Association of Kenya Insurers (AKI) Suing through its Chairman Mr. Mathew Koech) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) & another (Interested Party) (Petition 201 of 2020) [2021] KEHC 402 (KLR) (Constitutional and Human Rights) (16 December 2021) (Judgment)

Association of Kenya Insurers (AKI) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) & another (Interested Parties) [2021] eKLR

Neutral citation: [2021] KEHC 402 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 201 OF 2020

JA MAKAU, J

DECEMBER 16, 2021

IN THE MATTER OF ARTICLE 22(1) (D), 23(1), 23(3), 258(1), 258 (2) (D) AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 27, 118 AND 201 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIOND 70 & 73 OF THE INSURANCE ACT, CHAPTER 487 (AS AMENDED IN 2015)

AND

IN THE MATTER OF REGULATIONS 21, 22 OF THE INSURANCE REGULATIONS UNDER SECTION 180 OF THE INSURANCE ACT, CHAPTER 487 (AS AMENDED IN 2015)

AND

IN THE MATTER OF VALUE ADDED TAX ACT, 2013 AS AMENDED BY THE TAX LAWS (AMENDMENT) ACT, 2020

AND

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS OF PROVISION OF INSURANCE

BETWEEN

ASSOCIATION OF KENYA INSURERS (AKI) SUING THROUGH ITS CHAIRMAN MR. MATHEW KOECH) ..... PETITIONER

AND

KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

NATIONAL ASSEMBLY ..... 3RD RESPONDENT

AND

INSURANCE REGULATORY AUTHORITY (IRA) ..... INTERESTED PARTY

ASSOCIATION OF INSURANCE BROKERS OF KENYA (AIBK) (SUING THROUGH ITS CEO ELIUD ADIEDO) ..... INTERESTED PARTY

Paragraph 10 of Part II of the First Schedule to the Value Added Tax Act as amended by the Tax Laws (Amendment) Act 2020, declared unconstitutional for contravening articles 1, 27, 35, 201(b)(i) of the Constitution

Reported by Kakai Toili

Constitutional Law *– national values and principles – public participation – nature of public participation - what was the nature of public participation in the legislative process – Constitution of Kenya, 2010, article 10(2).*

Constitutional Law *– constitutionality of statutes - factors to consider - what were the factors to consider in determining the constitutionality of legislation.*

Constitutional Law *– fundamental rights and freedom - right to equality and freedom from discrimination – whether the imposition of Value Added Tax (VAT) on the insurance sector while other sectors were enjoying tax reliefs amounted to a violation of the right to equality and freedom from discrimination - whether the Association of Kenya Insurers was discriminated against as its members could not claim credit for input VAT which was enjoyed by other taxpayers as its members were exempt from VAT - Constitution of Kenya, 2010, article 27(1); Value Added Tax Act, 2013, section 17(6) and (7).*

Tax Law *– taxation – principles of taxation - principle that the burden of taxation should be shared fairly - whether the imposition of input Value Added Tax (input VAT) on insurance companies that were not able to pass the input VAT cost charged by the insurance agents and brokers to the insurance policyholders was a violation of the principle that the burden of taxation should be shared fairly – Constitution of Kenya, 2010, article 201(b)(i).*

Brief facts

The petitioners filed the instant petition seeking among others; that the court should declare that paragraph 10 of Part II of the First Schedule to the Value Added Tax Act as amended by the Tax Laws (Amendment) Act, 2020 (VAT Act) was unconstitutional. In April 2020, amendments to VAT Act amending paragraph 10 of Part II of the First Schedule to the VAT Act came into operation. The petitioner and 2nd interested party challenged the process and substance of the impugned legislation. They contended that the impugned amendments were unconstitutional because the National Assembly failed to facilitate meaningful participation and genuinely consider public views in its enactment. The petitioner further averred that they were discriminated against by the respondents' actions.

The petitioner contended that the impugned amendment was introduced at a time when the Government was giving tax incentives to Kenyans to cushion them against the adverse effects of the *Covid–19* pandemic on the economy. They further argued that the effect of the impugned amendment was that instead of the petitioner enjoying the tax incentives, it had been subjected to additional tax burdens.

The respondents opposed the petition and filed grounds of opposition and claimed that the impugned amendment made to paragraph 10 of Part II of the First Schedule to the Value Added Tax Act, 2013 to remove insurance agency and brokerage services from the list of Value Added Tax (VAT) services effective April 25, 2020 enjoyed the general presumption of constitutionality. The respondents also claimed that there was meaningful public participation prior to the promulgation of the impugned Act.

Issues

i. What was the nature of public participation in the legislative process?

ii. What were the factors to consider in determining the constitutionality of legislation?

iii. Whether the imposition of value added tax on the insurance sector while other sectors were enjoying tax reliefs amounted to a violation of the right to equality and freedom from discrimination.

iv. Whether the Association of Kenya Insurers was discriminated against as its members could not claim credit for input VAT which was enjoyed by other taxpayers as its members were exempt from VAT.

v. Whether the imposition of input VAT on insurance companies that were not able to pass the input VAT cost charged by the insurance agents and brokers to the insurance policyholders was a violation of the principle that the burden of taxation should be shared fairly.

Held

1. The guiding values and principles of governance which included the rule of law, accountability, democracy, and participation of the people enshrined in article 10(2) of the Constitution of Kenya, 2010 (Constitution) should be adhered to. In examining the constitutionality of a statute, it had to be assumed the Legislature understood and appreciated the needs of the people and the law it enacted was directed to problems that were made manifest by experience, and the elected representatives assembled in a Legislature enacted laws which they considered to be reasonable for the purpose for which they were enacted. The presumption was therefore in favour of the constitutionality of an enactment.
2. The constitutionality of legislation was a rebuttable presumption; and where the court was satisfied that the legislation failed to meet the constitutional muster, nothing barred the court from declaring it to be unconstitutional. Parliament had a constitutional obligation to take legislative and policy measures to ensure that there was the progressive realization of each and every right guaranteed by the Constitution.
3. Public Participation was embodied in article 10(2) of the Constitution which established the founding values which included, among others, transparency, accountability and participation of the people. The Constitution contemplated a participatory democracy that was accountable and transparent and made provisions for public involvement in legislative affairs.
4. The law was not that all persons had to express their views or that they had to be heard and that the hearing had to be oral. Similarly, the law did not require that the proposed legislation had to be brought to each and every person wherever the person could be. What was required was that reasonable steps be taken to facilitate the participation. Once that was done, the court would not interfere simply because due to the peculiar circumstances of an individual, he or she failed to get the information. In other words, what was required was that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore, even in cases where there were oral public hearings the mere fact that a particular person had not been heard did not necessarily warrant the whole process being nullified.
5. Considering the averments by the petitioners that there was no public participation because the National Assembly did not invite the petitioner to a public forum, that had no basis in law. Consequently, the enactment of the Tax Laws (Amendment), Bill, 2020 did not violate the principle of public participation under the Constitution or at all. The respondents had demonstrated that there was public participation before the impugned amendment to paragraph 10 of Part II of the First Schedule of the Value Added Tax Act, 2013 was introduced.

