



**Ibrahim v Ministry of Health & 2 others; British American Tobacco  
(Interested Party) (Petition 307 of 2019) [2022] KEHC 15443 (KLR)  
(Constitutional and Human Rights) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15443 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 307 OF 2019  
HI ONG'UDI, J  
NOVEMBER 18, 2022**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 1, 2, 4, 10, 12, 19, 20, 21, 22, 23,  
24, 26, 27, 28, 42, 43, 55, 69, 70, 165, 258, AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE PUBLIC HEALTH ACT, CHAPTER 242 LAW OF KENYA**

**AND**

**IN THE MATTER OF THE PUBLIC HEALTH  
(CONTROL OF SHISHA SMOKING) RULES, 2017**

**AND**

**IN THE MATTER OF TOBACCO CONTROL ACT NO. 4 OF 2007**

**AND**

**IN THE MATTER OF THE TOBACCO CONTROL REGULATIONS, 2014**

**BETWEEN**

**IBRAHIM MAHMOUD IBRAHIM ..... PETITIONER**

**AND**

**MINISTRY OF HEALTH ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**BRITISH AMERICAN TOBACCO ..... INTERESTED PARTY**



## JUDGMENT

1. The petition dated July 30, 2019 was filed pursuant to the *Public Health Act*, cap 242, the *Public Health (Control of Shisha Smoking) Rules, 2017*, the *Tobacco Control Act* and the *Tobacco Control Regulations, 2014* for the alleged contravention of articles 1, 2, 4, 10, 12, 19, 20, 21, 22, 23, 24, 26, 27, 28, 42, 43, 55, 69, 70, 165, 258 and 259 of the *Constitution*.
2. Accordingly, the petition seeks the following orders: -
  - a. A declaration that the use of tobacco products in consumable items and cigarettes described and the laws governing the control of production, supply, management, dissemination, consumption and use of Tobacco products in as far as they make such production, supply, management, dissemination, consumption and use legal is contrary to the provision of the *Constitution* especially articles 2, 10, 19, 20, 21, 24, 26, 27, 28, 42, 43, 55, 69 and 70 of the *Constitution*.
  - b. A declaration that the highest attainable standard prescribed in the *Constitution* is completely consistent with the total ban of the production, supply, management, dissemination, consumption and use of tobacco products such as cigarettes.
  - c. This honourable court be pleased to issue an order of mandamus compelling the respondents to ban the entire production, supply, management, dissemination, consumption and use of tobacco products and cigarettes and enforce the same.
  - d. A declaration that cancer is a tobacco related ailment and a national disaster requiring special administrative action including but not limited to allocation of special administrative action including but not limited to allocation of special budgetary consideration and banning of cigarettes and related tobacco products.
  - e. The costs of this petition.

### The Petitioner's Case

3. The heart of the petition as supported by the petitioner's affidavit dated July 30, 2019 challenges the legality of the production, manufacture, distribution, management, dissemination, control, consumption and use of tobacco in Kenya as allowed by the respondents. The petitioner claims this to be in total disregard of the effects of growing, consuming, selling and general use of the tobacco in the society.
4. He informed that the control and use of tobacco products in Kenya is regulated under the *Tobacco Control Act* No 4 of 2007 hence making its use legal. He took issue with the fact that tobacco products are not banned in totality yet present prominent risks such as cancer to the health of individuals consuming them or exposed to them as second-hand smokers. This is notwithstanding the fact that every person in Kenya has a right to attain the highest attainable standard of health.
5. He further deposed that the *Public Health (Control of Shisha Smoking) Rules, 2017* are selective in criminalization of shisha and protection of shisha users from harmful substances to the exclusion of other tobacco products without any justification or regard to the effects and health risks involved in production of these tobacco products. Further that the legislation on smoking control is inconsistent in its protection since for example various ailments such as cancer that are caused by the use of cigarettes



are not listed as part of the warning in the cigarette packages and neither is there a requirement to inform the public of such health risks.

