioner relied on the affidavit sworn by Caroline Kabui Karanja the Petitioner's Chief Executive Officer. According to her, on 13th July 2021, the Principal Secretary, National Treasury wrote to the Chairperson of the petitioner requesting him to nominate two persons to the inter – agency committee whose task was to develop regulations for non – deposit taking Micro – Finance Business in the country in line with section 3 of the *Microfinance Act*, 2006. The Petitioner complied, forwarded two names and on 31st August 2021, the Principal Secretary, National Treasury,

wrote to the Petitioner's Programmes Officer and Head of Legal informing them of their appointment to the inter – agency committee set up to develop the said regulations.

20. It was deposed that the said Committee commenced work and on 20th – 27th September 2021, they had their first workshop from which they developed an initial draft of the regulations that was forwarded to the Petitioner by the 2nd Respondent to give comments. Subsequent meetings were held by the said committee where they improved the initial draft and forwarded the same to the CS for further action.

21. It was averred that while this process was ongoing, on 7th December 2021, the President assented to the Amendment Act that commenced on 23rd December 2021, which *Act* gave the CBK power to make regulations to give effect to the said *Act* and further provided that persons engaged in digital credit business and are not regulated under any other law shall apply for a licence under the regulations to be developed under the *Act* within six months of publication of such regulations. According to the deponent, it was pursuant to the said requirement that the CBK on 23rd December 2021 which was the date of commencement of the *Amendment Act* 2021 issued a press release informing the public that it had developed draft regulations and invited the members of the public to give their comments. On 21st March, 2022, it was averred, the CBK issued another press release announcing publication by Legal Notice No 46 of March 18, 2022, of the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 that were now operational. The press release stated that all previously unregulated Digital Credit Providers are required to apply to CBK for a license within six months of the publication of the Regulations, i.e. by September 17, 2022 or cease operations. This position was reiterated by another press release on 17th May 2022 by the CBK.

22. In the meantime, it was averred, noting the complaints raised by the Petitioner's members' who operate in the non – deposit taking micro – finances business and the risk posed to them, the Chairperson of the Petitioner on 28th February 2022 wrote to the Governor of the CBK informing him of the ongoing process of enacting regulations to regulate non – deposit taking micro – finance institutions and why the Digital Credit Providers are distinct from the non – deposit taking micro - finance institutions. The letter elaborated the difference between the two and why non – deposit taking micro – finance institutions cannot be regulated under the *DCP Regulations*. However, the said letter did not elicit any response. This was followed up by another letter on 9th May 2022, by which the Petitioner reiterated the foregoing and informed the CBK of the dangers posed to its members in the non – deposit taking micro – finance business. Once again this letter did not elicit any response.

23. According to the deponent, since the 2nd draft of the regulations made under the *Microfinance Act* 2006 to regulate non – deposit taking micro – finance institutions were forwarded to the CS by the inter – agency committee in January this year, no action has been taken by the CS and since the National Assembly has since adjourned sitting sin die due to elections, it is not clear when and whether the said regulations shall be enacted as contemplated under section 3 of the *Microfinance Act* 2006.

24. It was disclosed that the CBK was set to close down members of the Petitioner who trade in non – deposit taking micro – finance businesses merely because they are yet to be regulated as contemplated under the *Microfinance Act* 2006, an action that portends extreme prejudice to the said members of the Petitioner who engage in a lot of activities by nature of their businesses and just like other entities exempted from the impugned regulations under regulation 2, non – deposit taking micro – finance institutions ought to be exempted pending the enactment of regulations to regulate the sector under the *Microfinance Act* 2006.

25. The deponent lamented that if the non – deposit taking micro – finance institutions are compelled to take out license under the impugned regulations, all of them will fold up since regulation 8 of the

impugned *regulations* will limit their activities to credit provision only and will prohibit them from taking cash collateral which is their only form of security.

26. The deponent revealed that on 21st June 2022, the President assented to the *Finance Act* 2022 that amended section 16(2)(j) of the *Income Tax Act* to exempt non – deposit taking micro – finance institutions from the applicability of the said section that provided for interest restriction based on the operating income otherwise known as Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA), just like Banks and other financial it is the same principle and understanding that ought to have been applied by the CBK in exempting the members of the Petitioner since their businesses just like banks, saccos and other entities licenced under the *Microfinance Act*, use digital channels as one of the ways of delivering financial services to customers. Their services are not limited to offering credit neither are they solely offered vide the digital platforms therefore compelling them to take out licences under the impugned regulations will highly prejudice the sector.

27. The Petitioner's case was that it is proper that members of the petitioner in the non – deposit taking micro – finance business are properly regulated as contemplated under section 3 of the *Microfinance Act* as opposed to lumping them up with digital credit providers who only offer credit services through digital channels and are not allowed to take cash collateral due to the nature of their business. The deponent clarified that the members of the Petitioner have not refused to be regulated but it is the CS who has failed to expeditiously enact the said regulations as mandated by section 3 of the *Microfinance Act*, 2006.

28. In a rejoinder to the replying affidavit sworn by Kennedy Kaunda Abuga on 20th July 2022, as well as the 3rd Respondent and sworn by Serah M Kioko on 2nd August 2022, the deponent while acknowledging that she was aware that there exists a Digital Lenders Association of Kenya (DLAK), it was her position that the entity is totally different from the Petitioner herein and its membership is comprised of digital lenders who are distinct from members of the Petitioner. According to her, the *Central Bank of Kenya (Digital Credit Providers) Regulations* targeted DLAK members but pursuant to the provisions of section 59(2) of the *Central Bank of Kenya Act* as introduced vide the *Amendment Act*, members of the Petitioner found themselves victims of the CBK's directive that directed any other person who before the coming into force of the *Amendment Act* was in digital credit business and is not regulated under any other law to apply for a licence under the *DCP Regulations* by the 17th of September 2022 failure to which they shall cease to exist.

29. She averred that the Petitioner did not participate as a stakeholder in the processes cited by the 1st and 3rd Respondents as they did not deem themselves Digital Credit Providers as defined by the *Amendment Act* which limits application of the *Act* to digital credit providers who carry out their businesses through digital channels. The Respondents collected comments from the Digital Lenders Association of Kenya to whom the *Act* and the *Regulations* targeted.

30. The deponent agreed with the CBK in its affidavit as well as the National Assembly, that the objects and reason for the Amendment Act were to regulate digital borrowing platforms as there was no law regulating the said entities. As for the members of the Petitioner, the *Microfinance Act* at Section 3 contemplates they are to be regulated under the said *Act* and the 2nd Respondent had duly commenced the process of enacting the said regulations but has since failed to conclude the process. In her view, the specified non – deposit taking micro – finance institutions contemplated under the *Microfinance Act* are Petitioners members also known as credit only micro – finances institutions whom their nature of business transcend beyond just credit provision but offer other services as opposed to what digital lenders do.

31. At all material times, it was averred, the non - deposit taking micro – finance institutions who are members of the Petitioner never considered themselves relevant stakeholders to the *Digital Providers Regulations* therefore never participated in their formulation as they were already engaged in a separate process that aimed at regulating the sector. As a matter of fact, the 1st, 2nd and 3rd Respondents equally never considered them relevant stakeholders as they never invited them to those discussions. Turning around to stall the process of regulating the Petitioner's members as provided for under the *Microfinance Act* and now requiring them to apply for licences under the *Digital Providers Regulations* is the most unreasonable and fair directives the 1st Respondent has made pursuant to the provisions of the section 59(2) of the *Amendment Act* which authorises them to do as such.

32. She denied that Petitioner or rather its members marked time and only approached court at last minute. Rather, the Petitioner has averred and demonstrated that it was engaged in a separate process that was meant to regulate its members and it is only until it occurred to them that the CS was taking his sweet time in finalizing the regulations and at the same time the CBK had sought to enforce the provisions of section 59(2) of the *Amendment Act* and given timelines whereby the members of the Petitioner faced a risk of being shut down that they approached court and sought for intervention.

33. Contrary to the averments of the CBK, the deponent stated that the Petitioner had identified from its wide range from members those who are specified non – deposit taking micro – finance institutions as they are distinctly categorised into the annexed list of members and referred to as credit only institutions. She joint hands with the averments by the CBK that the *regulations* were meant to regulate non – deposit taking micro – finance institutions only as provided under the *Microfinance Act* and not digital lenders. However, riding on the provisions of section 59(2) which the Petitioner impugns for being unreasonable, the CBK advised the CS to shelve the regulations on non – deposit taking institutions, an advisory that was never brought to the attention of the Petitioner at that point until it learnt of it through other sources.

34. Contrary to the averments contained in the affidavits by the CBK and Parliament, it was averred that the Petitioner in its letter dated 28th February 2022 acknowledged the fact that Section 59(2) of the *Amendment Act* unreasonably brings all credit providers not regulated under any other written law under the ambit of the *Digital Credit Providers Regulations*. It went further under highlighted the distinct nature of their members and why they cannot be regulated under the impugned *regulations*. The Petitioner therefore approached the Court and challenged National Assembly's administrative action vide the *Amendment Act* which has a chilling effect on their members. She reiterated that the *Amendment Act* was targeted at purely entities that deal purely in digital credit lending. It was however, unfortunate and unreasonable for the legislation to include any other person not regulated under any other law without considering the nature of businesses those other persons operate in yet the *Amendment Act* was specific on digital credit businesses that use digital channels as captured under Section 2 of the *Amendment Act*.

35. It was her position that it was wrong for National Assembly to conclude that members of the Petitioner undertake digital credit lending business yet just like any other persons operating in the era of technology use digital channels as one of the models of delivery of the services. According to her, it is false and unfair for the CBK to state that the Petitioner is seeking to shield its members from licensing, compliance with Anti – Money Laundering Rules and Consumer Protection measures yet the Petitioner is the one that has been pushing for the regulation of its members acknowledging the challenges presented by them being unregulated in its letters to the 1st Respondent. The draft regulations also covered the Anti – money Laundering and Consumer protection issues therefore it

is not true for the 1st Respondent to make such allegations when the Petitioner and its members are pushing to be regulated but properly and without negatively impacting their businesses.

36. Further, it is false as alleged by the CBK in its affidavit that the Petitioner seeks to gain an undue advantage by allowing its members to operate in an unregulated business environment when one of the orders sought by the Petitioner is to compel the 2nd Respondent to enact regulations under the *Microfinance Act* to regulate its members. The Petitioner averred that it in its Pleadings, attached documents, specifically the letter dated February 28th 2022 and enumerated the unique nature of its members' business and even distinguished between the Digital Credit Providers and the Non – Deposit Taking Micro – Finance Business. She expounded that members of the Petitioner already offer other services therefore it would be unreasonable to require them to apply to the 1st Respondent for provision of services they already provide when there are no any guidelines on the same and that the directive by the CBK did not envisage the averments in the CBK's affidavit.

37. The deponent deposed that putting the Petitioner's members under the impugned *regulations* will limit their mode of delivery to digital platforms only as defined under the *Amendment Act* therefore most of their other items, more so the physical offices set up at high costs will be rendered useless as that would mean they cannot continue interacting with clients physically, a position confirmed by the National Assembly in its affidavit where they state that the licences introduced in this case are specific to the regulation and oversight of the Digital Credit Services, its however not true that those are the only services offered by members of the Petitioner as contended in that affidavit. It was explained that members of the petitioner mobilize cash collateral as loan guarantee funds that are used for onward lending. It does not amount to deposit taking but it's an old age practice that is used by non – deposit taking institutions to check the credibility of the customer and largely for to borrow elsewhere for onward lending.

38. Based on legal advice, the deponent averred that the amendments to Section 16(2)(j) of the *Income Tax Act* through the *Finance Act* 2022 as much as were geared towards a different legislative purpose but the reasoning was the same parliament having taken views on the impact caused on non – deposit taking micro finances. Contrary to the averments in the CBK's affidavit, the Petitioner impugns the provisions of section 59(2) of the *Amendment Act* which gave the 1st Respondent powers to enact the impugned *regulations*. The Petitioner's intention is not to suspend the timelines for compliance but to revoke the applicability of the said section in so far as it seeks to compel members of the petitioner to apply for licences under the impugned regulations.

39. The deponent therefore believed that this petition is merited as its members are set to be subjected to serious prejudice if the challenged section is not revoked as prayed.

40. The Petitioner therefore sought the following orders:-

    1. A declaration be and is hereby issued that *Central Bank of Kenya (Amendment) Act*, 2021 violates Article 10 of the *Constitution* and is therefore Unconstitutional.

    2. A declaration be and is hereby made that Section 59(2) of the *Central Bank of Kenya Act* as introduced by *Central Bank of Kenya (Amendment) Act*, 2021 violates the Petitioner's members' rights under Articles 27 and 47 of the *Constitution* in as much as it purports to compel non – deposit taking micro – finance businesses to take out licenses under the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022.

    3. An order be and is hereby issued suspending implementation of section 59 (2) of the *Central Bank of Kenya Act* as introduced by the *Central Bank of Kenya (Amendment) Act*, 2021 in as

much as it seeks to compel non – deposit taking micro – finance businesses to take out licenses under the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022.

4. A Declarationthat *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 violate the Petitioner's members' rights under Article 27 therefore Unconstitutional to the extent that it discriminates against non – deposit taking micro – finance institutions.

5. An order of mandamus compelling the 2nd Respondent to make and/or finalize regulations to regulate specified non – deposit taking micro – finance businesses in accordance with section 3 of the *microfinance Act* 2006.

6. The Respondents be and are hereby directed bear the costs of this Petition.

7. Such other appropriate reliefs that this Honorable Court may deem expedient to meet the ends of justice.

Petitioner's Submissions

41. The Petitioners submitted that they had met the threshold for the grant of the orders sought in the Petition since the impugned provisions being Section 59(2) of the *Central Bank of Kenya Act* as well as the *Central Bank of Kenya (Digital Credit providers) Regulations* 2022 violate the Petitioner's members' (non-deposit taking micro-finance institutions) constitutional rights and freedoms.

42. After setting out the background and while reiterating the averments in the affidavits, it was submitted that Section 59 of the *Central Bank of Kenya Act* was introduced by Section 7 of the *Central Bank of Kenya (Amendment) Act* 2021.

43. Reference was made to Section 2 of the *Microfinance Act*, 2006 which defines the non-deposit taking microfinance business to mean non-microfinance bank business. Non-microfinance bank business is then defined to mean microfinance business, other than microfinance bank business as defined under this Act. In a nutshell, it was submitted that the non-deposit microfinance business carries out more similar business with micro-finance business only that they do not take deposits from their members.

44. It was explained that the Applicability of the *Microfinance Act*, 2006 in respect of non-deposit taking microfinance institutions is provided for under Section 3 of the same *Act*.

45. The Petitioners submitted that it thus goes without saying that their business is recognized under Section 3 of the *Microfinance Act* and the CS herein is mandated to make regulations applicable to non-deposit taking microfinance business institutions, a step which was initiated by the CS on 31st August 2021 (15 years after the enactment of the *Microfinance Act*, 2006).

46. The Petitioner reiterated the steps taken by the said Committee and submitted that to date the said regulations are yet to be enacted for reasons unknown to the Petitioner and its members. Instead, the National Assembly enacted the *Amendment Act*, that received presidential assent on 7th December 2021 and commenced on 23rd December 2021.It was however submitted that the mischief which the said amendment Act intends to cure can be seen from the Report of the Departmental Committee on Finance and National Planning on the Consideration of the *Central Bank of Kenya (Amendment) Bill (National Assembly) Bill* No. 10 of 2021 (Annexure SK3 of the 3rd Respondent Replying affidavit) on Page 8 of that Report (i.e. page 16 of the entire bundle) which indicates:

> The penetration of mobile money in Kenya has also led to the widespread use of digital credit as a result new financial technology companies popularly referred to as fintechs entering the market. The growth in digital credit access has also seen traditional brick and mortar

> banks launch specific products that are targeted to be offered on digital applications. Due to myriad challenges paused by the unregulated digital credit products, it has become necessary to develop a sound regulatory framework that will ensure that the service providers are licensed by the Central Bank of Kenya through the introduction of the *Central Bank of Kenya (Amendment) Bill* 2021 ... Currently, there is no legal framework governing digital borrowing platforms. As such, the Central Bank of Kenya will have an obligation of ensuring that there is a fair and non-discriminatory marketplace for access to credit.