6. Article 2(4) of the Constitution provided that any law including customary law, that was inconsistent with the Constitution was void to the extent of the inconsistency, and any act or omission in contravention of the Constitution was invalid. In construing the Constitution, article 259 enjoined the court to interpret the Constitution in a manner that promoted its purposes, values, and principles; advanced the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law; and contributed to good governance.
7. One of the ingredients of the rule of law was certainty of law. The most focused deprivations of individual interest in life, liberty or property had to be accompanied by sufficient procedural safeguards that ensured certainty and regulation of law. That was a vision and a value recognized by the Constitution and it was an important pillar of the rule of law.
8. The services of the petitioner's members under paragraph 2 of Part II of the First Schedule to the VAT Act were VAT exempt. The actual cost of the imposition of VAT on insurance agency and brokerage services would be and was borne by the petitioner's members whose services were VAT exempt under the VAT Act. The petitioner had provided copies of invoices received by its members from the intermediaries evidencing that. The law, if applied as the respondents averred; it would be that on one hand, it provided that the services of the petitioner's members were VAT exempt, yet on the other hand through the impugned Amendment it subjected the otherwise exempt services to VAT.
9. The respondents' contention that article 209 of the Constitution empowered the National Assembly to impose taxes and charges. Such taxes including income tax, VAT, customs duties and other duties on import and export goods and excise tax were not a response to the issue raised therein related to uncertainty, ambiguity and absurdity created by the impugned amendment.
10. Under article 209 of the Constitution, the Legislature retained wide authority to define the scope of the tax. The imposition of taxes was a constitutional imperative and the power to impose taxes was reposed in the Legislature. The imposition of tax by statute could not, in itself, amount to arbitrary deprivation of property contrary to article 40 of the Constitution. No tax or licensing fee could be imposed, waived or varied except as provided by the legislation.
11. Elementary justice demanded legal certainty of rules affecting the citizen. Legislation or a provision could be unconstitutional on grounds of cause and effect otherwise known as purpose or effect. Where the purpose or effect resulted in unconstitutional effects the provision or statute could be nullified for being unconstitutional.
12. To determine the constitutionality of a section of a statute or Act of Parliament, the court had to consider the purpose and effect of the impugned statute or section. If its purpose did not infringe a right guaranteed by the Constitution, the court had to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the impugned statute or section should be declared unconstitutional.
13. The court upon finding that the impugned amendment created uncertainty, ambiguity and absurdity was obligated to declare it as unconstitutional as the effect of the implementation would infringe a right already guaranteed under the Constitution, in particular, rights under article 10(2)(a) and 10(2)(d) of the Constitution.
14. The uncertainty and ambiguity of the impugned amendment made it impossible for the petitioner's members to plan for the tax burden that had been indirectly imposed on their services which were VAT exempt. The insurance on its part had no way of passing on the cost of VAT to policyholders. The imposition of VAT would therefore be a significant increase in the expenses of the petitioner's members whose income was already adversely affected by the *Covid-19* pandemic.
15. It was not clear, nor was the petitioner aware of the basis upon which Parliament decided to subject the insurance sector to additional tax burden during the *Covid-19* period whilst omitting the other sectors of the Kenyan economy by stating that the insurance sector had come of age and needed to contribute to government revenue.

16. VAT was a consumption tax that should be borne by the final consumer of the supply. Section 17 of the VAT Act allowed VAT registered taxpayers to claim a credit for input VAT against their output VAT to ensure the input VAT was effectively passed to the final consumer (in the instant case the insurance policyholders). The VAT charged by the insurance brokers and agents would be output VAT for them and would be passed to the petitioner's members which would be classified as input VAT.
17. Section 17(6) and 17(7) of the VAT Act limited the amount of input VAT claimable where input VAT was used to make exempt supplies. The insurance sector was therefore unfairly targeted by the imposition of the novel tax in the form of VAT while other sectors were enjoying tax reliefs. That was a complete contravention of article 27(1) of the Constitution.
18. The impugned amendment discriminated against the petitioner's members who would not be able to claim a credit for input VAT as provided for in the VAT Act and which was enjoyed by other taxpayers as the petitioner's members were exempt from VAT and would therefore not be able to effectively pass that input VAT to the final customer who were the insurance policyholders. That was in effect in contravention of article 27(1) of the Constitution.
19. The main income for insurance companies was VAT exempt insurance premiums; in view wherefore the insurance companies could not pass the input VAT cost charged by the insurance agents and brokers to the final consumer of their supply who were the insurance policyholders hence resulting in a heavier tax burden to the petitioner's members and in violation of article 201(b) (i) of the Constitution.
20. The court was clothed with jurisdiction to hear and determine the issues raised in the instant petition. Whenever legislation was challenged on grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts were obliged to consider whether the Parliament in enacting the law in question had given effect to the constitutional obligations.
21. One of the effects of the impugned amendment was that it created uncertainty, ambiguity, and absurdity contrary to the principle of the rule of law as set out in article 10 of the Constitution. The law on one hand provided that the services of the petitioner's members were VAT exempt, yet on the other hand through the impugned amendment, was subjecting the otherwise exempt services to VAT. The petitioner had a right to the certainty of the law and the court could not condone such a situation nor allow the ambiguity and uncertainty to persist anymore.

Petition allowed.