6. He averred that since the government is responsible for the legalization of use of tobacco products it is also obligated to go beyond informing the public of such risks and disallow use of these products in line with the dictates of the Constitution under articles 2, 10, 19, 20, 21, 24, 26, 27, 28, 42, 43, 55, 69 and 70. He noted that the Health Act No 21 of 2017 which gives effect to article 43 of the Constitution provides under section 5(1) that every person has the right to the highest attainable standard of health. Accordingly, it was deposed that there was no justification for banning certain tobacco products such as shisha while retaining use of its products such as cigarettes.
7. He averred that the ailments that are occasioned by tobacco products are debilitating yet the respondents were non-committal in their approach in the legislations covering these products. He further averred that the legislations were insufficient in protecting the public and so only a total ban of the products would suffice to resolve the matter. He noted that the Constitution in light of this, places an obligation on the government to protect the greater public health interest.
8. Taking into consideration the health risks attached to the use of tobacco products he deposed that the manufacture, importation, distribution, sale and consumption of cigarettes and tobacco products ought to be declared illegal in view of the dictates of the Constitution. He added that the attendant economic interest and revenue acquired from these products ought not to override the greater public health agenda in breach of the constitutional dictates which the respondents are bound by.

#### **The 1<sup>st</sup> & 2<sup>nd</sup> Respondent's Case**

9. The 1<sup>st</sup> & 2<sup>nd</sup> respondents in opposing the petition filed their replying affidavit dated February 17, 2022 sworn by Mutahi Kagwe, the 2<sup>nd</sup> respondent herein. He averred that there exists legislation in Kenya, being the Tobacco Control Act No 4 of 2007 which makes provisions to control the production, manufacture, sale, labelling, advertising, promotion and sponsorship of tobacco products, to provide for the Tobacco Control Board, to regulate smoking in specified areas, and connected purposes.
10. In addition he noted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are mandated under section 4 of the Act to prescribe the permissible levels of tar, nicotine, and such other constituent of tobacco products or their emissions as the Minister may specify, which levels shall not exceed the levels set by the World Health Organisation; prohibit the addition and use of any harmful constituent or ingredient in the production of tobacco products; prescribe the methods to be used In testing tobacco products and their emissions; prescribe the information that manufacturers shall provide to the Board including information on tobacco products and their emissions, sales and advertising data, and Information on product composition, ingredients, hazardous properties and brand elements; subject to the Act, control the labelling, packaging, sale, distribution, promotion or advertising of tobacco products so as to ensure that the purchaser or consumer of a tobacco product is not misled as to its quality, quantity, character, value, composition, effect, merit or safety and present injury or harm to the health of the consumer.
11. He deposed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had sensitized the tobacco farmers on the impact of tobacco farming and its use. They had also assisted the farmers to transition from tobacco products to farming of other crops. Additionally, he noted that Kenya is a party to the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), which provides for scientifically proven strategies and interventions for tobacco control in member states. Likewise, that Kenya is also a party to the WHO protocol to eliminate the illicit trade in tobacco products which provides for means of countering illicit trade in tobacco products, a key aspect of a comprehensive tobacco control policy.



In view of this it was deposed that all legislation concerning tobacco products was in compliance with international law.

12. He deposed that a total ban of tobacco products as prayed for by the petitioner would not automatically translate to the fulfillment of the highest attainable standards of health. Further, no empirical data had been adduced by the petitioner to support this claim.
13. He deposed therefore that the sudden and drastic approach proposed by the petitioner to address tobacco production, manufacture, sale and use would have adverse effects as the same would be taken outside the regulator's control in turn encouraging its illicit trade. This in the end would affect the long term national tobacco control approach which is towards a tobacco free nation. He averred that the *Tobacco Control Act* and the Regulations enjoy the presumption of constitutionality and had never been declared unconstitutional.
14. He deposed further that the petitioner's 'prayer (d) on a declaration that cancer is a tobacco related ailment and a national disaster, requiring special allocation is outside the jurisdiction of his court.

