REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 143 OF 2015

BETWEEN

BRITISH AMERICAN TOBACCO KENYA LTD …….……
PETITIONER

VERSUS

CABINET SECRETARY FOR THE MINISTRY OF HEALTH…….…….1ST
RESPONDENT

TOBACCO CONTROL BOARD …….……2ND RESPONDENT

ATTORNEY GENERAL …….……..3RD
RESPONDENT

AND

KENYA TOBACCO CONTROL ALLIANCE.…..…1ST INTERESTED
PARTY

CONSUMER INFORMATION NETWORK..….....2ND INTERESTED
PARTY

JUDGMENT

Introduction

1. This petition relates to the constitutionality of the Tobacco Control Regulations 2014 (hereafter **"the Regulations"**), which were published by the first respondent on 5th December 2014 in the Kenya Gazette as Legal Notice No 169, Legislative Supplement No 161. The Regulations, made pursuant to section 53 of the Tobacco Control Act, 2007 (hereafter "the Act"), seek to regulate various aspects of the tobacco sector in Kenya, in which the petitioner is one of the major players.

2. In its petition, the petitioner contended that the Regulations were to come into force on 5th June 2015, and consequently sought interim orders seeking to stay their implementation.

3. In a ruling dated 4th June 2015, this Court granted interim orders to restrain the implementation of the regulations pending hearing and determination of the petition. This judgment relates to the substantive issues raised in the petition.

The Parties

4. The petitioner is a public limited liability company incorporated under the provisions of the Companies Act, Chapter 486 of the Laws of Kenya. It has instituted the present proceedings against the Cabinet Secretary in the Ministry of Health (hereafter "**CS Health")**, who is responsible for making regulations under the Act; the Tobacco Control Board (hereafter **"the Board"**), a body established under section 5 of the Act and whose functions include the making of recommendations to the Minister and to participate in the formulation of Regulations under the Act, and the office of the Attorney General (hereafter **"AG"**), whose office is established under Article 156 as the principal advisor to the national government and its legal representative in civil proceedings.
5. Pursuant to a consent order entered into on 7th July, 2015, the **Kenya Tobacco Control Alliance** and the **Consumer Information Network** were joined to the proceedings as interested parties.

The Pleadings

The Petitioner's Case

6. The petitioner's case is contained in its petition dated 14th April, 2015, as well as the affidavits sworn by **Mrs. Constance Anjiri Anyika** on 14th April 2015 and 1st September 2015, the further affidavit sworn by **Mr. Simukai Munjanganja** on 27th April, 2015 and the further supplementary affidavit of **Mr. Rowlands Nadida** sworn on 6th May, 2015. The petitioner also filed two sets of submissions dated 1st September, 2015 and 4th December, 2015. Learned Counsel, Mr. Kiragu Kimani, Mr. Walter Amoko and Mrs. Kashindi represented the petitioner.

7. The petitioner's grievance relates to the manner of formulation and enactment of the Tobacco Control Regulations 2014. It contends that in late 2013, it obtained two different documents, both referred to as Tobacco Control Regulations, 2012. By a letter dated 4th November, 2013, it sought audience with the AG to discuss the procedural and substantive concerns it had with regard to the Regulations. Its efforts were, however, in vain.

8. On or about 11th February, 2014, it became aware that draft Tobacco Control Regulations, 2013 had been prepared by the Board and on the said date, at the Laico Regency Hotel in Nairobi, the National Assembly's Departmental Committee on Health was briefed by the Tobacco Control Board on the said Regulations, **Article 5.3 of the World Health Organization Framework Convention on Tobacco Control**, and the Guidelines for implementation of the aforesaid Article.

9. It further contends that on 18th March, 2014, a national stakeholders' forum on tobacco control was convened by the Ministry of Health where the 2013 draft Regulations were shared, and by a letter dated 25th March, 2014 addressed to the Board, it set out its concerns regarding the draft Regulations but it did not receive any response thereon. Further, that by its letter dated 4th June, 2014 addressed to the AG, which was written following its failure to get any response from the Board and the Ministry of Health, it sought audience with the AG to discuss the draft Regulations. It did not, however, get a response from the AG either.

10. It is further averred on behalf of the petitioner that it was notified by the Kenya Association of Manufacturers about a World Health Organization (**WHO) Technical Barriers to Trade**

Agreement meeting that was held on 22nd September, 2014. Its Regulatory Affairs Manager, a Ms. Emily Waita, who sat at the public gallery at the aforementioned meeting, was never given a chance to make any representations. It contends that based on the minutes of the said meeting, it is evident that members complained that there had been poor stakeholders involvement in preparation of the 2013 draft Regulations, and as a result, the Technical Barriers to Trade Agreement Committee rejected the draft Regulations and made recommendations to the effect that the said Regulations be reversed and the enactment process be started afresh so as to address the concerns that had been raised.

11. It is the petitioner's contention that the suggested revisions and fresh enactment was never done, and by a letter dated 1st December, 2014, it wrote to the AG setting out some of the key issues with regard to the said draft Regulations and further requesting for review so as to ensure that due process was followed and the issues arising addressed, but again the AG never responded. On 5th December, 2014, the Tobacco Control Regulations, 2014 were published by way of notice in the Kenya Gazette.

12. It was the petitioner's case therefore that the CS for Health and the Board did not engage with the tobacco industry as stakeholders in the process of developing the 2012 proposed Regulations. With regard to the 2013 Regulations, its contention was that the engagement of stakeholders was limited and entirely unsatisfactory. It is its contention that it was never given an opportunity to comment on the 2012 proposed Regulations, while its submissions with regard to the 2013 draft Regulations were not considered.

13. The petitioner alleges that it had great difficulty in obtaining the 2014 Regulations, and it was not until 2nd February, 2015 that the Board published the Regulations in the *Daily Nation* and *The Standard* newspapers. It is its contention that under section 5 (1) of the Statutory Instruments Act, 2013, where a proposed regulation is likely to have a substantial direct or indirect impact upon business or restrict competition, the regulatory authority is required to consult with persons likely to be affected.

14. The petitioner asserts that the Regulations have a substantial direct and indirect effect on the petitioner's business and that of other players in the tobacco industry in Kenya. It contends that it shall, for instance, incur substantial additional costs to comply with new labelling and packaging requirements under the Regulations.

15. It is also its case that the Regulations impose significant costs on it, the tobacco industry generally and the community, and that despite the significant costs to be imposed, it is not aware of any publication in the Kenya Gazette or in any newspaper of a regulatory impact statement as required under section 6 of the Statutory Instruments Act. It contends therefore that no such regulatory impact statement was prepared, and the CS for Health and the Board did not obtain any independent advice on the adequacy of the impact statement, prepare the compliance certificate as required by law, or table the regulatory impact statement and compliance certificate before Parliament.

16. According to the petitioner, it wrote to the CS Health on 27th January, 2015 seeking access to any regulatory impact statement and any other information evidencing compliance with the requirements under the Statutory Instruments Act. It further contends that Ms. Anjiri also wrote seeking access to any such regulatory impact statement and information relating thereto in exercise of her rights under Article 35 of the Constitution. In response thereto, the Board, in its letter dated 28th January, 2015, while not providing the information sought by Ms. Anjiri, contended that her request could be a tactic by the industry to derail the process of adoption of the regulations, and that Article 5.3 of the WHO Guidelines requires Member States to protect national policies from vested industry interests.

17. The petitioner further contends that by a letter dated 9th March, 2015 addressed to the Board, it

made a further request for the technical repository and digital storage device in follow up to its letter dated 27th January, 2015 which had not been responded to. On 13th March, 2015, it received an email from a Mr. Ibrahim Longolomoi indicating that the Board could not provide the requested information until consent was obtained from the CS of Health, who was by then on a trip abroad. It made a further, unsuccessful request by its letter dated 26th March, 2015.

18. Aside from the lack of stakeholder engagement in the process of enacting the regulations and the failure by the Board to avail information relating to the regulatory impact statement and the technical repository and digital storage device, the petitioner is also aggrieved by the introduction, through the Regulations, of the **solatium compensatory contribution**.

19. It is its contention that it was never heard on the issue and has never received any written reasons on the basis for imposing the said contribution, that the contribution is unconstitutional and otherwise unlawful because the amount is set without any reference to a determination of a lawful obligation to pay compensation or as to the amount, and that it has not received any reasons for the imposition or been given a chance to review such reasons. It is also its case that the said contribution is discriminatory as other industries, including those that deal in controlled substances, have not been subjected to similar measures.

20. It argues, further, that the wording in Regulation 38 that the contribution shall be two per cent of the value of the tobacco products manufactured or imported is vague and uncertain as it is not clear which information will be used to ascertain the value of manufactured or imported tobacco. It is also its contention that the imposition of the two per cent contribution is oppressive, irrational and unreasonable considering that tobacco manufacturers and importers are already subject to many other taxes including excise duty which is set at a very high level.

21. Further, the said contribution will have a significant effect on its operations and will have an impact on its employees, suppliers, contractors and investors. It contends further that to the extent that the contribution affects products manufactured for export, it will affect the export of tobacco product from Kenya to foreign markets, and therefore government revenue. In its view, the solatium compensatory contribution is primarily meant to punish tobacco manufacturers and importers for engaging in what is legal trade in the tobacco industry.

22. The petitioner is also aggrieved by the limitation in the Regulations of contact between public officers and tobacco industry players. According to the petitioner, the CS for Health has no power to prescribe a code of conduct for any public officer involved in implementing public health policies for tobacco control. It asserts that the tobacco industry is engaged in legal business; that the petitioner and other industries are licensed to carry out their legal business within Kenya, and that no other industry, including those dealing in controlled substances, are subjected to similar limitations on their interactions with public officers or authorities. In its view, by singling out the tobacco industry and providing that it should not benefit from incentives and privileges to establish and run its businesses, the Regulations constitute discrimination against it and other investors in the tobacco industry.

23. It is also its contention that the excessive limitation of the tobacco industry's interaction with public officers undermines its right to fair administrative action and offends the principles of good governance, including public participation, inclusiveness and non-discrimination. In particular, the petitioner singles out Part V of the Regulations as preventing the tobacco industry from participating in administrative and regulatory decisions likely to impact on the industry and denies it the right to a fair process as it advocates that members of the industry be condemned unheard.

24. With respect to the requirements in the Regulations regarding the packaging and labelling of tobacco products, the petitioner challenged the constitutionality of Regulation 3. It was its assertion that the total surface area of packaging and labelling of tobacco products is unclear, and the size of pictorial warnings to be displayed is not specified in terms of size and the mode of the display. It contends that through its letters dated 27th January, 2015, 17th February, 2015, 9th

March, 2015 and 26th March, 2015, it had requested the CS Health to supply it with technical information and guidance documents in accordance with Regulation 10 but no response was given. It is its contention therefore that it is unable to start making preparations for the printing of any warnings as required because it does not know exactly what is required.