Orders

i. *Paragraph 10 of Part II of the First Schedule to the Value Added Tax Act as amended by the Tax Laws (Amendment) Act 2020, was unlawful, unconstitutional, and it contravened the provisions of article 1, 27, 35, 201(b)(i) of the Constitution.*
ii. *Each party to bear its own costs.*

Citations

Cases

1. Britestone Pte Ltd vs. Smith & Associations Far East Ltd (2007) 4 SLR ® 855 — Explained
2. 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 (Petition 5 of 2017) — Explained
3. Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others [2012] eKLR (Civil Appeal 74 & 82 of 2012) — Explained
4. Commissioner of Income Tax vs. Westmont Power (K) Ltd (Nairobi High Court Income Tax Appeal No. 626 of 2002 [2006] eKLR) — Explained
5. Ecobank Kenya Limited vs Commissioner for Domestic Taxes [2012]eKLR (Commercial Civil Case 8 of 2010) — Explained

6. Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017]eKLR (Petition 32 of 2014) — Explained
7. Katiba Institute & another v Attorney General & another [2017] eKLR (Constitutional Petition 209 of 2016) — Explained
8. Kenya Human Rights Commission v Attorney General & another [2018] eKLR (Constitutional Petition 87 of 2017) — Explained
9. Kenya Union Of Domestic, Hotels,Education Institutions And Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 others [2014] eKLR (Petition 544of 2013) — Explained
10. Keroche Industries Ltd vs. Kenya Revenue Authority & 5 others [2007] eKLR (Misc Civ Appli 743 of 2006) — Explained
11. Kiambu County Government & 3 others v Robert N. Gakuru & others [2014] eKLR (Civil Application 97 of 2014)
12. Law Society of Kenya v Attorney General & 10 others [2016] eKLR (Petition 3 of 2016) — Explained
13. Nelson Andaya Havi vs. Law Society of Kenya & 3 others [2018] eKLR — Explained
14. Nyarangi & 3 Others vs. Attorney General ([2008] KLR 688) — Explained
15. Olum & Another vs. Attorney General ([2002] EA) — Explained
16. Speaker of the Senate & another vs. Attorney General & 4 others [2013] eKLR — Explained
17. Ndyanavo vs. Attorney General ([2001] E.A 495) — Explained
18. Tinyefunza vs. Attorney General of Uganda ([1997] UGCC 3) — Explained
19. Prinsloo vs. Van der Linde ([1977] ZACC 5) — Explained
20. Doctors for Life International vs. Speaker of the National Assembly and Others ((CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)) — Explained
21. Hambardda Wakhana vs. Union of India Air ([1960] AIR 554) — Explained
22. Pearlberg vs. Varty [1972] 1 WLR 534 — Explained

Statutes

1. Constitution of Kenya 2010 — article 1, 2(1) , 2(4), 10, 10(2), 27, 35, 118(1), 118(2) (b), 165(3)(d)(i) & (ii), 201(b) (i), 209, 232(1)(d), 232 (2) ,259 — Interpreted

Texts

1. Black's Law Dictionary, 9th Edition

Advocates

None mentioned

JUDGMENT

1. The petitioners through a petition dated 17th June 2020 supported by supporting affidavit by Mathew Koech sworn on the even date seek the following reliefs:-

    a) This honourable court be pleased to hold and declare that paragraph 10 of part II of the First Schedule to the *Value Added Tax Act* as amended by the Tax Laws (Amendment) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of article 1, article 10, article 27, article 35, article 118(2) (b), article 201(b) (i) and article 232(1)(d) of the Constitution above.

    b) The costs consequent upon this Petition be provided for.

c) Any other remedy or such other orders as this honourable court may deem just and expedient in the circumstances to remedy the violation of the petitioner's fundamental constitutional rights and freedoms.

Background

2. The brief background of this matter is that on 25th April 2020, amendments to VAT Act amending paragraph 10 of Part II of the first Schedule to the VAT Act came into operation. The said amendment, the process and legislation and its implementation by the 1st Respondent resulted into the current Petition.

The 1st Respondent's Response

3. The 1st respondent is opposed to the petition and in doing so filed ground of opposition dated 30th July 2020 setting out four (4) grounds of opposition thus:-

a) The orders sought are not based on any empirical evidence of implementation but based on the apprehensions sustained by the petitioners commercial interests.

b) Every Law passed by the National Assembly enjoys the Presumption of Constitutionality unless proved otherwise and the presumption can only be rebutted after a full hearing of the Petition on its merits.

c) That the petitioner has not laid out a case for the granting of conservatory orders as a constitutional relief as opposed to ordinary litigation.

d) The imposition of Taxes is a Constitutional Imperative granted to the Legislature and cannot amount to a violation of Constitutional Rights.

4. The 1st respondent further filed a replying affidavit by James Muturo sworn on 4th August 2020.

The 2nd Respondent's Grounds of Opposition

5. The 2nd respondent is opposed to the petitioner's petition and has filed grounds of opposition dated 24th June 2020 setting out seven grounds of opposition being as follows:-

a) That the impugned amendment made to paragraph 10 of part II of the First Schedule to the *Value Added Tax Act*, 2013 by the Tax Laws (Amendment) Act, 2020, to remove insurance agency and brokerage services from the list of VAT exempt services effective April 25, 2020 enjoys the general presumption of constitutionality. The said presumption can only be rebutted after a full hearing of the Petition on its merits.

b) That by the petitioner's own admission at paragraphs 5 to 10 and 16 (d)(i) to (xii) of the affidavit of Mathew Koech sown on June 17, 2020 confirms that the legislation complied with article 10(2)(a) and 118(1)(b) of the Constitution to the extent that there was a meaningful public participation prior to the promulgation of the impugned Act.

c) Further and without prejudice to paragraph 2 above, the public participation process was fully undertaken by the National Assembly pursuant to article 118(1)(b) of the Constitution. That as much as lack of public participation is the gravamen of the motion and petition filed herein, the National Assembly

which undertook the same is not a party; consequently granting the Orders sought in the interim and the final declarations sought, in the petition, will not only be an affront to the twin doctrines of constitutional avoidance / deference and separation of powers but it will also be condemning the Legislature unheard.

d) That pursuant to section 22 of the *Interpretation and General Provisions Act*, Cap 2 laws of Kenya, sections 70(1), 73(2) and 73(5) of the *Insurance Act*, Cap 487 (As amended in 2015) stand repealed. There is no *lacuna* or *hiatus* in transition. Respectfully, the pleaded uncertainty, ambiguity and breach of paragraphs 11 and 20 of the certificate, paragraph K of the motion and paragraphs 19, 20, 22, 23, 24, 25, 26 and 27 of the supporting affidavit of Mathew Koech deposed on June 17, 2020; and paragraphs 65 to 70 of the Petition are unfounded and cannot form the basis of issuing Orders and Declarations in the interim or ultimately.

e) That the petitioner, representing 51 insurance companies, is pursuing individual / private commercial interests aimed at maintaining their book-profits veiled as violation of rights. The alleged violations, if any, are narrow and subservient to the wider public interests of protecting the constitutional mandate of the National Assembly and the 0045ecutive under article 93 – 96 & 109; and articles 115 of the Constitution, respectively.

f) That the petitioner has not demonstrated that it has attempted to invoke article 119 of the Constitution and failed for it to seek redress by invoking the jurisdiction of this court.

g) The instant petition and the accompanying interlocutory application are scandalous, frivolous and bad in law and they form a classical description of an abuse of the due process of this honourable court.