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

15. The 3<sup>rd</sup> respondent in opposition made its reply by filing the following grounds of opposition dated February 18, 2022:
  - i. The petition seeks a ban of tobacco products in Kenya, yet the same is controlled by dint of the *Tobacco Control Act*.
  - ii. The petition alludes to the provisions of the *Tobacco Control Act* being unconstitutional yet the Act enjoys the presumption of constitutionality of statutes.
  - iii. The petition challenges the constitutionality of the *Tobacco Control Regulations, 2014* whose constitutionality was extensively litigated upon and the Regulations found to be constitutional by the Supreme Court's decision in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (interested parties); Mastermind Tobacco Kenya Limited (the affected party)* [2019] eKLR.
  - iv. The petition seeks to challenge the *Public Health (Control of Shisha Smoking) Rules, 2017* by terming the same as selective in the protection offered yet constitutionality of these rules was been litigated upon and judgement entered in favor of the same, in *Republic v Ministry of Health & 3 others ex-parte Kennedy Amdany Langat & 27 others* [2018] eKLR.
  - v. The prayers sought by the petitioner are fatally defective as the same are unenforceable. This is because a ban and budgetary allocation may only be effected by way of legislation, while declaration of national disasters is a preserve of the executive. Accordingly grant of the prayers would be in violation of the doctrine of separation of powers and a case of judicial overreach.
  - vi. The petition is defective both in form and substance and thus unmerited and brought in bad faith.
  - vii. It is in public interest and interest of justice that the current petition be dismissed with costs as the same is an abuse of court process.



## The Interested Party's Case

16. The interested party through its replying affidavit dated November 30, 2021 sworn by Shirley Gulenywa, the Marketing & Regulatory Counsel averred that the petition does not disclose any reasonable cause of action. This is because the constitutional court does not have jurisdiction to introduce any new laws or amend legislation. In the same way, that the jurisdiction to issue a ban on the sale of tobacco products which is currently legal is a preserve of the National Assembly.
17. It was deposed that the orders sought would result in the contravention of its constitutional right to property under article 40(1) of the *Constitution*. This is since the prayers seek to completely curtail its right to manufacture and sell tobacco products. That grant of the prayers would contravene its right of legitimate expectation to carry out its commercial activities.
18. The deponent noted that the interested party had publicly stated that combustible cigarettes pose serious health risks which would only be avoided by not smoking or ceasing to smoke all together. He deposed that the petitioner had not advanced any empirical and scientific evidence that the proposed ban on tobacco products would achieve the desired goal set out in the petition. In effect it was averred that a banning on all tobacco products would result in sale of illicit tobacco products which will not have been vetted and approved by the requisite government entities.

## Submissions

### The petitioner's submissions

19. The petitioner through the firm of Kithi and Company Advocates filed written submissions and a list of authorities dated April 4, 2022. The issues identified for determination are:
  - i. Whether the use of tobacco products in consumable items is contrary to articles 2, 10, 19, 20, 21, 24, 26, 27, 28, 42, 43, 55, 69, 70, 165, 258 and 259 of the *Constitution*;
  - ii. Whether the petitioner is entitled to the prayers sought.
20. On the right to a clean and healthy environment under article 42 of the *Constitution*, Counsel submitted that tobacco growing, production and manufacturing have grave harmful effects on the environment. As such the survival of the entire tobacco industry is a violation of the right to a clean and healthy environment. It was argued that the *Public Health Act*, The Public Health (Tobacco Products Control) Rules 2006, the *Public Health Control of (Shisha Smoking Rules)* and the *Tobacco Control Act* do not adequately address and protect the right to a clean and healthy environment as there is no way to eliminate the effects caused by the product.
21. In support of this point, reliance was placed on the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another* (2013) eKLR where it was held that a reading of articles 42 and 70 of the *Constitution* make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.
22. On the right to economic and social rights under article 43 (1) (a) and (b) of the *Constitution*, counsel submitted that the tobacco industry has actively contributed to violation of this right because it has lowered the standard of health of the persons living in Kenya. This is because tobacco kills up to half of its users which equates to 8 million deaths a year globally, making it currently the world's single biggest cause of preventable death among other dangers associated with its use.
23. Furthermore, he noted that the tobacco industry offends the provisions on article 55 (d) of the *Constitution* which provides that the State shall take measures, including affirmative action programs,