25. The petitioner further contends with regard to the labelling and packaging that local printers have expressed concern over the Regulations. According to the petitioners, the printers claim that the requirements with regard to labelling will adversely affect their business.

26. The petitioner asserts that it has lost time within which it would have started making arrangements to comply with the requirements for pictorial health warnings as a result of the failure on the part of the CS Health to avail information on the requirements of packaging and labelling; that the warning requirements may prevent it from fully using its trademarks and the full get up on its package, particularly if the size of the pictures and pictograms exceeds the present size requirements; and that the warning requirements, dependent upon clarification of size, may make it impossible for it to use its trademarks consisting of logos, colours, and other devices placed at certain positions on the package, including , but not limited to, position marks and entire marks.

27. The petitioner further argues that the warning requirements under the Regulations are not necessary or proportional/ This is because, in its view, the public, including youth, are already well informed of the risks of smoking, existing warnings as required by section 21 of the Tobacco Control Act have been displayed on cigarette packs in Kenya since September, 2008, there is no evidence to show that the warnings are not seen and assimilated by consumers or that trademarks neutralise consumers' existing awareness of the risks of smoking.

28. Its contention is that the real drivers of smoking initiation are factors such as personal influence, risk preferences, peer influence, socioeconomic factors, access and price, and that pictorial health warnings have not been shown to reduce smoking or significantly alter beliefs and intentions about smoking. It contends further that the warnings required under the Regulations go beyond anything necessary to effectively warn consumers, and would not prevent youth access to tobacco products but could create unintended consequences that undermine the health objectives, including by driving down prices and increasing illicit trade, and that there are a number of more effective and less restrictive measures targeted to reduce smoking such as creating offences of proxy purchase, youth purchase, smoking by minors in public, implementing more targeted youth education programmes aimed at preventing young people from taking up smoking and increasing measures to prevent the trade in illicit tobacco.

29. It is also the petitioner's case that the Regulations are unreasonable, disproportionate, irrational and onerous because there is an **East African Standard, EAS 110:2005**, which provides the specifications for cigarettes and is administered by the Kenya Bureau of Standards; that all manufacturers and importers of cigarettes have to ensure that their cigarettes meet the specifications; that it submits its cigarette packs and products for annual testing and certification by the Kenya Bureau of Standards which are tested as per the EAS standards and as such, there is in existence a mechanism for ensuring that all cigarettes manufactured or imported for sale in Kenya meet the stringent specifications, and in its view, there is no validated methodology for testing effects of tobacco ingredients on health, or its addictive effects.

30. Additionally, the petitioner argues that the product information required to be disclosed under Regulation 42, aside from the risk posed that such product information may be made accessible to the public, comprises manufacturers' trade secrets or sensitive information, and if such information is availed to the public, manufacturers' competitors, including illicit manufacturers, would be able to manufacture identical products and this may result to loss of trade and tax revenues to the government.
31. It is also the petitioner's contention that there is a risk of the product information misleading the public if it is made accessible to them. It gives such an instance as including a case where the public may deem one product to be less risky than another based on the information received and

yet cigarettes without ingredients are no more or less harmful than those with ingredients. It contends that in jurisdictions where such disclosure is permitted, steps are taken to ensure that trade secrets and other confidential information is not shared with the public.

32. With respect to the requirement in Regulation 13 regarding market share, the petitioner asserts that there is no way any manufacturer can ascertain its market share without the benefit of information on the productions and sales of other manufacturers. The requirement, therefore, is unreasonable as manufacturers cannot provide information they do not have, and it is irrational to require manufacturers of tobacco products to provide information that is not available or that they cannot ascertain, particularly since Regulation 14 makes it an offence to declare false information.

33. The petitioner also impugned regulation 15 on the basis that it is unconstitutional as it prohibits smoking in streets, walkways and verandas adjacent to public places. Its contention was that section 33 (7) of the Act vests the CS Health with powers to regulate areas where smoking may not be permitted, such regulation being restricted to buildings or vessels, or part thereof, or a class of buildings or vessels, or part thereof, to which members of the public have access. In its view therefore, regulation 15 (b) had extended the restriction to areas not contemplated under section 33 (7).

34. The petitioner has also challenged regulation 45 which prescribes a penalty of a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years for breach of any provision of the Regulations. It contends that the regulation is *ultra vires* section 24 (5) of the Statutory Instruments Act which only allows a penalty for breach of any provision of regulations to be a penalty not exceeding twenty thousand shillings or imprisonment not exceeding six months or both.

35. Finally, the petitioner contends that neither the CS Health nor the Board has any power, either pursuant to section 53 of the Act or otherwise, to make legislation to domesticate or implement Article 5.3 of the WHO Framework Convention on Tobacco and the Guidelines thereto. It prays that the Court should allow the petition and grant the following orders:

1. ***A declaration that Tobacco Control Regulations, 2014, being Legal Notice No. 169 of 2014 published in the Kenya Gazette Supplement 161, Legislative Supplement No. 156 of 2014 are void in their entirety having failed to comply with the applicable provisions of the Statutory Instruments Act, 2013 and Article 10 of the Constitution.***
2. ***An order for Judicial Review by way of Certiorari to remove into the High Court and quash the Tobacco Control Regulations, 2014 in their entirety.***

3. ***In the alternative to (2) above, an order for Judicial Review by way of Certiorari to remove into the High Court and quash regulations 3 to 39 (both inclusive) and regulation 45 of the Tobacco Control Regulations, 2014.***

4. ***In the alternative to (1) and (2) above:***

a. ***A declaration that Regulation 1 of the Tobacco Control Regulations, 2014 is not applicable to Part II of the Regulations.***

b. ***A declaration that Part VI (Regulations 37 and 38) of the Tobacco Control Regulations, 2014 is void.***

c. ***A declaration that Part V (Regulations 20 to 36) of the Tobacco Control Regulations, 2014 is void.***

d. ***A declaration that Part II (Regulations 3 to 7) of the Tobacco Control Regulations, 2014 is void.***

e. ***A declaration that Regulation 15 (b) of the Tobacco Control Regulations, 2014 is void.***

f. ***A declaration that Regulation 45 of the Tobacco Control Regulations, 2014 is void.***

g. ***A declaration be made that Section 7 (2) (f) of the Tobacco Control Act, 2007 is void.***

5. ***Any further order or relief that this Court deems fit to make to meet the interests of justice.***

6. ***The costs of this petition be awarded to the petitioner***.

The Case for the Respondents

36. The case for the respondents, which was presented on behalf of the AG by Learned State Counsel, Mr. Mohamed Ado, is set out in the affidavit in reply sworn by the CS Health, **Mr. James W. Macharia** on 28th July, 2015, a supplementary affidavit also sworn by Mr. Macharia on 23rd July, 2015, a replying affidavit sworn by **Prof. Peter A. Odhiambo** on 19th August, 2015 and written submissions dated 23rd September, 2015.

37. The respondents take the position that as a signatory to the WHO Framework Convention on Tobacco Control, Kenya is obligated to fulfil its obligations under the Convention by enacting and implementing legislation and regulations compliant with the Convention. They describe the convention as one that provides a framework and set of legally-binding measures to be implemented in countries that have ratified it, and as an evidence-based treaty that affirms the right of all people to the highest standard of health. It is on this basis that the Regulations impugned in this petition were formulated and enacted.

38. In his affidavit, Mr. Macharia deposes that on 11th December, 2014, he transmitted a copy of the Regulations to the Clerk of the National Assembly through a letter dated 9th December, 2014, together with an Explanatory Memorandum, a regulatory impact statement and a certificate of compliance. He further states that the Board, pursuant to its meeting on 29th October, 2014, recommended to him that there was need for publishing the regulatory impact statement as required under section 9 of the Statutory Instruments Act, which he did. It was his deposition that under **section 9 (g) and (h)** of the **Statutory Instruments Act**, a regulatory impact statement need not be prepared for publication if the proposed legislation is a matter arising under legislation that is substantially uniform or complementary with legislation of the national government or any county, and a matter advance notice of which would enable someone to gain unfair advantage.

39. It was also his averment that the impugned Regulations are for the benefit of the community and shall not impose significant costs on the community or part of the community, and there was therefore no need to prepare and publish the regulatory impact statement. In any event, in his view, the petitioner, which is a juridical or legal entity, did not qualify as a "community" as defined under section 6 of the Statutory Instruments Act, that is as a society of people living in the same place, under the same laws and regulations, and who have common rights and privileges.

40. According to the respondents, the CS Health had, in compliance with section 7 (3) of the Statutory Instruments Act, sought and obtained independent advice from a reputable Public Policy and Legislative Consultant on the adequacy of the regulatory impact statement, and had duly considered such advice before gazetting the Regulations.

41. It is also their contention that the petitioner had made its presentations under section 5 of the Statutory Instruments Act, which were duly considered; and that there had been a stakeholders' meeting held on 18th March 2014 at the Kenya School of Government in which the petitioner and other representatives of the tobacco industry participated. A subsequent stakeholders' meeting, in which the petitioner and other representatives of the tobacco industry participated, was held on 14th August 2014. In addition, parliamentary consultative meetings were held on 11th February

2014 and 21st August 2014 with the Parliamentary Departmental Committee on Health, and on 13th November, 2014 with the Parliamentary Committee on Delegated Legislation at the Laico Regency Hotel where the Regulations were presented to the Committees. A further consultative meeting was held on 7th May, 2014 with various other Parliamentary Departmental Committees.

42. According to Mr. Macharia, various other public participation meetings were held in eight other counties in which the graphic health warnings were subjected to various pre-testing. It is the respondents' case therefore that the petitioner and other industry stakeholders were properly consulted and they participated in the process of making the Regulations, and their submissions with respect thereto were duly considered.

43. The respondents contend that sections 5, 6, 7, 9 and 11 of the Statutory Instruments Act were fully complied with in making the Regulations; that there are various legislation that govern the tobacco industry and the Ministry of Health is keen on enforcement of tobacco control laws domestically within the confines of the Tobacco Control Act, 2007, Tobacco Control Policy, 2012 and as stipulated under the WHO Framework Convention while curbing the effects of the tobacco epidemic locally and globally and safeguarding the greater public health concerns.