The 3rd Respondent's Response

6. The 3rd respondent in opposition to the petition filed a notice of preliminary objection dated 3rd July 2020 setting out seven (7) grounds thus:-

a) It is trite law that in order to institute proceedings as in the present Petition, the entity must have the legal capacity to institute proceedings before the Court.

b) The question of whether one is a judicial person is one of law and substance that goes to the root of the Petition and as such the basis upon which the present petition has been brought is compromised completely.

c) The lack of legal capacity is not a technical question or a question of form but rather a question of substance that cannot be accommodated within the provisions of article 159(2) (d) of the Constitution.

d) There is no evidence that the Association of Kenya Insurers, the Petitioner herein, is a legal body duly registered and with capacity to institute legal proceedings in its own name.

e) The petitioner is therefore not a person as contemplated by article 258 of the Constitution and is incompetent to institute the proceedings herein.

f) Further, the petition and the notice of motion dated 17th June, 2020 is incurable defective on the grounds that:-

i. Contrary to order 4 rule 1 of the Civil Procedure Rules, petition and the notice of motion dated 17th June, 2020 has not bene instituted by a competent person.

ii. The second plaintiff/applicant has no *locus standi* to institute this suit and the said application on behalf of the first plaintiff.

iii. Mr Mathew Koech, the deponent to the affidavits sworn on 17th June, 2020 has no *locus standi* to institute these proceedings on his own behalf or on behalf of the unincorporated entity known as the Association of Kenya Insurers.

iv. Under the *Societies Act* the Association of Kenya Insurers has not capacity to sue on its own behalf or be sued in relation to matters in issue.

v. Mr Mathew Koech, the deponent to the affidavits sworn on 17th June, 2020 has no authority to capacity to sue on behalf of the Association of Kenya Insurers or at all

g) From the foregoing, it is clear that the Petition and the notice of motion herein are in bad in law, speculative, baseless and an abuse of the court process and should be dismissed with costs to the 2nd Interested Party.

7. The 3rd respondent further filed replying affidavit by Michael Sialai sworn on 3rd July 2020.

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8. I have carefully considered the pleadings, parties rival submissions and from the aforesaid I find that the following issues arise for consideration:-

a) Whether there was public participation in the enactment of the Tax Laws (Amendment) Act 2020.

b) Whether the impugned Amendment is in violation of articles 1, 10, 27, 35, 118(1) (b), 201(a) (b) (i) and 232 of the Constitution.

c) Whether petitioner is entitled to the reliefs sought.

A. **Whether there was public participation in the enactment of the tax laws (Amendment) Act 2020.**

9. Article 2(1) of the *Constitution of Kenya* provides that:-

" Supremacy of this Constitution.

2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

Further article 2(4) of the Constitution provides that:-

> "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

10. The guiding values and principles of governance including the rule of law, accountability, democracy, and participation of the people enshrined in article 10(2) of the Constitution should be adhered to.

11. I note the issue in this Petition before this Court is the constitutionality of legislation and as such it is important to consider the applicable principles. In *Katiba Institute & Another vs Attorney General & another (2017) eKLR* the Court cited the Supreme Court of India in *Hambardda Wakhana vs Union of India Air [1960] AIR 554* where it was held that:-

> "In examining the constitutionality of a statute, it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."

12. The Court in the case of *Pearlberg vs Varty [1972] 1 WLR 534* the Court held that:

> "Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative."
>
> "The Court further stated that the Constitutionality of legislation is a rebuttable presumption; and where the Court tis satisfied that the legislation fails to meet the constitutional muster, nothing bars the Court from declaring it to be unconstitutional." (Emphasis added)

13. The petitioner and 2nd interested party challenge the process and substance of legislation. It is contended the process leading to enactment of an Act is constitutionally flawed, the resulting legislation is also flawed and therefore, that would be the end of the matter. The process of enactment is challenged on ground of lack of public participation and the impugned Act is therefore challenged as being unconstitutional because the National Assembly failed to facilitate meaningful participation and genuinely consider public views in its enactment.

14. The respondents and 1st interested party contend that there was sufficient public participation before the impugned amendment was introduced to paragraph 10 of the part II of First Schedule of the *value Added Tax Act*, 2013.

15. It is trite that parliament has Constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed by the Constitution. The National Assembly's mandate to enact, amend and repeal laws is derived from the Constitution.

16. Public Participation is embodied in article 10(2) of the Constitution which establishes the founding values which include, among others, transparency, accountability and participation of the people. The Constitution contemplates a participatory democracy that is accountable and transparent and makes

provisions for public involvement in legislative affairs hence article 118 of the Constitution provides thus:-

> " 118(1) Parliament shall-
>
> a. Conduct its business in an open manner and its sittings and those of its committees shall be open to the public, and
>
> b. Facilitate public participation and involvement in the legislative and other business of parliament and its committees."

17. In the case of *Kenya Human Rights Commission vs Attorney General & another [2018] eKLR* the Honourable Court held that:-

> "...public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation. That is, people must be accorded an opportunity o participate in the legislative process and this is a question of fact to be proved by the party that was required to comply with this constitutional requirement that indeed there was compliance."
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> Further in the *Kenya Human Rights Commission vs Attorney General & another* (*supra*) the court quoted the case of L*and Access Movement of South Africa Association for Rural Development and others vs Chairperson of the National Council of provinces and others* [2016] ZAACC 22 the court observed with regard to the standard of public participation:-
>
> "The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public." (Emphasis added)

18. The respondents contend that there was sufficient public participation as before the impugned legislation was enacted into law, a special gazette was issued vide Kenya Gazette Supplement No 36 (National Assembly Bills No 8) (See exhibit marked MK.1 in the Applicant's Supporting Affidavit). It further stated in addition, vide a letter dated 1st April 2020 the Clerk of the National Assembly wrote a letter to the relevant stakeholders inviting them to make their submission on the proposed amendment.

19. It is averred that in the petitioner's own admission at paragraphs 5 to 10 and 16(d) vi – vii of the affidavit of Mr Koech supporting the application, he admits that among other processes there was public participation. His complaint is all about the time it took to allow them give their views.