47. In a nutshell, it was submitted, the mischief the said law intends to cure is the challenges that have been posed by the unregulated digital credit products where there is no human contact between the Lender and the customer. However, the Petitioner's members do not fall under the said category to say the least and the nature of the business involves more than just credit lending through digital platforms. The Petitioner therefore submitted that Section 6 of the *Amendment Act* amended section 57 of the *Principal Act*.

48. It was submitted that most of institutions which conducted businesses similar to the business carried out by the Petitioner's members were exempted from taking out the license under the said Regulations under Regulation 2 of the said *Regulations*. To that end, despite the Regulations which are to regulate the Petitioner's members being at advanced stage and only pending enactment, the Petitioner's members have since found themselves being subjected to the requirement to take out licenses under the *DCP Regulations* since they are yet to be regulated as contemplated under Section 3 of the *Microfinance Act*, 2006. It was the Petitioner's submissions that its members are at the brink of suffering untold prejudice and restriction to the nature of business they have been conducting as they will unfairly and illegally be subjected to regulations whose net effect is to lump them up with digital credit providers.

49. It was submitted on behalf of the Petitioners that the said Regulation 2 of *DCP Regulations* is discriminatory and violates the Petitioner's member's right as guaranteed under Article 27 of the *Constitution*.

50. According to the Petitioner its members who are non-deposit taking microfinance institutions just like banks, saccos and other institutions licensed under the *Microfinance Act*, 2006 offer financial and non-financial services to their customers that include financial education and business management services which expose them to human interactions with their customers. Just like banks and Saccos, they only use digital platforms as one of the platforms used to deliver financial services to their customers. It was therefore submitted that the said impugned provision violates the Petitioner's members' right of equality; equal protection and equal benefit of the law and freedom from discrimination as guaranteed under Article 27 of the *Constitution*. The Petitioner contended that it is discriminatory to treat persons in relevantly similar business differently, without any objective and reasonable justification and relied on the Canadian Supreme Court case of *Andrews v Law Society of British Columbia* [1989] I SCR 143.

51. It was the Petitioner's submissions that there is no justifiable rationale and objective that has been offered by the Respondents as to why the impugned regulations exempted banks, microfinance bank businesses licensed under *Microfinance Act*, Saccos among others and the same failed to exempt the non-deposit taking microfinance institutions yet they undertake similar businesses only that the later does not receive deposits from its customers.

52. In the Petitioner's view, this amounts to discrimination and violation of their right of equal protection and benefit before the law and relied on *Nelson Andayi Havi v Law Society of Kenya & 3 Others* [2018] 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 Party) (Constitutional Petition E005 & E001 (Consolidated) of 2021) [2021] KEHC 9748 (KLR) (20 September 2021) (Judgment) at paragraphs 370-376.

53. Reference was made to the case of *EG & 7 Others v Attorney General; DKM & 9 others* (Interested Parties); Katiba Institute & another (Amicus Curiae) and it was noted that whereas the National Assembly's suspension was that the institutions which have been exempted are already regulated and controlled by Central Bank of Kenya and other licensing entities, none of the Respondents has offered an explanation why the regulations regulating non-deposit taking micro-finance businesses have never been enacted pursuant to Section 3 of the *Microfinance Act*, since 2006. It was submitted that the Petitioner's members' carry out other businesses apart from credit lending to its customers. This is an economic right which they have continued to enjoy over time and this is not disputed by either of the Respondents. However, if they are now compelled to comply with *DCPs Regulations* the nature of their services shall be restricted by dint of Regulation 8 of the *DCP regulations*.

54. It is submitted that the Petitioner's members now have to stop all other activities save for provision of credit until an approval is given by the Central Bank of Kenya and that this is a limitation of their rights which they have enjoyed over time offering other services to their customers. According to the Petitioners, for such restriction and limitation to be sustained, it must meet the threshold outlined under Article 24 of the *Constitution*. However, the restrictions posed on the Petitioner's members' business by the *DCP Regulations* does not meet the threshold set out under Article 24 of the *Constitution*.

55. It was further submitted that public participation is one of the national values and principles in our *Constitution* which must be observed by all persons; state organs and public officers in the exercise of their responsibilities and that under Article 10 of the *Constitution* public participation is an irreducible minimum in the law-making process. In this regard reliance was placed on the decision of Lenaola, J (as he then was) in *Nairobi Metropolitan Psv Saccos Union Limited &25; Others v County of Nairobi Government & 3 Others* [2013] eKLR.

56. It was contended that Section 5 of the *Statutory Instruments Act* requires a regulation-making authority to, before issuing a statutory instrument, make appropriate consultations with persons who are likely to be affected by the proposed instrument. Specifically, section 5(3)(a) of the *Statutory Instruments Act* requires a regulation making authority to notify, either directly or by advertisement, bodies that, or organizations representative of persons who, are likely to be affected by the proposed instrument. In this case, the Respondents did not issue such notifications nor did they discharge their duty to consult under the said section 5 of the said *Act*. No evidence of advertisement or other form of notification has been presented by the Respondents to this Court. It was submitted that public participation must be qualitative and meaningful and not just cosmetic and the threshold test for qualitative and meaningful public participation under the Constitution has already been defined by the Courts. In this regard the Petitioner relied on the decision of Majanja, J in *Commission for the Implementation of the Constitution v Parliament of Kenya & Another & 2 Others* [2013] eKLR.

57. According to the Petitioner, the public and petitioner were not given a reasonable opportunity to submit their views on the impugned Regulations yet actual, meaningful and qualitative public participation is the test as illusory participation does not pass muster and reliance was placed on *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR, *Republic v County Government of Kiambu Ex parte Robert Gakuru & Another* [2016] eKLR, *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR, *Doctor's for life International v The Speaker National Assembly and Other* (CCT12/05) [2006] ZACC 11) as adopted in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1)

BCLR 47 (CC) as adopted in *Republic v County Government of Kiambu Ex parte Robert Gakuru & Another* [2016] eKLR.

58. According to the Petitioner, in submitting the Regulations to both Houses of Parliament, the 1st Respondent should also have ensured that a copy of a regulatory impact statement and a compliance certificate was also presented therewith as required by section 7(5) of the *Statutory Instruments Act*. It was contended that there was no public participation in the legislative process leading to the enactment of the impugned Section of the law. In addition to the foregoing, Article 259(1) of the *constitution* behoves the court when interpreting the *constitution* to do so in a manner that promotes its values and purposes and advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights and that one of the values and principles of our constitution is public participation.

59. The Petitioner, further contended that its members right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was infringed upon by the Respondents. According to the Petitioner, though the CS was mandated by the *Microfinance Act*, 2006 to make regulations that regulate the non-deposit taking micro finance businesses by dint of Section 3 of the said *Act*, despite a second draft having been submitted to the CS the same have never been enacted without any justifiable explanation being offered. Though the CBK stated that it informed the CS to put on hold the draft Regulations regulating the non-deposit taking microfinance institutions and to have the *DCP Regulations* implemented first, the Petitioner submitted that these reasons and rationale behind putting on hold the said regulations, was never brought to the attention of the Petitioner's members who had been involved in the drafting of the *Regulations* regulating the non-deposit taking microfinance businesses. To the Petitioner, having been part of the drafting process of the said draft regulations, the Petitioner's members had a legitimate expectation that the same should be enacted soon thereafter and if there was any delay as it is now, reasons thereof must be communicated to the Petitioner's members. In this regard the Petitioner relied on Article 47 of the *Constitution* Section 4 of the *Fair Administrative Action Act*, 2015 and submitted that it is unconstitutional and violation of the Petitioner's members right to fair administration action for the 1st and 2nd Respondent to decide to have them regulated through the *DCP Regulations* while all along they had engaged them in drafting of the *Regulations* that would regulate their business owing to the unique nature of their business as compared to the usual digital credit providers without notice and/or reasons. In fact, it was submitted that it is evident from the CBK's Replying Affidavit that they continued with the drafting of the regulations on non-deposit taking micro finance business even after the enactment of the *Amendment Act*.

60. According to the Petitioner, since the 1st and 2nd Respondent indeed appreciated the unique nature of business undertaken by the Petitioner's members as compared to the usual digital credit providers, to that end, to abruptly put on hold the enactment of those regulations with no communication whatsoever was in violation of the Petitioner's members' right to fair administrative action and right to legitimate expectation. In its view, the omission by the CS to enact the regulations regulating the non-deposit taking microfinance businesses after a final draft was submitted to it amount to violation of the right to fair administrative action and it relied on the definition of "administrative action" in Section 2 of the *FAA Act*, *Law Society of Kenya v Attorney General & 2 others* [2022] eKLR and *Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti* [2018] eKLR

61. In the Petitioner's submissions, it is very clear from the CBK's Replying Affidavit that the Petitioner's members are now required to take out licenses under the impugned regulations, *DCP Regulations* which is unreasonable, unjustifiable and adversely affects their businesses. The Petitioner further submitted that Section 59(2) of the *Central Bank of Kenya Act* and the regulations made thereunder, violates the Petitioner's right to fair administrative action as it is unreasonable for the following reasons:

a) It seeks to place all other business that touch on digital credit and is not regulated by any other law under the ambit of impugned section and regulations;

b) It fails to appreciate the fact that all business currently run-on digital platforms as one of the ways of delivering their services;

c) It fails to recognize the fact that there are business that touch on digital credit but offer other services alongside the credit business.

62. It was reiterated that Regulation 8 of the impugned regulations limit the activities of digital credit providers to provision of credit only, which essentially means if the non-deposit taking businesses were to be regulated under the impugned provisions, the nature of their businesses will be restricted and consequently collapse. Further, Regulation 8 (2) of the impugned regulations prohibits taking of cash collateral which acts as the only and main security for non-deposit taking micro-finance institutions therefore exposing them to the risk customers' breaches.

63. In view of the foregoing, this Court was urged to grant the reliefs sought in the Petition.

The 1st Respondent's Case

64. The 1st Respondent, the Central Bank of Kenya, in opposing the petition relied on the replying affidavit sworn by Kennedy Kaunda Abuga, the General Counsel at the Central Bank of Kenya.

65. It was averred by the deponent that the Central Bank of Kenya is established under Article 231(1) of the *Constitution of Kenya* and is mandated to, inter alia, formulate monetary policy, promote price stability, issue currency, and perform other statutory functions as may be conferred by an Act of Parliament. Under Section 57 of the *Central Bank of Kenya Act*, the CBK has the power to prescribe regulations, issue guidelines, circulars, and directives for the purpose of giving effect to the provisions of the *Act* and generally for the better carrying out of the objects of the CBK. Under Section 33(4) of the *Banking Act*, the CBK may issue guidelines to institutions licensed under the Act especially on standards of conducting business and the maintenance of stability, efficiency of the banking and the financial system in Kenya as recognised by Section 31(3)(b) of the *Act*.

66. It was deposed that under Section 48(1) & 2A of the *Microfinance Act*, 2006, the CBK may (with the approval of the CS, National Treasury) make regulations, or issue directions and guidelines to institutions licensed under the *Act* for the better carrying out of their functions. It was averred that pursuant to Section 3(1) of the *Microfinance Act*, 2006, the Act only applies to deposit taking microfinance businesses and specified non-deposit taking microfinance businesses. Under Section 3(2) of the *Microfinance Act*, the Cabinet Secretary, National Treasury is to make regulations specifying the non-deposit taking microfinance businesses to which the *Act* applies and prescribe measures for the conduct of their business. This is not to cover all non-deposit taking microfinance businesses.

67. According to the deponent, in the absence of the regulations above, all non-deposit taking microfinance businesses were left outside the ambit of regulation under the *Microfinance Act* and that this non-regulation caused a situation where the members of the public complained of the conduct of non-deposit taking microfinance institutions particularly those in the digital credit business. These issues, it was averred, range from predatory practices, high cost of facility and other charges up to 200% p.a.; unethical debt collection practices including contacting personal contacts of borrowers; and abuse of personal information, among others. There were also concerns about money laundering and financing of terrorism.

68. In order to address this legal lacuna, it was disclosed that three initiatives were taken by the Members of the National Assembly to regulate them. The first initiative was taken by the late Hon. Oroo Oyioka who sponsored the *Central Bank of Kenya (Amendment) Bill*, 2020 dated 3rd June 2020 which sought to amend Section 4A of the *Central Bank of Kenya Act* to enable the CBK to regulate and supervise the conduct of digital financial products and services. The second initiative was sponsored by Hon. Gideon Keter who sponsored the *Central Bank of Kenya (Amendment) Bill*, 2020 which sought to introduce Sections 43A to 43E enabling the CBK to license and regulate digital credit lenders. The third initiative was sponsored by the Departmental Committee on Finance and National Planning (hereinafter referred to as "the Committee") chaired by Hon. Gladys Wanga who prepared the *Central Bank of Kenya (Amendment) Bill*, 2021 dated 31st March 2021 whose principal object was to amend the *Central Bank of Kenya Act* to provide for licensing of digital credit service providers, who are not regulated under any other law. The Memorandum of Objects and Reasons confirmed that there was no legal framework governing digital borrowing platforms. The CBK was to ensure a fair and non-discriminatory marketplace for access to credit.

69. It was deposed that pursuant to Articles 10 and 118(1)(b) of the *Constitution of Kenya* 2010 as read with Standing Order 127(3) of the *National Assembly Standing Orders*, the Clerk of the National Assembly, the 3rd Respondent herein published a Notice in the Standard Newspaper publication of Friday, 21st May 2021. The Clerk informed the members of the public that the Bill was read for the first time on 11th May 2021 and committed to the Departmental Committee on Finance and National Planning for consideration. The Clerk invited the members of the public and relevant stakeholders to submit memoranda on the Bill in writing addressed to the Clerk not later than Friday, 28th May 2021 at 5.00 pm.

70. Pursuant to the aforesaid advert, it was averred that all the relevant stakeholders including the CBK, Office of the Data Protection Commissioner, Communications Authority of Kenya, ICPAK, Digital Lenders Association of Kenya, The Kueq Limited, Safaricom PLC, Pricewaterhouse Coopers Limited, Lawyers Hub, ECM Consulting Group LLP, Anjarwalla & Khanna Advocates LLP, CM Advocates LLP forwarded written Memoranda to the Committee. The Committee considered each Memorandum and met all the relevant stakeholders prior to preparing their report and the Governor of the CBK appeared before the Committee on 13th July 2021 and made presentations in that regard. Having taken into account the memoranda and contributions by all relevant stakeholders, the Committee recommended the passage of the Bill as amended and the National Assembly passed the *Amendment Act* which was assented to on 7th December 2021 and became operational on 23rd December 2021.

71. In light of the foregoing circumstances, the deponent believed that the *Amendment Act*, 2021 underwent extensive public participation as required by Articles 10(2), 118(1)(b) and Standing Order No. 127 of the *National Assembly Standing Orders*. Section 59(1) of the *Amendment Act* tasked the CBK to make the regulations within three months from the commencement date of the *Regulations* while Section 59(2) thereof enjoined all persons in the digital credit business but not regulated by any other law to apply for a license from the CBK under Section 33S of the *Amendment Act* within six months of the publication of the *Regulations*.

72. It was deposed that on 23rd December 2021 and in exercise of its statutory mandate under Sections 57(1) and 59(1) of the *CBK Act*, the CBK published the *Draft Central Bank of Kenya (Digital Credit Providers) Regulations*, 2021. In deference to the requirement for public participation under Article 10(2) of the *Constitution*, the CBK called for comments from all stakeholders on the *Draft Regulations* by Friday, 21st January 2022 at 5.00 pm and in the same press release of 23rd December 2021, the CBK

informed all unregulated Digital Credit Providers to provide their business details to the CBK through a link: *https://www.centralbank.go.ke/dcpdetails/*in order to to ensure and facilitate an orderly transition to a regulated environment. It was deposed that the members of the public and all other stakeholders provided valued feedback to the CBK on the *Draft Regulations* which the CBK considered including members of the Petitioner herein. Having incorporated the comments from all the stakeholders, the CBK published the same vide Legal Notice No. 46 (Legislative Supplement No. 23) of 18th March 2022 thus promulgating the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 (hereinafter referred to as "the DCP Regulations").