to ensure that the youth are protected from harmful cultural practices and exploitation. In support reliance was placed on the case of *Republic v Ministry of Health & 3 others ex-parte Kennedy Amdany Langat & 27 others* (2018) eKLR where the court found that the Cabinet Secretary has wide ranging powers under section 36 of the *Public Health Act* to undertake measures to ensure the safety of public health in the Republic which should apply mutatis mutandis in this case also.

24. On equality under the law, counsel submitted that the respondents by allowing the tobacco industry to thrive, have contributed to the violation of article 12 (1) and 19(1) of the *Constitution*. This is because the survival of this industry prevents the petitioner and other members of the public from enjoying their rights to an unpolluted environment as enshrined in the *Constitution*. On the other hand the industry only benefits a few being the manufacturers, sellers and consumers.
25. Counsel additionally submitted that in view of this, the petitioner and the public are suffering an unfair limitation of their rights contrary to article 24 of the *Constitution*. In support reliance was placed on the case of *Thulani Maseko v Prime Minister of Swaziland & others* 2180/2009 [2016] SZHCn180 where it was noted that it is the duty of the government to show that any limitation of a fundamental freedom is justified.
26. Counsel submitted that this court in interpreting the *Constitution* was under a mandatory duty to adopt an interpretation that conforms to article 259 of the *Constitution* as held in the case of *Apollo Mboya v Attorney General & 2 others* (2018) eKLR. He submitted thus that the main question this court is to answer is what was the purpose of the *Constitution* in articles 2, 10, 19, 20, 21, 24, 26, 27, 28, 42, 43, 55, 69, 70, 165, 258 and 259. Further whether the *Constitution* intended to give supremacy to the tobacco industry and its consumers over the rest of the public. He similarly invited the court to consider the consequences of having the tobacco industry in place to date and whether regulating the industry had mitigated effects of tobacco products.
27. On the final issue counsel submitted that the petitioner had demonstrated how the tobacco industry affects the public and this court ought to award remedies sought as the legal burden of proof under section I 07 of the *Evidence Act* had been discharged.

### **The respondents' submissions**

28. The respondents through State Counsel, Jackline Kiramana filed written submissions dated June 7, 2022. She identified the issues for determination as follows:
  - i. Whether the provisions of the laws regulating use of tobacco and tobacco products in Kenya are in violation of the *Constitution*;
  - ii. Whether the respondents have in any way violated the rights alleged by the petitioner; and
  - iii. Whether the petitioner is entitled to the prayers sought;
29. On the first issue, counsel submitted that the petition took issue with the *Tobacco Control Act*, 2007 and the *Tobacco Control Regulations, 2014* for legalization of the use of tobacco in Kenya which according to the petitioner was in violation of the right to the highest attainable standard of health and the right to a clean environment as guaranteed by the *Constitution*. In view of this counsel submitted that the Act's constitutionality had never been called to question and so it enjoys the presumption of constitutionality. It was argued that the petitioner had failed to rebut this presumption.
30. Likewise, it was submitted that the constitutionality of the *Tobacco Control Regulations, 2014*, was extensively litigated upon and the Regulations found to be constitutional by the Supreme Court's in its decision in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited)*



v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (interested parties); Mastermind Tobacco Kenya Limited (the affected party) [2019] eKLR. Moreover, that the question relating to the ban of shisha use was conclusively litigated upon and judgement entered in favor of the said ban, in Republic v Ministry of Health & 3 others ex-parte Kennedy Amdany Langat & 27 others [2018] eKLR.