20. The respondents place reliance in *British American Tobacco Kenya Limited vs. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties) eKLR* where the Court, in this case, underscored that public participation and consultation is a living

constitutional principle that goes to the constitutional tenet of the sovereignty of the people. The court proceeded to delimit the framework for public participation, under article 10, as follows:-

> "a) That the lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to the constitutional principle using reasonable means.
>
> b) Public participation is not an abstract notion; it must be purposive and meaningful.
>
> c) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
>
> d) Public Participation is not necessarily a process consisting of oral hearings, written submission can also be made. The fact that someone was not heard is not enough to annul the process.
>
> e) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

21. The National Assembly it is urged debated and passed the Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No 12 of 2018) and the President assented to the Bill to become law. It is contended further that the National Assembly did conduct public participation and took the views of the public into account and the evidence of public participation is annexed in Mr Sialai's replying affidavit at pages 98 – 101, and specifically the exhibit marked MS – 1, (see the photocopies of the *Nation* and *Standard* Newspapers of 1st and 8th April, 2020). There were various memoranda submitted by various agencies of government and other stakeholders including the Advocates on record for the Petitioner and various insurance agencies and brokerage companies as shown at pages 102 – 282 in the said affidavit of Mr Michael Sialai.

22. In addition to the aforesaid and further as it can be seen from the stakeholders memoranda the petitioner's Members were duly represented through the Memoranda received from the Chief Executive Officer Anjarwalla & Khanna, the advocates on record for the petitioner, M/s Bima Intermediaries Association of Kenya (IAK) and the Association of Insurance Brokers which were considered by the Committee. The Committee subsequently took into account the views of the two and made its recommendations on the submissions.

23. Upon consideration of the aforesaid against the petitioners claim that the amendments to the Tax Laws (Amendment) Act, 2020 were approved and passed without subjecting the provisions to public participation is therefore not supported by facts. That allegation is neither factual nor supported by any evidence.

24. In the case of the *Law Society of Kenya vs The Attorney General and 10 others Petition No. 3 of 2016* the court held as follows with respect to public participation:-

> "The law is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to each and every person wherever the person might be. What is required is that reasonable steps be taken to facilitate the said participation. Once this is done the Court will

not interfere simply because due to peculiar circumstances of an individual, he or she failed to get the information. In other words, what is required is that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore, even in cases where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified." (Emphasis added)

25. Arising out of the aforesaid and considering the averments by the petitioners that there was no public participation because the National Assembly did not invite the petitioner to a public forum, I find that has no basis in law. Consequently, the enactment of the Tax Laws (Amendment), Bill, 2020 did not violate the principle of public participation under the Constitution or at all.

26. It is trite that there is presumption of constitutionality of statutes until the contrary is proved, as was held by the Court of Appeal of Tanzania in *Ndyanavo vs Attorney General [2001] EA 495*, which was a restatement of the law in the English case of *Pearlberg vs Varty* [1972] 1 WLR 534, where the Court held that:-

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

27. Additionally on issue of public participation, I find guidance in the Judgment of Court of Appeal in the case of *Robert N Gakuru & others vs Governor Kiambu County & 3 others (2014) eKLR*, which discussed the principle of Public Participation. The court, while acknowledging the centrality of the principle of public participation, sought to determine what exactly amounts to public participation. In determining this, the court stated:-

> "
>
> " 51. This principle has been dealt with by the South African Constitutional Court in a number of mattes. It must be appreciated that the Constitution of South Africa has several similarities to our own current Constitution. To appreciate these similarities, it is necessary to reproduce section 72 of the Constitution of South Africa. The said section provides:-
>
> "(1) The National Council of Provinces must –
>
> (a) Facilitate public involvement in the legislative and other processes of the Council and its committees; and
>
> (b) Conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken –
>
> i. To regulate public access, including access of the media, to the Council and its committees; and
>
> ii. To provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
>
> (2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."

28. In the recent High Court decision in *Law Society of Kenya vs The Attorney General and 10 others* Petition No 3 of 2016 the court held as follows with respect to public participation:-

> " The Law is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to each and every person wherever the person might be. What is required is that reasonable steps be taken to facilitate the said participation. Once this is done the Court will not interfere simply because due to peculiar circumstances of an individual, he or she failed to get the information. In other words, what is required is that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore, even in cases where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified."

29. In view of the above I find that the public participation exercise carried out prior to promulgation of the impugned amendments fits the bill prescribed by the Supreme Court in British American Tobacco Kenya Limited case (*supra*), and as emphasised by the Court such allegations will not automatically vitiate the process, having considered of the emergence of the Covid-19 Pandemic as the relevant circumstance of the promulgation in issue. Accordingly I am satisfied that the Respondents have demonstrated that there was public participation before the impugned amendment to paragraph 10 of part II of First Schedule of the *Value Added Tax Act*, 2013 was introduced.

B. Whether the impugned amendment is in violation of articles 1, 10, 27, 35, 118(1) (b), 201(a) (b) (i) and 232 of the Constitution.

30. The petitioner contention is that the constitutionality of legislation is a rebuttable presumption and where a court is satisfied that the legislation fails to meet the Constitutional muster, nothing bars the Court from declaring it to be unconstitutional.

31. It is of paramount importance in deterring constitutional validity of a Statute to consider the purpose or effect of the legislation. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the Constitution.

32. In support of the above proposition reliance is placed in the case of *Kenya Human Rights Commission vs Attorney General & another* [2018] eKLR where Mwita J, adopted the decision in *Olum & another vs Attorney General [2002] EA*, where it was stated that:-

> " To determine the constitutionality of a section of a statute or Act of Parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court must go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional." (Emphasis supplied)

33. The petitioner in further support of this position on purpose and effect being relevant in determining the constitutionality of a legislation or statute has placed reliance in the decision of Court of Appeal in *Centre for Rights Education Awareness & Another vs John Harun Mwau & 6 others [2012] eKLR* where the Court observed that in determining whether a statue is constitutional or not, the Court must determine the object and purpose of the impugned Act and this can be discerned in the intention expressed in the Act itself.

34. The petitioner contend that in the instant matter, the long title of the Tax Laws Amendment Act, 2020 states that it is 'an Act of Parliament to make amendments to tax related laws.' The objective of enacting the Act in the Memorandum of objects and reasons in the Bill (refer to page 3 of MK 1 annexed to the Supporting Affidavit) that was introduced in the National Assembly states under The *Value Added Tax Act*, 2013 (No. 3 of 2013) 'the Bill seeks to amend the *Value Added Tax Act* to align the incentives contained in the Bill with the best practice.' It would be important to state that, the Notice to members of the Public as contained in the Daily Nation Newspaper of 1 April 2020 (refer to page 7 of MK 1 annexed to the Supporting Affidavit and page 98 of the 3rd respondent's replying affidavit) states 'The Bill proposes amendments to various tax related statutes to cushion the Economy and Kenyans against the economic effects of the Covid –

35. Article 2(4) of the Constitution clearly provides that any law including customary law, that is inconsistence with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. There are also guiding values and principles of governance including the rule of law; accountability; democracy; and participation of the people enshrined in article 10(2) of the Constitution.