44. Mr. Macharia sets out in his affidavit the effects of tobacco usage in Kenya and asserts that the Regulations are intended to effectively implement the life-saving measures already contained in the Tobacco Control Act. It is his averment that the Regulations have been enacted in order to address the negative effects of tobacco use which have impacted negatively on the lives of the people of Kenya, the economy and the environment.

45. While conceding that the tobacco industry pays tax to the government, the respondents aver that the government spends huge sums of money to cure tobacco related illnesses. Their position is that the proper implementation of these Regulations will ease the burden of diseases and disabilities both from the community and the State which shall ensure that basic rights to life, health and clean environment are achieved as envisaged under the Bill of Rights.

46. According to the respondents, there are currently no regulations to regulate the production, manufacture, sale, distribution and farming of tobacco products. They term the petitioner's motive in challenging the Regulations as suspect and assert that it simply does not want the industry regulated.

47. With respect to the **East Africa Standards 110: 2005** which the petitioner argues provides for health warnings and is administered by the Kenya Bureau of Standards, the respondents aver that the said Standards do not provide for graphic health warnings but instead specifies the methods for sampling and testing of cigarettes. It is their position therefore that the said standards cannot be substituted with Regulations made under section 53 of the Act. It is their case, further, that Kenya is the only country in East Africa that has enacted tobacco control legislation hence the need for regulations to implement the provisions of the Act.

48. The respondents aver that many other countries, including the United Kingdom, France, Ireland and Australia have moved towards standardized plain packaging to achieve important public health benefits *vis a vis* the vested interests of the tobacco industry, and which effectively removes the opportunity to advertise and promote tobacco products by the tobacco industry. They assert that Part II of the Regulations is in conformity with sections 16, 21, 22, 23, 24, 25 and 26 of the Tobacco Control Act and the schedule thereto and are therefore not unconstitutional or *ultra vires* the mandate of the CS Health.

49. It is the respondents' case that warning labels are highly effective in reducing tobacco consumption; that research has established that large, graphic warning labels on tobacco products is an effective way to inform consumers about the harmful impact of tobacco, encourage users to quit and deter non-users from starting smoking; that pictorial warning labels have a greater impact than the text-only labels; and that large and clear images depicting the real effect of tobacco use

placed on both sides of the package are more effective in educating members of the public before they engage in tobacco consumption; and the pictorial warnings help tobacco users to easily visualize the nature and severity of tobacco-caused diseases.

50. The respondents argue that vulnerable groups such as low-literacy people, children, and minorities can understand images more than the writings; that the larger warnings reduce the part of the package available for tobacco branding and advertising; and that it is a legal requirement to use multiple graphic health warnings and to rotate them periodically in order to avoid over exposure and prevent people from becoming desensitized from a single image and to test which set of images is more suited to achieve cessation and prevention objectives. They further aver that Article 8 of the WHO Framework Convention requires states parties to adopt effective national legislation and actively promote effective regulations that requires 100% smoke-free environments in all indoor public places, indoor workplaces on all means of public transport, and, as appropriate, other public places with no exceptions that provide for smoking areas.

51. With respect to the petitioner's complaint about the disclosure requirements under the Regulations, the respondents argue that Part III of the Regulations is in conformity with section 4 of the Act, and the disclosures required under this part are meant for counteractive measures in order to control and mitigate tobacco related health perils. They also assert that the disclosures are required as tobacco products contain over four hundred (400) harmful ingredients which need to be regulated, controlled and their quantity monitored. The disclosure requirements are therefore reasonable and justifiable in an open and democratic society.

52. The respondents further aver that sections 23 and 25 of the Tobacco Control Act and Article 13 of The WHO Framework Convention outlaw all forms of advertising and promotion through false, misleading and deceptive means aimed at creating an erroneous impression about the characteristics, health effects, hazards and emissions of a tobacco product. It is also their contention that Part IV of the Regulations is in conformity with sections 32, 33, 34 and 35 of the Tobacco Control Act and not *ultra vires* the powers and authorities granted to the CS Health under the Act.

53. With respect to the limitations on contact between public officers and members of the tobacco industry, the respondents argue that the restrictions, which are imposed under Part V of the Regulations, are in conformity with Chapter 6 of the Constitution, the Tobacco Control Act, 2007, the Public Officers Ethics Act, 2003 and the Leadership and Integrity Act. They are also in keeping with the provisions of Article 5.3 of the WHO Framework Convention and Guidelines, and are therefore not *ultra vires* any law or the powers of the CS Health. Mr. Macharia averred that the restrictions are meant to prevent integration of tobacco industry's policies with that of government and protect government policies from the interference of commercial and other vested interests of the petitioner and the tobacco industry generally.

54. With regard to the imposition of the 2% **solatium compensatory contribution**, the respondents averred that Part VI of the Regulations is in conformity with the Constitution and provided for under section 7 (2) (f) of the Act and Article 6 of the WHO Framework Convention. Mr. Macharia deposed that the contribution is meant to cater for the health perils caused by tobacco, is not unconstitutional, and is just like any other levy such as the tourism levy fund under section 105 of the Tourism Act, Chapter 383, Laws of Kenya and the fuel levy fund, and that it is to be utilized for the functions captured under section 7 (4) (a), (b) (c) of the Act. According to the respondents, the health perils and harm caused by tobacco is enormous and cannot be underestimated hence the need to share the cost of handling tobacco consumption related diseases and other health complications caused by tobacco consumption and use.

55. As regards the petitioner's complaints concerning the technical repository, Mr. Macharia averred that through the office of the AG, via a letter dated 23rd July, 2015, the digital storage device containing the technical repository was released to the petitioner's advocate for onward transmission to the petitioner.

56. **Prof. Peter A. Odhiambo**, the Chairman of the Tobacco Control Board, made various depositions regarding the implications and impact on health of tobacco consumption. It was his averment that tobacco consumption affects all parts of the human body particularly the vital organs such as the brain, lungs, heart, arteries and veins and causes non-communicable diseases; that it predisposes to many communicable diseases including tuberculosis, and that it harms foetuses and children. He deposes that since prevention is far better than cure, undertaking the protection of the health of the people of Kenya should be prioritized at all costs as spelt out in the Constitution, the provisions of the Act, the WHO Framework Convention and the Tobacco Control Regulations 2014.

The 1st Interested Party's Case

57. The 1st interested party, the Kenya Tobacco Control Alliance, filed an affidavit in opposition to the petition sworn on 23rd July, 2015 by Joel S. Gitali. It also filed written submissions dated 17th September, 2015. Its case was presented by its Learned Counsel, Mr. Mbullo.

58. Mr. Gitali's depositions focus largely on the various negative effects of tobacco use. He avers that such use results in death, poverty, and health concerns among others. He has annexed to his affidavit various documents and articles which support his assertions with regard to tobacco consumption.

59. He asserts that tobacco use must be controlled, and it is his deposition, on behalf of the 1st interested party, that the impugned Regulations do not in any way contravene the Constitution or any other law. Further, that the Regulations do not discriminate against the petitioner; and the solatium compensatory contribution fund is in line with the Constitution as it was established pursuant to the WHO Framework Convention and does not violate any property rights as provided under Article 40 of the Constitution. It was also his averment that the law applies uniformly to the tobacco industry and thereby ensures equality before the law for all players in the tobacco industry. He urged the Court to allow the implementation of the Regulations as such implementation would go a long way in curbing the negative effects of tobacco.

The 2nd Interested Party's Case

60. The Consumer Information Network, the 2nd interested party, filed an affidavit in opposition to the petition sworn by Mr. Samuel J. Ochieng on 23rd July 2015.

61. Mr. Ochieng deposes that to declare the Regulations void will be disastrous as their nullification would deny the citizens their opportunity to exercise their rights under Article 46 of the Constitution. In addition, it was his averment that the grant of the orders sought in the petition would deny citizens their right to access information as required under Article 35 of the Constitution, and would enable the petitioner to continue exploiting the ignorant and poor populace who would otherwise benefit from the implementation of the Regulations.

62. According to the 2nd interested party, the petitioner should not be allowed to oppose the implementation of the Regulations while in the countries it manufacturers and exports cigarettes to, it has complied with the printing of the public health warnings; and further, that such requirements have been accorded global compliance. Additionally, that the petitioner is applying double standards in attempting to oppose the use of graphic warnings as it has already printed in its products that the use of tobacco is harmful to the health by causing lung diseases.

63. Mr. Ochieng highlighted the practice in various jurisdictions with regard to regulations in the tobacco industry and reiterated and supported the position taken by the respondents with respect to the Regulations.

Analysis and Determination

64. I have read and considered the pleadings of the parties, which I have set out in some detail in the preceding paragraphs. I have also read and considered their written submissions, which I shall advert to in the course of rendering my determination of the matters raised in the petition.

65. The parties, particularly the respondents and interested parties, have made detailed averments and submissions with respect to the health consequences of tobacco consumption, both to smokers and to the general public, which I note that the petitioner does not dispute. At the hearing of this matter, Mr. Amoko submitted on behalf of the petitioner that the averments and submissions on the harmful effects of tobacco are not relevant to the narrow inquiry that the court is required to undertake.

66. However, having read the pleadings and submissions, as well as the documents relied on to show the effects of tobacco consumption, and having mulled over the intentions of the legislation and the implications of tobacco consumption on public health and the health of the individual, I am unable to agree with the petitioners on this point. The effects of a product on the health rights of others cannot be divorced from the process and need for its regulation. Consequently, in considering the issues that properly fall within the constitutional jurisdiction of this Court regarding the enactment and implementation of the impugned Tobacco Control Regulations which the petitioner raises, I will do so within the context of a public health system and the needs thereof *vis a vis* the commercial rights and interests of tobacco manufacturers such as the petitioner.

67. I believe that the petitioner's case, and the responses thereto, fall into two limbs. The first relates to the petitioner's contention that the process of formulating the Regulations was unconstitutional as it did not involve the participation of stakeholders. The second limb also challenges the constitutionality of the Regulations, this time in terms of their content, on the basis that they are unconstitutional for either being arbitrary or unreasonable, or for being in violation of its constitutional rights.

68. In determining the petition therefore, I will address myself to three issues that arise consequent on the two limbs of the petitioner's case:

a. ***Whether the process leading to the enactment of the Tobacco Regulations, 2014 was lawful;***

b. ***Whether specific Regulations are unconstitutional for being arbitrary or unreasonable;***

c. ***Whether a violation of the petitioner's constitutional rights has been made out.***

Whether the Process Leading to the Enactment of the Tobacco Regulations, 2014 was Lawful

69. The petitioner's contention in this regard is that the process leading to the making of the Regulations was unlawful and unconstitutional as appropriate consultations were not conducted and a regulatory impact statement was not prepared and published as required by law.