31. Counsel stressed that the questions of constitutionality of the legislations had already been settled and this court barred by the doctrine of *res judicata* from adjudicating on the same. It was submitted as such that the cited decisions were judgements in rem, and hence applicable in the instant petition.
32. Turning to the second issue, counsel submitted that the use of tobacco and tobacco products does not happen in a vacuum. This is because the same is regulated by both national and international laws. Taking this into consideration it was noted that the petitioner had not adduced any evidence to show that the respondents had in any way violated the provisions of the impugned laws. It was argued thus that the respondents could not be penalized for complying with the laws relating to tobacco products.
33. On the final point, counsel submitted that the prayers sought in the petition were defective and should not be granted. This is because the prayer sought relating to a declaration that cancer is a national disaster is a preserve of the Executive arm of Government. Likewise, that this court lacks jurisdiction to give budgetary allocation, whether special or otherwise as the same is a preserve of the legislative arm of Government.

#### **The interested party's submissions**

34. The firm of Kaplan and Stratton Advocates on behalf of the interested party filed written submissions dated June 8, 2022. Counsel noted that they additionally adopted the submissions of the respondents. Counsel identified the issues for determination as follows:
  - i. Whether the constitutional court has jurisdiction to issue a ban on the sale of tobacco products; and
  - ii. Whether the sale of tobacco unjustifiably infringes constitutional rights and whether a ban on the sale of such products is the only measure that would adequately protect such rights.
35. Counsel on the first issue submitted that owing to the doctrine of separation of powers, this court lacks jurisdiction to amend the Tobacco Control Act by issuing the orders sought by the petitioner. This is since it is a sole preserve of the National Assembly under article 109 of the Constitution 2010. In support reliance was placed on the case of Law Society of Kenya v Kenya Revenue Authority and another (2017) eKLR where it was held that it is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provisions is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate.
36. Turning to the second issue, counsel submitted that the production and sale of tobacco products is a lawful activity regulated by the Tobacco Control Act, which enjoys a presumption of constitutionality. As such there was no breach of articles 2, 10, 19, 20, 21, 24, 26, 27, 28, 42, 43, 55, 69 and 70 of the Constitution as the sale of tobacco products is already regulated.
37. On whether the petitioner had demonstrated that all tobacco products have the same risk profile, counsel noted that the petitioner had failed to provide evidence demonstrating that all tobacco products are in fact equally harmful. It was submitted that there is overwhelming evidence that not all tobacco products have the same risk profile, rather that certain categories of tobacco products that do



not contain tobacco or do not involve the combustion of tobacco may pose significantly reduced risk compared to traditional cigarettes and shisha.

38. In conclusion counsel submitted that this court lacks the requisite jurisdiction to grant the orders sought in the petition because doing so would amount to an amendment of the *Tobacco Control Act*.

### **Analysis and Determination**

39. I have carefully considered the pleadings, submissions, case law and the law and in my view the issues for determination are:
- i. Whether the use of tobacco products in consumable items and cigarettes and the laws governing the control of production, supply, management, dissemination, consumption and use of tobacco products violates articles 2, 10, 19, 20, 21, 24, 26, 27, 28, 42, 43, 55, 69 and 70 of the *Constitution*.
  - ii. Whether the petitioner is entitled to the reliefs sought.