36. On construing the constitution article 259 of the Constitution enjoins this Court to interpret the Constitution in a manner that (a) promotes its purposes, values, and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.

37. The petitioner in support of the petition submits on ambiguity, uncertainty and absurdity of the impugned Amendment in which the petitioner contend the impugned Amendment is in violation of article 10(2)(a) and 10(2)(d) of the Constitution.

38. Article 10(1)(b), 10(2)(a) and 10(2)(d) of the Constitution provides:-

> " 10(1)(b). 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 enacts, applies, or interprets any law."
>
> "10(2)(a). the National values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people."
>
> "Article 10(2)(d) of the Constitution provides the national values and principles of governance include sustainable development."

39. The Court clearly expressed itself on the issue of the rule of law regarding certainty in the case of *Keroche Industries Ltd vs Kenya Revenue Authority & 5 others [2007] eKLR* where Nyamu J (as he then was) held:- "one of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regulating of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law." (Emphasis supplied)

40. In the instant Petition, there is no dispute, that the services of the Petitioner's members under paragraph 2 of Part II of the First Schedule to the VAT Act are VAT exempt. This notwithstanding the 1st Respondent has in response averred that the impugned Amendment is targeted at insurance agency and brokerage services. The actual cost of the imposition of VAT on these services will be and is borne by the petitioner's members whose services are VAT exempt under the VAT Act. The Petitioner has

provided copies of invoices received by its members from the Intermediaries evidencing this. (refer to the Further Affidavit of Mathew Koech sown on 6 July 2020 at pages 7 – 26 of MK2).

41. One has therefore to ask what are the practical effects of the implementation of the impugned Amendment which has resulted in the Petitioner's members paying and will pay VAT on the otherwise exempt services through the back door. It is no doubt clear that the law if applied as the Respondents aver; it would be that in one hand, it providing that the services of the Petitioner's members are VAT exempt, yet on the other hand through the Impugned Amendment subjecting the otherwise exempt services to VAT.

42. The respondents on their part did not file any single document in response to the petition, addressing the issue related to uncertainty, ambiguity and absurdity created by the impugned Amendment. I therefore find that this issue is uncontroverted by the respondents.

43. The respondents contention that article 209 of the Constitution empowers the National Assembly to impose taxes and charges. Such taxes including income tax, value-added tax, customs duties and other duties on import and export goods and excise tax is not a response to the issue raised herein related to uncertainty, ambiguity and absurdity created by the impugned Amendment.

44. The respondents urge that the manner in which 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, I find that the legislature retains wide authority to define the scope of the tax.

45. In the case of *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) vs. Kenya Revenue Authority & 3 others [2014] eKLR* the court dealing with a similar issue held as follows:-

> " Finally, the imposition of taxes is a constitutional imperative and the power to impose taxes is reposed in the legislature. The imposition of tax by statute cannot, of itself, amount to arbitrary deprivation of property contrary to article 40 of the Constitution."

46. The respondents urge under article 210(1) of the Constitution that "No tax or Licensing fee maybe imposed, waived or varied except as provided by the legislation." Consequently, it is urged by the Respondents that it is within the authority of the National Assembly to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it imposed, calculated and enforced. It is therefore urged that the National Assembly has not violated the Constitution in enacting the Tax Laws (Amendment) Bill, 2020. In addition it is contended that imposition of taxes cannot be unconstitutional as the Constitution permits the National Government to impose taxes as a means of raising revenue. Further, a Statute cannot be unconstitutional merely because it does not meet the economic interest of the petitioner.

47. On issue of uncertainty, ambiguity and absurdity that may be created by impugned Amendment, a three (3) Judge bench of the High Court in the case of *Katiba Institute & another vs Attorney General & another* [2017] eKLR, held that "elementary justice demands legal certainty of rules affecting the citizen. A legislation or provision can also be unconstitutional on grounds of cause and effect otherwise known as purpose or effect. Where the purpose or effect results into unconstitutional effects the provision or statute may be nullified for being unconstitutional, "To determine the constitutionality of a section of a statute or Act of Parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court must go further and examine the effect of the implementation. If either

its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional." (Emphasis supplied).

48. The court upon finding that the impugned Amendment creates uncertainty, ambiguity and absurdity is obligated to declare it as unconstitutional as the effect of the implementation would infringe a right already guaranteed under the Constitution, in particular, rights under article 10(2)(a) and 10(2)(d) of the Constitution.

49. The right of certainty and predictability in economic activities was clearly upheld in the case of *Ecobank Kenya Limited v Commissioner for Domestic Taxes (2012) eKLR* where it was held:

> "The Appellant and other business people have a right of certainty and predictability in the applicability of economic activities. This right necessarily militates against polices, regulations and procedures which are haphazardly resorted to by public regulatory bodies without adequate notice to those whose conduct or behaviour is to be regulated."

50. I find the uncertainty and ambiguity of the Impugned Amendment makes it impossible for the petitioner's members to plan for the tax burden that has been indirectly imposed on their services which are VAT exempt. It is further not in doubt that the insurance on its part have no way of passing on the cost of VAT to policy holders. The imposition of VAT would therefore be a significant increase in the expenses of the Petitioner's members whose income is already adversely affected by the current Covid-19 pandemic.

51. It has further been demonstrated that the ambiguity of the Impugned Amendment and the confusion it has created to the insurance industry is further characterized by the following:-

> "(1) The Impugned Amendment creates an absurdity in its effect in that the imposition of VAT on insurance agency and insurance brokerage services increase the management expenses of the petitioner's members above the limits prescribed under section 70 (1) of the *Insurance Act* as read with regulation 21(1) of the Insurance Regulations. Section 70 of the *Insurance Act* as read with regulation 21 of the Insurance Regulations provides that insurers shall not incur management expenses above certain prescribed limits in a particular financial year. These limits are set at the end of each financial year which for the insurance industry is end of December. Therefore, the 14% VAT that became effective in April 2020 could not have been factored in when setting the management expenses for the year 2020.
>
> (ii) The input VAT charged on the commissions will be an added cost to insurers as it cannot be passed to the final consumer and is not recoverable under the law. This will therefore have the impact of increasing the management expenses incurred by an insurer leading to a breach of the provisions of the *Insurance Act*. Exceeding such limits is an offence under the *Insurance Act*. By complying with the provisions of the Impugned Amendment the Petitioner's members risk committing a criminal offence under the *Insurance Act*. This is certainly absurd and contrary to the principle of the rule of law."