70. The petitioner has relied on several decisions including **Nairobi Metropolitan PSVs Saccos Ltd and Others vs County Government of Nairobi and Others [2014] eKLR, Richard Dickson Ogendo and 2 Others vs Attorney General and Others, [2014] eKLR** and **Doctors for Life International vs Speaker of the National Assembly, 2006 (12) BCLR 1399**, in which Courts have considered the meaning and implication of the constitutional requirement for public participation and consultation. It submits that the respondents are duty bound to demonstrate that appropriate consultations were undertaken before the enactment of the Regulations.

71. Its argument is that the respondents have not shown the extent to which the consultations they allege took place drew on the knowledge of persons having expertise in the Regulations or ensured that persons who are likely to be affected by the Regulations had an adequate opportunity to comment on the contents of the Regulations. It is also its submission that the respondents have failed to show how the alleged consultation involved direct notification or advertisement to the

bodies that are likely to be affected by the Regulations or invitations that submissions be made, or held public hearing as required by the Statutory Instruments Act. In its view, the consultation that occurred does not amount to genuine, appropriate consultation within the intent of the Constitution and the Statutory Instruments Act as its representations and those of others were not taken into considerations before the enactment of the Regulations.

72. It was therefore its submission that the respondent failed to provide a meaningful opportunity for public participation, and the alleged opportunities for consultations that were provided also failed to ensure that the petitioner had an opportunity to comment on the Regulations. It therefore argues, in reliance on the decision in **Coalition for Reforms and Democracy and Others vs Republic and Others, Petition No 628 of 2014 (the CORD case)** that the process leading to the enactment of the Regulations was flawed, the entire process was vitiated, and the Regulations were therefore a nullity.

73. In response, the respondents ask the Court to note that there is no single member of the public challenging the Regulations. Consequently, in their view, the petitioner's challenge is based on commercial and other vested interests. It was their submission that members of the public, having participated in the process that led to the enactment of the Regulations, are clearly happy and wish the same to be enforced without exception.

74. With respect to the requirement for public participation, the respondents, while maintaining that there was massive public participation, ask the Court to be guided by the decision in **Minister of Health vs New Clicks South Africa (PTY) Ltd (2006) (2) SA 311** in which the Court held that:

> ***"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."***

75. The respondents also ask the Court to be guided by the sentiments of the Court in **Richard Dickson Ogendo and 2 Others vs Attorney General and 5 Others [2014] eKLR** in which the Court stated that:

> ***"The task of the Minister under the Traffic Act was to adopt a tool to measure alcohol content as a means of enforcing the provisions of sections 44 and 45 of the Act. The issue, as I have demonstrated, was not one of creating a new offence or a new set of laws that would change the tenor of the Act, it was dealing with a technical matter. The evidence demonstrates experts contemplated in section 5(2)(a) of the Statutory Instruments Act were involved in the identifying a means to enforce the legislative provisions. However, it is clear that a cross-section of the public was not represented in the preparation or promulgation of the Rules. Although the Statutory Instruments Act was not applicable, it is reflective of the kind of public participation contemplated in future. What is clear from the Act is that it does not provide a consequence for lack of public participation because ultimately the legislature, as the representatives of the people will decide whether the statutory instrument is accepted or rejected in accordance with section11 of the Act."***

76. Mr. Mohamed submitted on behalf of the respondents that the Tobacco Control Act came into force in 2007 and since then, there had been attempts to pass regulations and public consultations had been held between then and the enactment of the 2014 Regulations. His submission was that there had been adequate consultation and public participation in the process of enacting the Regulations. The interested parties agreed with the respondents that the Regulations are legal and comply with the Constitution, the Act and the WHO Framework Convention.

77. The constitutional requirement for public participation and consultation in, *inter alia*, the enactment of legislation is not in dispute. Article 10 of the Constitution sets out the national values and principles of governance which are binding on all ***"State organs, State officers, public officers and all persons"*** whenever any of them, among other things, ***"enacts, applies or interprets any law".***

78. Further, the principle is captured in Article 118 of the Constitution with respect to participation in Parliamentary proceedings. Titled ***"Public Access and Participation"*** the Article provides that:

1. ***Parliament shall-***

a. ***Conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and***

b. ***Facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*** (Emphasis added)

79. The principle of public participation has been the subject of judicial interpretation in various decisions. In **Kenya Small Scale Farmers Forum and 6 Others vs Republic of Kenya and 2 Others, Petition No 1174 of 2007,** the Court observed as follows:

> ***"……..One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, "the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's 'sovereign and inalienable right to determine the form of governance of our country…" Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people.' Other principles include rule of law, democracy, human rights, integrity, transparency and accountability. These principles bind all State organs, State officers, public officers and all persons generally……,Parliament established under Article 94 acts as the custodian of the legislative authority of the Republic. Under Article 94(2) "Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty."***

80. In **Robert N. Gakuru and Others vs The Governor Kiambu County and 3 Others, Petition No 532 of 2013** the Court (Odunga J) considered the principle of public participation with respect to county legislation and observed as follows:

> **"[75]** ***In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it."***

81. In **Moses Munyendo and 908 Others vs Attorney General and Another, Petition Number 16 of 2013** the Court rendered the following view of the issue:

> **"[21]** ***As concerns the pre-parliamentary or consultative stage, the Permanent Secretary has given evidence on how different stakeholders were consulted. Some of the organisations consulted include the following; Kenya National Federation of Cooperatives, National Cotton Growers Association, Meru Central Diary Co-operative Union Limited, Cereal Growers Association and the Horticultural***

> ***Farmers and Exporters Association. <u>The organisations consulted are, in my view, broadly representative of agricultural interests in the country.</u> This evidence is not controverted by the petitioners. Furthermore<u>, I do not think it is necessary that every person or professional be invited to every forum in order to satisfy the terms of Article 10.</u> Thus the contention by the first petitioner that "I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law" is not necessarily decisive of the lack of public participation…"*** (Emphasis added)

82. In the case of **Consumer Federation of Kenya (COFEK) vs Public Service Commission and Another, Petition No. 263 of 2013** the Court observed as follows with respect to the petitioner's claim that there had been no public participation:

> ***"[13] …. The Petitioner has latched on to the phrase "participation of the people" in a selective and selfish manner. I have said that there is no express requirement that "participation of the people" should be read to mean that "the people" must be present during interviews but taken in its widest context that their in-put is recognized."***

83. Finally, in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County of Nairobi Government and 3 others, Petition No 486 of 2013**, the High Court stated:

> ***"[47] Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows; "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."***

84. I am also guided by the views expressed by the Constitutional Court of South Africa in the case of **Doctors for Life International vs Speaker of the National Assembly and Others (supra)** in which the Court expressed the following view:

> ***"[145] It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process."***

85. With regard to what amounts to reasonable participation, the Court stated that:

> ***"The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially***

affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation."

86. In this petition, the petitioner alleges that there was no public participation, and such participation as took place did not amount to genuine, appropriate, consultations within the Constitution and the Statutory Instruments Act. It contends further that its views and submissions, as well as those of other members of the tobacco industry, were not considered.

87. Section 5 of the Statutory Instruments Act provides as follows with respect to public participation in the process of making regulations:

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

a. ***have a direct, or a substantial indirect effect on business; or***

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

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

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

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

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

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

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

88. The material before me indicates that there were various consultative meetings held prior to the promulgation of the impugned Regulations. From the documents annexed to the respondents' affidavit in opposition to the petition sworn by Mr. Macharia, I note that a meeting was held on 18th March, 2014 and 14th August, 2014, at the Kenya School of Government, which was attended by, amongst others, the petitioner and other players in the tobacco sector. I also note that consultative meetings were held with various Parliamentary committees on 11th February, 2014, 7th May, 2014 and 21st August, 2014. Meetings were also held in eight counties including Mombasa, Kilifi, Nakuru, Machakos, Kiambu, Nairobi, Kisumu and Kakamega to discuss the impugned Regulations. The documents also show that the petitioner was on various occasions given notice of the meetings and requested to nominate a suitable representative to attend in order to discuss the impugned Regulations.

89. I also note, in particular, that the Report on the Public Participation forum held on 14th August,

2014 shows that discussions pertaining, specifically, to the pictorial health warnings under the Regulations took place. The minutes of the meeting held on 18th March, 2014 similarly show that discussions were held with respect to the contents of the Regulations. The petitioner has also submitted that it made written submissions on the contents of the proposed Regulations.

90. In the circumstances, and given the views expressed in the decisions cited above with respect to public participation, I am unable to find that the Tobacco Control Regulations, 2014, were a nullity for lack of public participation. It is clear that the petitioner and other industry players were consulted; their representatives attended various meetings; they made submissions with respect to the Regulations. As the cases cited above illustrate, the Regulations cannot properly be impugned on the basis that the petitioner's views were not taken into considerations: the position is that there is no requirement that the views held by any particular group or individual on a matter before the legislature or regulation – making body must prevail. As was stated at paragraph 50 and 51 of the decision in the South African case of **Merafong Demarcation Forum and Others vs President of the Republic of South Africa and Others**, **CCT(41/07)[2008] ZACC 10; 2008(5)SA 171 (cc); 2008(10)BCLR 968 (CC)(13 JUNE 2008)**:

> ***"…But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. [51] To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public."*** (Emphasis added)

91. Ultimately after the process of consultation, the Regulations were tabled in Parliament and passed. It must be borne in mind that legislative power is vested in Parliament under Article 94, which states as follows:

1. ***The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.***

2. ***Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty***.

92. While there is an obligation on Parliament under Article 118 cited elsewhere in this judgment to facilitate public participation, there is no requirement that legislation will be invalidated simply because there was a perception that a certain level of public participation was not achieved. I am persuaded in this view by various decisions from other jurisdictions. In his dissenting opinion in the **Doctors for Life** case **(supra),** Yacoob J stated as follows on this issue:

> **"[328]…*Any contention that the ICCPR, on any interpretation requires member countries to ensure that it is essential for the public to be consulted before legislation is adopted and the legislation to be invalid absent consultation would, in my view, be liable to rejection with the ridicule it deserves. Nor can it be said that the addition of the word "opportunity" in the introduction to the section improves the position. The kind of right contemplated would have to be facilitated by a government whether the word "opportunity" was in the text of the***

document or not. <u>The hard fact is though that the provisions of the ICCPR are satisfied by indirect participation reasonably restricted</u>; DFL wants unrestricted indirect participation as well as substantial direct participation. It is not necessary to go through any of the other international instruments. <u>All of them are understandably satisfied with indirect participation without any direct component</u>

[329] <u>I have examined many constitutions. None of them properly read provide that legislation will be invalid unless some generally stated unspecific requirement of public involvement is fulfilled</u>. Many have manner and form provisions that are clear and specific and that facilitate a measure of public involvement. <u>I have found no judgment of any court anywhere in which a legislative provision properly adopted in an open legislature and having been read through in the way required by the relevant instrument has been found to have been inconsistent with the constitution on the basis of non-compliance with some generalised public involvement provision even if the prescribed manner and form provisions have all been complied with</u>." (Emphasis added)

93. Similarly, in the case of **Marshall vs Canada, Communication No. 205/1986, UN Doc CCPR/C/43/d/205/1986(1991)**, the United Nations Human Rights Committee expressed itself as follows:

"5.4 It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. <u>Surely, it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives</u>. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.