73. In light of the foregoing circumstances, the deponent believed that the *DCP Regulations* underwent extensive public participation as required by Article 10(2) of the *Constitution* and the *Statutory Instruments Act*, 2013. Accordingly, on 21st March 2022, the CBK informed the members of the public and all Digital Credit Providers that the *DCP Regulations* had been published and were now operational and that they were required by Section 59(2) of the *CBK Act* to apply for licences within six months from 18th March 2022 (by 17th September 2022) or cease operations. The CBK confirmed to the stakeholders that it would work with them to ensure that the regulations work for and with Kenyans and in accordance with the best practices.

74. It was confirmed that the *Amendment Act*, 2021 and the *DCP Regulations* have been operation for about seven (7) and four (4) months respectively and that though the Petitioner was aware of the timelines imposed by statute and it did not take up any cudgels with the draft or the approved enactments as soon as they were passed and/or promulgated. According to the deponent, for the Petitioner to wait until about a month to the deadline for the licensing to then come to Court under Certificate seeking stay or suspension of Section 59(2) of the *Amendment Act* is not only an unreasonable delay, but a gross abuse of the Court process and manifests mala fides on the part of the Petitioner thereby disentitling it to any remedy before this Court.

75. The deponent deposed that in accordance with the provisions of Section 11(1) of the *Statutory Instruments Act*, No. 23 of 2013, on 22nd March 2022 the CBK transmitted the *DCP Regulations* to the Clerk of the National Assembly for tabling before the National Assembly's Committee on Delegated Legislation and that the *DCP Regulations* were tabled before the Committee on Delegated Legislation on 23rd March 2022 and approved by the National Assembly on 14th May 2022. On 25th May 2022, the CBK received a confirmation from the Clerk of the National Assembly that the National Assembly had acceded to and/or approved the *DCP Regulations* under Standing Order No. 210(4)(a) of the *National Assembly Standing Orders*.

76. It was therefore asserted that both the *Amendment Act* and the *DCP Regulations* went through the complete legislative framework envisaged under Article 94 of the *Constitution of Kenya,* 2010 as read together with the provisions of the *Central Bank of Kenya Act* and the *Statutory Instruments Act*, 2013. According to the deponent, both the National Assembly and the CBK undertook wide and consultative public participation in the review and formulation of the *Amendment Act* and the *DCP Regulations* and accorded each comment received the weight it deserved from individuals and all stakeholders including the Competition Authority of Kenya (CAK) on the consumer protection concerns adopted in the *Amendment Act* and *Regulations*.

77. According to him, the Petitioner herein had a chance to present a memorandum to the National Assembly's Committee on Finance and Planning and to the CBK during public participation, but it did not take up the opportunity. It cannot now complain about lack of public participation in the enactment of the *Amendment Act* and the *DCP Regulations*. In his view, the belated attempts in the letters of 9th May 2022 and 28th February 2022 from the Petitioner herein are of no momentum and

could not help much as they were raised after the enactment of the *CBK Amendment Act*, 2021 and the passage of the *DCP Regulations*. It was disclosed that in the Petitioner's letter dated 28th February 2022, the Petitioner acknowledged the challenge of unregulated digital credit providers including questions of high interest and charges on loans, unethical debt collection practices and misuse of personal data and therefore appreciates the need for regulation. Further, the Petitioner acknowledges that the non-deposit taking microfinance institutions are not regulated by the *Microfinance Act*, 2006 and confirms that the Cabinet Secretary, National Treasury is yet to make regulations required under Section 3(2) of the *Microfinance Act*, 2006 specifying the non-deposit taking microfinance businesses to which the *Act* applies and prescribing measures for the conduct of their business. The Petitioner has equally not identified which of its members are specified and would fall within the ambit of the regulations under Section 3(2) of the *Microfinance Act*, 2006.

78. The deponent confirmed that while the *Amendment Act* was still before the National Assembly, the CS, National Treasury by a letter dated 13th July 2021 wrote to the CBK Governor requesting for two nominees to the Inter-Agency Committee to develop the Regulations for the non-deposit taking microfinance businesses. It was noted that the CS, National Treasury echoed the challenges caused by the non-regulation of the non-deposit taking microfinance institutions. Pursuant thereto the Governor of the CBK nominated Mr. Evans Kebabe and Ms. Georgina Muthama to the Inter Agency Committee who were appointed on 31st August 2021 and on 3rd November 2021, the CBK received the Draft Non-Deposit Taking Microfinance Business Regulations, 2021 for its comments. On 22nd December 2021, the CBK received an invitation from the Cabinet Secretary, National Treasury inviting the two nominated members and an experienced officer from the CBK to participate in the Inter-Agency Workshop from 24th – 31st January 2022.

79. It was deposed that on 20th January 2022, the CBK responded to the CS National Treasury and gave its views on the Draft Non-Deposit Taking Microfinance Business Regulations, 2021 in which the CBK was categorical that the *Amendment Act*, 2021 had brought all the unregulated digital credit providers under the regulation and supervision by the CBK and further informed the National Treasury that the Draft Regulations be put on hold to enable the CBK to fully implement the *Regulations*, then a review of implementation can be done to establish whether there are any non-deposit taking credit institutions outside the regulatory perimeter necessitating a further review of the legal framework. The CBK undertook to address all the grave public concerns surrounding the digital credit providers within the purview of the *Amendment Act* and *DCP Regulations*. The deponent believed that in light of the CBK's comments, the National Treasury deferred the finalization of the Draft Regulations to enable the CBK implement the *Amendment Act* and the *DCP Regulations*.

80. It was noted that the Petitioner has conceded in its letter dated 28th February 2022 that under the *Amendment Act*, 2021, the definitions under Section 2 of the *Amendment Act* brings all the unregulated non-deposit taking microfinance businesses into the ambit and regulation of the CBK under the *DCP Regulations*. Consequently, the clear intention of Parliament is to bring all unregulated digital credit providers including the Petitioner's members under the regulation and supervision of the CBK- which the Petitioner clearly admits was done. It was therefore averred that it is wrong for the Petitioner to now seek to be exempted from compliance with the *Amendment Act* and the *DCP Regulations* which are clear, were procedurally and lawfully passed and/or approved by the National Assembly in exercise of its legislative power under Article 94 of the *Constitution of Kenya*, 2010.

81. The deponent believed that through this Petition and Application, the Petitioner seeks to avoid being subject to licensing, reporting and regulatory scrutiny of the sources of their members financing. The Petitioner also seeks to avoid its members' compliance with the *Proceeds of Crime and Anti Money Laundering Act*, 2009 which demands them to report all suspicious transactions to the

Financial Reporting Centre which will weaken Kenya's compliance with the International Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) obligations which are presently under review by the Eastern and Southern Anti-Money Laundering Group.

82. It was further averred that the Petitioner seeks to avoid compliance by its members with the consumer protection measures including fair treatment, transparency, requirement for furnishing notices to customers before increasing the cost of credit and disclosing the total costs of credit.

83. Based on legal advice, it was deposed that for one to claim its freedom from discrimination protected under Article 27 of the *Constitution* has been violated, it has to prove that the alleged act is not only unreasonable but also arbitrary and that it does not rest on any rational basis having regard to the objects for which the enactment was done. In this case it was averred that the *Amendment Act* and the *DCP Regulations* were clearly designed to bring all unregulated digital credit providers including the Petitioner's members under the regulation and supervision of the CBK. According to the deponent, the Petitioner has not demonstrated how the bringing of all the admittedly unregulated digital credit providers to the ambit of regulation by the CBK is discriminatory to its members. In any event, it was averred that the *Amendment Act*, 2021 and the *DCP Regulations* are clear that they only cover those unregulated DCPs and do not cover institutions licensed and regulated under the *Banking Act*, the *Microfinance Act*, 2006, the *Sacco Societies Act*, 2008, which are subject to licensing, reporting, regulation, consumer protection and compliance with the reporting obligations under the *Proceeds of Crime and Anti Money Laundering Act*, 2009, which the Petitioner seeks to be exempted from.

84. In the deponent's view, it is the Petitioner herein that seeks to gain an undue advantage by allowing its members to operate in an unregulated business environment and expose the people of Kenya to lawlessness where the non-deposit taking microfinance institutions would continue with their predatory practices, high cost of facility interest and other charges, unethical debt collection practices, and abuse of personal information, among others. It was averred that in any event, differential treatment under Regulation 2 of the *DCP Regulations* cannot by any figment of imagination amount to discrimination of the Petitioner's members as alleged.

85. It was averred that the Petitioner has failed to identify the peculiar or unique nature of its members' business model which would require exclusion from the *DCP Regulations*. According to the deponent, in respect to the additional services provided members of the Petitioner including financial education and business management services, the *DCP Regulations* under Regulation 8(1)(b) allows the digital credit providers to provide credit and any other services or activity approved by the CBK from time to time. Consequently, there is no bar to the members of the Petitioner providing additional services including financial education and business management services. What they are required to do is to request the CBK to approve those additional services which the CBK will consider in accordance with the Regulations and approve. In respect to Regulation 8(2) of the *DCP Regulations*, it was confirmed that the taking of cash collateral is a form of deposit taking activity regulated under the *Banking* and *Microfinance Acts*. It is therefore illegal for any entity describing itself as a non-deposit taking microfinance institution to accept cash collateral under Section 3 of the *Banking Act* and Section 4 of the Microfinance Act. In the deponent's belief, Regulation 8(3) of the *DCP Regulations* only emphasizes what is already proscribed by the *Banking* and *Microfinance Acts*. Therefore, any of the Petitioner's members whose business model includes taking cash as collateral is required to obtain a license from the CBK under the *Banking Act* and/or the *Microfinance Act* hence there is no demonstrable breach or violation of the right to Petitioner's or its members right to a fair administrative action as alleged.

86. It was the deponent's position that the Petitioner herein has not demonstrated how its rights, or the rights of its members have been violated or are prejudiced by them complying with the *Amendment*

Act and the *DCP Regulations* which are now in operation. On the contrary, there was adequate and wide public participation in developing both the *Amendment Act* and the *DCP Regulations*, there is no discrimination against the Petitioner or any of its members by the *Amendment Act* and the *DCP Regulations* and that there is no breach of the right to fair administrative action as alleged and the Petitioner did not demonstrate how the loss will occur or the specific prejudice that its members will suffer if they comply with the law and are regulated in accordance with the *Amendment Act* and the *DCP Regulations*.

87. It was noted that the Petitioner does not challenge Section 33S of the *Amendment Act* which requires the Petitioner's members to obtain licenses to continue conducting digital credit business, yet they want to suspend the timelines for compliance without identifying what challenges they face in respect of compliance with the law and have not sought any guidance from the CBK to address the requirements for compliance as timelines are imposed by statute and the CBK cannot vary the same. It was therefore contended that the Petitioner's Petition is unmerited, misconceived, incompetent and an abuse of the court process and the Court was urged to dismiss it with costs to the 1st Respondent herein.

1st Respondent's Submissions

88. On behalf of the 1st Respondent, it was submitted that the Petitioner is an Association of Micro-Finance Institutions in Kenya and it has the following members: banks, wholesale microfinance institutions, microfinance banks, credit only institutions, Saccos, and development institutions. Its membership includes entities regulated under the *Banking Act*, the *Microfinance Act*, 2006, and the *Sacco Societies Act*, 2008. The Petitioner also draws a large number of its members from entities not regulated under any law, also known as Credit Only Institutions.

89. It was however submitted that pursuant to Section 3(1) of the *Microfinance Act*, 2006, the *Microfinance Act* only applies to deposit taking microfinance businesses and specified non-deposit taking microfinance businesses while Section 3(2) of the said *Act* states that the Cabinet Secretary, National Treasury shall make regulations specifying the non-deposit taking micro-finance businesses to which the Act applies and prescribe measures for the conduct of their business. However, this is yet to be done. In the absence of the Regulations above, it was submitted that all non-deposit taking microfinance businesses were left outside the ambit of regulation under the *Microfinance Act*, a situation that led to complaints from the members of the public on the conduct of non-deposit taking microfinance institutions particularly those in the digital credit business including predatory practices, high cost of facility and other charges up to 200% p.a., unethical debt collection practices including contacting personal contacts of borrowers, and abuse of personal information, among others and concerns about money laundering and financing of terrorism.

90. While reiterating the averments in the replying affidavit, it was submitted that the following issues falls for determination:

    a) Whether there was public participation in the enactment of the Impugned Section 59 of the *Amendment Act*?

    b) Whether Regulation 2 of the *DCP Regulations* discriminates and/or violates the Petitioner's members' rights under Article 27 of the *Constitution*?

    c) Whether Section 59 and the *DCP Regulations* violated the Petitioner's right to a fair administrative action protected under Article 47 of the *Constitution of Kenya*, 2010; and

    d) Whether this Honourable Court should issue the Orders sought in the Petition

91. On the issue whether public participation was conducted before enactment of the Impugned *Amendment Act* and *Regulations*, it was submitted that Article 10(2) of the *Constitution of Kenya* provides for the National values and principles of governance which bind all state organs, state officers, public officers and all persons in their application or interpretation of the *Constitution* or the making or implementation of public policy decision, and lists, inter alia, public participation as one of the values. In support of the position reliance was placed on Section 2 of the *Statutory Instruments Act*, No. 23 of 2013, The *Black's Law Dictionary*, 10th Edition, *Republic v County Government of Kiambu Ex-parte Robert Gakuru & another* [2016] eKLR.

92. It was submitted that public participation therefore means allowing the members of the public or stakeholders to participate or contribute to the proposed legislation and taking into account their contributions in the enactment. It was noted that Article 118(1)(b) of the *Constitution* enjoins Parliament including the 3rd Respondent herein to facilitate public participation in the process of making legislation by requiring Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. Pursuant to Article 124(1) of the *Constitution*, the 3rd Respondent adopted the Standing Orders for the National Assembly on 9th January 2013 during the Fourth Session of the Tenth Parliament. *Standing Order No. 127 of the National Assembly*.

93. It was submitted that in the National Assembly, the duty to undertake public participation vests in the Departmental Committee to which a Bill is committed under Standing Order No. 127 of the *National Assembly Standing Orders* and in the instant case, the duty vests in the Departmental Committee on Finance and National Planning.

94. It was submitted that under Section 48(1) & 2A of the *Microfinance Act*, 2006, the CBK may (with the approval of the CS, National Treasury) make regulations, or issue directions and guidelines to institutions licensed under the *Act* for the better carrying out of their functions. Accordingly, pursuant to Section 57 and 59(1) of the *CBK Act*, the CBK is a regulatory making authority when it exercises its powers under Section 59(1) of the *Amendment Act* in developing the *DCP Regulations*. It was submitted that Section 4(a)of the *Statutory Instruments Act*, 2013 enjoins regulation-making authorities to undertake appropriate consultation before making statutory instruments.

95. In support of the submissions the Petitioner relied on *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others* [2013] eKLR, *British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another* (Interested Parties); [2019] and *Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR.

96. It was noted that while from the onset that the Petitioner has only challenged the issue of public participation in the enactment of the *Amendment Act* at paragraphs 26-29 of the Petition, in response to this allegation, the 3rd Respondent in the Replying Affidavit gave a candid explanation of how it conducted adequate public participation. From the Petitioner's affidavit, it was confirmed that there was public participation prior to the enactment of the Amendment Act that it was aware of, but it opted not to participate as it did not deem itself and its members as Digital Credit Providers. Reference was made to *Nairobi Metropolitan Psv Saccos Union Limited &25; others v County Of Nairobi Government & 3 others*, *supra*.

97. Consequently, it was submitted that there was adequate notice to all the stakeholders including the Petitioner herein, it was aware and had an adequate opportunity to present its views to the Committee by way of a Memorandum or through an oral hearing which it admittedly did not take and did not

proffer any proposal to the Committee for consideration. It cannot now claim that there was no public participation on the *Amendment Bill*. The Court was urged to be persuaded by the decision in *Republic v County Government of Kiambu Ex parte Robert Gakuru & Another*.

98. In respect to the *DCP Regulations*, it was submitted that nowhere in the Petition does the Petitioner challenge the *DCP Regulations* for want of public participation. The Petitioner has not pleaded the issue of public participation in the promulgation of the *DCP Regulations* but has submitted at length on the same at paragraphs 44-52 of its Written Submissions. The Petitioner has also raised questions of want of an explanatory memorandum or a Regulatory Impact Assessment prior to the promulgation of *Regulations*, but these issues are not borne out of the Petitioner's pleadings before this Court. According to the 1st Respondent, no party is entitled to address issues not embodied in its pleadings in the Submissions and reliance was placed on *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR. However, notwithstanding the Petitioner's failure to plead the issue, the 1st Respondent maintained that it explained how the CBK undertook public consultation as required by Sections 4 and 5 of the *Statutory Instruments Act*, 2013.