52. Reliance is placed in the case of *Commissioner of Income Tax vs Westmont Power (k) Ltd [2006] eKLR* where Visram J (as he then was) held that:-

> " Even through taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity."

53. On infringement arising out of impugned Amendment the Respondents contend the uncertainty of the impugned amendment does not arise as a matter of right. It is their contention that it is subject to judicial scrutiny and interpretation. The legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. It is urged that Rajah JA put forth this fact succinctly in *Britestone Pte Ltd vs Smith & Associations Far East Ltd (2007) 4 SLR ® 855*, thus:-

> " The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

54. On infringement of article 10(2)(d) of the Constitution, the respondents contended that the *World Commission on Environment, 1987, Our Common Future* (Oxford University Press), defined 'sustainable development' as 'development that meets the needs of the present without compromising the future generations to meet their own needs.' The provision of insurance services is a fundamental ingredient that underpins economic development and growth in society. The insurance industry supports individuals, communities, and businesses to understand, manage and mitigate risks and supports their assets. In essence a thriving marketing supports a vibrant community and vice versa.

55. The petitioner in further response aver that it has not been subjected to VAT since 1989 and this was intended to allow the sector to grow by increasing penetration of insurance products and sevices in the Kenyan market in order to support individuals and businesses mitigate various risks. However, in recent years, insurance penetration in Kenya dropped to 2.43% of GDP, the lowest in 15 years. It is clear with the insurance industry presently even struggling with penetration and growth, any increase in costs to this sector (VAT on insurance brokerage an agent services) will definitely negatively impact the role that the sector can play in sustainable development especially in this era of climate change and even bigger disruption that has been brought about by the Covid-19 pandemic and these are the effects that will continue to be felt for years to come. The insurance industry therefore needs to be supported so that it can assist communities, businesses and individuals mitigate the risks.

56. The petitioner urge that the impugned amendment is in violation of article 232 (2) of the Constitution for its failure to comply with the principles of public service. It is petitioner's position that the objective of involving the public in the law making process is to ensure that the legislators are aware of the concerns of the public, promote legitimacy and awareness about 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 as provided under article 232(1) (d) of the Constitution.

57. It is petitioner's contention that as regards the impugned Amendment, the parliament was not open, accountable, and responsive as envisaged under article 232(1)(d) of the Constitution when passing the Tax Bill. The Bill proposed amendments to various tax related statutes and as indicated in the Notice of 1 April 2020 in the Daily Nation Newspaper the Bill was to cushion the economy and Kenyans against economic effects of the Covid – 19 pandemic, however, the Parliament took advantage of the

situation to introduce other measures that were not pandemic related in clear violation of article 10 (2) (c) which expressly provides that the National values and principles of governance, that state organs and officers should consider when making laws, include transparency and accountability.

58. The petitioners urges that its members were not provided with meaningful opportunities for public participation and therefore the TLAA was passed without meeting this critical constitutional muster. The Impugned Amendment affected the rights and fundamental freedoms of the Petitioner and the Public at large yet it was done as though it was a minor and inconsequential amendment and without engaging the public more so those who would be affected by the deletion (the petitioner's members).

59. The petitioner contend that its members rights as enshrined under article 27 & 201 (a) (b) (1) of the Constitution were infringed. Article 27(1) of the Constitution provides

> " Every person is equal before the law and has the right to equal protection and equal benefit of the law."

60. Article 201 of the Constitution provides:-

> " The following principles shall guide all aspects of public finance in the Republic—
>
> (a) there shall be openness and accountability, including public participation in financial matters;
>
> (b) the public finance system shall promote an equitable society, and in particular —
>
> (i) the burden of taxation shall be shared fairly."

61. The respondent contend the Tax Laws (Amendment) Bill, 2020 proposed to modernize various tax statutes in order to remove the many unfair tax incentives that exist in the system, so as to comply with article 201 (b) (i) on promoting fairness in the sharing of taxation burden.

62. The petitioner urge that they were discriminated by the Respondents actions. Discrimination is described in the *Black's Law Dictionary, 9th Edition* as:-

> "(1) the effect of a law or established practice that confers privileges on a certain class because of race, age, sex, nationality, religion or hardship.
>
> (2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

63. The petitioners in support thereto contend that the impugned Amendment was introduced at a time when the Government was giving tax incentives to Kenyans to cushion them against the adverse effects of the Covid – 19 pandemic on the economy. The effect it is urged by the petitioner that the impugned Amendment has instead of the petitioner enjoying the tax incentives rolled out by the Government, been subjected to additional tax burdens during the Covid-19 pandemic.

64. In the instant petition it is not clear, nor is the Petitioner aware of the basis upon which parliament decided to subject the insurance sector to additional tax burden during the Covid-19 period whilst omitting the other sectors of the Kenyan economy by stating that the insurance sector had come of age and needed to contribute to government revenue. It is urged by the Petitioner however what is clear is that there was an intricate scheme to deny the Petitioner unconstitutionally, discriminately, and

illegally, as a stakeholder in the insurance industry of its right to participate in the legislative process considering the importance of the legislation and its impact on the public.

65. The respondents contend that mere differentiation or inequality of treatment does not amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary for one to show that the selection or differentiation was unreasonable or arbitrary, that it did not rest on any basis having regard to the objective the legislature or the Constitution had in view. An equal protection was not violated if the expectation which was made was required to be made by some other provision of the Constitution, and that it was not possible to exhaust the circumstances or criteria which would afford a reasonable basis for classification in all cases.

66. Reliance in support of the aforesaid proposition is placed in the case of *British American Tobacco Kenya PLC (formerly British Tobacco Kenya Limited) vs. 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.

67. It is trite law therefore that differentiation and categorization of various taxes does not amount to discrimination. The High Court in *Nelson Andaya Havi vs Law Society of Kenya & 3 others [2018] eKLR* stated as follows at paragraph 92;

> " 92. From the above definition, it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization."

68. The respondents contention is therefore that any differentiation in taxes therefore a firm Constitutional basis. Further the High Court in *Nelson Andaya Havi vs Law Society of Kenya & 3 others* [2018] eKLR stated that it is not every differentiation that amounts to discrimination.

69. The respondents urge that the imposition of taxes does not amount to discrimination as such the petitioner's allegations that they have been discriminated against by paying taxes has no basis in law.

70. The petitioner urge that discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Reference is placed in the case of *Nyarangi & 3 others vs Attorney General (2008) KLR* 688, where Nyamu, J (as he then was) referring to the repealed Constitution and defining discrimination stated as follows:-

> " Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complaint. An secondly, the bias must be based on the grounds set out in the Constitutional definition of the world "discriminatory" in Section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the Constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be found on an intelligible differentia which distinguishes person or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought opt be archived by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification."