5.5 ...Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant <u>cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs</u>. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a)."

We are persuaded by these arguments and find <u>that the fact that the State did not directly involve the Petitioners cannot be said to invalidate the whole process</u>, which now, even as we speak is understandably in its final stages……."

94. In the circumstances, I am satisfied that there was adequate consultation in the formulation of the impugned regulations. The petitioner and other stakeholders participated in various meetings of stakeholders and submitted their views. They participated in various meetings with committees of Parliament. There was therefore both direct participation and consultation of the people, but also indirect consultation and participation through the people's representatives, Parliament and Parliamentary Committees, in the process of formulation of the impugned Regulations. It is therefore my finding that the process leading to the enactment of the Tobacco Regulations, 2014 was lawful.
95. However, before leaving this issue, there is a final question that I need to address. This relates to the regulatory impact statement which the petitioner alleges the respondents failed to prepare and publish, and which therefore, in the petitioner's view, renders the Regulations invalid.

Absence of a Regulatory Impact Statement

96. The petitioner relies on the provisions of the Statutory Instruments Act to impugn the Regulations. It contends that the ordinary and natural meaning of section 6 of the Statutory Instruments Act is that the obligation to prepare a regulatory impact statement arises whenever a proposed statutory instrument is likely to impose significant costs on the community. Its contention is that the failure by the respondents to prepare and publish a regulatory impact statement renders the Regulations unconstitutional and a contravention of section 7 of the Statutory Instruments Act.

97. According to the petitioner, the regulatory impact statement was not notified in the Kenya Gazette and in a newspaper likely to be read by people who are affected by the proposed Regulation as required under section 8 (1) of the Statutory Instruments Act. The petitioner relies on **Black's Law Dictionary's** definition of the word **'community'** to submit that the definition makes it clear that the word community does not exclude a juridical person as argued by the respondents. Consequently, it is its contention that, together with others in the tobacco industry, it is a part of the community as envisaged under the Act.

98. The petitioner further contends that as the regulatory impact statement had not been published as required, the assertion by the respondents that it was submitted to the National Assembly is incorrect. Further, that the regulatory impact statement as prepared is wholly inadequate to meet the requirements under the Statutory Instruments Act. It is also its case that the failure to meet the requirements of the Statutory Instruments Act cannot be remedied by the advice obtained on the adequacy of the regulatory impact statement, which it alleged was purely perfunctory and lacked any analysis.

99. The respondents counter these arguments by maintaining that they complied with the requirements of the Statutory Instruments Act. They concede that section 6 of the Statutory Instruments Act requires the preparation and publication of a regulatory impact statement if the proposed statutory instrument is likely to impose significant costs on the community. They also concede that a regulatory impact statement was prepared but not published. They argue, however, on the authority of section 9 (g) and (h) of the Statutory Instruments Act, that a regulatory impact statement need not be prepared if the proposed legislation is a matter arising under legislation and is substantially uniform or complementary with national or county legislation. It also need not be published if advance notice would enable someone to gain unfair advantage.

100. Section 6 of the Statutory Instruments Act provides that:

> ***If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.***

101. Section 7 sets out what should be included in a regulatory impact statement, while section 8 sets out the provisions requiring that a notification be issued with regard to a regulatory impact statement in the following terms:

1. ***Preparation of a regulatory impact statement for proposed statutory instrument shall be notified in the Gazette and in a newspaper likely to be read by people particularly affected by the proposed legislation.***

2. ***If the proposed statutory instrument is likely to have a significant impact on a particular group of people, the notice shall be published in a way likely to ensure members of the group understand the purpose and content of the notice.***
3. **…**

102. I note that in this case, the respondents prepared a regulatory impact statement with regard to the Regulations. In a letter dated 9th December, 2014, the CS Health transmitted to the Clerk of the National Assembly, the Regulations together with a Compliance Certificate and an Explanatory

Memorandum for tabling before Parliament. It appears also, according to the evidence set out in the affidavit of Mr. Macharia, that the CS Health obtained independent advice on the regulatory impact statement in respect of the regulations. It appears, therefore, as submitted by the respondents, that they did prepare the statement. What they did not do is publish it in accordance with section 8 of the Statutory Instruments Act.

103. As submitted by the petitioner, there is some contradiction and uncertainty in the position taken by the respondents on the regulatory impact statement. They argue, on the one hand, that they did prepare the statement and present it to Parliament. On the other hand, they argue that such a statement was not necessary in the circumstances of this case. In this regard, they rely on the provisions of section 9 of the Statutory Instruments Act to explain their failure to publish the statement. They argue that the regulations were for the benefit of the community, and were not likely to impose significant costs on the community. Further, that a regulatory impact statement need not be prepared if the proposed legislation is a matter arising under legislation that its substantially uniform or complementary with, and advance notice thereof would enable someone to gain unfair advantage.

104. The relevant provisions of section 9 of the Statutory Instruments Act are in the following terms:

> ***A regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legislation only provides for, or to the extent it only provides for—***
>
> ***…***

a. ***a matter arising under legislation that is substantially uniform or complementary with legislation of the National Government or any County;***

> ***(h) a matter advance notice of which would enable someone to gain unfair advantage;***

105. I am not persuaded by the respondents' argument that the petitioner and others in the tobacco manufacturing sector, being juridical persons, are not a "community" for the purposes of the Statutory Instruments Act. I am also not persuaded that section 9(h) would apply in this case, no material having been placed before me to show that the petitioner and others would have taken "unfair advantage" if the regulatory impact statement had been published, and how they would have done so.

106. However, I am persuaded by the argument, in reliance on section 9(g) of the Statutory Instruments Act, that the regulatory impact statement is not required to be published where the contemplated legislation is a matter arising under legislation that it is substantially uniform or complementary with. The Tobacco Control Regulations arise under the provisions of the Tobacco Control Act. They are complementary with the provisions of the Act, and are intended to advance government policy with regard to safeguarding members of the public from the dangers posed by consumption of tobacco products. To that extent, they fall under the exceptions under section 9 (g) of the Statutory Instrument Act. It is my finding therefore that the failure by the respondents to publish the regulatory impact statement did not render the Regulations unlawful.

107. I now turn to consider the last two issues raised in this petition, namely whether specific regulations are unconstitutional for being arbitrary or unreasonable, and whether a violation of the petitioner's constitutional rights has been made out. As the issues are so closely interlinked, I will consider them as one issue. Before dealing with this issue, however, it is useful at this point to consider the legal status of the **World Health Organisation Framework Convention on Tobacco Control**, which Kenya signed and ratified in 2004, and the Guidelines for the Implementation of the Convention. As I understand the petitioner's case against the implementation of the articles of the Convention, its provisions are not binding, and steps taken to

implement the general principles must be in line with local laws. The petitioner's position is therefore that the respondents should not have attempted to make regulations to implement the WHO Framework Convention.

108. I have considered the provisions of the Framework Convention and the petitioner's submissions with regard thereto. The petitioner has not drawn to my attention, and I have not seen, anything in its provisions that is in conflict with our Constitution or national legislation on tobacco control. It is noteworthy in this regard that the Tobacco Control Act was enacted in 2007, subsequent to Kenya's ratification of the WHO Framework Convention. Although this was not submitted by the respondents, there appears to have been an intention to comply with the Convention in the enactment of the Tobacco Control Act.

109. In any event, in dealing with this issue, one must start by recognising the important role that the World Health Organisation plays in assisting states deal with matters related to health. Article 2 of the Constitution of the **World Health Organization (WHO)** provides the mandate of the WHO to include:

> ***"To propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective."***

110. It appears to me that the WHO Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, enacted pursuant to the WHO Framework Convention, as regulations formulated by the WHO under Article 2 of the WHO Constitution set out above, are binding upon states. Implementation of the Convention is to be done in accordance with paragraph 5 of the said Guidelines which provides that:

> ***"Without prejudice to the sovereign right of the Parties to determine and establish their tobacco control policies, Parties are encouraged to implement these guidelines to the extent possible in accordance with their national law."***

111. The petitioner has not placed anything before me that demonstrates that the implementation of the Convention or the Guidelines is in any way in conflict with the Constitution or national legislation on tobacco control. Further, Article 2 (5) and (6) recognize that the general rules of international law and any international treaty or convention to which Kenya is a party shall form part of the law of Kenya. I have not seen anything that would bar the implementation of the WHO Convention, and I am therefore constrained to find that there is no merit in this attack on the Regulations by the petitioner. I will therefore now turn to consider the specific regulations whose constitutionality is challenged in this matter.

Whether Specific Provisions of the Regulations are unconstitutional

112. Before delving into this issue, I will start by addressing my mind to the preliminary point raised by the respondents that the petitioner has failed to show that its constitutional rights have been violated as required by the principle in **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** and **Meme vs Republic and Another [2004] eKLR**. The respondents argue that on this basis, the petition should be dismissed.

113. It is, I believe, settled that a party who alleges violation of his or her rights must plead with precision the rights violated and the manner in which they have been violated. As the Court of Appeal stated in **Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others, Civil Appeal No. 290 of 2012:**

> **"[41]** ***We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of***

precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

114. The petitioner has alleged that substantially all of the Regulations, including 10, 11, 12, 13, 14 , 20-36, 37-39 and 45, as well as section 7 of the Tobacco Control Act, violate its constitutional rights to, inter alia, non-discrimination and the right to property. In my view, the petitioner is entitled to a hearing to examine whether, as it alleges, there is indeed any provision of the Regulations that contravenes its rights. In any event, in accordance with the requirements of Article 22 and 159 of the Constitution, the Court is under a duty to be slow to dismiss a matter before it on the basis only that a party has not pleaded with precision the violations of the Constitution that he or she alleges have been violated.

115. A second consideration before embarking on an analysis of the specific regulations relates to the principles that the Court should apply in determining whether impugned legislation is in conformity with or violates the Constitution. These principles were enumerated in the Cord case at paragraphs 91-94 as follows:

"[91.] The Constitution has given guidance on how it is to be interpreted. Article 259 thereof requires that the Court, in considering the constitutionality of any issue before it, interprets the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.

[92.] We are also guided by the provisions of Article 159(2) (e) of the Constitution which require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the Constitution.

[93.] Thirdly, in interpreting the Constitution, we are enjoined to give it a liberal purposive interpretation. At paragraph 51 of its decision in Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of S. vs Acheson, 1991 (2) S.A. 805 (at p.813) where he stated that:

> ***"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and ….aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."***

[94.] Further, the Court is required, in interpreting the Constitution, to be guided by the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other: see Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)."

116. Thus, in considering the petitioner's claim of violation of its rights by the respondents, I must do so while bearing in mind the overall constitutional and social context in which the allegations of violation are made, and a need to balance the rights of the petitioner against the rights of others, in

this case consumers of tobacco products and the general public exposed to tobacco products.

Regulation 37-39 and Section 7 (2) (f) of the Tobacco Control Act

117. The petitioner impugns these provisions for having introduced into the law the payment of a **solatium compensatory contribution**. Its contention is that the solatium compensatory contribution is *ultra vires* the power and authority granted under the Act. According to the petitioner, Regulations must have a rational nexus with the objects and purpose of the statute as was held in **Nature Foundations Limited vs Minister for Information and Communication and Another, [2015] eKLR**. It argued further that a solatium compensatory contribution is an entirely different concept to a levy as it is compensation payable for an established injury as opposed to a levy under section 105 of the Tourism Act. The petitioner's argument was further that the solatium contribution is, in effect, a fee or tax which is illegal on both constitutional and administrative law grounds.

118. The petitioner further relied on the decision in **Keroche Industries Limited vs Kenya Revenue Authority and 5 Others [2007] 2 KLR 240** to submit that taxation can only be done on clear words and cannot be on intendment. It was its submission that under Article 210 of the Constitution, no tax or licensing fee may be imposed, waived or varied except as provided by legislation, and the power to impose taxes, including the amount of the tax, is exclusively legislative and cannot be delegated. In its view, section 7 (2) (f) of the Tobacco Control Act is not legislation imposing a tax or a license fee and it cannot be taken as a power to impose an annual fee, tax or contribution.

119. The petitioner therefore terms the solatium compensatory contribution a violation of its right to property. It was submitted on its behalf that the right to property has a foundation in fundamental law and should not be taken away by the Legislature or the Executive. For that proposition, the petitioner relied on **Ives vs South Buffalo Railway Company Co. 201 N.Y 271 (N.Y. 1991)** and submitted that the imposition of the solatium compensatory contribution without due process of the law, including without any lawful determination of wrong doing on its part that occasioned injury to the State, damages suffered by the State and causation amounts to unlawful deprivation of the right to own property under Article 40 of the Constitution.

120. It was also the petitioner's case that the solatium compensatory contribution violates Articles 10 (1) and 47 of the Constitution as it amounts to a denial of the right to due process of the law, and relied in this regard on the decision in **Law Society of Kenya vs Attorney General and Another, [2009] eKLR**. In its view, the wording of Regulation 38 is vague and the solatium compensatory contribution is disproportionate under Article 24 of the Constitution as it imposes an arbitrary and unjustified burden on cigarette manufacturers and importers without meeting the constitutional threshold. While relying on **Congreve vs Home Office [1976] 1 QB 629**, the petitioner's further argument was that the aim of the solatium compensatory contribution is to punish tobacco manufacturers and importers for engaging in the business and that the imposition was done without taking into account all relevant considerations and for improper motive.

121. In their reply on this issue, the respondents submitted that the imposition of the solatium compensatory contribution is in conformity with section 7 (2) (f) of the Tobacco Control Act and Article 6 of the WHO Framework Convention and is meant to cater for health perils caused by tobacco use, and it is therefore not *ultra vires*. It was also their contention that the fund created is not unconstitutional and is just like any other levy. While relying on **Luco Njagi and 21 Others vs Ministry of Health and 2 Others [2015] eKLR**, they contended that the fund is aimed at promoting the realization of the right to health, is not a punishment but is a cost sharing means to pay for sick and dying smokers.

122. It was also the respondents' submission that the imposition of the levy does not violate the right to property as the State has the right to impose restrictive measures, which measures cannot be viewed as taking away the right to property but as aimed at guarding consumers' rights against the

lethal effects of tobacco use and exposure to tobacco smoke. In their view, the petitioner's rights sought to be protected in this matter are not absolute and must be weighed against the rights and fundamental freedoms of other entities including members of the public. Their submission was that the vested economic interests of the petitioner should not be allowed to override and drive the greater public health interest agenda in Kenya.

123. The interested parties agreed with the respondents that the solatium compensatory contribution is authorized under the Tobacco Control Act and is supported by the WHO Framework Convention. Their submission was that the solatium compensatory contribution is neither a tax nor a tariff but a required payment used to fund the Tobacco Control Fund based on mitigation of tobacco-related harms. In their view, the argument by the petitioner that it is a heavy tax payer is diluted by the fact that what it pays (in taxes) is cancelled out by the fact that the health sector uses up to three times the amount to mop up the negative effects of tobacco use. In the interested parties' view, the petitioner should be alive to the polluter pays principle.

124. Section 7 of the Act, sections 7(2)(f) of which alongside regulations 37-39 of the Regulations has been challenged by the petitioner, is in the following terms:

1. ***There is established a fund to be known as the Tobacco Control Fund.***
2. ***The Fund shall consist of—***

a. ***such sums as may be appropriated by Parliament for that purpose;***
b. ***such sums as may be realised from property forfeited to the Government under section 52 of this Act;***

c. ***sums received, including fees, contributions, gifts or grants from or by way of testamentary bequest by any person or persons: Provided that such sums may not be received from any person that would create a conflict of interest;***

d. ***monies earned or arising from any investment of the Fund pursuant to section 8(2);***

e. ***all other sums which may in any manner become payable to, or vested in, the Fund;***

f. ***a solatium compensatory contribution payable by any licensed cigarette manufacturers or importers in the country as may be determined by the Board.*** **…**

125. Regulation 37 then provides as follows:

> ***The solatium compensatory contribution payable under section 7 (2) (f) of the Act in every financial year shall be the sum of two per cent of the value of the tobacco products manufactured or imported by the manufacturer or importer in that financial year.***

126. Regulation 38 and 39 relate to forfeiture and disposal of certain property, the proceeds therefrom to be placed in the Tobacco Control Fund. It is not clear from the petitioner's pleadings and submissions what its grievance is with respect to these regulations, so I will confine myself to a consideration of its arguments with respect to the constitutionality of section 7(2)(f) and regulation 37 which create the solatium compensatory contribution and set the amount to be paid in respect thereof.

127. **Black's Law Dictionary, 9th Edition**, defines the word 'solatium' at page 1519 in the following terms: "***Compensation; esp., damages allowed for hurt feelings or grief, as distinguished from damages for physical injury***." In the **Concise Oxford English Dictionary, 12th Edition**, at page 1373 the term is defined as "***a thing given as a compensation or consolation***."

128. In determining the meaning of the term solatium compensatory contribution and whether or not it

accords with the Act and the Constitution, it is important to consider what the legislative intent was in making provision for its establishment as part of the Tobacco Control Fund. Section 7(4) provides as follows:

3. ***The Fund shall be used for meeting the capital and current expenditure relating to—***

a. ***research, documentation and dissemination of information on tobacco and tobacco products;***
b. ***promoting national cessation and rehabilitation programs; and***
c. ***any other matter incidental to the matters stated in paragraphs (a) and (b).***

129. It appears to me that the intent behind the establishment of the fund was to assist the state in dealing with the adverse effects of tobacco consumption, which as I observed elsewhere above, are captured succinctly by the respondents in their pleadings and are undisputed by the petitioner. In my view, the fund accords with the intents and purposes of the Act, and can properly be seen as a form of compensatory payment for the negative consequences of tobacco smoking in the area of public health.

130.The petitioner has also complained about the amount of the solatium compensatory contribution, which is pegged at 2% of the ***"the value of the tobacco products manufactured or imported by the manufacturer or importer in that financial year."*** The petitioner terms this provision vague and uncertain. It complains, further, that the fund is unconstitutional as it purports to impose a tax contrary to Article 210 of the Constitution. The respondent's reply is that the amount is a levy, like the tourism and fuel levy.

131. In my view, in setting out the amount of the solatium compensatory contribution, regulation 37 puts into effect the provisions of section 7(2)(f) of the Tobacco Control Act. Like the fuel and tourism levy, the solatium compensatory contribution is provided for in legislation, and the specifics in respect thereof provided for in regulations. The provision in Regulation 37 can be compared to the provisions in the Tourism and Road Maintenance Levy Fund Act which empower the Minister, by order in the Gazette, to make provision in respect of the levies. For instance, section 105 of the **Tourism Act, No. 28 of 2011** provides that:

1. ***The Minister may, by order, require the payment by persons engaged in tourism activities and services of a tourism levy.***

2. ***The tourism levy order may make different provisions in relation to different tourism activities and services.***

3. ***A tourism levy may contain provisions as to the evidence by which a person's liability to the tourism levy, or his discharge of that, may be established, and as to the time at which any amount payable by any person by any of tourism activity and service shall become due.***

> ***(4) All monies received in respect of the tourism levy shall be paid into the Fund established under section 67 of this Act.***
>
> ***….***

132.In the present case, the solatium compensatory contribution, which is provided for in the parent legislation, was arrived at through a process which, as I found above, was consultative and involved all stakeholders, and in which the petitioner participated. In the circumstances, I am unable to find a violation of the petitioner's right to property as alleged, or of the provisions of Article 210 of the Constitution.

Regulations 20-36 on Interactions between Public Authorities and the Tobacco Industry

133.The petitioner has challenged Part V of the Regulations on three grounds. It argues that the

regulations are outside the powers vested in the Minister by section 53 of the Act, that there is no provision in the Act for the regulation of interactions between the industry and public officers, and that such power can only be exercised by Parliament. It therefore terms the regulations an abuse of power and prays that they should be declared void.

134. The petitioner further argues that the regulations at Part V demonstrate a flawed attempt to implement Article 5.3 of the WHO Framework Convention. Its submission is that there is no power under section 53 of the Tobacco Control Act, pursuant to which the Regulations are made, to make Regulations to implement the WHO Framework Convention.