99. It was submitted that contrary to the Petitioner's assertion that none of its members participated in the promulgation of the *DCP Regulations*, its members: Platinum Credit Ltd, Real People Credit Ltd, Premier Credit Ltd, Momentum Credit actually participated and submitted comments on various clauses of the *Regulations*.

100. On the issue whether Regulation 2 of the *DCP Regulations* discriminates and/or violates the Petitioner's members' rights under Article 27 of the *Constitution*.

101. According to the 1st Respondent, it is a well-settled legal principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation as was espoused in the case of *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272 which was echoed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR which further provided the standard of proof in Constitutional Petitions. In this case it was submitted that the Petition alleges discrimination against non-deposit taking micro-finance businesses but does not demonstrate how the same is arbitrary or unreasonable. To this end, it was submitted that the Petitioner failed to attain the requirements of Anarita Karimi case and cannot allege that the 1st Respondent has violated its rights under Article 27. In this regard the 1st Respondent cite *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR.

102. According to the 1st Respondent, the Petitioner has not demonstrated how its members offering digital credit services are of a similar description to the other categories such as Banks and the Microfinance Banks the differentiation of treatment wholly attributed to their categorical descriptions. Secondly, from the Petitioner's List of Members, there is Cooperative Bank of Kenya which is a licensed bank and regulated under the Banking Act. There are also micro-finance banks in the membership of the Petitioner including Kenya Women Microfinance Bank Ltd, Rafiki Microfinance Bank Ltd, Faulu Kenya Microfinance Bank Ltd, SMEP Microfinance Bank, Key Microfinance Bank Ltd, Century Microfinance Bank Ltd, Sumac Microfinance Bank Ltd, U & I Microfinance Bank Ltd Caritas Microfinance Bank Ltd, Daraja Microfinance Ltd, Maisha Microfinance Bank and Uwezo Microfinance Bank. All these institutions are regulated under the *Micro Finance Act*, 2006. There is also a Sacco Society, Stima Sacco Society Ltd. All these institutions have been exempted under Regulation 2 because they are already regulated under the *Banking* and *Microfinance Act* 2006 and *Sacco Societies Act*. It was submitted that the Petitioner has not brought any evidence to prove that its other members

on whose behalf it has filed this Petition are regulated under any other law in the provision of Digital Credit Services.

103. To the 1st Respondent, the reliance on Section 3 of the *Microfinance Act* 2006 is not helpful to the Petitioner herein because Section 3(1) of the *Act*, applies the *Act* to deposit taking microfinance businesses and specified non-deposit taking microfinance businesses. Those deposit-taking microfinance institutions are already regulated and exempted under Regulation 2. The other members of the Petitioner, also known as Credit Only Institutions are not regulated under any law and that in fact, Section 3(2) of the said *Act* relied upon by the Petitioner herein does not regulate all the non-deposit taking micro-finance institutions. It enjoins the Cabinet Secretary, National Treasury to make regulations specifying the non-deposit taking micro-finance businesses to which the Act applies and prescribe measures for the conduct of their business. Consequently, even if the regulations were in place, they are not to regulate all the non-deposit taking microfinance institutions.

104. The 1st Respondent pointed out that in its letter of 28th February 2022, the Petitioner herein conceded that non-deposit taking microfinance institutions are not regulated under any law. The Petitioner further conceded that there are steps to develop the regulations, those regulations have not been enacted as of today or the date of the passage of the *Amendment Act* and the *DCP Regulations*. The Petitioner further conceded that the definitions of a Digital Credit Provider, Digital Channel, Digital Credit, in Section 2 of the *Amendment Act* covers the Petitioner herein and any other person not licensed or regulated under any other law. The Petitioner's concern is that it provides additional services like financial education, business management services and other ancillary services. However, these additional services do not exempt the Petitioner unregulated members from being regulated under the *DCP Regulations*.

105. Consequently, it was submitted that the clear intention of Parliament was to bring all unregulated digital credit providers including the Petitioner's members under the regulation and supervision of the CBK- which the Petitioner clearly admits was done. In recognition of this, the Petitioner in its letter of 9th May 2022 at pages 106-107 of the Petition invoked Regulation 2(g) of the *DCP Regulations* which permits the CBK to exempt any entity approved by the CBK. To the 1st Respondent, it is wrong for the Petitioner to now seek to be exempted from compliance with the *Amendment Act* and the *DCP Regulations* which are clear, were procedurally and lawfully passed and/or approved by the National Assembly in exercise of its legislative power under Article 94 of the *Constitution of Kenya*, 2010. That would be an action in breach of the legislative intent of Parliament to bring under regulation all digital credit providers.

106. It was submitted that the issues raised by the Petitioner are covered in the *Amendment Act*, 2021 and the *DCP Regulations* are clear that they only cover those unregulated DCPs and do not cover institutions licensed and regulated under the *Banking Act*, the *Microfinance Act*, 2006, the *Sacco Societies Act*, 2008, which are subject to licensing, reporting, regulation, consumer protection and compliance with the reporting obligations under the *Proceeds of Crime and Anti Money Laundering Act*, 2009, which the Petitioner seeks to be exempted from. Consequently, the unregulated members of the Petitioner are not on the same pedestal as banks, microfinance banks and Saccos regulated and exempted under Regulation 2 of the *DCP Regulations*. They cannot therefore claim to be discriminated upon by virtue of the said *Regulation*. In this regard the 1st Respondent referred to *Peter K. Waweru v Republic* [2006] eKLR and it was submitted that there is an extremely big and reasonable distinction between the exempted institutions under Regulation 2 and the Petitioner's unregulated members and that it is the Petitioner herein that seeks to be treated specially, contrary to the provisions of Article 27(1) & (2) of the *Constitution* in order to gain an undue advantage by allowing its members to operate in an unregulated business environment and expose the people of Kenya to lawlessness where the

non-deposit taking microfinance institutions would continue with their predatory practices, high cost of facility interest and other charges, unethical debt collection practices, and abuse of personal information, among others.

107. In any event, it was contended, differential treatment under Regulation 2 of the *DCP Regulations* cannot by any figment of imagination amount to discrimination of the Petitioner's members as alleged and the case of *Federation of Women Lawyers Kenya (Fida K) & 5 Others v Attorney General & Anor* [2011] eKLR.

108. According to the 1st Respondent, the Petitioner here has failed to prove that the differentiation of the exempted institutions (including members of the Petitioner herein) and the unregulated digital credit providers (including another large set of the Petitioner's members herein) is arbitrary or unreasonable. The Petitioner has also failed to identify the peculiar or unique nature of its members' business model which would require exclusion from the *DCP Regulations*. Consequently, there is no demonstrable breach or violation of the right to Petitioner's or its members right to equal protection and equal benefit of the law as alleged.

109. On whether Section 59 and the *DCP Regulations* violated the Petitioner's right to a fair administrative action protected under Article 47 of the *Constitution of Kenya*, 2010, the 1st respondent reiterated the averments in the replying affidavit and references was made to Section 2 of the *Banking Act* which defines a Banking business.

110. It also cited Section 3(1) (a) of the *Banking Act* and it was submitted, the *Banking Act* prohibits the transaction of any banking or financial business including the taking of deposits without a valid license from the CBK. Similarly, the 1st Respondent relied on the definition in Section 2 of the *Microfinance Act*, 2006 of a microfinance bank business and submitted that Section 4(1) of the *Microfinance Act* prohibits any person from carrying out any deposit taking microfinance business without a license issued under the Act. It was therefore submitted that the taking or acceptance of cash collateral is a form of deposit taking activity regulated under the *Banking* and *Microfinance* Acts and that it is illegal for any entity describing itself as a non-deposit taking microfinance institution to accept cash collateral under Section 3 of the *Banking Act* and Section 4 of the *Microfinance Act* explained above. Consequently, Regulation 8(2) of the *DCP Regulations* is in good stead, it is rational and accords with the provisions of Sections 3 and 4 of the *Banking* and *Microfinance Acts* as it only emphasizes what is already proscribed by the *Banking* and *Microfinance Acts*. There is nothing unreasonable about this provision.

111. On the claim of alleged breach of legitimate expectation, it was submitted that the Petitioner has equally failed to prove that his legitimate expectation was breached or violated by the CBK and the 1st Respondent cited *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.

112. Applying the foregoing principles, it was submitted that the Petitioner has not established or satisfied that there existed any promise from the Respondents herein in respect to the impugned Section 59(2) or the *DCP Regulations*. In any event, both the 3rd Respondent and the CBK discharged their constitutional and statutory duties within the parameters of the law and accorded all other stakeholders including the Petitioner herein a chance to give their views and comments. The 1st Respondent cited *Shollei v Judicial Service Commission & another* (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment).

113. For the foregoing reasons, the Court was urged to dismiss the Petitioner's claim for breach of the right to a fair administrative action and of legitimate expectation as the Petitioner has not demonstrated how these rights are affected of violated at all.

114. On costs, it was sought that the costs of this suit be awarded to the Respondents. This submission was based on Section 27 of the *Civil Procedure Act* and Rule, 26 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 gives the Court discretion to award costs. They also relied on the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* (2013) eKLR which cited with approval the words of Murray C J in *Levben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227.

115. In *Jasbir Singh Rai & Others v Tarlochan Rai & Others* [2014] eKLR, it was submitted, the Court stated that departure from the now settled laws on costs should only be for good reasons such as in public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain.

116. To the 1st Respondent, the Petitioner herein having failed to establish its claims as demonstrated above and has also failed to prove that this is a public interest litigation disentitling the Respondent to costs.

2nd and 4th Respondents' Response

117. On behalf of the 2nd and the 4th Respondents, they relied on the affidavit sworn by Julius Muia the Principal secretary, National Treasury. According to him, Kenyans have been increasingly relying on digital credit providers for fast and easy access to credit. Various digital credit providers have made credit easily and quickly accessible making them a very popular alternative to traditional credit providers. However, the growing popularity of these digital credit providers has come with its own set of challenges. Prior to the enactment of the *Amendment Act*, there was no legal framework governing digital credit providers. This left the public unprotected and vulnerable. The lack of regulation led to unforeseen consequences such as misuse of private data in debt enforcement and high interest rates.

118. It was averred that the Central Bank of Kenya as established under the *Constitution of Kenya* and statutory legislation is mandated to among others formulate monetary policy, promote price stability, issue currency and perform other statutory functions as may be conferred by an Act of Parliament. It was deposed that the Ministry of Treasury and Planning under Article 225 of the *Constitution of Kenya*, 2010 is mandated to strengthen financial and fiscal relations between the national and county governments, issue guidelines on the preparation of county development planning, prepare the annual legislative proposals on intergovernmental fiscal transfers, monitor and evaluate of economic trends and administer the Equalization fund among others.

119. According to him, before the enactment of the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 all non-deposit taking microfinance businesses were left outside the ambit of regulations as provided in the *Micro-Finance Act*, 2006. This created a situation in which some non-deposit taking microfinance businesses practices were considered going against consumer and data protection and led to widespread complaints from the general public.

120. It was averred that section 3 of the *Micro Finance Act* does provide that the Minister of the Ministry Treasury and Planning may make regulations to both identify the specific non-deposit taking micro-finance businesses and regulate their conduct; the section, however, does not limit other authorized bodies from enacting regulations to supervise the conduct and practices of non-deposit taking micro-finance businesses. Pursuant to section 48(1) of the *Micro-Finance Act,* 2006 the Central Bank of Kenya with the approval of the Minister makes regulations for prescribing anything under the *Act* that may be prescribed by the Central Bank. Under section 33(s) of the *Central Bank of Kenya Act* as amended by the *Amendment Act* granted the Central Bank with the power to license and oversee the previously unregulated digital credit providers industry.

121. It was averred that the impugned amendments and regulations were as a result of the growing uptake of the digital creditors business and an outcry against the predatory practices some institutions were conducting, namely, high cost of facility and other charges, unethical debt collection practices and abuse of personal information among others. There were also concerns about money laundering and financing of terrorism. Due to the above rising concerns the 3rd respondent moved to address this legal lacuna and culminated in an expansive and detailed amendments of the *Central Bank of Kenya Act* to provide it with the necessary tools to regulate and supervise the industry.

122. It was deposed that in that light and in conforming with the *Constitution* on the need of having public participation the 3rd respondent published a Notice in the Standard Newspaper publication of 21st May, 2021 which informed members of the public to submit memoranda on the Bill in writing no later than 28th May 2021. Pursuant to the aforesaid advert, the relevant stakeholders including the Digital Lenders Association of Kenya forwarded written memoranda to the Departmental Committee on Finance and National Planning who thereafter met all the relevant stakeholders prior to preparing their report.

123. It was disclosed that after taking into considerations the memoranda and presentations of all the relevant stakeholders, the Departmental Committee recommended the *Bill* as amended and the same was passed and the President assented the *Bill* on 7th December, 2021. Pursuant to the passing of the *Amendment Act*, the 1st respondent under the provisions of section 59 commenced to make regulations in respect to the practices and conduct of digital credit providers.

124. The deponent then proceeded to reiterate the steps that had been taken by the CBK and asserted that that the allegations that there was a lack of public participation in the enactment of the *Amendment Act* and the *Regulations* are unfounded and without substance. The deponent wondered why it took the petitioners so long to lodge a complaint when the *Amendment Act* and *Regulations* have been in operation for more than 7 and 4 months respectively during that length and only waited upon the expiry of deadline time lines to be licensed as provided in the *Regulations*. Based on legal advice, the deponent averred that the delay of the petitioner to bring this petition a month to the deadline for licensing is a gross abuse of the court process and manifests mala fides as they are clearly seeking to halt attempts to bring sanity and accountability to a murky situation.

125. It was deposed that both the 1st and 3rd respondent undertook wide and consultative steps in the formulation and publication of the amendments and regulations in ensuring that public participation was a cornerstone before the publication and enactment of the same. It was contended that the petitioner was silent on the steps they undertook to safeguard their rights during the promulgation of the amendments and regulations; they have been unable to demonstrate that they were denied the right to participate in the process of public participation as demonstrated by the respondents. Further the attempts by the petitioner to voice their concerns came after the promulgations of the amendments and regulations and such failure on their part cannot be placed on the respondents.

126. It was disclosed that the petitioner vide letter dated 28th February, 2022 confirmed the unregulated nature of the digital credit providers and the push their members have taken to be brought under a regulatory ambit leaves them in a quandary as they are clearly not identified as specified non-deposit taking micro-finance business as captured in the *Micro-Finance Act*, 2006. However, the deponent averred that their offices had begun the process of making the regulations to oversee the activities specifying the non-deposit taking micro-finance businesses that the Act will apply and prescribing measures for conduct of their business as provided in section 3 (2) of the *Micro-Finance Act*, 2006 and in furtherance to that endeavour the CS, National Treasury wrote to the Central Bank Governor

requesting for two nominees to the Inter-Agency Committee to develop the regulations for the non-deposit taking micro-finance businesses among other agencies.

127. The deponent then set out the steps that had been taken in that direction until the Inter-Agency Committee held a workshop from 24th – 31st January, 2022 in which stakeholders were invited to give feedback on the draft regulations and that it was around that time that the Central Bank forwarded its comments on the National Treasury's draft regulations and informed them of the effect of the impugned Amendments to the *Central Bank of Kenya Act* which had brought all the unregulated digital credit providers under their supervision. Further the Central Bank informed the National Treasury put on hold the draft regulations to enable the Central Bank to implement the impugned CBK regulations to facilitate a review of implementation, if needed, to establish whether there are any non-deposit taking credit businesses outside the regulatory perimeter that would necessitate further review of the legal framework. In view of the comments and recommendations of the Central Bank the National Treasury deferred the finalization of the draft regulations to enable the Central Bank implement the Regulations and see if there is need for further amendments and regulations to be enacted.