71. The petitioner additionally drew this Courts attention for persuasive authority to the decision of the constitutional Court of South Africa in *Prinsloo vs Van der Linde [1977] ZACC 5* where at paragraph 25 the Court held that:

> " In regard opt mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. (Emphasis added)

72. There is no dispute in this Petition that VAT is a consumption tax that should be borne by the final consumer of the supply. Section 17 of the VAT Act allows VAT registered tax payers to claim a credit for input VAT against their output VAT to ensure the input VAT is effectively passed to the final consumer (in this case the insurance policy holders). It is noted that the VAT charged by the Insurance brokers and agents will be output VAT for them and will be passed to the petitioner's members which would be classified as input VAT. However, it is clear that section 17(6) and 17 (7) of the VAT Act limits the amount of input VAT claimable where input VAT is used to make exempt supplies. The insurance sector was therefore unfairly targeted by imposition of the novel tax in the form of VAT while other sectors were enjoying tax reliefs. This is a complete contravention articles 27(1) of the Constitution.

73. In view of the above it is evidently clear that the impugned Amendment, discriminates against the petitioner's members who would not be able to claim a credit for input VAT as provided for in the VAT Act and which is enjoyed by other tax payers as the petitioner's members are exempt from VAT and would therefore not be able to effectively pass this input VAT to the final customer who are the insurance policy holders. In view whereof I find that is in effect contravention of article 27 (1) of the Constitution.

74. Further the main income for Insurance Companies is VAT exempt Insurance Premiums; in view wherefore the Insurance companies cannot pass the input VAT cost charged by the insurance agents and brokers to the final consumer of their supply who are the insurance policy holders hence resulting in a heavier tax burden to the petitioner's members and in violation of article 201 (b) (a) of the Constitution.

C. Whether Petitioner is entitled to the reliefs sought.

75. The respondents contend that this court has no jurisdiction to hear and determine this petition. It is urged this court is bound by doctrine of judicial restraint and that the Parliamentary powers and privileges bar the jurisdiction of this court.

76. The respondents urge that the rationale for non-interference is to circumvent crisis that may arise out of intrusions of one arm into another. The Supreme Court in *Speaker of the Senate & another vs Attorney General & 4 others [2013] eKLR*, in addressing the role of the courts in parliamentary proceedings and the need for non-interference, held that-;

> " This court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another."

77. In view of the above it is respondents contention that this honourable court restrains itself from interfering with the business of the 3rd respondent based on the principle of separation of Powers given that the petitioner has so far not shown any of the following in their application and/or petition that:-

a) That there was a breach of the Constitution or any other law.

b) That the relevant Committee failed to adhere to the rules of natural justice and procedure.

c) That the process leading up to the enactment of the Tax Laws (Amendment) Act, 2020, or the alleged impugned provision is proved to be improper and / or illegal."

78. In seeking reliance on the doctrine of judicial restraint the 3rd respondent sought reliance in the decision of Supreme Court dicta in *Justus Kariuki Mate & another vs Martin Nyaga Wambora & another [2017] eKLR* that:-

> " ...the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case."(Emphasis added)

79. The respondents therefore plead that the jurisdiction of this Court can only be invoked in the event of breach of the Constitution and there has been no evidence or at all, of such violation of the Constitution and or the right and freedoms enshrined therein. In any case it is averred that the Amendment seeks to advance public interest as the tax intended to be collected from the amendment will be put into public use and benefit.

80. The petitioner on its part contend that the Parliament passed a unconstitutional legislation and further parliament in passing the impugned Amendment, did not uphold the letter and spirit of the Constitution.

81. Article 165(3)(d)(i) and (ii) of the Constitution provides that:-

> " Subject to clause (5), the High Court shall have—
>
> (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;"

82. In view of clear provisions of article 165 (3)(d)(i) and (ii) of the Constitution as quoted herein above, and in view of the question raised in the Petition herein, touching on the interpretation of

the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution, I have no doubt, that this honourable court is clothed with jurisdiction to hear and determine the issues raised in the instant petition.

83. I am alive to the fact that whenever a legislation is challenged on grounds that parliament did not adopt it in accordance with the provisions of the Constitution, Courts are obliged to consider whether the Parliament in enacting the law in question has given effect to the constitutional obligations.

84. The petitioners in support of the above sought reliance in the case of *Katiba Institute & another vs Attorney General & another* [2017] eKLR where the Court adopted the position in *Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)* where it was held that:-

> " When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court…must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme…; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid…" (Emphasis added)

85. Upon consideration of the petitioner's pleadings and submission, I find that he petitioner has proved that the impugned Amendment resulted in violation of provisions of the Constitution and is therefore unlawful, unenforceable, null and void *ab initio*.

86. One of the effects of the impugned Amendment is that it creates uncertainty, ambiguity, and absurdity contrary to the principle of the rule of law as set out in article 10 of the Constitution. The law on one hand provides that the services of the petitioner's members are VAT exempt, yet on the other hand through the Impugned Amendment, is now subjecting the otherwise exempt services to VAT. I find that the petitioner has a right to certainty of the law and this court cannot condone such situation nor allow the ambiguity and uncertainty to persist any more.

87. It has further been shown that the impugned Amendment has discriminatorily introduced VAT which is a novel tax in the insurance sector at a time when other sectors of the economy are being cushioned from adverse economic effects of the Covid-19 pandemic. This is discrimination contrary to article 27 of the Constitution.

88. Additionally the impact of a possible unfair tax burden resulting out of the impugned Amendment must be considered while construing the impugned Amendment. This should be considered in the light of the fact that the petitioner's services are exempted form VAT, however the petitioner's members cannot pass the input VAT cost charged by the insurance agents and brokers to the final consumer of their supply, who are the insurance policy holders resulting therefore in a heavier tax burden on the petitioner's members in clear contravention of article 201(b)(i) of the Constitution.

89. Reliance of the above is placed in the case of *Tinyefunza vs Attorney General of Uganda [1997] UGCC 3* where it was stated that:-

> " If a petitioner succeeds in establishing breach of a fundamental right, he is entitled to relief in exercise of Constitutional jurisdiction as a matter of course."

90. The upshot is that the petitioner's Petition dated 17th June 2020 is meritorious and is allowed in the following terms:-

a) Paragraph 10 of part II of the First Schedule to the *Value Added Tax Act* as Amended by the Tax Laws (Amendment) Act 2020, is unlawful, unconstitutional, and contravenes the provisions of article 1, 27, 35, 201 (b) (i) of the Constitution.

b) Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF DECEMBER, 2021.

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA