REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 353 OF 2017

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 165 & 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLES 1, 2, 3, 10, 24, 26, 27, 28, 32, 40, 32, 40, 43, 47, 48, 73, 93, 94, 95, 96, 110, 114, 115, 118, 124 AND 131, 201, 205, 210, 258, 259 OF THE CONSTITUTION OF KENYA AS WELL AS THE FOURTH SCHEDULE THERETO

AND

IN THE MATTER OF SECTIONS 29A, 44A, 55A AND 59 OF THE BETTING, LOTTERIES AND GAMING ACT, CHAPTER NO. 131, LAWS OF KENYA

AND

IN THE MATTER OF THE SECTIONS 29, 30, 31 AND 32 OF THE FINANCE ACT NO. 15 OF 2017

AND

IN THE MATTER OF ALLEGED ENACTMENT BY PARLIAMENT OF A LAW THAT IS INCONSISTENT WITH AND OR IN CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED EXERCISE OF PARLIAMENTARY POWERS AND AUTHORITY IN CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED EXERCISE OF PRESIDENTIAL POWERS AND AUTHORITY IN CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND

FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS OF BETTING, LOTTERIES, GAMING AND PRIZE COMPETITIONS AND THE CONSUMERS OF THEIR SERVICES

BETWEEN

PEVANS EAST AFRICA LIMITED…….....…...….....….PETITIONER

VERSUS

CHAIRMAN BETTING CONTROL AND LICENSING BOARD.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR.....2ND RESPONDENT

COMMISSIONER GENERAL, THE KENYA REVENUE AUTHORITY.....3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF FINANCE.....4TH RESPONDENT

THE NATIONAL ASSEMBLY.....5TH RESPONDENT

THE SPEAKER OF THE SENATE.....6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL…….....…...7TH RESPONDENT

***C*ONSOLIDATED WITH PETITION NO. 505 OF 2017**

BRADLEY LIMITED T/A PAMPAZUKA NATIONAL LOTTERY.....PETITIONER

VERSUS

THE BETTING AND LICENSING BOARD.....1ST RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA.....2ND RESPONDENT

THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

THE NATIONAL SPORTS FUND.....INTERESTED PARTY

JUDGMENT

Introduction

1. This judgement disposes two consolidated petitions, namely, Petition numbers **353** of 2017 and **505** of 2017. The common thread in the two petitions is that they challenge the constitutionality of Sections **29A, 44A, 55A** and **59B** of the Betting, Lotteries and Gaming Act,[1](hereinafter referred to as **the act**) and Sections **29, 30, 31** and **32** of the Finance Act 2017.[2]

2. The Petitioners assault on the constitutionality of the above provisions can be reduced into five grounds, namely, **(a)** failure to involve the Senate in the legislative process; **(b** that the legislative process offended both the Constitution and Parliamentary Procedures;**(c)** that the tax is unconstitutional on grounds of unfairness, burdensome, and discrimination, **(d)** violation of the Petitioners' right to

legitimate expectation and **(e)** violation of Right to Property under Article **40 (2)** of the Constitution.

3. On its part, the fifth Respondent assailed the two Petitions citing abuse of court process arguing that the two companies share directors, and after failing to obtain interim orders in number **353** of 2017, without disclosing to the court the existence of the first Petition, the second Petition was filed in which they obtained interim orders.

The Parties

4. For ease of reference, the Petitioners in No. **353** of 2017 and 505 of 2017 will hereinafter be referred to as the "first Petitioner" and the "second Petitioner"respectively. Also, where the context so permits, number **353** of 2017 and **505** of 2017 will be referred to as "the first Petition" and the "second Petition" respectively.

5. Both the Petitioners are limited liability companies duly incorporated in the Republic of Kenya under the Companies Act, and licensed under the provisions of the Act[3] to engage in the gaming, lotteries, betting and price competitions.

6. The first petitioner sues on its own right and in public interest. It has sued the following, namely, Betting Control and Licensing Board, the body that issues licenses and permits for betting undertakings in Kenya; [4]the Cabinet Secretary in charge of the Ministry responsible for betting, lotteries, gaming and prize competition industry; the Kenya Revenue Authority which is mandated to collect betting, gaming and lottery taxes;[5] the Cabinet Secretary, finance in charge of state fiscal policy which includes influencing tax administration in Kenya through proposing the budget statements which culminate in the annual Finance Acts; the National Assembly which is in charge of the legislative function pursuant to Article **94** of the Constitution; the Speaker of the Senate, the house of Parliament in charge of *inter alia* giving input to Bills concerning County Governments pursuant to Article **96** of the Constitution and the Hon. attorney General, the principal legal Government adviser.

7. The second Petitioner sued the Betting Control and Licensing Board, the National Assembly, the Commissioner General, Kenya Revenue Authority and the Honorable Attorney General. For avoidance of doubt, I will maintain the Respondents as listed in the first Petition, that is, first to seventh Respondents. However, where the description so permits, it will also refer to the three Respondents in the second Petition who are also sued in the first Petition.

8. Even though the cases are similar, for ease of clarity, I will briefly summarize each Petitioners case below.

The first Petitioners' case

9. The first Petitioner, a tax payer owns the Sport Pesa Trade name through which it provides a multiple of platforms for sports betting. It avers that Parliament, through the Finance Act, 2016 introduced **12%** gaming tax to gaming revenue, **7.5%** betting tax chargeable on gaming revenue, **5%** lottery tax chargeable on lottery turnover, and **15%** prize competition tax chargeable on total gross turnover payable by the respective industry players.

10. Further, during the 2016/2017 fiscal year, the Finance Bill as drafted proposed to impose uniform rate of **50%** tax chargeable on revenue from betting, gaming, lotteries and prize competitions with the purpose of regulating and controlling betting. The ultimate goal was to minimize and or eliminate gambling practices among the youth. The tax burden would be borne by the betting industry players.

11. It also avers that the Bill was subjected to public participation and all key stake holders concurred with the public finance specialists, the National Treasury, as well the Finance Committee of Parliament that **50%** tax proposed was unsustainable, unnecessary and ill-advised. It was recommended that the same ought to be deleted in the best interest of the country and the industry. The recommendation was approved by Parliament. Consequently, the Bill that was passed by Parliament on 30th May 2017 and

presented to the President for assent omitted the **50 %** tax as was previously proposed.

12. The President declined to assent to the Finance Bill 2017 on the basis that the Bill did not contain the provision for **50%** tax chargeable on betting, lotteries, gaming and prize competitions. Instead he directed the National Assembly to make provision for imposing tax at the rate of **35%** chargeable on the betting, gaming, lotteries and prize competition industry players. He referred the Bill back to Parliament.

13. The first Petitioner challenges the legality of the President's directive stating that:-

i. *The President arbitrarily imposed his subjective opinion on what ought to constitute state tax policy while ignoring public participation and the input of fiscal technocrats who concluded that **50 %** tax for the betting industry was unsuitable;*

ii. *that the President exceeded his mandate and acted irrationally by considering extraneous factors which he ought not to consider while his powers under Article **115** of the Constitution limits his mandate to making reservations on what was presented for assent;*

iii. *that the President arbitrarily settled on **35%** as the applicable tax rate that Parliament ought to impose on the betting industry, which rate was not taken through public participation or technical financial sustainability enquiries and mandatory legal procedure by following the legislative process, hence the process violated and abused executive powers;*

iv. *The President unilaterally, irregularly and illegally imposed his subjective will to kill the betting industry by imposing an unsustainable tax burden (35%) on industry players;*

v. *the President whimsically, arbitrarily and unilaterally revised state tax policy thereby usurping Parliaments' mandate, and undermining sovereignty of the people and their power to act through their duly elected representatives.*

14. It also avers that that under Article **115 (2)** of the Constitution, the entire legislative process should have re-started including, inviting comments from stakeholders and the public and obtain input from technocrats assessing suitability and sustainability of the proposed **35%** tax and input from the Commission of Revenue Allocation pursuant to Article **205** of the Constitution because the Bill dealt with financial matters concerning county governments. He also avers that it was necessary to discharge the procedural obligation prescribed in the National Assembly Standing Order No. **120** as read with Article **109 (4)** of the Constitution requiring publication of a Bill at least **14** days before debate is done and observe due process in tax legislation and adhere to the twin principles governing imposition of taxes, namely, "no taxation without consent of the people" and no taxation without representation and compliance with Article **94.**

15. The first Petitioner also avers that Parliament failed to re-publish the Bill proposing 35% tax in the Gazette depriving the Petitioner and other stakeholders the opportunity to make representations. Further, the parent Ministry in charge of oversight of the Kenyan Betting Industry while considering a proposal by the Ministry of Sports, Culture and Arts to introduce a National Sports Fund to be financed by increasing tax paid by betting industry players made recommendations to the effect that further taxation on industry players will be counter- productive as it has the effect of encouraging underground sports betting dens and slot betting machines and cross-border betting, hence increasing the tax would be detrimental.

16. It also avers that Parliament without considering the recommendations executed the Presidential directive and amended Sections **29A, 44A, 55A** and **59B** and re-submitted the amended Finance Act 2017 for Presidential assent. The taxes are set to come into force on **1st J**anuary 2018. Further, Parliament abdicated its mandate to enact legislation strictly in accordance with the Constitution and was reduced to a mere tool for imposition of Presidential will in contravention of Article **93(2)** of the Constitution, hence, it enacted an unconstitutional statute and violated the principles governing taxation.

17. The first Petitioner describes the tax as unfair, excessive, malevolent, arbitrary, capricious,

unjustified, discriminative and unreasonably high aggregating to **90%**, hence, the tax is unconstitutional and violates the principle of horizontal and vertical equity of tax and that Sections **29, 30, 31** and **32** of the Act affect the finances of the County Governments hence the input of the Senate was crucial before the Bill was presented for Presidential assent, hence, it avers that the process contravened the Constitution.

The Second Petitioners case

18. The second Petitioner avers that:- ***(i)*** it is duly licensed to undertake the business of private lottery; **(ii)** In 2016 it established a national lottery in the name of Pambazuka National Lottery (PNL) which is available for participation both by way of direct purchase of issued tickets or on its digital and online platforms and in setting up the said lottery business and its attendant national infrastructure necessary for operating the business, it invested over two billion shillings and has employed over 500 persons; **(iii)** that in considering the huge investment in Kenya, it considered inter alia the applicable tax regime and its direct co-relation with the projected returns on the investment, sustainability of the business and expansion thereof. The applicable taxes in 2016 were business license fee, business permit fee, 25% statutory contribution to charitable causes in terms of the license to operate a lottery and corporation tax being 30% of the net profit; **(iv)** that it had a legitimate expectation that the tax regime obtaining at the time of its investment would not be arbitrarily increased, changed or varied and that any change thereof would be effected in the manner contemplated by the Constitution and would be reasonable.

19. It also avers that any tax measures imposed and applied by the state and any law providing such a measure must comply with the Constitution in term of fairness, reasonability and strictly adhere to the process provided for its enactment such as public participation. It challenges the constitutionality of the Act on grounds that:-

i. *No public and or sufficient public participation was undertaken*

ii. *Article **201 (b)** requires a public finance system applied by the state to promote equity, in particular, fair sharing of the burden of taxation.*

iii. *that the provisions are unfair in that they impose tax on revenue generated as opposed to profit earned, hence it amounts to forceful deprivation of property.*

iv. *that to the extent that the provisions relate to functions of the county governments, and the Senate was not involved, the same are unconstitutional.*

20. The second Petitioner also avers that:- ***(i)*** *the Parliamentary Committee advised against the proposal describing it as untenable and counterproductive while KRA recommended retention of the existing regimes;* ***(ii)*** *Both the Ministry of Interior and Coordination of National Government and the Parliamentary Committee on Finance also advised against the increase of the impugned taxes;* ***(iii)*** *that the National Assembly passed the Bill, forwarded it to the President but he refused to assent to it. He recommended that rate be varied to **35%** instead of **50%.** The National Assembly subsequently complied with the Presidents' recommendations and passed the Bill which was subsequently assented to and published as the Finance Act, 2017**[6]**whose net effect is to raise the tax liability to **100%** as pleaded in paragraphs **37** and **38** of the second Petition.*

21. It also avers:- ***(i)*** *that Sections **29, 30, 31** and **32** of the Finance Act**[7]**are unconstitutional on grounds that they contravene Articles **201 (b) (i), 10 (2) (b), 27 (1) , 201 (b) (i)** and **201 (a), 40 (2)** of the Constitution, Schedule **4** (Part **2**), Section **4 (a)** of the Constitution and Articles **110, 111, 112** of the Constitution;* ***(ii)*** *that Sections **28, 30, 31,** and **32** of the Finance Act**[8]** were not passed in a manner consistent with Articles **109 (3)** and **(4), 122, 123** and **124** of the Constitution, in that the National Assembly failed to adhere to its orders, namely, standing order numbers **49, 120, 127 (3)** and **1 (2); (iii)** that the proposed taxes threaten to cause it loss and damage and that the imposition of taxes has no basis in law.* It prays that the court declares the imposition and application of the Betting, Gaming and Prize Competition Tax at **35%** of the monthly turnover as unfair, unlawful, and unconstitutional in

consideration of Article **201 (b) (i)** of the constitution.

First, second, fourth and seventh Respondents grounds of opposition

22. On behalf of the first, second, fourth and seventh Respondents, the Hon. Attorney General filed grounds of opposition stating that*:-* ***(a)*** *acts of Parliament are presumed to be constitutional until the contrary is proved;* ***(b)*** *that the Petitioners have not demonstrated that the impugned act is unconstitutional;* ***(c)*** *that the act was enacted in accordance with the law;* ***(d)*** *and that the national parliament has authority to impose taxes.*

The fifth Respondents' grounds of opposition and Replying Affidavit

23. The National Assembly filed grounds of opposition and a Replying Affidavit sworn by **Michael Sialai**, the Clerk to the National Assembly. He states that:- ***(a)*** *the National Assembly's mandate to enact, amend and repeal laws is derived from the constitution, hence this Petition threatens its legislative role and contravenes Article* ***109*** *of the Constitution;* ***(b)*** *that there was adequate public participation in the process leading to enactment of the Finance Act 2017;* ***(c)*** *the National Assembly has discretion to pass the Bill just as it was presented to the President or amend the Bill in line with the presidents reservations;* ***(d)*** *that the National Assembly has the discretion to accept or reject the suggestions made by the president;* ***(e)*** *during the legislative process, amendments may be introduced to the Bill and to hold that every amendment must be subjected to public participation, would negate the legislative process;* ***(f)*** *the act fell exclusively within the mandate of the National Assembly as per Article* ***114*** *of the Constitution and Section* ***40*** *of the Public Finance Management Act;**[9]* *and* ***(g)*** *Article* ***114 (3)*** *of the Constitution defines a Money Bill;* ***(h)*** *Article* ***209*** *permits the national government to impose taxes as a means of raising revenue and;* ***(i)*** *declaring the impugned provisions as unconstitutional has grave ramifications;* ***(j)*** *the rate of taxation is a policy decision within the mandate of the executive and the court ought to decline to make policy decisions and that the petition is a threat to separation of powers.*

The third Respondents Grounds of opposition

24. The third Respondents grounds of opposition are that:- **(a)** *under part* ***11*** *of the first Schedule to the Kenya Revenue Authority Act, the third Respondent enforces the provisions of the Betting, Lotteries and Gaming Act;* ***(b)*** *that the impugned act was enacted in accordance with the provisions of Article* ***109*** *and* ***118 (1) (a)*** *of the Constitution;* ***(c)*** *that the* ***35%*** *complained of was informed by policy which sought to provide disincentives to the Betting industry;* ***(d)*** *that a tax burden imposed by the act cannot be termed as discriminative or unconstitutional.*

Interested Party's Replying Affidavit

25. Martin Machira, the Interested Party's Corporation Secretary and Director, Legal Services in the Replying Affidavit filed on 14th December 2017 avers that the petition does not disclose any violation of constitutional rights and that the Finance Act 2017 was passed in accordance with the constitution.

Issues for determination

26. Upon considering the opposing facts presented by the parties, I find that the following issues distill themselves for determination, namely; **(a)** *Whether or not it was a Constitutional imperative to involve the Senate in the enactment process of the impugned legislation,* ***(b)****Whether or not the process of enacting the legislation offended both the Constitution and Parliamentary Procedures,* ***(c)*** *whether or not the taxes complained of are unfair, burdensome, discriminatory, hence unconstitutional;* ***(d)*** *whether the second Petitioners Right to legitimate expectation has been violated,* ***(e)*** *whether the Petitioners Right to Property has been violated* ***(f)*** *whether or not these two Petitions are an abuse of court process.*

27. I will consider all the advocates submissions as I address each of the above issues. I must however, register my deep indebtedness to all the advocates for their industry in their detailed submissions, professionalism and seriousness with which they prosecuted or defended these Petitions and their

courtesy to the court and to each other.

(A) Whether or not it was a Constitutional imperative to involve the Senate in the enactment process of the impugned legislation

28. Counsel for the first Petitioner posed the following questions; ***(a)*** *Can the national government impose taxation on a matter which not only falls peculiarly within the function of county government, but which is also actually meant to be taxed by the county governments, and whether that undermines the revenue-raising capacity of county governments and by extension service delivery by county governments?* ***(b)*** *In view of* ***(a)*** *above, whether the imposition of taxation can be done without involving the Senate.*

29. He submitted that:- *(i) Betting, gaming, lotteries and prize competition are constitutionally within the purview of county government;* ***(ii)*** *Article* ***185 (2)*** *gives legislative authority to county assemblies to make laws necessary for effective performance of the functions or exercise of powers of the county governments under the fourth schedule.* He cited the definition of a Bill concerning county Government in **110 (1)** of the Constitution and argued that Betting, casinos and gambling are matters affecting county governments.

30. Citing Article **96,** he argued that imposition of taxation by the national government on a matter falling within the functions of county governments cannot be done without the input of the Senate.[10] Sections **29, 30, 31** and **32** of the act affects finances of county governments,[11] hence the National assembly violated Articles **109** and **110 (3)** of the Constitution. To buttress his argument, he cited a paragraph from *The Federal Gambling Tax and the Constitution****[12]*** that the national government cannot under the pretext of its taxing power invade reserved powers of the County Governments.

31. Counsel for the second Petitioner submitted that to the extent that the impugned provisions relate to Betting and other forms of Gambling which are an express function and power of the County Government set out at Schedule **4** (Part **2**) Section **4 (a)** of the Constitution, then strict procedure for enacting Bills containing provisions that affect the Counties as provided under Articles **110, 111,** and **112** must apply. [13]

32. Mr. Kuria for the First, Second, Fourth and Seventh Respondent's submitted that:- ***(i)*** *every act of Parliament enjoys a presumption of constitutionality;****[14]******(ii)*** *that the burden of proving otherwise lies on the Petitioners,****[15]*** ***(iii)*** *that to justify a nullification of a legislation, there must be a clear and unequivocal breach of the Constitution;* ***[16]******(iv)*** *As much as possible, a legislation should receive a construction that will make it operative and not inoperative;****[17]****and* ***(iv)*** *that a court is under an obligation to interrogate the objects and purposes of a given legislation before declaring it unconstitutional.****[18]***

33. Mr. Mwendwa for the fifth Respondent submitted that finance bills falls exclusively within the mandate of the National Assembly since it's a money Bill. **Mr Nyaga** for the third Respondent submitted that the provisions in question were validly enacted, while **Mr. Muchemi** for the interested Party submitted that a money Bill may only be introduced in the National assembly.

34. When the constitutionality of legislation or the process of its enactment is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids,"[19] the impugned legislation and the entire legislative process is capable of being read in a manner that is constitutionally compliant.

35. In interpreting the law, courts must infuse it with values of the Constitution. Courts must never shirk from this constitutional responsibility. As Moseneke DCJ stated:-

> *"The Constitution has reconfigured the way judges should do their work. It invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with transformative roles. The new legal order liberates the judicial function from the*

confines of the common law, customary law, statutory law or any other law to the extent of its inconsistency with the Constitution. This is an epoch making opportunity which only a few, in my view, of the High Court judges have cared to embrace or grasp. A substantive, deliberate and speedy plan to achieve an appropriate shift of legal culture at the High Courts and Magistrates' Courts is necessary. After all, it is the Constitution that confers substantial review powers on the judiciary. However, without an appropriate legal culture change the judiciary may become an instrument of social retrogression. In time the judiciary will lose its constitutionally derived legitimacy." ***[20]***

36. Article **2 (4)** of the Constitution provides that any law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

37. Article **259** of the Constitution provides that the Constitution shall be interpreted in a manner that promotes it's purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistently with this, when the constitutionality of legislation or any act or omission is in issue, the court is under a duty to examine the objects and purport of the legislation, the act or omission and to read the provisions of the legislation, the conduct or omission so far as is possible, in conformity with the Constitution.[21]

38. It is clear to anyone perusing through the Constitution of Kenya 2010, that the supreme authority in the Republic of Kenya belongs to the people; that State organs are subordinate to the will of the people and essentially exercise this authority by servant on their behalf. As part of the dictates of devolution contained in the Constitution, the National Assembly forms just one part of the Parliament of Kenya.

39. The Senate of the Republic of Kenya forms one of the two houses (or chambers) of the Parliament of the Republic of Kenya. Thus, it is a National legislative assembly. It draws its existence and authority from the concept of devolution under the Constitution.

40. The key mandate of the Senate of the Republic of Kenya is to safeguard and promote the interests of the units of devolution known as Counties. Hence the Senate must endeavour to influence national laws and revenue amounts that touch on counties as well as participating in oversight of State officers.[22]

41. The Constitution confers on both houses legislative competence. Legislative competence refers to the authority conferred by the Constitution on a legislature to pass legislation. The legislative competence and procedure for enacting legislation is provided under Article **109** of the Constitution. Any Bill may originate from the National Assembly.[23] A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article **122** and the Standing Orders of the Assembly.[24]

42. A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles **110** to **113**, Articles **122** and **123** and the Standing Orders of the Houses.[25] Article **110** of the Constitution defines Bills concerning County Government. It reads:-

(1) In this Constitution, "a Bill concerning county government" means--

(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;

(b) a Bill relating to the election of members of a county assembly or a county executive; and
(c) a Bill referred to in Chapter Twelve affecting the finances of county governments.

(2) A Bill concerning county governments is--

(a) a special Bill, which shall be considered under Article 111, if it--

(i) relates to the election of members of a county assembly or a county executive; or
(ii) is the annual County Allocation of Revenue Bill referred to in Article 218; or

(b) an ordinary Bill, which shall be considered under Article 112, in any other case.

(3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.

(4) When any Bill concerning county government has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House.
(5) If both Houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent.

43. Section **4**, part **2** of the fourth schedule of the constitution provides that the functions and powers of the county are- **(4)** Cultural activities, public entertainment and amenities including **(a)** betting, casinos and other forms of gambling; **(h)** sports and cultural activities and facilities. The question that begs for an answer is whether the impugned Bill contains provisions that affect the functions and powers of county governments within the meaning or Article **110 (1) (a)** of the Constitution.

44. In order to determine whether authority to enact a particular piece of legislation vests only in Parliament or concurrently in Parliament and the Senate, it is necessary to determine whether the legislation in question is 'legislation with regard to a matter concerning county government that falls within a functional area listed in Schedule **4** part two.' Where the legislation clearly falls within the functions in the said schedule, there is no difficulty determining whether it is a matter concerning the county governments. Difficulties only arise where the legislation falls outside any of the matters covered in the fourth schedule and the court is invited to determine whether it is a matter for the National Assembly or County governments. Even then, in such situations, courts have come up with a test.

45. In *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another*,[26] the Constitutional Court South Africa held that the manner of resolving this type of problem in relation to legislative authority is to characterise the legislation by applying what is sometimes called the *'pith and substance'* test. This test requires *'the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about' (para 36).* In footnote 53 of *DVD Behuising* the court referred to Indian authors who said that the doctrine of *'pith and substance'* was one of the interpretive tools which is invoked whenever *'a law dealing with a subject in one list is also touching on a subject in another list.'* As appears from paras 36-38 of *DVD Behuising* and the authorities there mentioned, the purpose of the legislation is at the forefront of this enquiry. Legislation may purport to deal with matters within Schedule **4** but its true purpose and effect may be found to have been directed at achieving a different goal falling outside the functional areas listed in Schedule **4.** Thus, it is necessary to ascertain the purpose of the impugned legislation.

46. In the case of national legislation, the application of the pith and substance test to legislative competence may lead to a conclusion that the bill's pith and substance place it wholly within functional areas of the national government, even though certain provisions of the Bill (which for this purpose would be viewed as ancillary or incidental) fall within Schedule functional areas of county governments (an exclusive county government competence). Conversely, and in the case of county legislation, the pith and substance test may lead to a conclusion that the bill's pith and substance place it wholly within Schedule **4** part two functions, even though certain provisions of the Bill (again viewed for this purpose as ancillary or incidental) may fall outside Schedule **4** part **2.**

47. Pith and substance is a legal doctrine in constitutional interpretation used to determine under which head of power a given piece of legislation falls.[27] The doctrine is primarily used when a law is

challenged on the basis that one level of government has encroached upon the exclusive jurisdiction of another level of government. Doctrine of Pith and Substance says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks at the substance of the matter.[28]

48. Thus, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be *intra vires* even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable: whether in the guise of making a law on a matter within its competence, the legislature is, in truth, making a law on a subject beyond its competence. However, where that is not the position, the fact of encroachment does not affect the *vires* of the law even as regards the area of encroachment.

49. The analysis must answer two questions:[29]what is the pith and substance or essential character of the law? does it relate to an enumerated head of power in the Constitution? The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law;[30]What is the true meaning or dominant feature of the impugned legislation? This is resolved by looking at the purpose and the legal effect of the regulation or law. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was legislating within its jurisdiction, or venturing into an area under county government jurisdiction. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law. The effects can also reveal whether a law is colourable (does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?[31]

50. There are two significant principles to be used in determining whether a matter falls within a particular national or county government jurisdiction;[32] The Constitution must be interpreted flexibly to meet new social, political and historic realities; The principle of devolution must be respected, keeping in mind:- Power is shared by two levels of government, each autonomous in developing policies and laws within their own jurisdiction.