### **Issue No. (i). Whether the use of tobacco products in consumable items and cigarettes and the laws governing the control of production, supply, management, dissemination, consumption and use of Tobacco products is contrary to Articles 2, 10, 19, 20, 21, 24, 26, 27, 28, 42, 43, 55, 69 and 70 of the Constitution**

40. The petitioner's central contention in this matter revolves around the legality of the production, manufacture, distribution, management, dissemination, control, consumption and use of tobacco in Kenya as allowed by the respondents through the *Tobacco Control Act* and the *Tobacco Control Regulations, 2014*. He took issue with the fact that tobacco products are not banned in totality despite the prominent risks associated with growing, consuming, selling and their general use in the society. This he argued was selective since shisha products had been banned by virtue of the *Public Health Act*, cap 242 and the *Public Health (Control of Shisha Smoking) Rules, 2017*.
41. The respondents opposed this assertion stating that the said laws enjoyed the presumption of constitutionality since their constitutionality had not been rebutted and challenged. Moreover, it was noted that the Supreme Court in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (interested parties); Mastermind Tobacco Kenya Limited (the affected party)* [2019] eKLR while examining a similar question concluded that the legislations were constitutional.
42. In the same way it was submitted that the constitutionality of the *Public Health (Control of Shisha Smoking) Rules, 2017* had been litigated upon and judgement entered in favor of the same, in *Republic v Ministry of Health & 3 others ex-parte Kennedy Amdany Langat & 27 others* [2018] eKLR. I note that the constitutionality of these laws was upheld in these cases and so stand guided by the same.
43. In addition to that, it is appreciated that at the forefront, the spirit of the *Constitution* must preside and permeate the process of judicial interpretation as spelt out under article 259 of the *Constitution*. Equally, this court in interpreting a statute is obligated to bear in mind as a first principle that there is a general presumption that Acts of Parliament are enacted in conformity with the *Constitution*. This was



affirmed by the Court of Appeal of Tanzania in the *Ndyanabo v Attorney General* case (2002) AHRLR 243 (TzCA 2002) in the following words:

“Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”

44. The presumption of constitutionality bears its origin from the fact that the *Constitution* bestows upon the legislature the power to make laws having force of law in Kenya. This is provided under article 94(5) of the *Constitution* which as follows:

“No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.”

45. The petitioner herein as it can be discerned from the petition is aggrieved by the use of tobacco products in Kenya and questions why these products have not been banned in totality. I note that while he states that the enabling laws are contrary to the cited provisions he does not rebut the constitutionality of the said laws. I say so because the petitioner fails to specifically challenge the provisions of the laws that are deemed unconstitutional or state how they have been breached by the respondents. Instead he stresses that the laws should not allow use of tobacco products as the same violate the cited constitutional provisions.

46. It is imperative to note that the burden to prove that the *Tobacco Control Act* and the *Tobacco Control Regulations, 2014* are contrary to the cited constitutional provisions lies on the petitioner. The threshold of proving one’s case is set out in the *Evidence Act* cap 80 as follows:

107. Burden of proof

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

47. 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 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...”

Also see: *Alice Wanjiru Rubiu v Messiac Assembly of Yahweh* [2021] eKLR.

48. It is not therefore enough for the petitioner to solely rely on his dissatisfaction in the use and legalization of tobacco products in Kenya. He should avail evidence to show how the statute and regulations are contrary to the provisions of the constitution complained of. The impugned decision by the respondents is a policy issue and parliament is obligated to make laws to govern various aspects, issues and products in Kenya, as it deems fit. Infact, failure to regulate the product would be going against its constitutional mandate. In absence of a demonstration and proof that the impugned laws violate the constitution, this court is mandated to uphold the constitutionality of the laws as required by the law and as upheld by the Surpeme Court in the *British American Taobcco Kenya, PLC* (supra).
49. In the circumstances of this case I find the case of *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR pertinent and valuable in this issue. The 2 judge bench pronounced as follows:
- “ 32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional.”
50. Although the petitioner put up a spirited fight on the use of tobacco products and its effects he failed to demonstrate by submission of facts and evidence how the impugned laws were in breach of the cited constitutional provisions. Undoubtedly the standard of proof places the onus of proof on the petitioner to prove the elements that constitute the violation of the said provisions which includes sufficient facts to justify a finding that the Tobacco Control Act and Tobacco Control Regulations, 2014 are in breach of the constitutional dictates. This was not done in this case.
51. The inevitable conclusion that I come to is that the use of tobacco products and the laws governing the control of production, supply, management, dissemination, consumption and use of tobacco products is not contrary to articles 2, 10, 19, 20, 21, 24, 26, 27, 28, 42, 43, 55, 69 and 70 of the Constitution.