128. From the foregoing, it was averred, it is evident that the petitioner seeks to shield their members from the scrutiny of licensing, reporting and regulation of the sources of their members financing, avoid compliance with the provisions of *Proceeds of Crime and Anti-Money Laundering Act*, 2009 and compliance with consumer protection measures which were non-existent until the promulgation and enactment of the *Amendments* and *CBK Regulations*.

129. It was averred that the petitioners alleged violation or threatened violation of the *Constitution* but did not buttress the manner or evidence of violation or the loss/damage suffered or likely to be suffered. In the deponent's view, it is not true that the petitioner's right to protection from discrimination as provided in Article 27 of the *Constitution* was violated as no evidence of the same was availed. In any event:

    i. The manner and conduct of the 1st and 3rd respondents was both open and accommodating to the considerations of the stakeholders in the industry.

    ii. The petitioner has failed to demonstrate that the impugned amendments and regulations were conducted in an arbitrary and unreasonable manner as the institutions that were exempted it should be noted are regulated under various statutes as provided in section 3 of the *CBK Regulations*.

    iii. The respondents acted lawfully, reasonably and fairly in the circumstances and public interests militate towards the action taken.

130. It was further averred that it is not true that the respondents breached Article 47 of *Constitution*. According to him:

    i. That the impugned amendments and regulations were enacted to both facilitate open and fair practices doing away with the arbitrary charge hikes and poor consumer protection measures.

    ii. That it is further from the truth that the regulations attempt to prohibit taking cash collateral but in fact the regulations only identify the mode of credit and recovery of non-performing loans as provided in part VI of the impugned *regulations*.

    iii. The actions of the 2nd respondent to delay the promulgation of the draft regulations is an administrative function that is outside the jurisdiction of this court to determine as said action is subject to the prevailing resources and conditions that face the nation.

131. In the circumstances, the deponent asserted that no evidence has been led to suggest that the respondents violated any of the cited constitutional and statutory provisions and the assertion that the *Amendment Act* and *Regulations* are unconstitutional are mere fallacy and meant to advance the personal interests of the petitioners' members.

132. It was averred that the Petition does not raise any valid constitutional grounds, prayers or issues to warrant intervention and the balance of convenience, public interest and scale of justice militate and tilt against granting reliefs sought in the Petition. In light of the facts disclosed the Court was urged to decline to issue the orders sought and dismiss the Petition with costs.

2nd and 4th Respondents' Submissions

133. In their submissions, the 2nd and 4th Respondents reiterated the foregoing averments the court was called upon to be alive to the fact that save for rights specified under Article 25 which cannot be derogated, all other rights are not absolute: they can be limited in an open and democratic society.

134. On the issue of public participation, the petitioner failed to demonstrate that there was a failure on the part of the respondents to ensure that there was public participation. To the contrary, the 1st respondent clearly demonstrated the steps taken by the 1st and 3rd respondents to ensure that the public was duly informed and indeed given the opportunity to participate by forwarding their comments and concerns with regard to the provisions of the *Act* and *Regulations*.

135. Based on *Doctors for Life International v Speaker of the National Assembly and Others* (*supra*) it was submitted that for the petitioner to sustain a claim that there was a lack of public participation, it was incumbent on their part to demonstrate that the public was not given sufficient or adequate time to participate in the promulgation process. It was noted that courts have taken the view when determining 'reasonable opportunity' is to be a case by case approach. This is due to nature of the legislation to be enacted and the intended impact it will have on the public and stakeholders. As earlier demonstrated the respondents clearly informed the public and stakeholders were informed about the intended amendments to the *Central Bank of Kenya Act* and given an opportunity to participate. What the petitioner has failed to demonstrate is whether at that time they were denied to provide either oral or written submissions on the amendments.

136. On the issue whether the petitioners' constitutional rights and freedoms violated, it was submitted that the petitioners did not offer any evidence that the provisions of the Act and Regulations infringed their constitutional rights and or how it will or has impacted their ability to provide the services that are intended to be regulated. This submission was based on *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272 as well as the Court of Appeal's decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.

137. On that ground alone, it was submitted that the Petition is devoid of any iota of precision so much so that it is not easy to determine real issues in contention.

138. Secondly, even if the petitioner had satisfied the threshold in *Anarita Karimi Njeru case* it was submitted that the Petition would still have failed as the respondents offered a cogent justification of their action in regard to the promulgation and enactment of the amendments and regulations. The respondents have demonstrated the key steps taken on their part to ensure adherence of the spirit and letter of the Constitution as evidenced by the replying affidavits of the respondents.

139. According to the 2nd and 4th Respondents, the petitioners are not deserving of equity. It is apparent from the record that the petitioners are attempting to create an elaborate series of events to demonstrate that their rights were violated by the enactment of the *Act* and *Regulations*. Secondly, the assertions

by the petitioners that the exclusion of other registered financial institutions is factually false and misleading; this stems from the fact that those identified financial institutions are under the supervision of the Central Bank under their respective legislations and the amendment and regulations was meant to streamline and safeguard the activities of the institutions and public. Thirdly, it is evident that the petitioners are looking for any avenue to challenge the *Act* and *Regulations* at this late date and be compensated by the respondents for their perceived violations of constitutional rights; the unreasonable and undue delay by the petitioners to lodge a claim against the provisions of the *Act* and *Regulations* months before their registration deadlines cannot be condoned or explained.

140. The Court was therefore urged to find that there was no violation of the Petitioners' rights, as pleaded.

141. It was therefore submitted that the petitioners miserably failed to prove their case on a balance of probabilities and is not entitled to the prayers sought which they urged the court to dismiss with costs.

The 3rd Respondent's Case

142. The 3rd Respondent, the National Assembly, relied on the affidavit sworn by Serah Kioko, EBS., the Deputy Clerk of the National Assembly. According to her, the National Assembly's mandate to enact, amend and repeal laws is derived from the *Constitution*. According to her, the Petitioner's prayers therefore threaten the legislative role of Parliament specifically, the National Assembly under Article 94 and 95 of the *Constitution*.

143. It was averred that Article 109(1) of the *Constitution* provides that Parliament shall exercise its legislative power through bills passed by Parliament and assented to by the President. Also cited was Article 94(1) and (2) of the *Constitution* which provide that the legislative authority of the people of Kenya is derived from the people and is vested and exercised by Parliament. In her view, Parliament therefore manifests the will of the people and exercises their sovereignty. In her averment, under Article 186(4) of the *Constitution*, 2010, Parliament may legislate for the Republic on any matter. She therefore averred that the National Assembly has the constitutional mandate to enact legislation in Kenya and a statute is deemed to be valid upon its constitutional enactment by the National Assembly.

144. The deponent then outlined the steps that were taken in the enactment of the *Amendment Act* which was initiated as *National Assembly Bill No. 10 of 2021*. After setting out the stakeholders who presented their respective views, it was averred that following the consideration of the proposals received through written memoranda and public hearings, the Committee in considering the Bill observed that:

> Access to digital credit has grown in leaps and bounds and therefore the need to provide a legal framework to regulate the industry by ensuring that the consumer rights are protected and data privacy is safeguarded.

145. It was averred that the National Assembly conducted adequate public participation in the consideration of the impugned law and it was noted that the Petitioner equally acknowledged the importance and necessity of regulating digital credit providers in its letter 28th February 2022 where it affirmed that the 1st Respondent's steps to license and supervise digital credit providers was to curb the negative social impact experienced due to high interest rates on loans and unethical debt practices. After compiling its report, the National Assembly's Departmental Committee on Finance and National Planning compiled its report having considered the nature of the views concerns of the different stakeholders and laid it before the National Assembly on 5th August 2022 and after the second reading on 11th August 2021 the report of the Departmental Committee on Finance and National Planning was passed. It was therefore averred that contrary to the Petitioner's allegations, the National Assembly conducted public participation on the impugned provision 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. It was asserted that as evidenced from the comments received from the public and stakeholders during public participation, the failure to regulate institutions providing digital credit facilities has led to exploitative practices by such institutions as they are not held accountable by law.

146. It was averred that prior to the coming into force of the impugned legislations, non-deposit taking micro finance institutions had not been regulated within any legislative framework therefore any non-deposit microfinance institutions providing digital credit services remained unregulated since Section 3(1)(b) of the *Micro Finance Act* only provides for the regulation of specified non-deposit-taking microfinance institutions. It is therefore the case that not all non-deposit taking micro finance institutions are regulated under the *Micro Finance Act*. Furthermore, even with the provisions under section 3(1)(b) and 3(2), prior to the enactment of the provision of section 59 of the *Act* and the further publication of the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022, there was no framework to govern microfinance institutions undertaking digital credit lending business.

147. It was contended that Article 94(5) of the *Constitution* precludes all other persons or bodies, other than Parliament from making provisions having the force of law in Kenya except under authority conferred by the *Constitution* or delegated by the legislature through a statute. The National Assembly may, therefore delegate to any person or body the power to make subsidiary legislation. The National Assembly must however have control of such legislation, so the Act must provide that all delegated legislation must be approved by the House before having the force of law.

148. Based on legal advice, it was averred that there are two common ways by which Parliament can control delegated legislation. It can require the delegated legislation to be laid before Parliament and that it not come into effect until Parliament approves it or by the lapse of a specific period without the legislation having been disallowed. Pursuant to Article 94(6) of the *Constitution* as read with Section 11 of the *Statutory Instruments Act* No. 23 of 2013, all regulation-making authorities are required to submit copies of all statutory instruments for tabling before the National Assembly in accordance with the *Statutory Instruments Act*. It was contended that in view of the above, the Central Bank of Kenya being a regulation making authority having been conferred with power to make regulations by the *Central Bank of Kenya Act*, Cap 491 of the Laws of Kenya is also required to submit the regulations it makes in accordance with the *Statutory Instruments Act*.

149. In this case, by dint of the power to make regulations, the CBK formulated the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 and pursuant to the provisions of Section 59 (1) of the *Amendment Act*, which required regulations under the *Act* to be made within three months of coming into force of the *Act*, *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 were received by the Clerk of the National Assembly on 22nd March, 2022 and on 23rd March, 2022, the regulations were tabled in the National Assembly in accordance with Section 11 of the *Statutory Instruments Act*. Following the tabling, the said regulations stood referred to the Committee on Delegated Legislation for consideration pursuant to Section 12 of the *Statutory Instruments Act* and Standing Order 210 of the *National Assembly Standing Orders*. The Committee on Delegated Legislation at its sitting held on 14th May, 2022 satisfied itself that the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 are in accord with the *Constitution*, the *Statutory Instruments Act* (No. 23 of 2013), the *Interpretation and General Provisions Act* (Cap 2) and the *Amendment Act* pursuant to which they were made and the resolution of the Committee was communicated to the Central Bank of Kenya pursuant to Standing Order 210 (4) of the *National Assembly Standing Orders* and the *Statutory Instruments Act*, 2013.

150. As regards the allegations of discrimination, it was averred that the impugned provision marked financial institutions under the *Banking Act*, *Micro Finance Act* and the *Micro and Finance Enterprises*

Act as exempted since the entities borrowing and liquidation is regulated and controlled by the Central Bank of Kenya and other licensing entities. Further:

a. The bodies under the *Banking Act*, *Micro Finance Act* and *Micro and Small Enterprises Act* undertake a different business as compared to the Petitioners, they are deposit taking entities. The deposit taking nature place a requirement by the regulator as to how much the entities hold while the Petitioner who are simply credit providers lacks such restrictions.

b. Additionally, the institutions under the *Banking Act*, *Micro Finance Act* and *Micro and Small Enterprises Act* perform an intermediation role through the use of customer deposits to give loans on which they earn interest.

c. The Petitioner being very distinct from the entities from which they derive comparison in the Petition are misguided. It has not been shown that any entity operating exactly as the Petitioner is exempt from the said provision. Discrimination can only arise where persons who are in the same field or sector, are accorded different treatments, which is not the case herein.

151. The above notwithstanding, it was averred that Article 27(4) provides for the grounds for which the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language. Therefore, any differentiation in treatment in the sector is not prohibited by the provisions under Article 27 of the *Constitution* and the Petitioner has not adduced any evidence to suggest that the impugned provisions were based on the prohibited grounds as set out in the *constitution*.

152. According to the deponent, the Petitioner did not set out clearly the nature of discrimination that has been alleged, neither has he shown who is suffering the said discrimination.

153. On fair administrative action, it was averred that the Petitioner misapplied and misinterpreted Article 47 of the *Constitution* on fair administrative action as the provision does not apply in the circumstances of this case wherein the Petitioner is challenging the constitutionality of a legislative provision. In her view, in enacting the impugned section of the *Amendment Act*, the National Assembly was carrying out its legislative functions as opposed to administrative functions and therefore the process of enacting a law does not fall within the purview of Article 47 of the *Constitution* and the *Fair Administrative Actions Act*.

154. In addition, the imposition of regulatory and licensing requirements is a policy decision solely within the mandate of the Executive and enacted by Parliament, and this Court ought to decline to make policy decisions which are solely within the realm of the other arms of Government. Further, the above-mentioned licenses and fees are put in place to serve a particular purpose which does not overlap with the mandate of any other institution. The licenses introduced in this case are specific to the regulation and oversight of the Digital Credit Services provided by members of the Petitioner. The Respondents cannot be faulted for undertaking their statutory functions. It was her position that the CBK has been empowered through section 4A of the *Central Bank Act* to formulate and implement such policies as best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems.

155. It was therefore averred that this Court ought not to exercise its discretion to grant the Orders sought in the Petitioner's Petition as the Applicant has not adduced any or any cogent evidence to demonstrate to this Court that his rights have been infringed by the enactment of the Amendment Act and the Court was urged to dismiss the petition with costs.

3rd Respondent's Submissions

156. In its submissions, the National Assembly reiterated the foregoing and reliance was placed on *Law Society of Kenya v The Attorney General and 10 Others* Petition No. 3 of 2016 and *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others* (Interested Parties) [2020] eKLR and it was submitted that the 3rd Respondent placed evidence before the Court to show that the Section 59(2) of the *Amendment Act* was subjected to public participation, an averment that was not disputed by the Petitioner. Additionally, the averments by the Petitioners that there was no public participation because the National Assembly did not invite the Petitioners has no basis in law.

157. As regards the *Regulations*, it was submitted that the said issue was not pleaded in the Petition and has only been introduced in the Petitioner's submissions and in this regard it cited the case of *Republic v Chairman Public Procurement Administrative Review Board & Another Ex-Parte Zapkass Consulting and Training Limited & Another* [2014] eKLR and submitted that is trite law that parties must restrict themselves to pleadings and any material ground not pleaded cannot be argued or adjudicated upon.

158. It was however submitted that the Committee on Delegated Legislation satisfied itself that the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 complied with the requirement for public participation.

159. On the issue of discrimination, it was submitted that while article 27(1) provides for equality, the same provisions do not prohibit differentiation or classification based on different requirements of the law. What the *Constitution* requires is that any classification or differentiation must bear a rational connection to a legitimate government purpose. Reliance was placed on the case of *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another* (Amicus Curiae) Petition 150 & 234 of 2016 (Consolidated), *Mohammed Abduba Dida v Debate Media Limited & Another* [2018] eKLR, *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another* [2011] eKLR, *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR and *Karnataka Bank Ltd. v Union of India on 12 August, 2003*.

160. In the 3rd Respondent's submissions the marked financial institutions under the *Banking Act*, *Micro Finance Act* and the *Micro and Finance Enterprises Act* are exempted because;

    a) The entities borrowing and liquidation is regulated and controlled by the Central Bank of Kenya and other licensing entities.

    b) Further the bodies under the *Banking Act*, *Micro Finance Act* and the *Micro and Finance Enterprises Act* undertake a different business as compared to the Petitioners, they are deposit taking entities. The deposit taking nature place a requirement by the regulator as to how much the entities hold while the Petitioner who are simply credit providers lacks such restrictions.

    c) Additionally, the institutions under the Banking Act, *Micro Finance Act* and the *Micro and Finance Enterprises Act* perform an intermediation role through the use of customer deposits to give loans on which they earn interest.

161. According to the National Assembly, the Petitioner being very distinct from the entities from which they derive comparison in the Petition are misguided. It has not been shown that any entity operating exactly as the Petitioner is exempt from the said provision. Discrimination can only arise where persons who are in the same field or sector, are accorded different treatments, which is not the case herein. It is therefore evident that there is a legitimate reason to differentiate. Therefore, the conduct complained of cannot amount to discrimination. Furthermore, from the evidence on record, other than general

assertions, no discrimination, as understood in law was disclosed by the Petitioners. It was hence submitted that the Petitioners have not demonstrated how they have been discriminated against.