135. The petitioner further alleges that this part violates Articles 10, 37, and 47 of the Constitution, as well as Article 27. It is its case that the respondents discriminate against the tobacco industry by singling it out and limiting its engagement in legitimate commercial engagements. The petitioner relied on the decision in **President of the Republic of South Africa and Another vs Hugo, 1997 (6) BCLR 708 (CC)** for the proposition that the scope of the right to freedom of equality and non-discrimination.

> **"is** ***not merely to avoid discrimination against members of historically disadvantaged groups but to achieve a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."***

136. The respondent's position on Part V of the Regulations is that the part is in conformity with Chapter Six of the Constitution, the **Tobacco Control Act**, the **Public Officers Ethics Act**, the **Leadership and Integrity Act**, as well as **Article 5.3 of the WHO Framework Convention and the Guidelines**. It is therefore, in their view, not *ultra vires* any law or powers of the CS for Health as alleged. Accordingly, it is their submission that Regulations 20 to 36 fall squarely within the statutory authority of the CS for Health under section 53 of the Tobacco Control Act.

137. The respondents further argue that in order to meet the regulatory objectives of the Tobacco Control Act, the Regulations are aimed at limiting interactions with the tobacco industry to those that are strictly necessary for effective regulation, and any such necessary interactions with the tobacco industry and its allies must be open and transparent. Further, that such restrictions are meant to prevent integration of tobacco industry policies with those of the government and to prevent interference with government policies from commercial and other vested interests. In the respondents' view, the restrictions are necessary because there is a fundamental and irreconcilable conflict between the interests of the tobacco industry and the goals of public health which the respondents are obligated to promote, protect and implement.

138. The interested parties agree with the position taken by the respondents. Their submission is that the Regulations ensure that the tobacco industry remains informed of legal obligations and is able to make public and transparent communications regarding tobacco control policy and other matters while ensuring that it is not able to weaken measures aimed at protecting the health of Kenyans and efforts aimed at controlling tobacco use and exposure. They view Regulation 36 as intended to cure the mischief by the petitioner and others in the tobacco industry as it acts as a deterrent against subversion of the law for economic gain. In their view, the Regulations are neither unreasonable, unjustifiable, severe nor disproportionate.

139. Are the provisions of Part V of the Regulations *ultra vires* the powers of the CS Health under the Act? Section 53 of the Tobacco Control Act sets out such powers in the following terms:

1. ***The Minister may, on recommendation of the Board, make regulations—***

a. ***for prescribing anything required by this Act to be prescribed;***
b. ***prohibiting anything required by this Act to be prohibited;***
c. ***generally for the better carrying out of the objects of this Act.***

2. ***The Minister may, in consultation with the Ministers for the time being responsible for matters relating to agriculture, trade and industry, finance, education, information and communication, foreign affairs, internal security and any other relevant ministry, formulate the policy framework regarding—***

a. ***the multidisciplinary and inter-sectoral implementation of this Act; and***

b. ***any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of this Act***. (Emphasis added)

140. It appears to me that section 53 of the Act gives the Cabinet Secretary very wide powers with respect to the making of regulations for the better carrying out of the objects of the Act. He may also, in consultation with various other ministries, formulate a policy framework regarding any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of the Tobacco Control Act.

141. The objects and purposes of the Tobacco Control Act are set out in section 3 of the Act to include:

> ***"to provide a legal framework for the control of the production, manufacture, sale, labelling, advertising, promotion, sponsorship and use of tobacco products, including exposure to tobacco smoke, in order to—***

a. ***protect the health of the individual in light of conclusive scientific evidence implicating tobacco production, use and exposure to tobacco smoke and tobacco products, in the incidence of debilitating illness, disease, disability and death;***

b. ***protect the purchasers or consumers of tobacco products from misleading and deceptive inducements to use tobacco products and consequent dependence on them; and inform them of the risks of using tobacco products and exposing others to tobacco smoke;***

c. ***protect the health of persons under the age of eighteen years by preventing their access to tobacco products;***

d. ***inform, educate and communicate to the public the harmful health, environmental, economic and social consequences of growing, handling exposure to and use of tobacco and tobacco products, and tobacco smoke;***

e. ***protect and promote the right of non-smokers to live in a smoke-free environment;***

f. ***protect and promote the interest of tobacco growers by providing viable alternative crops;***

g. ***adopt and implement effective measures to eliminate illicit trade in tobacco including smuggling, illicit manufacturing and counterfeiting;***

h. ***promote and provide for rehabilitation and cessation programmes for consumers of tobacco products;***

i. ***promote research and dissemination of information on the hazardous effects of tobacco production and use including exposure to tobacco products and tobacco smoke, in particular the health risks including addictive characteristics of tobacco consumption and exposure to tobacco smoke***.

142. It is therefore my finding, in view of the above provisions, that the Cabinet Secretary for Health has the power and the mandate to make the regulations in Part V of the Regulations. The petitioner and other players in the tobacco industry are in a peculiar industry, one whose products have been

scientifically implicated in debility, disease and death. As the Tobacco Control Act notes in the object clause, its aim is to ***"protect the health of the individual in light of conclusive scientific evidence implicating tobacco production, use and exposure to tobacco smoke and tobacco products, in the incidence of debilitating illness, disease, disability and death…"***

143. In my view, it is within the mandate of the CS Health to make regulations that will limit interaction between such an industry and public officers who, unfortunately, a matter that is within the public domain, are not famous for their integrity and concern for the health of the public. Given the nature of the industry, the differential treatment with other industries is permissible.

144. In addition, as a reading of Part V of the Regulations shows, there is no ban on interactions between public officers and the tobacco industry but such interactions are merely regulated. For instance, Regulation 22 makes provisions with regard to how public officers may interact with the tobacco industry, with Regulation 22 (1) making it clear that:

> ***Any interactions between public authorities or public officers and the tobacco industry shall be limited to the extent strictly necessary for effective tobacco control and enforcement of relevant laws***.

145. The intention behind this limitation is, in my view, to ensure effective enforcement and implementation of the tobacco control laws. It accords with the provisions of Article 24 of the Constitution as it allows a differentiation in interactions with public officers between the tobacco industry and other industries which is permissible under the Constitution. As was observed in the case of **State of Kesata and Another vs N. M. Thomas and Others, 1976 AIR 490, 1976 SCR (17906**:

> "***The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."***

146. I am also persuaded in this finding by the words of Chaskalson J in **S vs Makwanyane and Another,** ***CCT 3/94(1995) 2A CC3*** where he outlined key determining factors when a court is considering the question of limitation of rights:

> ***"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provision of Section 33(1). The fact that difference rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equally"; means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.***

In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

Regulations 3 to 11-Packaging and Labelling

147. The petitioner has challenged Part II of the Regulations, which make provisions with respect to labelling and packaging, on several grounds. It is unhappy about the time for compliance with the requirements of the regulations, and the specifications of the health warnings

148. The petitioner submits that under section 21(4) of the Act the health warnings were to come into effect within 9 months of the publication of a notice to that effect. Regulation 1, on the other hand, provides that the Regulations are to come into effect 6 months from the date of publication, which was six months from the date of their publication on 5th December 2014. It now asks the Court, should it not nullify the Regulations, to direct that the requirements with respect to labelling and packaging come into effect nine months from the date of the Court's decision.

149. With respect to the specifications of the health warnings, while it submits that it eventually received the technical storage device containing the technical repository and technical information on 29th July 2015, the petitioner has an issue with the prescribed images. It therefore asks the Court to direct that the petitioner and other members of the tobacco industry should not be obliged to comply with the Regulations in so far as the health warnings are concerned until such time as adequate quality images of the prescribed health warnings are provided so as to enable the health warnings to be clearly displayed.

150. The respondents counter that Part II of the Regulations is in conformity with sections 16, 21, 22, 23, 24, 25 and 26 of the Tobacco Control Act and the Schedule to the Act, and does not in any way violate the Constitution, nor is it ultra vires the Act. It is their submission further that the First Schedule of the Regulations adds graphic health warnings to the written words contained in the Schedule of the Tobacco Control Act and it is a means to educate the members of the public and reduce the ill health caused by tobacco use and consumption.

151. On their part, the interested parties highlighted the practice with respect to labelling and packaging in other jurisdictions and submitted that the health warnings are in line with global and regional implementation of picture-based warnings, and do not in any way violate international trade rules. Further, that under Articles 35 (1) (b) and 46 (3) of the Constitution and under the Food, Drug and Chemical Substances Control Act, the petitioner is under an obligation to provide and give accurate information on its products' effects and contents so as to enable the Government to conduct scientific tests to determine the levels of the chemicals harmful to the population. As such, the Regulations are not in contravention of the Constitution.

152. The interested parties have drawn attention to Article 46 of the Constitution, which provides that:

1. ***Consumers have the right-***

a. ***To goods and services of reasonable quality;***

b. ***To the information necessary for them to gain full benefit from goods and services;***

c. ***To the protection of their health, safety, and economic interests; and***

d. ***To compensation for loss or injury arising from defects in goods or services.***

2. ***Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising***.

153.With respect to tobacco products, section 21 of the Tobacco Control Act stipulates that:

1. ***No person shall manufacture, sell, distribute, or import a tobacco product unless the package containing the product displays, in the prescribed form and manner, such information as may be prescribed with respect to the product and its emissions and the health hazards or effects arising from the use of the product or from its emissions.***

2. ***Every package containing a tobacco product shall—***

a. ***have at least two warning labels of the same health messages, in both English and Kiswahili, comprising of not less than 30% of the total surface area of the front panel and 50% of the total surface area of the rear panel, and both located on the lower portion of the package directly underneath the cellophane or other clear wrapping;***

b. ***bear the word "WARNING" appearing in capital letters and all text shall be in conspicuous and legible 17-point type, unless the text of the label statement would occupy more than seventy percent of such area, in which case the text may be of a smaller but conspicuous type size, provided that at least sixty percent of such area is occupied by the required text; and***

c. ***bear text that is black on a white background or white on a black background in a manner that contrasts by typography, layout or colour with all other printed material on the package.***

3. ***All the warning labels specified in the Schedule shall be randomly displayed in each twelve-month period on a rotational basis and in as equal a number of times as is possible, on every successive fifty packages of each brand of the product and shall be randomly distributed in all areas within the Republic of Kenya in which the product is marketed.***

4. ***The Minister may, by notice in the Gazette, prescribe that the warning, required under this section, be in the form of pictures or pictograms: Provided that such notice shall come into operation upon expiration of nine months from the date of its publication***.

154.A reading of the Regulations demonstrates that what the respondents were doing at Part II (Regulation 3 – 11) of the impugned Regulations was to put into effect the provisions of section 21 of the Act. To illustrate, Regulation 3 provides that:

1. ***A person who manufacturers, sells, distributes or imports a tobacco product shall ensure that every package containing the tobacco product bears warning labels and information required under section 21 of the Act and specified in the Schedule to the Act and the corresponding pictures and pictograms set out in the First Schedule.***

2. ***The manufacturer, seller, distributor or importer of tobacco product shall ensure that the health warning and message including a pictogram or picture required under paragraph (1) is not distorted or likely to be damaged, concealed, obliterated, removed or rendered permanently unreadable when the package on which it is printed is opened in the normal way.***

3. ***A picture and pictogram required under paragraph (1) shall be in full colour with contrasting colours for the background in a manner that maximizes noticeability and legibility or elements of health warnings and messages in the approved layout and design***.

155.It is evident that the legislative intention behind the above Regulations was to regulate advertising of tobacco products and to ensure that consumers were fully aware of the nature and content of the tobacco products that they consumed. The Regulations in this part are therefore in accord with the parent legislation and the Constitution.

156. With regard to the date by which the petitioner and others in the tobacco industry are to comply with the regulations in respect of the health warnings, it is correct that there is a conflict between the time given in the Act and that set in the Regulations. Section 21 (4) requires compliance within nine months from the date of publication of such Regulations pertaining to the pictorial warning specifications, while the Regulations provide a timeline of 6 months. This Court stayed the coming into force of the Regulations in June, 2015. Having found that there is no violation of the Constitution or statute in Part II of the Regulations, and bearing in mind the time that has elapsed since the orders suspending the operation of the Regulations was granted, it is my view that a period of six months from the date hereof is reasonable for the implementation of the pictorial health warnings.

157. The petitioner had also complained that it had not been given the technical repository and digital storage device under Regulation 10, and was therefore not able to implement the Regulation. However, it confirmed that it was given such technical information on 29th July 2015. It has complained, however, that the prescribed images would result in significant pixilation of the health warnings when printed and result in poor quality images. This, however, in my view, is not a matter of law or the Constitution but a technical matter that should be resolved between the petitioner and other industry players and the respondents, and I decline to enter into an inquiry in respect thereto.

Regulations 12-14 Disclosure of Information

158. The petitioner is also aggrieved by the requirement for provision of information and the disclosure requirements in the Regulations. It submits that such requirements violate Articles 10 (1), 31 and 47 of the Constitution, is uncertain and impossible to comply with. It is its argument further that Regulation 12 and 13 unjustifiably deprive it of its intellectual property rights and that the information disclosure requirements in general are disproportionate and illegal by dint of Article 24 of the Constitution as they impose an unjustified burden.
159. The answer from the respondents is that Part III of the Regulations is in conformity with section 4 of the Tobacco Control Act and the disclosures required are meant for counteractive measures to control and mitigate tobacco related health problems. It is also their submission that the disclosure is required because tobacco products contain several harmful ingredients which need to be regulated, controlled and the quantity monitored. Their case therefore is that the disclosure is reasonable and justifiable in an open and democratic society and in line with Article 24 of the Constitution and supported by the Guidelines for implementation of Articles 10 and 20.2 of the WHO Framework Convention.

160. The respondents have relied on various decisions, including **British American Tobacco South Africa (PTY) Limited vs Minister of Health and Others, Case No. 60230/2009, British American Tobacco UK Ltd and Others vs Secretary of State for Health, [2004] EWHC 2493 (Admin) (05 November, 2004), Imperial Tobacco Ltd, Re Judicial Review 2010, SLT 1203, 2010 GWD 32-655, [2010] Scot CS CSOH 134** to support their case with respect to the necessity and lawfulness of regulations requiring labelling and health warnings on packaging.

161. The interested parties supported the respondents and submitted, with respect to the disclosure requirements, that the petitioner misstates, confuses and misrepresents the basic obligations of World Trade Organisation Member States in respect to trademark protections and the intersection of trade law with health. Their submission was that trade law allows legitimate public health measures to restrict trade, so long as no alternative could achieve the same goal with a lesser restriction on trade.

162. In their view, the Regulations impugned in this petition seek higher noble goals than trade guided by the principles and objectives of Trade Related Aspects of Intellectual Property Rights Agreement; that the Regulations do not eliminate the use of trademarks, or threats to confuse consumers through the ban on tobacco advertising, promotion and sponsorship, but are permissible and lawfully restrict the use of certain trademarks.

163.I have considered the provisions of these two Regulations. Regulation 12 deals with product disclosure while Regulation 13 deals with industry disclosure. Regulation 12 (1) (c), which is relevant for present purposes, states that:

> ***A manufacturer or importer shall, at the end of each calendar year, provide the Cabinet Secretary, for each type of tobacco product and for each brand manufactured or imported, all toxological data available to the manufacturer concerning the ingredients of that tobacco product in the case of products intended to be burnt or unburnt or of products not intended to be burnt or unburnt which shall for each ingredient-***

i. ***refer in particular to their effects on health;***

ii. ***include any effects produced in combination with any of the other ingredients of that product that are not produced by that ingredient alone; and***

iii. ***include any addictive effects***.

164.The requirements of this regulation are, in my view, clear, and I am unable to see how they violate the petitioner's constitutional right to intellectual property or to privacy. They are aimed at identifying the products and ingredients used by manufacturers of tobacco products, ensuring that public health authorities have full information about the ingredients in tobacco products, and the health effects thereof.

165.In any event, it is my view that such requirements and disclosure outweigh the intellectual property rights pertaining to tobacco products, though it must be emphasised that the infringement thereof has not emerged from the petitioner's case. At any rate, I am guided in my consideration of this issue by the sentiments of the Canadian court in the case of **Canada (Attorney General) vs JTI-MacDonald Corp 2007 SCC 30 (CanLII)** in which it was observed as follows:

> ***"[T]obacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse.***"

166.Confronted with such a product and a need to balance the public health interests and the rights of the public against the commercial interests of the petitioner and others in the tobacco industry, the choice is fairly obvious.

167. A second regulation impugned on the basis that it imposes unreasonable disclosure demands on the petitioner is Regulation 13, which provides that:

> ***A manufacturer shall at the end of every calendar year, submit a report to the Cabinet Secretary on-***

a. ***The quantity of tobacco products produced in the immediately preceding calendar year;***

b. ***Market share;***

c. ***Sales made and revenues earned;***

d. ***Quantities exported where applicable; and***

e. ***Affiliated organizations and its agents or persons acting on its behalf***.

168. As I understand the petitioner's submission, the only item in the information required under Regulation 13 that it is not in a position to provide relates to its market share. A reading of the rest of the information required, namely the quantity of tobacco products produced, sales made and revenues earned, quantities exported and any affiliated organizations or agents and persons acting on behalf of such organizations is, in my view, readily available, indeed is within the knowledge of, the manufacturers.

169. Information relating to the market share, as submitted by the petitioner, can only be available to the regulator, that is to say the respondents, who have the responsibility of regulating the entire industry. In the circumstances, while I find that the rest of the information required from the petitioner and other entities in the tobacco industry is reasonable, the requirement that they supply information relating to their market share is unreasonable, and they are under no obligation to comply with it.

170. In closing on this point, I have noted the argument that there are other legislation such as the Standards Act, Chapter 496 of the Laws of Kenya, which also requires manufacturers to avail certain information pertaining to various products, which are then subjected to various examinations. However, the Tobacco Control Act is a special legislation addressing the concerns pertaining to the tobacco industry in Kenya, which as I observed elsewhere relates to a product scientifically implicated in serious negative health consequences. That being the case, its provisions and the subsidiary legislation made thereunder cannot properly be impugned on the basis that there is other legislation on the basis of which information is required from parties in the positon of the petitioner.

171. My conclusion therefore is that save for the limited finding with respect to the disclosure of the market share by the petitioner and others in the industry, it is my finding and I so hold that the disclosure requirements under Part III of the Regulations do not in any way contravene the Constitution or any other law.

Regulation 45 on Offences

172. Finally, the petitioner has challenged Regulation 45 on the basis that it is *ultra vires* section 24 (5) of the Statutory Instruments Act and therefore null and void. It relies on the decision in **Kenya Country Bus Owners' Association and 8 Others vs Cabinet Secretary for Transport and Infrastructure and 5 Others [2014] eKLR** in which the Court found the regulation at issue null and void for breach of the provisions of the Statutory Instruments Act.

173. Regulation 45 provides that;

1. ***Any person who contravenes or facilitates the contravention of these Regulations commits an offence punishable under the Act.***

2. ***Any person who contravenes any provisions of these Regulations commits an offence and is liable, on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years***. (Emphasis added)

174. A reading of the above provision against section 24 (5) of the Statutory Instruments Act makes it clear that the Regulation cannot stand. The Statutory Instruments Act provides as follows with respect to imposition of penalties in statutory instruments:

> ***There may be annexed to the breach of statutory instrument a penalty, not exceeding twenty thousand shillings or such term of imprisonment not exceeding six months, or both, which the regulation making authority may think fit***.

175. Regulation 45 of the Tobacco Control Regulations is therefore *ultra vires* section 24 (5) of the Statutory Instruments Act and therefore void.

Conclusion and Disposition

176. The Tobacco Control Act has very clear objectives of safeguarding individuals and the public from the dangers posed by consumption of tobacco, which as the Act states in its objects clause, has been implicated in causing debilitation, disease, and death. The Regulations impugned in this petition are intended to safeguard the public, those who smoke and those who do not, and to provide certain information with regard to the contents of tobacco products. Having considered the various arguments of the parties, I have come to the following findings:

1. That there was sufficient public participation and consultation in the formulation of the Regulations and the process was therefore in accordance with constitutional requirements on public participation;

2. No violation of the petitioner's rights by the Regulations has been demonstrated;

3. Regulation 13 (b) of the Tobacco Control Regulation, 2014 is null and void to the extent that it requires tobacco manufacturers and importers to disclose information pertaining to their market share in the tobacco industry in Kenya.

4. Regulation 45 of the Tobacco Control Regulations, 2014 is ultra-vires section 24 (5) of the Statutory Instruments Act and is therefore null and void;

5. Regulation 1 is in conflict with section 24 of the Act with respect to the period within which the Regulations should come into force. Consequently, it is my direction that the Regulations shall come into force within six (6) months from the date hereof.

6. With respect to costs, I direct that each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 24th day of March 2016

MUMBI NGUGI

JUDGE

Mr. Kiragu Kimani, Walter Amoko and Mrs Kashindi instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for petitioner.

Mr. Mohamed instructed by the State Law Office for the respondents.

Mr. Mbullo instructed by the firm of Nathan Mbullo & Associates for the interested parties.