#### **Issue No. (ii). Whether the petitioner is entitled to the reliefs sought**

52. Even though the petitioner was certain that he was entitled to grant of the reliefs sought in the petition, the respondents and interested party opposed this assertion. It was their argument that the prayers sought were outside this court’s jurisdiction as they fell within the purview of the Executive and Legislative arms of government. It was submitted that grant of the said prayers would be in violation of the doctrine of separation of powers.



53. The Constitution in this regard provides under article 1(3) of the Constitution as follows:
- Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution --
- a. Parliament and the legislative assemblies in the county governments;
  - b. the national executive and the executive structures in the county governments;  
and
  - c. the judiciary and independent tribunals.
54. The Constitutional Court in South Africa while addressing the issue of separation of powers in the case of Doctors for Life International v Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11 stated that:
- “The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised’.. ..”
- But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its values.”
55. Similarly, the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR speaking to this issue opined that:
- “Separation of powers does not only proscribe organs of government from interfering with the other’s function, but also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. It also warned that such powers are, however, not a license to take over functions vested elsewhere, and recommended that there must be judicial, legislative and executive deference to the repository of the function.”
56. It is clear from the cited provision and authorities that the court and the respondents have separate constitutional mandates as distinct arms of the government. The question therefore is whether the reliefs sought by the petitioner fall within the mandate of the respondents hence barring this court from granting the same by virtue of the doctrine of separation of powers. Where the reliefs are found to involve matters outside the set parameters, this court’s jurisdiction will therefore be lacking to grant the same.
57. An examination of the prayers (b)(c) and (d) in the instant petition that are deemed to be in violation of the doctrine of separation of powers reveals that the reliefs involve a question on the rightness and



- adequacy of Parliament’s decision to regulate use of tobacco products. The petitioner prays for an order compelling the respondents to make the requisite changes by ensuring a total ban of tobacco products.
58. In my view this is a challenge on the government’s legislative policy decision which a matter within the legislative authority of the Parliament as provided in the *Constitution*. This court as a consequence is required to refrain from making a determination on a question which is best suited for Parliament to determine.
59. I find the caution given in the case of *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR imperative in the circumstances of this case. The court held as follows:
- “97. A court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the political question doctrine; secondly, the constitutional-avoidance doctrine; and, thirdly, the ripeness doctrine. The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.
98. We shall commence with the political question doctrine. *Black’s Law Dictionary*, 10th Edition, Thomson Reuters Publishers, at page 1346 defines it as:
- The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government. [underlining added]
99. The political question doctrine focuses on the limitations upon adjudication by courts of matters generally within the area of responsibility of other arms of Government. [See generally *Ariel L. Bendor; Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of Israeli and American experience?*]
100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the courts are doing in such situations is assigning discretion on the issue to another branch of Government. [See generally *Fritz W. Scharpf; Judicial Review and the Political Question: A functional analysis and Herbert Weschler; Towards Neutral Principles of Constitutional law*”]
60. Evidently, the reliefs sought by the petitioner revolve around policy issues that are specifically set out for the Parliament by the *Constitution*. It is my considered view that it would be against the constitutional dictates for this court to grant the said reliefs. I say so because their nature invokes the doctrine of separation of powers curtailing this court’s jurisdiction to make a determination on the same. In effect the petitioner is not entitled to the said reliefs.
61. The upshot of the foregoing and for the reasons set out above, is that the petition dated July 30, 2019 lacks merit and I dismiss it. No costs shall be awarded as the petition was filed in great public interest.



Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2022 IN  
OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