162. It was, in addition, submitted that no evidence of discriminatory enforcement was placed before the Court or that the Respondents have granted any special treatment to entities undertaking similar activities. Reference was made to the decision of the Supreme Court discussing the burden of proof in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 Others* [2020] eKLR.

163. This position, it was submitted was also affirmed by the Superior Court in the *Miguna Miguna v Lufthansa Group & 7 Others* and it was submitted that the Petitioner failed to provide evidence to prove the inequality alleged and has not shown how the provisions of the Act have imposed unfair discrimination. On the contrary, the impugned regulation seeks to enhance the public interest by seeking to regulate the digital lending industry to ensure that the consumer rights are protected and data privacy is safeguarded. Accordingly, the impugned regulation is not in violation of the right to equality and non-discrimination. Further, the Petitioner has not set out clearly the nature of discrimination that has been alleged, neither has he shown who is suffering the said discrimination.

164. On the issue whether Section 59 of the *Central Bank of Kenya Act* and the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 violate the Petitioner's members right to fair administrative action under article 47 of the *Constitution*, it was submitted that the Petitioner has not identified with a certain degree of precision on how the provisions of Section 59(2) of the Central Bank of Kenya as introduced by the *Central Bank of Kenya (Amendment) Act*, violate the Petitioner's members right to fair administrative action.

165. It was however submitted that based on the definition of "administrative action", as decisions by "authorities" or "quasi-judicial tribunals" which actions decisions or omissions adversely affect the rights or interests of any person to whom the actions, decisions or omissions relate in the *Fair Administrative Action Act*, 2015, such actions, decisions or omissions do not relate to legislations. Similarly, it was submitted that since Section 2 of the same *Act* defines an "administrator' to mean a person who takes administrative action or who makes an administrative decision, the National Assembly in enacting law is not taking an administrative action. To the contrary, in enacting Section 59(2) of the *Central Bank of Kenya Act*, the National Assembly was carrying out its legislative functions as opposed to administrative functions and therefore the enacting a law does not fall within the preview of Article 47 of the *Constitution* and the Fair Administrative Actions Act. In support of the submissions, the National Assembly cited the case of *Kenya Bankers Association v Attorney General & Another; National Assembly* (Interested Party) [2020] eKLR .

166. Consequently, it was submitted that the provisions of Article 47 of the *Constitution* and the *Fair Administrative Action Act*, 2015 cannot be invoked in this case.

167. It was also submitted that the imposition of regulatory and licensing requirements is a policy decision solely within the mandate of the Executive and enacted by Parliament, and this Court ought to decline to make policy decisions which are solely within the realm of the other arms of Government. Furthermore, the above-mentioned licenses and fees are put in place to serve a particular purpose which does not overlap with the mandate of any other institution. The licenses introduced in this case are specific to the regulation and oversight of the Digital Credit Services provided by members of the Petitioner. The Respondents cannot be faulted for undertaking their statutory functions. In this case it was the National Assembly's submission that the Petitioner had not demonstrated how the requirement for license contravenes their rights.

168. In conclusion, it was the 3rd Respondent's position that:

i. The enactment of the *Central Bank of Kenya (Amendment) Act* did not violate Articles 10, 118 and 259 of the *Constitution* or any other provision of the *Constitution*.

ii. Regulation 2 of the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 does not violate Article 27 and does not discriminate against the Non-deposit taking micro finance businesses.

iii. The provisions of Article 47 of the *Constitution* and the *Fair Administrative Action Act*, 2015 cannot be invoked in this case since the National Assembly when enacting Section 59 of the *Central Bank of Kenya Act* was not carrying out an administrative action.

169. As such, it was urged that the Petition is without merit and ought to be dismissed with costs to the 3rd Respondents.

Determination

170. The facts of these petitions are largely not in dispute. What provoked this petition was the enactment of the *Central Bank of Kenya (Amendment) Act*, 2021 (the Amendment Act) which was assented to by the President on 7th December 2021 and commenced on 23rd December 2021. Section 6 of the *Amendment Act* amended section 57 of the *Principal Act* by providing as follows:

> "6. Section 57 of the principal Act is amended by inserting the following new subsections immediately after subsection (2)—
>
> (3) Without prejudice to the generality of subsection (1), The Bank may make Regulations as are necessary or expedient to give full effect to the provisions of this Act including —
>
> (a) the licensing requirements for digital credit businesses;
>
> (b) permissible and prohibited activities;
>
> (c) anti-money laundering and measures for countering financing terrorism;
>
> (d) credit information sharing;
>
> (e) data protection;
>
> (f) consumer protection;
>
> (g) reporting requirements for digital credit providers;
>
> (h) offences and penalties;
>
> (i) dispute resolution mechanisms; and
>
> (j) such other measures necessary for regulation of digital lending"

171. By Section 7 of the *Amendment Act*, Section 59 was introduced into the *Principal Act* and it was provided in Section 7 aforesaid that:

> 7. The principal Act is amended by inserting the following new section immediately after section 58—

59.

(1) Any Regulations required to be made under this Act, to give effect to the provisions on digital lending, shall be made within three months of the coming into force of this Act.

(2) Any person who before the coming into force of this Act was in digital credit business and is not regulated under any other law, shall apply for a licence in accordance with Section 33S, within six months of publication of the regulations under subsection (1).

172. However, prior to this process the Cabinet Secretary, Treasury had on 31st August 2021, the CS constituted an inter – agency committee whose sole mandate was to develop regulations for non – deposit taking Micro – Finance Businesses as mandated by section 3 of the *Micro – Finance Act*, 2006 which Committee met several times and developed a 1st draft of the regulations to regulate the sector.

173. This process, according to the Petitioners was initiated pursuant to Section 3 of the *Microfinance Act*, 2006 which is to the effect that:

(1) Subject to subsection (3), this Act shall apply to:

(a) Every deposit-taking microfinance business;

(b) Specified non-deposit taking microfinance business, in the manner prescribed under subsection (2)(b).

(2) For the purposes of subsection (1)(b), the Minister may make regulations –

(a) Specifying the non-deposit taking microfinance business to which that subsection applied; and

(b) Prescribe measures for the conduct of the specified Business.

174. According to the Petitioners, they fall under this legislation since Section 2 of the *Microfinance Act*, 2006 defines the non-deposit taking microfinance business to mean non-microfinance bank business. Non-microfinance bank business is then defined to mean microfinance business, other than microfinance bank business as defined under this *Act*. To the Petitioners, non-deposit microfinance business carries out more similar business with micro-finance business only that they do not take deposits from their members.

175. On 23rd December 2021, being the date of commencement of the said *Amendment Act*, the CBK announced through a press release the development of draft regulations and invited comments on the same. On 21st March 2022, the CBK through a press release announced publication of the *DCP Regulations* vide Legal Notice No. 46 of 18th March, 2022. Vide the said press release, the CBK stated that all previously unregulated Digital Credit Providers (hereinafter referred to as the DCPs) were required to apply to it for a licence within six months of the publication of the regulations, i.e by September 17, 2022, or cease operations. On 17th May 2022, the CBK issued a further press release reiterating the contents of the press release dated March 21, 2022.

176. It is clear that the initiative that was taken by the Cabinet Secretary was shelved mid-way. According to the Respondents this was informed by the need to observe the impact of the *DCP Regulations.*

177. It is agreed by all the parties to this dispute that before these two initiatives were triggered, there were no regulations in force the objects and reason for the Amendment Act were to regulate digital borrowing

platforms as there was no law regulating the said entities. The Petitioners however contend that Section 3 the *Microfinance Act* contemplates that they are to be regulated under the said Act and that the 2nd Respondent had duly commenced the process of enacting the said regulations but failed to conclude the process. According to the Petitioner, the specified non – deposit taking micro – finance institutions contemplated under the *Microfinance Act* are Petitioners members also known as credit only micro – finances institutions whom by their nature of business transcend beyond just credit provision but offer other services as opposed to what digital lenders do.

178. In the Petitioners' view, from the Report of the Departmental Committee on Finance and National Planning on the Consideration of the *Central Bank of Kenya (Amendment) Bill (National Assembly) Bil*l No. 10 of 2021, the mischief the said law intended to cure were the challenges that were posed by the unregulated digital credit products where there is no human contact between the Lender and the customer. However, the Petitioner's members did not fall under the said category since the nature of their business involves more than just credit lending through digital platforms. In other words, the Petitioners' case is that they ought not to have been brought under the *Amendment Act* by the *DCP Regulations*.

179. The view taken by the Respondents was however that since under Section 3(2) of the *Microfinance Act*, the Cabinet Secretary, National Treasury is only supposed to make regulations specifying the non-deposit taking microfinance businesses to which the Act applies and prescribe measures for the conduct of their business, those regulations would therefore not to cover all non-deposit taking microfinance businesses. Accordingly, in the absence of the regulations, all non-deposit taking microfinance businesses were left outside the ambit of regulation under the *Microfinance Act*. This lacuna caused a situation where the members of the public complained of the conduct of non-deposit taking microfinance institutions particularly those in the digital credit business. It was this lacuna that informed the enactment of the *Amendment Act*.

180. It was also contended that the said *Regulations* are discriminatory and that there was no public participation in the process of formulating the same.

181. The issues that fall for determination in this petition are therefore as follows:

1) Whether there was public participation in the enactment of the Impugned Section 59 of the *Amendment Act*?

2) Whether Regulation 2 of the *DCP Regulations* discriminates and/or violates the Petitioner's members' rights under Article 27 of the *Constitution*?

3) Whether Section 59 and the *DCP Regulations* violated the Petitioner's right to a fair administrative action protected under Article 47 of the *Constitution of Kenya*, 2010; and

4) Whether this Honourable Court should issue the Orders sought in the Petition

182. Before dealing with this issues, the Court has to make a determination as to whether the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 apply to the kind of business that the Petitioners are engaged in.

183. Since the petitioners contend that they ought to be regulated under the *Micro Finance Act* and not under the *Central Bank of Kenya Act*, it is important to interrogate whether the provisions of the *Micro Finance Act* cover the petitioners. According to the Petitioners, the said *Regulations* prohibit them from taking of cash collateral which acts as the only and main security of non – deposit taking micro – finance institutions. To prohibit them from taking cash collateral will therefore expose them to the risks of default by the customers and therefore lead to the collapse of their business as they

will be left without security. It is on this bass that they argue that the *Regulations* ought to apply only to Digital Credit Providers which are distinct from the non – deposit taking micro - finance institutions. On the other hand, the Respondents while admitting that Regulation 8(2) of the *DCP Regulations* prohibits non-deposit taking microfinance institution from accepting cash collaterals, contended that the taking of cash collateral is a form of deposit taking activity regulated under the *Banking Act* and *Microfinance Act* and it is therefore illegal for any entity describing itself as a non-deposit taking microfinance institution to accept cash collateral under Section 3 of the *Banking Act* and Section 4 of the *Microfinance Act*. Accordingly, Regulation 8(3) of the *DCP Regulations* only emphasizes what is already proscribed by the said Acts. Therefore, any of the Petitioner's members whose business model includes taking cash as collateral is required to obtain a license from the CBK under the *Banking Act* and/or the *Microfinance Act* hence there is no demonstrable breach or violation of the right to Petitioner's or its members right to a fair administrative action as alleged.

184. Section 4 of the *Microfinance Act*, the piece of legislation under which the Petitioners believe they ought to be regulated, a section that prescribes the qualifications for carrying out deposit-taking microfinance business provides in subsection (1) as hereunder:

> (1) No person shall carry out any deposit-taking microfinance business, hereinafter referred to as "deposit-taking business", unless such person is—
>
> (a) a company registered under the Companies Act (Cap. 486) whose main objective is to carry out such business; or
>
> (b) a wholly-owned subsidiary of a bank or a financial institution whose main objective is to carry out such business; and
>
> (c) licensed under this Act.

185. It is therefore clear that for an entity to undertake any deposit-taking microfinance business, which is the business that the Petitioners state that its members are engaged in, it must not only be registered under the *Companies Act* (Cap. 486), but its main objective must be to carry out such business. In the alternative it must be a wholly-owned subsidiary of a bank or a financial institution whose main objective is to carry out such business. Either way, the entity must be licensed under the *Microfinance Act*. It is however clear that Banks and Saccos are regulated under specific legal instruments. Accordingly, in order for any other entity to enjoy the protection of the Act, the entity, if non-deposit taking, must be specified pursuant to the Regulations mad by the Minister which Regulations are also expected to prescribe measures for the conduct of the specified Business. It is agreed that it was this process of prescription was commenced but aborted half way before its completion.

186. The Petitioners contend that they had legitimate expectation that had the process ben carried out to its that final destination, their business which relies on the taking cash as collateral, would have been legitimised.

187. That brings us to the principal of legitimate expectation. The Supreme Court extensively dealt with this principle in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, where the Supreme Court held at paragraphs 263- 267 thus:

> "(263) Legitimate expectation" is a doctrine well recognized within the realm of administrative law, as is clear from the English case, *In re Westminster City Council*, [1986] AC 668 at 692 (Lord Bridge):
>
> > "... the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".
>
> (265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.
>
> [266] Wade and Forsyth in their work, *Administrative Law*, 10th ed (pages 446-448), discuss the relevant legal principles on legitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority, that is said to be bound to fulfil the expectation. Citing the House of Lord's decision in *R. v. DPP ex p. Kebilene* [1999] 3 WLR 972(HL), the learned authors observe that a statement made by a Minister cannot found an expectation that an independent officer will act in a particular way. They cited the case, *R. v. Secretary of State for Education and Employment, ex p. Begbie* [2000] 1 WLR 1115 (CA),where the Court of Appeal held that an election promise made by a Shadow Minister did not bind the responsible Minister after a change of government. The authors cite the House of Lord's decision in *R. v. DPP ex p. Kebilene*, for the principle that clear statutory words override any expectation howsoever founded.
>
> [267] The principle is well reflected in judicial practice in Kenya. A relevant excerpt from *Republic v. Nairobi City County & Another ex parte Wainaina Kigathi Mungai*, High Court Judicial Review Misc. Case No. 356 of 2013; [2014] eKLR thus reads [paragraph 33]:
>
> > "... the legal position is that legitimate expectation cannot override the law. This was the position in *Republic v Kenya Revenue Authority, ex parte Aberdare Freight Services Limited* [2004] 2 eKLR 530 where it was held:
> >
> > > "... a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has

> no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims... Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative 'strength of expectation... "

188. The emerging principles, according to the Supreme Court at paragraph 269 are that:

i. there must be an express, clear, and unambiguous promise given by a public authority.

ii. the expectation itself must be reasonable.

iii. the representation must be one which it was competent and lawful for the decision-maker to make; and

iv. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

189. It is however recognised that legitimate expectation may also arise from the previous conduct of the authority in question. Therefore, if a public authority is to depart from previous decisions in similar cases, it must then demonstrate good reason for that departure. Hence in *R (Bibi) v Newham London Borough Council* 2001 EWCA Civ 607, it was held:

> "Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires."

190. In this case, it is clear that the process of formulating the Regulations was terminated before the views collected from the public had been crystallised into Regulations. In my view, at that stage it cannot be stated with certainty that the proposed regulations would have legitimised, the Petitioners' their business which relies on the taking cash as collateral.

191. Accordingly, I find no basis for invoking the principle of legitimate expectation in the circumstances of this case. To the tent that the Petitioner's' case is hinged on the fact that the propose Regulations under the *Microfinance Act* would have laid a foundation for the legitimisation of their business, the Petitioners' case is built on quicksand.

192. However, the Petitioners contend that the halting of the process of the formulation of the Regulations under the *Microfinance Act* violated the Petitioner's members' right to fair administrative action as protected by Article 47 since it amounted to an infringement of their rights to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47 of the *Constitution* provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

193. The position is re-enacted in section 4(1) and (2) of the *Fair Administrative Action Act*, 2015.

194. Before dealing with this issue one has to first make a determination that the actions of the Respondents complained of amount to administrative action. Section 2 of the *Fair Administrative Action Act*, 2015 defines "administrative action" to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

195. The same section defines 'administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

196. According to the Respondents, the Petitioner misapplied and misinterpreted Article 47 of the *Constitution* on fair administrative action as the provision does not apply in the circumstances of this case wherein the Petitioner is challenging the constitutionality of a legislative provision. In its view, in enacting the impugned section of the *Amendment Act*, the National Assembly was carrying out its legislative functions as opposed to administrative functions and therefore the process of enacting a law does not fall within the purview of Article 47 of the *Constitution* and the *Fair Administrative Actions Act*.

197. In support of the submissions, the National Assembly cited the case of *Kenya Bankers Association v Attorney General & Another; National Assembly* (Interested Party) [2020] eKLR in which the Court held as follows;

> " 40. According to Article 93 of the *Constitution*, the National Assembly forms an integral part of the legislative arm of government and is clothed with the constitutional authority to enact legislation under Article 95. Therefore, the National Assembly when enacting legislation is not carrying out an administrative action in the strict sense, but exercising its constitutional duty to enact legislation as the legislative branch of Government."

198. Consequently, it was submitted that the provisions of Article 47 of the *Constitution* and the *Fair Administrative Action Act*, 2015 cannot be invoked in this case.

199. With due respect, I have my own reservations regarding the broad statement in the above case. Section 3 of the *Fair Administrative Action Act*, 2015 applies the provisions of the Act to both state and non-state agencies. The national Assembly is a state agency. The *Act* applies where such agencies are exercising a wide variety of action which actions are not limited to but include the exercise of administrative authority, the performance of judicial or quasi-judicial functions under the *Constitution* or any written law; or where the actions, omissions or decisions affect the legal rights or interests of any person to whom such action, omission or decision relates. Whereas I agree that the 3rd Respondent while performing its legislative function is not exercising an administrative authority, where in the performance of such functions, its actions, omissions or decisions affect the legal rights or interests

of any person to whom such action, omission or decision relates, the 3rd Respondent is bound by the provisions of the *Fair Administrative Action Act*, 2015.

200. Accordingly, I associate myself with the position adopted in the case of *Law Society of Kenya v Attorney General & 2 others* [2022] eKLR where the Court expressed itself as hereunder:

> " There is no doubt the decision not to exempt the Petitioner from the impugned tax is an administrative action. I say so because the decision adversely affected the rights of the Petitioner. One of the Petitioner's rights allegedly adversely affected is the right to equality and freedom from discrimination under Article 27 of the Constitution. As such, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness."

201. As held by Majanja, J in *Dry Associates Ltd v Capital Markets Authority and Another* – Petition No. 328 of 2011:

> " Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is nolonger left to the realm of common law...but is to be measured against the standards established by the Constitution."

202. The centrality of Article 47 in our constitutional organogram was appreciated in in *Judicial Service Comission v Mbalu Mutava* [2015] eKLR at para 23 where Githinji, JA held that:

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

203. It is therefore my view that where a person alleges that Parliament in enacting legislation undertook actions or omissions or decisions that affect the legal rights or interests of such a person to whom such action, omission or decision relates, this Court cannot simply brush the matter aside on the ground that Parliament is not subject to the provisions of Article 47 of the *Constitution*. It is important to emphasise that the wording of Section 3 of the *Fair Administrative Actions Act* is couched in inclusive terms rather than exclusive terms which, in my view, means that the Court in interpreting the section ought not to restrict itself to the examples set out under the section.

204. In this case, the Petitioner contended that the 3rd Respondent violated its right to fair administrative action hence is bound by the provisions of the *Fair Administrative Action Act*, 2015. For the Petitioners to succeed in this contention, it has to show that it had certain legal rights or interests relating to the legislative action or decision that as being undertaken by the 3rd Respondent which rights or interests were bound to be adversely affected and that in carrying out its legislative mandate the 3rd Respondent did not adhere to the spirit of Article 47. In this case, if I understand the Petitioner correctly, in enacting the *Amendment Act*, by introducing section 59(2) of the *Central Bank of Kenya Act*, the Respondents acted unreasonably due to the following reasons:

1) The *Amendment Act* sought to place any other business that touches on digital credit and is not regulated under any other law under the ambit of the impugned regulations without considering the effects on the nature of people's businesses.

2) The *Amendment Act* to appreciate the fact that all business currently run on digital platforms as one of the ways of delivering their services.

3) The *Amendment Act* failed to recognize the fact there are business that touch on digital credit but offer others services alongside.

205. It is important to reiterate that by the time of the enactment of the *Amendment Act*, there were no regulations in place relating to the business that was being conducted by the Petitioners. In those circumstances, and as one cannot tell the kind of regulations that were bound to be formulated, whether they would crystallise the rights that the Petitioners were claiming or not, I do not see how the Petitioners can claim that the enactment of the *Amendment Act* violated their right to fair administrative action. In other words, their rights were contingent upon the enactment of the *Regulations* under the *Microfinance Act*, without which the *Amendment Act* cannot be successfully impeached. In order therefore, to successfully impeach the legislative enactment, the Petitioner has to satisfactorily prove that it was never afforded an opportunity of being heard before the enactment was passed. That, however, is an issue that I will deal with later in this judgement.

206. The Respondents however contended that, the imposition of regulatory and licensing requirements, being a policy decision solely within the mandate of the Executive and enacted by Parliament, this Court ought to decline to make policy decisions which are solely within the realm of the other arms of Government. Further, the above-mentioned licenses and fees are put in place to serve a particular purpose which is the regulation and oversight of the Digital Credit Services provided by members of the Petitioner and which does not overlap with the mandate of any other institution hence the Respondents cannot be faulted for undertaking their statutory functions. In this case it was the National Assembly's submission that the Petitioner had not demonstrated how the requirement for license contravenes their rights.

207. These submissions call for a determination whether Courts should interfere with policy decisions. In the Canadian case of *Just v R in Right of B.C*. (Vancouver No. C822279), Justice McLachlin of the Supreme Court of British Columbia observed thus:

> "In general, policy refers to a decision of a public body at the planning level involving the allocation of scarce resources or balancing such factors as efficiency and thrift. The operational function of government, by contrast, involves the use of governmental powers for the purpose of implementing, giving effect to or enforcing compliance with the general or specific goals of a policy decision...one hallmark of a policy, as opposed to an operational, decision is that it involves planning... A second characteristic of a policy decision as opposed to an operational function is that a policy decision involves allocating resources and balancing factors such as efficiency or thrift."

208. However, it is not for this court to determine whether in arriving at a particular policy decision, the policy maker's decision was wise or merited. It therefore follows that the timing of a policy decision based on the prevailing circumstances do not justify the Court's interference with the policy

in question. As was appreciated by Majanja, J in *Mark Obuya & Others v Commissioner of Domestic Taxes & 2 Others* [2014] eKLR:

> " 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 licence to declare it unconstitutional..."

209. This was appreciated by the Supreme Court of India in the case of *Hambardda Dawakhana v Union of India Air* (1960) AIR 554. The same Court in case of Union of India v M/S Exide Industries Ltd. on 24 April, 2020 expressed itself as follows:-

> " 11. The approach of the Court in testing the constitutional validity of a provision is well settled and the fundamental concern of the Court is to inspect the existence of enacting power and once such power is found to be present, the next examination is to ascertain whether the enacted provision impinges upon any right enshrined in Part III of the Constitution. Broadly speaking, the process of examining validity of a duly enacted provision, as envisaged under Article 13 of the Constitution, is premised on these two steps. No doubt, the second test of infringement of Part III is a deeper test undertaken in light of settled constitutional principles. In *State of Madhya Pradesh v Rakesh Kohli & Anr*.4, this Court observed thus:
>
> > " 17. This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds, namely
> >
> > (i) that the appropriate legislature does not have competence to make the law, and
> >
> > (ii) that it does not take away or abridge any of the fundamental rights enumerated in Part III of the 4 (2012) 6 SCC 312 Constitution or any other constitutional provisions..."
>
> That brings us to the next step of examination i.e. whether the said clause contravenes any right enshrined in Part III of the Constitution, either in its form, substance or effect. It is no more res integra that the examination of the Court begins with a presumption in favour of constitutionality. This presumption is not just borne out of judicial discipline and prudence, but also out of the basic scheme of the Constitution wherein the power to legislate is the exclusive domain of the Legislature/Parliament. This power is clothed with power to decide when to legislate, what to legislate and how much to legislate. Thus, to decide the timing, content and extent of legislation is a function primarily entrusted to the legislature and in exercise of judicial review, the Court starts with a basic presumption in favour of the proper exercise of such power."

210. In *State of M.P v Rakesh Kohli & Anr on 11 May, 2012*, the same Court had this to say:-

> "29. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:
>
> (i) there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature
>
> (ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found
>
> (iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence
>
> (iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law and
>
> (v) in the field of taxation, the Legislature enjoys greater latitude for classification."

211. Back home in *Bidco Oil Refineries Limited v Attorney General & 3 Others* [2013] eKLR it was 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."

212. That position resonates with the opinion held in *Association of Gaming Operators-Kenya & 41 Others v Attorney General & 4 Others* [2014] eKLR where *Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others* Nairobi Petition No. 544 of 2013 [2014] eKLR, was cited in which it was held that:

> "Article 209 of the *Constitution* empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of the *Constitution*, the legislature retains wide authority to define the scope of the tax."

213. What comes out from the above authorities is that unless there is an allegation of a specific violation of the *Constitution*, the court cannot question the wisdom of legislation or its policy object. The

fact that the implementation of the statute may be difficult or inconvenient as opposed to being unconstitutional or unlawful, does not warrant it being declared unconstitutional since it is within the authority of the legislature to enact legislation governing the manner in which a particular form of regulation is administered including the manner in which it imposed and enforced because such issues go to the application of the Act, rather than its constitutionality. It is therefore within the sole mandate of the Legislature/Parliament to decide when to legislate, what to legislate and how much to legislate and to decide the timing, content and extent of legislation. Further vague contentions as arbitrariness, unreasonableness or irrationality without more do not warrant the striking out of an enactment unless some constitutional infirmity has to be found. Since it is presumed that Parliament and State Legislatures are alive to the needs of the people whom they represent hence the best judge of the community by whose suffrage they come into existence, the court ought not to concern itself with the wisdom or unwisdom, the justice or injustice of the law. Similarly, hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law since in the field of taxation, the Legislature enjoys greater latitude for classification. Therefore, 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.

214. However, the legislature must, in enacting law based on policy decision comply with Article 10 of the *Constitution*. I have however considered the issue whether the said Article was contravened and I have found in the negative.

215. I now come back to the issue whether the principle of public participation was adhered to by the Respondents.

216. From the affidavits deposed to by the Respondents, the steps taken by the Respondents towards the enactment of formulation of the *Amendment Act* and the *Regulations* have been set out and these steps have not been challenged by the Petitioner. There are now clearly laid down principles guiding the principle of public participation in our and other jurisdictions with similar constitutional provisions.

217. Before dealing with these principles it is important to set out the constitutional foundation for public participation and its rationale. Article 10 of the *Constitution* provides that:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them––

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include -

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

218. The importance of this Article was affirmed in Nairobi Civil Appeal No. 224 of 2017 – *Independent Electoral and Boundaries Commission & Others v The National Super Alliance & Others*, where the Court of Appeal expressed itself as follows:

> " 80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the *Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 *Constitution* in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the *Constitution* in a manner that promotes its values and principles.
>
> 81. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate."

219. The rationale for the principle was laid down in *Doctor's for life International v The Speaker National Assembly and Others* (CCT12/05) [2006] ZACC 11) as adopted in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR where the Court observed that:

> "The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation...The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process."

220. Similarly, in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as adopted in *Republic v County Government of Kiambu Ex parte Robert Gakuru & Another* [2016] eKLR the Court stated that:

> " Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other...What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process..."

221. Ngcobo, J dealt with the issue in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) when he stated:

> " The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected."

222. It is similarly my view that this Court not only has the power but the obligation to determine whether a particular legislation was in fact and in substance enacted in accordance with the *Constitution* and not to just satisfy itself as to the formalities or the motions of doing so.

223. "Public participation" according to Section 2 of the *Statutory Instruments Act*, No. 23 of 2013:

> Means involvement by the regulation-making authority of persons or stakeholders that the statutory instrument may directly or indirectly apply to.

224. According to *Black's Law Dictionary*, 10th Edition, public participation is:

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

225. However, public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by *Black's Law Dictionary* 9th Edn. at page 358 as

> " the act of asking the advice or opinion of someone"

"participation" on the other hand is defined at page 1229 thereof as

> " the act of taking part in something, such as partnership ..."

Therefore, public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words, the end product ought to be owned by the public. This position was appreciated in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) as hereunder:

> " If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."

226. This was Ngcobo, J's view in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (*supra*) where he held *inter alia* as follows:

> " Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other...What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process...To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected...Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values [and] social justice" and declares that the Constitution lays down

"the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, 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."

227. As to what amounts to public facilitation, Ngcobo, J in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) expressed himself as hereunder:

> " The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter);...the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."

228. Therefore, public participation must inculcate the principles of openness, democracy, accountability and representation. It was therefore held in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR as follows:

> " In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behaves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively...I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular

radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1) (b) just like the South African position requires just that."

229. This Court however, held in *Republic v County Government of Kiambu Ex Parte Robert Gakuru & Another* [2016] eKLR at page 12 paragraphs 50 and 52 that:

> "However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case...Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question...The Respondent has however adduced evidence showing that not only was the Bill leading to the said Act widely advertised but that the applicants themselves participated by giving their views thereon. Whereas the views of the applicants may not have been swallowed hook, line and sinker, that does not necessarily mean that there was no public participation."

230. As was appreciated by Lenaola, J in *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others* Petition No. 486 of 2013, public participation is not the same as saying that public views must prevail.

231. Accordingly, the caution expressed by Sachs, J in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:

> "The passages from the *Doctors for Life majority judgment,* referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of

these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of 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...Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done."

232. This position was adopted by Majanja J's decision in Majanja, J in *Commission for the Implementation of the Constitution v Parliament of Kenya & Another & 2 Others & 2 Others* [2013] eKLR when he expressed himself as follows:

> " The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para. 630, "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

233. What the Courts are saying was that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed.

234. As appreciated by Ngcobo, J:

> " Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings."

235. Similar views were expressed in *Diani Business Welfare Association and Others v The County Government of Kwale* [2015] eKLR where the Court held that:

> " it does not matter how public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation...it is an indictment against the Petitioners that they would chose to ignore an important civic and constitutional duty to shape the financial and budgetary policy, the implementation of which would affect them in terms of revenue measures and the utilization of that revenue..."

236. Therefore, it is not the law that each and every citizen must be heard. As aptly put in *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others* (Interested Parties) [2020] eKLR:

> " The principle of public participation does not require the legislature to conduct a census-like exercise of knocking at the door of every person residing in its jurisdiction with a view to confirming that the residents have given their opinions on a contemplated legislative measure, and where no comments are forthcoming, to 'forcefully' extract opinions from residents. The duty placed upon the legislature by the law is to inform the public of its business and provide an environment and opportunity for those who wish to have a say on the issue to do so."

237. Article 118(1)(b) of the *Constitution* enjoins Parliament to facilitate public participation in the process of making legislation by requiring Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. *Standing Order No. 127 of the National Assembly* provides that:

(1) A Bill having been read a First Time shall stand committed to the relevant Departmental Committee without question put.

(2) Notwithstanding paragraph (1), the Assembly may resolve to commit a Bill to a select committee established for that purpose.

(3) The Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the House.

238. Accordingly, the duty to undertake public participation vests in the Departmental Committee to which a Bill is committed and as submitted, in the instant case, the duty vest in the Departmental Committee on Finance and National Planning.

239. In this case the Respondents elaborately set out the steps taken in the enactment of the *Amendment Act* and the formulation of the *Regulations* which steps were not challenged by the Petitioner. The position adopted by the Petitioner was that it did not participate as a stakeholder in the processes cited by the 1st and 3rd Respondents as they did not deem themselves Digital Credit Providers as defined by the *Amendment Act*. Accordingly, the Respondents only collected comments from the Digital Lenders Association of Kenya to whom the *Act* and the *Regulations* targeted. From the Petitioner's own averments, it was aware of the process of the amendment of the Act and the formulation but because it believed hat it was not affected thereby, it did not make any representation. To my view, the Respondents cannot be blamed for the failure of the Petitioner to present its views on the view that the proposal did not apply to it.