51. A law found to be valid under the pith and substance analysis of the law may also have some *incidental* effects upon matters outside of the government's jurisdiction. This is tolerated, as a law is classified by its dominant characteristic.[33] The modern approach to Constitutional interpretation is to allow a fair amount of interplay and overlap into the other level of government's jurisdiction.[34]

52. The doctrine has been applied in India also to provide a degree of flexibility in the otherwise rigid scheme of distribution of powers. The reason for adoption of this doctrine is that if every legislation were to be declared invalid on the grounds that it encroached powers, the powers of the legislature would be drastically circumscribed.

53. The following passage from the Indian Supreme Court is relevant:-

> *"It is settled law of interpretation that entries in the Seventh Schedule are not powers but fields of legislation. The legislature derives its power from Article 246 and other related articles of the Constitution. Therefore, the power to make the Amendment Act is derived not from the respective entries but under Article 246 of the Constitution. The language of the respective entries should be given the widest scope of their meaning, fairly capable to meet the machinery of the Government settled by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality and if there is any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude."**[35]***

54.The case of *Prafulla Kumar Mukherjee vs The Bank of Commerce***[36]**succinctly held that whatever may be the ancillary or incidental effects of a Statute enacted by a State Legislature, such a matter must

be attributed to the appropriate list according to its true nature and character.

55. Thus, Parliament or county assemblies would be entitled to enact legislation of this kind because, in accordance with the pith and substance test, the legislation's characterisation as a whole would place it within its functional areas. Hence, the question that falls for determination is whether the pith and substance of the impugned legislation and its characterization as a whole places it wholly or substantially within the scope of the functional mandate of the national government even though matters ancillary or incidental to it fall within the functional mandate of the county government.

56. Pith means "true nature" or "essence of something" and substance means "the most important or essential part of something."[37] In my view, the pith and substance of the impugned Bill is taxation. Is Taxation a matter within the functional areas of county governments. Does the true character of the Bill place it within the functional areas of County Governments? Taxation as discussed below is a function of the national government. Betting, Casinos and other form of gambling are functions of the county governments. There lies the interplay. Can it be tolerated? As stated above, the modern approach to Constitutional interpretation is to allow a fair amount of interplay and overlap into the other level of government's jurisdiction.

57. To determine to what extent we can allow the interplay, we need to examine the character of the Bill further. Does the impugned legislation meet the test in Article **110 (1)** which defines a Bill concerning county government as**:-** "a Bill concerning county government" means **(a)** a Bill containing provisions affecting the functions and powers of the county governments set forth in the fourth schedule."

58. A further text is to examine the purpose of the Bill. The pith and substance of the impugned legislation can be discerned by examining the purpose of the Bill. The preamble to the Finance Bill 2017, reads "An act of Parliament to amend the law relating to various taxes and duties and for matters incidental thereto." Here lies the purpose, namely, to amend the law relating to various taxes and duties. Article **209** provides that only the national government may impose taxes and charges. My reading of this Article is that only the national government may impose taxes and charges and not county governments.

59. The pith and substance of the impugned law can also be discerned by examining the true character of the Bill. Article **114 (1)** provides that "A money Bill may not deal with any matter other than those listed in the definition of " a money Bill" in clause **(3).** Sub-Article **(3) & (4)** provides that " In this Constitution, "a money Bill" means a Bill, other than a Bill specified in Article **218**, that contains provisions dealing with--

> *(a) taxes;*
> *(b) the imposition of charges on a public fund or the variation or repeal of any of those charges;*
> *(c) the appropriation, receipt, custody, investment or issue of public money;*
> *(d) the raising or guaranteeing of any loan or its repayment; or*
> *(e) matters incidental to any of those matters.*
>
> *(4) In clause (3), "tax", "public money", and "loan" do not include any tax, public money or loan raised by a county.*

60. From the above provisions, a Bill dealing with taxes such as the impugned legislation is a money Bill. Further, taxation is a function of the national government. Thus, in my view, the Bill was correctly processed by the National Assembly because its pith and substance falls within the functions of the national government. It was not necessary for the Senate to be included in the legislative process. The national Assembly had the requisite legislative competence to legislate the Bill in question. The competence stems from the clear provisions Constitution discussed above.

61. Constitutional provisions must be construed purposively and in a contextual manner and that courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[38]

but should avoid “excessive peering at the language to be interpreted.[39]

62. It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.[40]

63. It is thus clear that it is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article **259**.

64. Thus, it is imperative to read the provisions of Articles **109 (3), 110 (1) (a), 114 (3)** together with Article **209(1)** which confers power to impose taxes upon the national government. I find no inconsistency in holding that imposition of taxes is a function of the national government, and that the Bill was correctly processed. It was not necessary to involve the Senate in the enactment. The pith and substance of the Bill places within the functions of the national government.

(B) Whether the process of enacting the legislation offended both the Constitution and Parliamentary Procedures

65. Under this issue, three issues where raised, ***(a)*** *whether public participation was undertaken,* ***(b)*** *whether the President overstepped his mandate under Article* ***115*** *of the Constitution,* ***(c)*** *whether Parliament flouted the Constitution and its standing orders while enacting the impugned legislation,*

(i) Whether or not public participation or sufficient public participation was undertaken.

66. Counsel for the first Petitioner submitted that the Petition does not challenge the constitutional and statutory mandate of the national government to impose taxes, but objects to the non-compliance with the applicable procedural and substantive law regulating Parliament's legislative powers and that where the law prescribes a procedure to be followed in enacting a law, that procedure must be followed.[41]

67. Counsel also submitted that the legislation process requires input of technocrats and public participation before enactment of legislation. Counsel stated that taxation has a direct impact on the life of citizens and that the constitution restricts imposition of a tax burden beyond what is necessary, hence requires extensive public participation involving stakeholder input before enacting tax legislation.

68. The second Petitioners counsel submitted that the impugned legislation is unconstitutional on grounds that it was enacted without public participation or sufficient public participation. He stated that public participation is a constitutional imperative[42]especially in financial matters and its absence is sufficient to vitiate and invalidate the resultant legislation. He pointed out that absence of public participation in the process of the enactment of the 2016 legislation was not rebutted and that failure to file a replying affidavit to rebut the averments means that the facts are not challenged.[43]

69. He submitted that public participation is now a central tenet under our Constitution that the public should be involved in the business of the legislature, which the constitution decrees should be carried out in an open and accountable manner.[44]

70. The Respondents and interested Party's counsels submitted that there was sufficient public participation. Mr. Mwendwa submitted that during the legislative process, amendments may be introduced on the floor of the house and to hold that every amendment must go through public participation would negate and undermine the legislative process and in any event, the amendments introduced were within the parameters of what had been subjected to public participation.

71. A proper analysis of applicable Articles of the Constitution including Articles **10, 118 (1) (b)** and

Standing Order **127 (3)** lead to the conclusion that Parliament was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process leading to the enactment of the impugned legislation.

72. My analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government. Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.[45]

73. The logical question that follows is, is whether the National Assembly undertook public participation that in any meaningful sense meets the threshold appropriate for public participation. Differently put, what was the threshold for public participation which would have been appropriate for this exercise and was it met by the national assembly.

74. It appropriate to begin by reiterating the very practical advice by Justice Sachs in the South African case of *Minister of Health and Another vs New Clicks South Africa(Pty) Ltd and Others**[46]* where at para. 630, he noted that *"... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."*

75. In the ***Mui Basin Case**[47]* a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:-

> **a.** ***First,*** *it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*
>
> b. ***Second****, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*
>
> **c.** ***Third,*** *whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See* ***Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya*** *(JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*
>
> > *"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*
>
> **d.** ***Fourth****, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or*

action and their views must be more deliberately sought and taken into account.

e. ***Fifth****, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

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

76. I will now apply these elements to the facts of the present case to determine whether the Respondents demonstrated that there was sufficient public participation in the legislative process.

77. Paragraph **10** of the Replying Affidavit of **Michael Sialai** addresses itself to this question. The annextures referred to therein include a newspaper advertisement inviting submissions from the public, submissions from various stakeholders, correspondence showing retreats were held to consider the subject and minutes of various meetings. The Petitioners also admit that there were various discussions and views from various stakeholders some of whom opposed the introduction of the taxes. In fact, the first Petitioners name appears in the list of the members of the private Sector alliance who submitted a memorandum. Applying the above elements, I find and hold that there was sufficient public participation prior to the enactment of the legislation.

78. As was held in the *Doctors for life****[48]*** case what is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making."[49] This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation.[50] As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised.

79. Further, in the *Doctors for life case*,[51] the court went on to hold that "in determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."

80. As for this case, I am satisfied that there was reasonable public participation. Evidently, some of the views presented out rightly opposed the amendments, but Parliament went ahead and enacted the legislation. This raises fundamental questions, such as must Parliament agree with all the views submitted? Can a court invalidate a legislation on grounds that Parliament did not take into account the

views expressed or ignored them or must Parliament agree with all the views.

81. The following excerpt from *Republic vs County Government of Kiambu Ex parte Robert Gakuru & another* where the court grappled with similar questions is relevant*:-**[52]*

> *"51. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by* ***Lenaola, J*** *in* ***Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013****, public participation is not the same as saying that public views must prevail."*

82. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public.[53] This position was appreciated *in* ***Doctors for Life International vs. Speaker of the National Assembly and Others****[54]* as hereunder:-

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

83. The primary duty of the courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice."[55] And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.

84. 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. 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. But as held in the above cited case which is of persuasive authority to this court, public participation does not mean that the views collected must prevail, hence, I find no solid grounds to invalidate the legislation in question.

85. The second Petitioner avers that there was no public participation prior to the enactment of the 2016 Finance Act which was amended by the 2017 act. It is the Petitioners case that this averment was not rebutted. It is true, the Respondents only concentrated on responding to the 2017 act. But, there is nothing to show that that prior to the 2017 amendment the Petitioners challenged the 2016 amendment nor were sufficient details provided to demonstrate how it was enacted. Whereas, sufficient material has been provided by both sides on the process leading to the 2017 act, other than the allegation of absence of public participation, nothing more was availed to the court.

86. In my view, the Petitioners could have done better to advance this argument by availing documents in support of the process of enacting the 2016 act to demonstrate absence of public participation. For a court to exercise its powers to invalidate a legislation, it must act on clear evidence beyond doubt that either the process was unconstitutional in that it violated the relevant law, standing orders and the Constitution or the legislation is out rightly unconstitutional.

(ii) Whether the President overstepped his mandate under Article 115 of the Constitution

87. The crux of Petitioners counsels is that:- ***(i)*** *the President ought to assent only to a legislation that has been passed strictly in accordance with the Constitution,* ***(ii)*** *that the President arbitrarily imposed his subjective opinion on what ought to constitute state tax policy;* ***(iii)*** *that he ignored public participation and the input of fiscal technocrats who concluded that 50% tax for the betting industry was unsustainable and unnecessary;* ***(iv)*** *that the President exceeded his mandate;* ***(iv)*** *that what was received from the President was not a reservation but a comment/opinion;* ***(v)*** *that Article* ***115*** *does not envisage the President will give a new proposal, but can only give reasons for declining to assent;* ***(vi)*** *that the President usurped the role of Parliament by directing Parliament to insert a provision for a uniform* ***35%*** *tax on the Bill;* ***(vii)*** *that the proposal ought to have been subjected to the full legislative mandate;* ***(viii)*** *that the legislative mandate is not shared with the executive.**[56]***

88. Mr. Mwendwa and Mr. Nyaga submitted that the President did not usurp the role of the National Assembly and that the President expressed his reservations and made various recommendations regarding certain provisions in the Bill and upon due consideration and duly observing all procedures, the National Assembly accommodated the reservations, passed the Bill and submitted it to the President for assent.

89. At this juncture, it is apposite that I consider the provisions of Article **115** of the Constitution which provides that:-

> *(1) Within fourteen days after receipt of a Bill, the President shall--*
>
> > *(a) assent to the Bill; or*
> >
> > *(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.*
>
> *(2) If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part -*
>
> > *(a) amend the Bill in light of the President's reservations; or*
> >
> > *(b) pass the Bill a second time without amendment.*
>
> *(3) If Parliament amends the Bill fully accommodating the President's reservations, the appropriate Speaker shall re-submit it to the President for assent.*
>
> *(4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported--*
>
> > *(a) by two-thirds of members of the National Assembly;*
> >
> > *and*
> >
> > *(b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.*
>
> *(5) If Parliament has passed a Bill under clause (4)--*
>
> > *(a) the appropriate Speaker shall within seven days re-submit it to the President; and*
> > *(b) the President shall within seven days assent to the Bill.*
>
> *(6) If the President does not assent to a Bill or refer it back within the period prescribed in clause (1), or assent to it under (5)(b), the Bill shall be taken to have been assented to on the expiry of*

that period.

90. The contestation here is that the President made a recommendation in the Memorandum to the Speaker of the National Assembly recommending that betting, lotteries and gaming activities should be taxed at the rate of 35%. The Petitioners case is that the recommendation amounted to a directive by the President to the National Assembly, directing the National Assembly what to do, an act the Petitioners' construe to amount to interference of the legislative mandate of the National Assembly.

91. Article **115 (1) (b)** provides in mandatory terms that the President shall *(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.*

92. A similar issue arose in the eleventh Parliament (third session) of the National Assembly. In a communication from the chair entitled *"Consideration and scope of Presidential Reservations pursuant to Article **115**…"*, Hon. Justin Muturi the Speaker of the National Assembly then and now, on 28th July 2015 stated *inter alia* that:-

> i. *In submitting his reservation on a Bill to the house, the President is not prohibited from including his preferred text of the particular clause, section, subsection or paragraph of the Bill;**[57]***
>
> ii. That just like amendments to Bills, the text proposed by the president on a Bill need not be subjected to the other stages subjected to a Bill upon publication, that is, publication, first reading, second reading and third reading;
>
> iii. *That any committee or member of the house is free to propose further amendments to the Presidential recommendations. So long as such amendments have the effect of fully accommodating the Presidents reservations, the voting threshold for the passage of such amendment or indeed the proposals made by the President, is a simple majority as contemplated by Article **121** of the Constitution. Any other proposed amendment, that does not fully accommodate the reservations, or indeed a total override of the Presidents reservations, including his proposed text, would attract the two third requirement.*

93. In a society governed by the rule of law, it is important to have a clear statement of what the law is. It is therefore necessary to make an unambiguous distinction between a mere legislative proposal and an adopted law. This distinction is made at the moment of enactment (the usual term in common law systems) or promulgation (the usual term in civil-law systems) and is typically marked by the formal signature of the bill that is about to become a law by the head of state. In granting his or her signature, or assent, to the new law, the head of state gives it finality and formal legitimacy.[58]

94. Assenting to a bill implies at least the possibility of refusing or withholding assent. The power of a head of state to refuse or to withhold assent to legislation is known as the veto power. In principle, this allows a president to protect the constitution, to uphold the balance and separation of powers, to prevent the enactment of rushed or badly drafted legislation and to thwart legislation that serves special interests rather than the common good.

95. According to the classical doctrine of the separation of powers, the power of enacting laws (legislative power) should be separated from the power of administering the state (executive power) and the power of interpreting and applying the laws to particular cases (judicial power).[59]

96. However, constitutions adhering to this doctrine do not typically keep the branches of government entirely separate. As James Madison argued, the doctrine allows for each of the three branches of government to have some involvement in, or control over, the acts of the other two. This partial mixture of mutually controlling powers is known as a system of checks and balances.[60]

97. When the court is called upon to consider the scope and extent of the Presidents power under Article **115**, it may be helpful to consider how the checks and balances of the constitution reflect, and relate the

Presidency as a means of protecting the constitution. One of the traditional functions of the Presidency is to protect against legislation that is blatantly unconstitutional or that has not been enacted in accordance with the proper constitutional procedure. The president's role is essentially that of a constitutional guardian, whose function is to conduct an executive review of proposed legislation (in contrast to the more widely known judicial review).

98. In my view, the protection of the constitution is the original purpose of the powers under Article **115** as envisaged by the authors of the Constitution. This power, is conceived as a reactive, and quite exceptional, instrument that would be used only occasionally and that could only 'be applied legitimately to legislation that is clearly unconstitutional, or was badly drafted.[61] This Presidential power is also a protection against harmful policies and corruption. It can be used by Presidents to prevent the passage of legislation that the President finds objectionable on policy or substantive grounds, without having to make any complaint against the constitutional or procedural propriety of the bill in question.

99. In addition to being deployed against legislation to which the President is ideologically opposed, the power is often relied upon as a means of preventing the enactment of so-called pork-barrel bills (where legislators vote for public funds to be spent on projects in their own areas) or special-interest legislation (where lobbyists attempt to influence legislators to enact laws that privilege a certain section of society against the common good).

100. This understanding of the veto power, in contrast to the veto exercised solely on constitutional or procedural grounds, widens the scope of presidential discretion. It calls on the president, as a figure representing a national constituency, to consider the merits, wisdom and necessity of a bill, and to act as the guardian of general interests.[62] It envisages the president as an autonomous policy actor, but not necessarily as the sole or primary policy initiator.

101. To prevent the arbitrary or capricious use of the power, while keeping responsibility in the hands of the President, the drafters of the Constitution carefully in Article **115** included a provision requiring the President in the memorandum to note *any reservations that the President has concerning the Bill*.