240. This issue is however linked to the question whether Section 5 of the *Statutory Instruments Act* was complied with.

241. Section 4(a)of the *Statutory Instruments Act*, 2013 enjoins regulation-making authorities to undertake appropriate consultation before making statutory instruments while Section 5(3) provides the procedure for conducting the consultation in the following terms:

(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

(a) have a direct, or a substantial indirect effect on business; or

(b) restrict competition;

the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

(2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—

(a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and

(b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

(3) Without limiting by implication, the form that consultation referred to in subsection (1) might take, the consultation shall—

(a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

(b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

242. According to the Petitioner, in this case the Respondents did not issue such notifications nor did they discharge their duty to consult under the said section 5 of the said *Act*.

243. According to the Petitioner, in submitting the Regulations to both Houses of Parliament, the 1st Respondent should also have ensured that a copy of a regulatory impact statement and a compliance certificate was also presented therewith as required by section 7(5) of the *Statutory Instruments Act*.

244. On their part, the Respondents contended that in accordance with the provisions of Section 11(1) of the *Statutory Instruments Act*, No. 23 of 2013, on 22nd March 2022 the CBK transmitted the *DCP Regulations* to the Clerk of the National Assembly for tabling before the National Assembly's Committee on Delegated Legislation and that the *DCP Regulations* were tabled before the Committee on Delegated Legislation on 23rd March 2022 and approved by the National Assembly on 14th May 2022. According to them, the Petitioner had a chance to present a memorandum to the National Assembly's Committee on Finance and Planning and to the CBK during public participation, but it did not take up the opportunity.

245. As was held by Mativo, J (as he then was) in *Council of County Governors v Attorney General & Another* [2017] eKLR:-

> " There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional)."

246. This is in tandem with the decision of the Supreme Court discussing the burden of proof in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 Others* [2020] eKLR where the Court opined as follows:

> "(49) Section 108 of the *Evidence Act* provides that,
>
> > "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;"
>
> and Section 109 of the Act declares that,
>
> > "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> [50] This Court in *Raila Odinga & Others v Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
>
> > "a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden..."
>
> (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

247. It was therefore held in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR that:

> "It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."

248. Accordingly, it was upon the Petitioner to prove that the law was not followed in the passage of the *Amendment* and the *Regulations*. No such evidence was placed before me in this petition.

249. Apart from that it was the Petitioner's case that its members are not regulated by the *Microfinance Act*, 2006 and that the Cabinet Secretary, National Treasury is yet to make regulations required under Section 3(2) of the *Microfinance Act*, 2006 specifying the non-deposit taking microfinance businesses to which the Act applies and prescribing measures for the conduct of their business. If that position holds, then it would follow that the Petitioner's members do not fall within the class of persons who

are likely to be affected by the proposed instrument under section 5(1) of the *Statutory Instruments Act* and therefore the Respondents were not enjoined to consult them. In other words, the Petitioners' arguments regarding this issue are self-defeating.

250. It is therefore my view and I find that the Petitioner's complaint, based as it is on lack of public participation, must fail.

251. The next issue is whether based the impugned instruments are discriminatory. It was submitted on behalf of the Petitioners that the said Regulation 2 of *DCP Regulations* is discriminatory and violates the Petitioner's member's right as guaranteed under Article 27 of the *Constitution*. The said Regulation 2 of *DCP Regulations* provide as follows:

> These Regulations shall not apply to—
>
> (a) an institution licensed under the Banking Act;
>
> (b) an institution licensed under the Microfinance Act, 2006;
>
> (c) a Sacco society licensed under the Sacco Societies Act, 2008;
>
> (d) the Kenya Post Office Savings Bank supervised under the Kenya Post Office Savings Bank Act;
>
> (e) credit arrangements involving the provision of credit by a person that is merely incidental to the sale of goods or provision of services by the person whose primary business is the provision of the goods or services;
>
> (f) an entity whose digital credit business is regulated under any other written law;
>
> (g) any other entity approved by the Bank.

252. According to the Petitioners, in so far as the Regulations exempt institutions licensed under the *Banking*, *Micro – Finance Act*, *Sacco Societies Act* among others but fail to exempt non – deposit taking Micro – Finance businesses who are yet to be regulated under the *Microfinance Act*, the same are discriminatory against non – deposit taking micro finance institutions whose nature of business is similar to banks and institutions licenced under the *Micro – Finance Act* since they too offer financial and non-financial services to their customers that include financial education and business management services which expose them to human interactions with their customers. The Petitioner contended that it is discriminatory to treat persons in relevantly similar business differently, without any objective and reasonable justification. The only difference according to the Petitioner is that its members do not receive deposits from its customers.

253. It contended that it is the same understanding and principle that was applied by the National Assembly when it enacted the *Finance Act* 2022 that exempted non – deposit taking micro – finance businesses from the application of section 16 (2) (j) of the *Income Tax Act* that equally exempts Banks and micro and small enterprises. To the Petitioner, the exemption and the rationale negate the provisions of section 3 of the *Micro – Finance Act* 2006 which contemplates regulations to be made by the CS to regulate specified non – deposit taking micro – finance businesses.

254. It was noted that whereas the National Assembly's suspension was that the institutions which have been exempted are already regulated and controlled by Central Bank of Kenya and other licensing entities, none of the Respondents has offered an explanation why the regulations regulating non-deposit taking micro-finance businesses have never been enacted pursuant to Section 3 of the *Microfinance Act*, since 2006.

255. It is submitted that the Petitioner's members now have to stop all other activities save for provision of credit until an approval is given by the Central Bank of Kenya and that this is a limitation of their rights which they have enjoyed over time offering other services to their customers. According to the Petitioners, for such restriction and limitation to be sustained, it must meet the threshold outlined under Article 24 of the *Constitution*. However, the restrictions posed on the Petitioner's members' business by the *DCP Regulations* does not meet the threshold set out under Article 24 of the *Constitution*.

256. On their part, the Respondents contended that for one to claim its freedom from discrimination protected under Article 27 of the *Constitution* has been violated, it has to prove that the alleged act is not only unreasonable but also arbitrary and that it does not rest on any rational basis having regard to the objects for which the enactment was done. In this case it was averred that the *Amendment Act* and the *DCP Regulations* were clearly designed to bring all unregulated digital credit providers including the Petitioner's members under the regulation and supervision of the CBK. According to the Respondents, the Petitioner has not demonstrated how the bringing of all the admittedly unregulated digital credit providers to the ambit of regulation by the CBK is discriminatory to its members. In any event, it was averred that the *Amendment Act*, 2021 and the *DCP Regulations* are clear that they only cover those unregulated DCPs and do not cover institutions licensed and regulated under the *Banking Act*, the *Microfinance Act*, 2006, the *Sacco Societies Act*, 2008, which are subject to licensing, reporting, regulation, consumer protection and compliance with the reporting obligations under the *Proceeds of Crime and Anti Money Laundering Act*, 2009, which the Petitioner seeks to be exempted from.

257. According to the 1st Respondent, the Petitioner has not demonstrated how its members offering digital credit services are of a similar description to the other categories such as Banks and the Microfinance Banks the differentiation of treatment wholly attributed to their categorical descriptions. Secondly, from the Petitioner's List of Members, are banks regulated under the Banking Act and micro-finance banks regulated under the *Micro Finance Act*, 2006. All these institutions have been exempted under Regulation 2 because they are already regulated under the *Banking* and *Microfinance Act* 2006 and *Sacco Societies Act*. It was submitted that the Petitioner has not brought any evidence to prove that its other members on whose behalf it has filed this Petition are regulated under any other law in the provision of Digital Credit Services. They cannot therefore claim to be discriminated upon by virtue of the said *Regulation*.

258. According to the deponent, the Petitioner did not set out clearly the nature of discrimination that has been alleged, neither has he shown who is suffering the said discrimination.

259. Article 27 of the *Constitution* provides that:

27.

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

260. It is true that Article 27(1) of the *Constitution* guarantees every person the right equal benefit and treatment by the law while Article 27(4) of the *Constitution* provides that the State shall not discriminate directly or indirectly against any person on any ground. It is however important to note that the Article states that the

> "State shall not discriminate directly or indirectly against any person on any ground, including..."

This means that there may be other grounds of discrimination not expressly set out which are similarly outlawed and it is upon the Court while exercising its jurisdiction pursuant to Article 19(3) of the *Constitution* which provides that:

> The rights and fundamental freedoms in the Bill of Rights—
>
> (a) belong to each individual and are not granted by the State;
>
> (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and
>
> (c) are subject only to the limitations contemplated in this Constitution.

261. Similarly, Article 20(3) of the *Constitution* provides that:

> (3) In applying a provision of the Bill of Rights, a court shall—
>
> (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
>
> (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

262. Therefore, the position adopted by the Respondents that since the ground of discrimination relied upon by the Petitioner is not one of the grounds expressly set out in Article 27, that ground cannot be successfully invoked is not entirely correct.

263. The *Black's Law Dictionary* defines discrimination as follows:

> The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap

or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.

264. Wikipedia, the free encyclopedia defines discrimination as:

prejudicial treatment of a person or a group of people based on certain characteristics.

265. The *Bill of Rights Handbook*, Fourth Edition 2001, defines discrimination as:-

A particular form of differentiation on illegitimate ground.

266. McIntyre, J in the Canadian Supreme Court case of *Andrews v Law Society of British Columbia* [1989] I SCR 143, defined discrimination as:

> "... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society."

267. In *State of Bombay v F. N. Balsara* AIR 1951 SC 318 at p. 326, a decision based on the opinion of Professor Willis' *Constitutional Law*, 1st ed. At 578, it was stated that:

> "The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred & in the liabilities imposed. The inhibition of the amendment...was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation.' It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, & nullifies what they do only when it is without any reasonable basis."

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269. In his decision in *Nyarangi & 3 Others v Attorney General* HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J (as he then was) held:

> "The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification...The rights guaranteed in the *Constitution* are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the *Constitution* may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including
>
> (a) the nature and importance of the limitation
>
> (b) the relation between the limitation and its purpose
>
> (c) less restrictive means to achieve the purpose.
>
> The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:-
>
> (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and
>
> (2) Are reasonable in the light of their legitimate aim."

270. I agree with the decision in *Pevans East Africa Limited v Betting Control and Licensing Board & 2 others; Safaricom Limited & another* (Interested Parties) [2019] eKLR, where the Court cited with approval the test applied in the case of *Harksen v Lane NO and Others* (1997) 11 BCLR 1489 (CC) where the South African Constitutional Court established the criteria for determining whether a provision of law is discriminatory as follows:

a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: -

   (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the

potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.

c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause of the...Constitution, being Article 24 of the Constitution in the instant case.

271. That was the position in *Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General* [2011] eKLR, of the court citing the South African case of *Jacques Charl Hoffmann v South African Airways*, CCT 17 of 2000 held that to determine whether or not there is infringement of the right to equality, then it ought to determine:

a. whether the provision under attack that makes a differentiation bears a rational connection to a legitimate government purpose. If the differentiation bears no such connection, there is a violation of Section 9 (1). If it bears a rational connection, the second enquiry arises.

b. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9 (3).

c. If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.

272. For the Court to uphold the plea for discrimination, it must be shown that persons or entities undertaking similar activities are treated differently. However, differential treatment is not necessarily unconstitutional as was appreciated by the Court of Appeal in the case of *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR in which it was stated as follow:-

> " And direct and indirect discrimination was distinguished in the case of *Nyarangi & Others v Attorney General [2008] KLR 688* when it was stated that;
>
> > " Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs v Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found "to disqualify negros at a substantially higher rate than white applicants".

With regard to differential or unequal treatment it was observed in the case of *Kedar Nath v State of W.B.* (1953 SCR 835 (843) that;

> " Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

273. As was held by Mativo, J in the case of *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR: -

> " 94. The clear message emerging from the authorities, both local and foreign, is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.
>
> 95. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.
>
> 96. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination."

274. In this case, it is contended that though the Petitioners undertake similar businesses as those carried out by other institutions, the *Regulations* exempt institutions licensed under the *Banking*, *Micro – Finance Act*, *Sacco Societies Act* among others but fail to exempt non – deposit taking Micro – Finance businesses who are yet to be regulated under the *Microfinance Act*. According to the Petitioner, its members offer financial and non-financial services to their customers that include financial education and business management services which expose them to human interactions with their customers.

275. However, the Respondents have stated that the reason for the exemption of the other institutions is that all these other institutions that have been exempted under Regulation 2 are already regulated under the *Banking* and *Microfinance Act* 2006 and *Sacco Societies Act*. The Petitioner admitted that it is not regulated under any of those pieces of legislation and in act admitted that in the absence of any Regulations made pursuant to Section 3 of the *Microfinance Act* 2006 there is a need for regulations since they are not regulated. In my view lack of regulations as regards the affairs of the members of the Petitioners is a plausible reason to not treat them in the same manner as those entities that are already being regulated under their respective Acts of Parliament.

276. It was further contended that the impugned provision marked financial institutions under the *Banking Act*, *Micro Finance Act* and the Micro and Finance Enterprises Act as exempted since the entities borrowing and liquidation is regulated and controlled by the Central Bank of Kenya and other licensing entities. Further:

a. The bodies under the *Banking Act*, *Micro Finance Act* and Micro and Small Enterprises Act undertake a different business as compared to the Petitioners, they are deposit taking entities. The deposit taking nature place a requirement by the regulator as to how much the entities hold while the Petitioner who are simply credit providers lacks such restrictions.

b. Additionally, the institutions under the *Banking Act*, *Micro Finance Act* and *Micro and Small Enterprises Act* perform an intermediation role through the use of customer deposits to give loans on which they earn interest.

c. The Petitioner being very distinct from the entities from which they derive comparison in the Petition are misguided. It has not been shown that any entity operating exactly as the Petitioner is exempt from the said provision. Discrimination can only arise where persons who are in the same field or sector, are accorded different treatments, which is not the case herein.

277. It was averred that the Petitioner did not adduce any evidence to suggest that the impugned provisions were based on the prohibited grounds as set out in the *constitution*.

278. In my finding the Respondents have satisfactorily shown that Accordingly, that ground cannot be sustained. Whereas it is admitted that there is discrimination between the other entities that are exempted from the application of the regulations, it is not enough to prove discrimination. One must go further and prove that the discrimination is unfair since not all distinctions between people are illegal. Where it is shown that the distinctions complained about are reasonable in the light of their legitimate aim, such distinctions will be lawful.

279. In this case the Respondents have explained the reasons behind the distinctions and I find the same plausible.

280. The Petitioner has taken issue with the fact that no regulations have been finalised under section 3 of the *Microfinance Act* and sought from this Court an order compelling the Respondents to formulate those regulations. I agree that where an Act of Parliament provides for the formulation of facilitating regulations, the failure to do so may justify the Court's intervention. In this case, however, the Respondents contend that the *Regulations* made by the CBK are sufficient and that should they turn out to be inadequate, necessary steps will be taken to remedy the situation.

281. The law is clear that it is within the sole mandate of the Legislature/Parliament to decide when to legislate, what to legislate and how much to legislate and to decide the timing, content and extent of legislation. Therefore, vague contentions as arbitrariness, unreasonableness or irrationality without more do not warrant the striking out of an enactment unless some constitutional infirmity has to be found. Since it is presumed that Parliament and State Legislatures are alive to the needs of the people whom they represent hence the best judge of the community by whose suffrage they come into existence, the court ought not to concern itself with the wisdom or unwisdom, the justice or injustice of the law.

282. I have said enough above to show that I am not persuaded that there has been any violation of any constitutional rights or freedoms of the Petitioners. The enactment of C*entral Bank of Kenya (Amendment) Act*, 2021 and the *Central Bank of Kenya (Digital Credit Providers) Regulations*, 2022 cannot amount to infringement of the constitutional rights of the Petitioners. To the contrary, and as admitted by the petitioner, regulations are necessary to superintend, the manner in which the Petitioner's members conduct their business in the interest of the public that rely on such services.

Order

283. Having arrived at the aforesaid findings, the order that commends itself to me and which I hereby make is that this petition lacks merit and is hereby dismissed but with no order as to costs as this matter clearly was a public interest matter.

284. Judgement accordingly.

G V ODUNGA

JUDGE

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2022

M W MUIGAI

JUDGE