102. My understanding is that this reservation is a clear statement of the president's objections, giving a reasoned justification for the exercise of the refusing to assent to the Bill. The statement also gives the president an opportunity to lay out precisely what is wrong with the bill and to specify how the bill could be improved. In this way, the veto power also becomes—albeit indirectly—an agenda setting power through which the president is able to exercise political leadership, to define policy stances to the electorate and to put political pressure on legislators.

103. The constitutional power of the President to state what is wrong with the Bill can be done without making recommendations or proposals to Parliament to avoid the danger of being perceived to be descending to the legislative arena which is a function of Parliament. However, to the extent that Members of Parliament have the Constitutional safeguard and freedom of rejecting the recommendations, I find that it would be unsafe to conclude that they were influenced by the President' proposal. The doctrine of presumption of Constitutionality of an act of Parliament leaves the burden upon the person alleging the undue influence to prove so. Mere suspicion is not enough to persuade a court to invalidate a legislation.

104. Indisputably, there exists a presumption as regards constitutionality of a statute. The Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles.[63] But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits.

105. Thus, the burden fell upon the Petitioners to demonstrate that Parliament was unduly influenced by the Presidents' recommendation to the extent that they did not exercise their constitutional mandate in passing the Bill. It should be remembered that under Article **115 (2) (a) & (b),** Parliament may amend the Bill in light of the President's reservations or pass the Bill a second time without amendment.

106. In Kenya, a bill that has been vetoed by the president becomes law if the legislature, by an ordinary majority, amends the bill in accordance with the president's proposals, while a two-thirds majority is necessary to enact a Bill that has not been so amended.[64] I find no basis to invalidate the legislation on grounds of the President's conduct complained of. In my view, the final enactment was passed in conformity with the above provisions.

107. Again, to prevent the arbitrary or capricious use of the power, while keeping responsibility in the hands of the President, the drafters of the Constitution carefully in Article **115 (6)** included a provision providing that if the President does not assent to a Bill or refer it back within the period prescribed in clause **(5) (b),** the Bill shall be taken to have been assented to on the expiry of that period.

(iii) Whether Parliament flouted the Constitution and its standing orders while enacting the impugned legislation.

108. The first Petitioners' counsel submitted that:- ***(i)*** *the fifth Respondent acted illegally by failing to publish in the Kenya Gazette the Finance Bill 2017 and violated standing order numbers* ***120, 121, 127 (3),*** *Articles* ***114 (2), 10 (2) (a), 118 (1) (b)*** *and* ***201(a), 115, 47,*** and that legislation must conform to the Constitution,[65]and that Parliament abdicated its mandate to enact legislation strictly in accordance with the Constitution, that it flouted both procedural and substantive Constitutional requirements regulating the enactment of legislation and enacted an unconstitutional legislation.

109. Mr. Mwendwa submitted that Parliament followed the correct procedure in enacting the legislation. Mr. Muchemi for the interested party submitted that the amendments made to the bill after the presidents reservations were within the parameters of what went through public participation.

110. On the alleged non-compliance with standing orders, the earlier quoted communication from the Speaker on the National Assembly is instructive. It will suffice to state that that just like amendments to Bills, the text proposed by the President on a Bill need not be subjected to the other stages subjected to a Bill upon publication, that is, publication, first reading, second reading and third reading. Consequently, I find that there was no breach of the procedural requirements.

111. Further, unless the alleged breach of procedure during the enactment is demonstrated to be so fundamental that it is a mockery of the relevant constitutional and procedural requirements, I hold that it would not meet the threshold for a court to nullify an otherwise constitutional legislation. Thus, it is upon the person alleging to demonstrate to the court that the process was fundamentally flawed such that the ensuing legislation should not be allowed to stand.

(C) Whether the tax is unfair and burdensome to the Petitioners

112. Counsel for the first Petitioner submitted that *the constitution enjoins Parliament to impose taxation only in accordance with the national values and principles of governance among them equity and fairness in the distribution of tax burden, equality and non-discrimination, equal protection before the law, sanctity of property, good governance, integrity, transparency, and accountability.*

113. He also submitted that the uniform taxation violates the principle of horizontal and vertical taxation; that the power of the state to regulate gambling is not unlimited; [66] that the high tax rate amounts to punitive sanction and that one aim of the Constitution is to limit federal power to coerce the states and citizens.[67] Counsel urged the court to be guided by the principles of taxation, namely, certainty, equality, equity, legality.[68]

114. Citing Article **201 (b) (i),** Counsel for the second Petitioner submitted that the burden of taxation must be shared fairly because their effect is to levy **65 %** tax, being **30%** corporate tax and **35%** Betting, Lottery or Gaming Tax, which is unfair and well above rates charged to similar industry players elsewhere or other industries. Counsel also submitted that the tax is discriminative and will lead to absurd results.

115. Mr. Nyaga for the third Respondent submitted that the tax rate of **35%** is constitutional and was informed by government tax policy and that the impugned provisions are constitutional while Mr.Muchemi submitted that the alleged breach of fundamental rights is speculative.

116. Addressing the question of alleged unfairness of taxes, the House of Lords in the case of *Partington vs. Attorney General**[69]*** stated:-*"As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."*

117. As Lord Russel of Killowen in *Inland Revenue Commissioner vs. Duke of Westminister* [70] stated that:-"…*The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case."*

118. In *Hamdardda Wakhama vs Union of India**[71]*** the Court stated as follows:-

> *"..when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose, regard must be had to the enactment as a whole, to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at."*

119. A serious assault has been made against the impugned legislation on grounds that the tax rate of 35 % is high, unreasonable and burdensome, hence unconstitutional. The Constitution does not define the term "unfair taxation "nor did any of the parties in this case attempt to define it.

120. Jean-Baptiste Colbert, Louis XIV's Comptroller-General of Finances, once said that *" the art of taxation consists of plucking the goose so as to obtain the largest number of feathers with the least amount of hissing."**[72]***

121. Colbert's comment raises a number of questions:[73] When are more feathers being plucked than the goose can afford to lose? How many feathers is the goose giving up, compared to others? Is it justifiable for the goose to start hissing about the number of feathers that it is giving up? How does the goose feel about the plucking of its feathers? [74]These questions relating to Colbert's metaphorical goose can also be asked about a taxpayer. When is the tax burden too much for a taxpayer to bear? How heavy is the tax burden of one taxpayer compared to others' tax burden? Is it justifiable for taxpayers to complain about the effect of the tax burden on their ability to make a living? And how does the taxpayer perceive the tax burden?[75]

122. Judge Murphy, in the Canadian case of *Lawson vs. Interior Tree Fruit and Vegetables Committee of Direction*,[76]said:- *'That they are taxes, I have no doubt. In the first place they are enforceable by law… Then they are imposed under the authority of the legislature. They are imposed by a public body…. The levy is also made for a public purpose.'* The judge's words strengthen the notion that a tax is a compulsory impost with the purpose of providing benefits to the public.

123. Equity in taxation expresses the idea that taxes should be 'fair,' and is a concept used in all tax policy analysis. However, it should be noted that equity/fairness is a normative, value-based concept and its interpretation differs across individuals, countries, cultures and time. Since it depends on one's particular perspective, as well as the specific circumstances being considered, the concept may at times be difficult to apply in practice.

124. Tax equity is commonly discussed according to four definitions of 'fairness.' These definitions are also normative, and sometimes conflict, so they too are difficult to apply in practice. However, they are a common reference point for discussion. Horizontal equity posits that taxpayers who are equally economically situated should be treated equally for tax purposes. Vertical equity posits that taxpayers who are not identical from an economic standpoint, but are differently situated, should be treated

differently for tax purposes.

125. The E.U. Court of Justice [77] defined unfair burden as:-

> "(..) a burden which, for each undertaking concerned, is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share." According to the Court, "it falls to the national regulatory authority to lay down general and objective criteria which make it possible to determine the thresholds beyond which – taking account of the characteristics mentioned in the preceding paragraph – a burden may be regarded as unfair (...)"

126. A basic theme of tax policy holds that taxes must be levied for a public purpose. The public is taxed "to raise money for public purposes" and not to support the private needs of individuals.'[78] Thus, initially, the validity of a tax should be tested by determining who benefits from the tax and whether the tax was implemented with proper authority.[79] As far as I can discern from the material before me, there is no contest at all on the authority by the tax body to levy the tax nor has it been alleged or demonstrated that the tax in not being levied for a public purpose.

127. It is admitted by all that the tax is question falls under the category of deterrent taxes.Writing eloquently on deterrent taxes, Martinez, Leonard P. authoritatively states:-[80]

> "A tax that deters an activity will be upheld unless deterrence is its exclusive purpose. A tax cannot be used to bar an activity, but taxes that discourage or make an activity difficult or expensive have been upheld by the Court.**[81]** In deference to the taxing authority, the Court will often search for means to label a tax as a "revenue generation" operation, thereby making deterrence merely a side effect of the tax.' According to the Court, legitimate taxes "generate revenues, impose fiscal burdens on individuals, and deter certain behavior."**[82]** The amount of a tax does not appear to be a factor which the Court chooses to focus on-sometimes even if an excessive amount demonstrates a deterrent purpose. In fact, the Court has expressed the idea that even a tax with a particularly steep rate or an "obvious deterrent purpose" does not necessarily evince an inappropriate use of the power to tax.**[83]** ' So long as revenue generation can be labelled as the main purpose for the tax, the high rate and the deterrent effect will likely be disregarded."

128. The tax complained of in this Petition falls under the category described as "sin tax" and is aimed at discouraging the activities in question. As the learned author opines in the above excerpt, *A tax that deters an activity will be upheld unless deterrence is its exclusive purpose*. *A tax cannot be used to bar an activity, but taxes that discourage or make an activity difficult or expensive have been upheld by the Court*. The third Respondent maintained that the tax complained is a government policy to discourage the youth from engaging in the activity. The policy aims at achieving a legitimate purpose in public interest which can meet the limitation test under article 24 of the Constitution. This is a lawful government policy but as the learned author states above, deterrent purpose does not necessarily evidence in appropriate use of power but is aimed at deterring certain behavior.

129. It has not been demonstrated that the tax is punitive. The Legislature cannot use tax laws as tools to inflict punishment or assess penalties. A tax imposed with punishment as the obvious goal will likely be found to be an abuse of the legislature's taxing authority. No evidence of abuse of the tax policy was demonstrated in this case.

130. On the question whether the tax in question is harsh and oppressive the following excerpts from the above cited article by Martinez, Leonard P is highly instructive:-

> *"A tax law that operates in a harsh or oppressive manner toward individuals or groups of individuals also lacks legitimate authority. Although progressive taxation, in theory, could become confiscatory if an ultra steep rate were imposed on a few individuals, the Court has often travelled some distance to uphold a tax that at first glance appeared to be harsh and oppressive...."**[84]**(foot notes omitted}*

131. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its imposition does not necessarily infringe on the citizens rights unless it is demonstrated to be out rightly arbitrary and unconstitutional. A court is to consider both "the nature of the tax and the circumstances in which it is levied.

132. As stated above, the tax is grounded on a government policy aimed discouraging a certain group people from the activities in question. The reasonableness of this policy has not been questioned.

133. On the question of discrimination, the above quoted authors have expressed themselves in the following terms:-

> "The Court has not overlooked the possibility that taxation might lead to violations of the Equal Protection Clause. However, the Court has shown difficulty developing clear indicators of an equal protection violation. The need for broad powers of taxation, as well as the impracticality of exacting the same contribution from every individual, has led the Court to narrow its use of the Equal Protection Clause when considering taxation. The Court has felt safe to strike a tax for equal protection reasons only when legislatures tax similarly situated entities differently. The cases follow a predictable pattern. Those cases that provide relief against a tax scheme are those in which horizontal equity is violated. On the other hand, cases involving issues of vertical equity usually are decided in favor of the government."(foot notes omitted)

134. It follows that for the court to uphold the plea for discrimination, it must be shown that persons or entities undertaking similar activities are taxed at different rates. This was not done in this case.

135. Notwithstanding the notion that fairness and equity limit the power to tax, Courts have made it clear that differential taxation schemes are not unconstitutional. Despite the existence of tax rate differentials, progressive tax schemes have survived in the cases that have considered vertical equity as the prime issue. [85]

(D) whether the Petitioners Right to legitimate expectation has been violated

136. The Second Petitioner avers that it invested heavily to establish the business and in so doing it considered the existing tax regime and its right to legitimate expectation was violated by the introduction of the impugned tax.

137. Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth[86]*** at pages 449 to 450, thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*
>
> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

138. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of

Law. There cannot be legitimate expectation against the clear provisions of a statute. The impugned legislation having been lawfully enacted overrides the expectation if any pleaded by the second Petitioner.

(E) whether the impugned legislation violates the Petitioners Right to property

139. The Petitioners have cited the provisions of Article **40 (2)** of the Constitution which provides Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description or limit in any way the enjoyment of any right under Article **40**.

140. The Right to property under Article **40** is not absolute. A common way of determining whether a decision that limits rights is justified is by asking whether the decision in question is proportionate. Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as *'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected'.* ***[87]***

141. G. Huscroft, B. Miller and G. Webber (eds) have authoritatively stated the jurisprudence of proportionality includes this 'serviceable—but by no means canonical—formulation' of the test:--

> i. *Does the legislation (or* ***other government action)*** *establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?*
>
> ii. *Are the means in service of the objective rationally connected (suitable) to the objective?*
>
> iii. *Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?*
>
> iv. *Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?****[88]***

142. Proportionality has been called the *'most important doctrinal tool in constitutional rights law around the world for decades'*[89] and *'the orienting idea in contemporary human rights law and scholarship.'* A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R vs Oakes*[90] where Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

> a. *First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. I find that the decision by the Respondent does not meet this test.*
>
> b. *Secondly, the means chosen must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. I find that the decision complained of does not meet this test.*

143. In each case, Dickson CJ said, courts will be *'required to balance the interests of society with those of individuals and groups'*.[91]It is my view that it is in public interest that taxes must be paid. I find and hold that the impugned legislation does not infringe on the Petitioners Rights to property, but it is aimed at serving a legitimate public interest.

(F) Whether or not these two Petitions are an abuse of the Court process

144. Mr. Mwendwa accused the Petitioners of withholding material facts from the court. Mr. Mwendwa stated that the Petitioners are related in that they share directors, and that upon filing the first Petition, the

first Petitioner failed to obtain interim orders. The second Petitioner filed the second Petition, and this time it was able to persuade the court and obtained interim orders. Mr Mwendwas contented that failure to disclose to the court the existence of the first Petition was in bad faith, and that had the said information been disclosed to the court, it would have influenced the court in deciding to grant or refuse the orders.

145. The Petitioners admit that the companies share directors, but argue that in law they are different entities,[92]hence the two Petitioners approached the court separately and as of right. The flip side of this scenario is that since the companies share directors or investors as the Petitioners counsels described them. Were the directors in the second Petition aware about the first Petition challenging the same provisions as at the time they filed the second Petition? Were they aware that interim orders were declined in the first Petition as at the time they filed the second Petition?

146. Considering the fact the two companies are closely related, that they share directors or investors as the Petitioners counsels described them, it is hard to believe that they were not aware of both cases not withstanding that they are separate legal entities. The question that follows is whether or not the second Petitioner had a duty to disclose to the court the existence of the first Petition.

147. It is settled law that a person who approaches the Court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/it owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner.**[93]***

148. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.[94]The second petitioner was under a solemn duty to bring to the attention of the court the existence of the first Petition at the earliest opportunity possible and leave it to the court to determine the merits or otherwise of its case. This is even more crucial considering that the Petitioners engage in similar business, that their businesses are regulated by the same law, and that two Petitions challenge the same legal provisions and the core complaint is the same. Further, the determination of either case if successful would be beneficial to either of the Petitioners.

149. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the second petitioner, but also to any additional facts which it would have known if it had made inquiries.

150. The question that inevitably follows is whether the non-disclosure in this case was innocent, in the sense that the fact was not known to the second petitioner or that its relevance was not perceived. In my view, the non disclosure in this case cannot be said to be innocent bearing in mind the close relationship between the two companies and the similarity of their businesses and the similarity of the cases before the court. It would have been enough to state that there is a pending Petition brought by a different company, a complete legal entity, challenging the same provisions. Also, there would have been no prejudice for the second Petitioner to disclose that the directors interest in the first Petition, and leave it to the court to determine the issue. Its true companies are legal entities but they operate through their directors. The non-disclosure in this case cannot be said to have been innocent.

151. Disclosure of this information would have cleared the perception that the second Petition was filed to achieve what the first Petition could not get because the effect of the orders if granted would benefit both Petitioners.

152. I have in numerous decisions of this court[95] observed that "It is trite law that the court has an

inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."[96]

153. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

(b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right.*

(d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

(e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.**[97]***

(f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.* ***[98]***

154. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[99]

155. It's settled law that a litigant has no right to purse *paripasua* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amounts to abuse of court/legal process."[100]

156. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[101] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[102]

157. Turning to this case, I find no difficulty in concluding that notwithstanding the fact that the two companies are separate legal entities and each of them had the right to sue, the fact that they share directors, that they engage in similar undertakings and brought the Petitions challenging the same legal

provisions made it absolutely necessary for the second Petitioner at least the disclose to the court the existence of the first Petition, its interests in the two companies and leave the rest to the court. This is because the two Petitions arise from the same set of facts and circumstances and seek substantially similar reliefs. Even where a party brings a case to the court and is aware of the existence of similar or previous litigation, the party has a duty to bring such information to the court. This will help the court to avoid rendering conflicting decisions on the same subject.

Disposition

158. In view of my analysis and answers to all the issues discussed above, I find and hold that the conclusion is irresistible that these two Petition must fail. Consequently, I dismiss the two consolidated Petitions with no orders as to costs.

Orders accordingly. Right of appeal.

Signed, Delivered, Dated at Nairobi this 28th day of_ December, 2017

John M. Mativo

Judge

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[1] Chapter 131, Laws of Kenya

[2] Act No. 15, Laws of Kenya

[3] Supra note 1

[4] Pursuant to section 4 of the Act

[5] Under section 2 of the Act

[6] No. 15 of 2017

[7] Ibid

[8] Ibid

[9] Number 18 of 2012

[10] Counsel cited Article

[11] Counsel cited clause 4, Part 2 of the Fourth Schedule

[12] 43, J. Crim. L. Criminology & Police Sci. (1952-1953)

[13]Counsel cited Institute of Social Accountability & Another vs National Assembly & 4 Others {2015}eKLR AND Coalition for Reform and Democracy (CORD) & Another vs Republic of Kenya & Another {2016}eKLR

[14]Counsel cited Susan Wangui Kguru & Others vs A.G & Another

[15]Ndyanabo vs A.G {2001}2ea 485 and Coalition For Reforms and Democracy (CORD) vs A.G. & Others {2015}eKLR cited

[16] Counsel cited Timothy Njoya vs A.G & Another {2014} eKLR citing Pearlberg vs Varty {1972}1WLR 534

[17] Council of Governors & 3 Others vs Senate & 53 Others {2015}eKLR cited

[18] Institute of Social Accountability & Another vs National Assembly & 4 Others {2015}eKLR cited

[19] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[20] In "Transformative adjudication, the fourth Bram Fischer memorial lecture" (2002) 18 SAJHR 309 at 318

[21]Investigating Directorate: Serious Economic Offences and Others vs Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

[22] Article 96

[23] Article 109 (2)

[24] Article 109 (3)

[25] Article 109 (4)

[26] {2000} ZACC 2;2001 (1) SA 500 (CC)

[27] Cushing v. Dupey {1880} UKPC 22

[28] https://en.wikipedia.org/wiki/Pith_and_substance

[29] Ward vs. Canada (Attorney General) 2002 SCC 17, [2002] 1 SCR 569 (22 February 2002)

[30]Ibid

[31]The pith and substance analysis is not technical or formalistic — it is essentially a matter of interpretation. The court looks at the words used in the impugned legislation as well as the background and circumstances surrounding its enactment. In conducting this analysis, the court should not be concerned with the efficacy of the law or whether it achieves the legislature's goals.

[32]Supra note 29

[33] Ibid

[34] Ibid

[35] Jijubhai Nanbhai Kachar vs State of Gujarat, 1995 Supp. (1) SCC 596

[36] {1947} 49 BOM. L.R. 568

[37] http://www.desikanoon.co.in/2014/05/constitutional-law-doctrine-of-pith-and-substance.html

[38]Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24

[39] Johannesburg Municipality v Gauteng Development Tribunal and Others [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another 1950 (4) SA 653 (A) at 664G-H.

[40] Smith Dakota vs. North Carolina, 192 US 268(1940)

[41]Counsel cited Kenya National Commission of Human Rights vs A.G. & Another {2015}eKLR

[42]Counsel cited Institute of social accountability & another vs National Assembly & 4 Others {2015} eKLR, Robert Gakuru & Others vs The Governor, Kiambu County & Others {2014}eKLR & Glenister vs The President of the Republic of South Africa and Others CCT 48/10 {2010}ZACC

[43]Counsel cited Majanja J in Israel Otieno Agina vs The A.G {2011}eKLR

[44]Counsel cited Kenya Association of Stock Brokers and Investment Bank vs A.G & Another {2015}eKLR

[45] See e.g. Daly v SSHD [2001] UKHL 57 §§24-32 and ACCC/C/2008/33

[46] 2006 (2) SA 311 (CC)

[47] In the Matter of the Mui Coal Basin Local Community {2015} eKLR

[48] Infra note 53

[49] For example, according to the United States National Park Service, "[p]ublic involvement (also called public participation) is the active involvement of the public in . . . planning and decision-making processes." United States National Park Service, Director's Order No 75A: *Civic Engagement and Public Involvement*, 17 November 2003, available at http://www.nps.gov/policy/DOrders/75A.htm [accessed 26 December 2017] at section V. See also United States Code of Regulations, Title 40 (Protection of Environment), 40 CFR 25(1)(a), (b) and (d), *National Wildlife Federation v Burford* 835 F.2d 305, 322 (D.C. Cir. 1987).

[50] Infra note 54

[51] Infra note 54

[52]{2016} eKLR

[53] Ibid

[54] **(CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**

[55] Section 165(2) of the Constitution.

[56] See supra note

[57] Hon. Justin B. N. Muturi, ESQ, MP, Speaker of the National Assembly, 28th July 2015

[58] International IDEA, http://www.constitutionnet.org/sites/default/files/presidential_veto_powers.pdf

[59] Ibid

[60] Ibid

[61] McCarty, Nolan, 'Presidential Vetoes in the Early Republic: Changing Constitutional Norms or

Electoral Reform?' The Journal of Politics, 71/2 (April 2009), pp. 369–84

[62] Supra note 38

[63] See Charanjit Lal Chowdhury Vs. the Union of India and others AIR 1951 SC 41 : 1950 SCR 869

[64]Art. 115

[65] Counsel cited Doctors for Life International vs Speaker of the National Assembly and Others CCT 12/05, 2006 ZAZZ11

[66]Counsel cited Karthy Kenealy, State Regulation of Casino Gambling: Constitutional Limitations and Federal Labour Law Preemption, 49 Fordham L. Rev. 1038 (1981)

[67] Counsel cited Cooter Siegel, Not the Power to Destroy: An Effects Theory of the Tax Power, Virginia Law Review, Vol. 98;1195

[68] Counsel cited Yonas Girma Admassau & Prof. Dr. Umit Ustun, A Review of Constitutional Principles Regarding Taxation: Ethiopian and Turkish Perspective, P. 13, www.preprints.org, posted on 18 April 2017

[69] {1869}:- 4 HL 100, 122

[70] {1936} AC 1 24

[71] AIR 1960 at 554

[72]Colbert, J.B. n.d. Quotes.net. [Online] Available from: http://www.quotes.net/quote/35381 [Accessed: 2017-12-26]

[73] Theunis Steyn, A Conceptual Framework for Evaluating the Tax Burden of Individual Taxpayers in South Africa, Submitted in fulfillment of the requirements for the degree PhD option: Taxation in the Faculty of Economic and Management Sciences at the University of Pretoria, May 2012

[74] Ibid

[75] Ibid

[76] {1931}S.C.R. 357

[77] Judgment of the EU Court of Justice of 6 October 2010, on case C-222/08, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0222:EN:HTML, on 25.12.2017.

[78] Loan Ass'n v. Topeka, 87 U.S. 655,664 (1874).

[79] See ibid. at 665

[80]Martinez, Leonard P. (1999) ""To Lay and Collect Taxes": The Constitutional Case for Progressive Taxation," Yale Law & Policy Review: Vol. 18: Iss. 1, Article 4. Available at: http://digitalcommons.law.yale.edu/ylpr/vol18/iss1/4

[81]Sonzinsky v. United States, 300 U.S. 506, 513 (1937)

[82]According to dissenting Chief Justice Rehnquist, "taxes are customarily enacted to raise revenue to support the costs of government" but also "may be enacted to deter or even suppress the taxed activity." Department of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 787 (1994) (Rehnquist, C.J., dissenting).

[83] Ibid at 778

[84] Supra note 77 at page 137

[85]See, e.g., Magoun, 170 U.S. at 300-01. An Illinois inheritance statute set up three classifications of persons who were differentially taxed.The statute classed heirs and devisees into three tax classes based upon their blood relationship to the decedent; close relatives, more distant relatives, and "strangers to the blood" of the decedent.The rates were progressive among the categories. The statute also treated one classification differently based upon the amount of inheritance.The "stranger-to-the-blood" class was progressively taxed based upon the value of the inheritance. The rates progressed from three dollars per one hundred dollars of inheritance on amounts under ten thousand dollars up to six dollars per one hundred dollars of inheritance if the amount exceeded fifty thousand dollars.

[86] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000

[87]Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

[88]G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

[89] Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 709.

[90] R v Oakes [1986] 1 SCR 103 [69]–[70].

[91] Ibid

[92] Salmon vs Salmon cited

[93] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[94] Brinks-Mat Ltd vs Elcombe {1988} 3 ALL ER 188

[95]See e.g. Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others Succ Cause no 920 of 2009 AND Graham Rioba Sagwe & Others vs Fina Bank Limited & Others, Pet No. 82 of 2016

[96]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[97] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[98](2007) 16 NWLR (319) 335.

[99] Justice Niki Tobi JSC of Nigeria

[100] Supra note 1

[101]Ibid

[102] Ibid