



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 22 OF 2015

**KENYA ASSOCIATION OF STOCK BROKERS AND INVESTMENT
BANKS..... PETITIONER**

VERSUS

**THE ATTORNEY GENERAL.....1ST
RESPONDENT**

**THE KENYA REVENUE AUTHORITY.....
.....2ND RESPONDENT**

JUDGMENT

Introduction

1. This petition revolves around the constitutionality of two provisions of the Finance Act, 2014, which re-introduced into the Kenya tax regime the capital gains tax (hereafter **CGT**). This tax is provided for and was being charged chargeable under the Income Tax Act, Cap 470 of the Laws of Kenya. Its application was however, suspended some thirty years ago, in 1985.
2. The petitioner, the Kenya Association of Stockbrokers and Investment Banks, describes itself as an association that represents the interests of Kenyan stockbrokerage and investment banking companies. It has lodged the petition against the Attorney General, the legal advisor to the Government whose office is established by dint of Article 156 of the Constitution as the 1st respondent (**hereafter the AG**) and the Kenya Revenue Authority (**hereafter KRA**), a statutory body established under the Kenya Revenue Authority Act as the 2nd respondent. Under Section 5 of the establishing Act, KRA is the government agency responsible for the collection and receipt of all government revenue.
3. By an application under Certificate of Urgency brought by way of Notice of Motion dated 26th January, 2015, the petitioner sought conservatory orders, pending the hearing and determination of the application and petition, to stay the coming into force and implementation and/or operation of Sections 10 (a) and 23 of the Finance Act, 2014 (hereafter the "**Finance Act**"). The petitioner also sought orders to restrain KRA from commencing, instituting or proceeding with any enforcement action against taxpayers and specifically members of the petitioner in relation to and/or on account of their failure to file returns on and/or pay taxes charged under the two provisions of the Finance

Act. The Court declined to grant the conservatory orders and directed that the parties proceed with argument on the substantive petition. It also gave an early date for the hearing of the petition, and it was argued before this Court on 16th February 2015.

Background

4. The facts giving rise to the petition are largely undisputed. On 12th June, 2014, the government published the Finance Bill, 2014 which proposed a number of amendments to the Income Tax Act. The Bill was tabled on the floor of the National Assembly for debate, resulting in the Finance Act, 2014 which was published on 19th September 2014. It is not in dispute that the Act re-introduced the CGT which had been suspended in 1985.
5. The petitioner states that upon the coming into law of the Finance Act, 2014, it noticed a number of key changes that were introduced into the Bill when the Bill was being discussed in the National Assembly, namely Sections 10 (a) and 23. It states that it is aggrieved by these two sections and seeks in this petition to challenge their conformity with the Constitution in so far as the process of their enactment and their content is concerned.

The Case for the Petitioner

6. The petitioner's case is contained in its petition dated 26th January 2015 which is supported by an affidavit sworn on the same date by Mr. Wilson Njoroge Ngigi. It has also filed a Further Affidavit sworn on 9th February, 2015 by Mr. Ngigi, as well as a Supplementary Affidavit sworn by Mr. Nikhil Rustam Hira. The petitioner further relies on two sets of submissions dated 10th and 16th February, 2015 respectively. Its case was presented by its Learned Counsel, Mr. Kiragu Kimani and Mr. Oduor.
7. The petitioner's case as it emerges from the affidavits in support of the petition and the submissions is fairly straightforward. It is that the petitioner is aware that prior to 1985, the Government of Kenya used to charge tax payable on the net capital gains realized by a person on the transfer of property, including marketable securities, at the rate of thirty five percent. This tax was assessed by the taxpayer and paid at the end of the year, along with the taxpayer's annual personal income tax filing, but the tax was suspended in 1985 to encourage investment in the real estate sector as well as spur growth in the securities exchange.
8. The petitioner has explained the method of trading in securities at length to illustrate its grievances with the re-introduction the CGT. It states that prior to 2004, the Nairobi Stock Exchange (NSE) utilized a manual mode of trading in shares, which used the 'open outcry' method of trading where dealers would meet on the trading floor and shout prices. The prices would then be written on a board, and at the end of the trading, a manual allocation would be sent to the requisite share registrars for issuance of share certificates. After successfully purchasing shares, a party would be issued with a share certificate which certificate would be prima facie evidence of ownership. The petitioner states that this mode of trading marketable securities was time consuming and limited the number of trades that could be concluded in one day, and it was common for investors to wait for weeks or even months to get their physical share certificates after completing the purchases and transfer forms.
9. It is averred on behalf of the petitioner that the manual system was also susceptible to a lot of risks, including risk of non-settlement and non-delivery, and the risk of introduction of duplicate certificates. These risks eroded the integrity of the securities exchange and hindered growth, and it therefore became imperative to establish a more efficient mode of trading marketable securities.
10. In the year 2000, the Central Depositories Act was enacted to establish and operate the Central Depository System (CDS) for the central handling of deliveries and settlement of securities in the Capital Markets in Kenya. This was designed to move settlement in marketable securities to an

automated paperless system, and was in line with global securities trading, delivery and settlement standards and would help Kenya's Securities Exchange grow by attracting capital inflows and preventing the capital that had already been invested from moving to other competing frontier markets. It is the petitioner's averment that the move to the CDS system set the stage for the growth and expansion of the Kenyan securities exchange, and it supported an increase in the volume of trades that could be conducted, as well as the range of products that could be offered. The petitioner avers that this system facilitates holding of shares in electronic accounts opened by shareholders and manages the process of transferring shares traded at the NSE. In this new paperless system, the share certificate has been abolished as the prima facie evidence of ownership.

11. According to the petitioner, the Kenyan securities exchange has experienced significant growth since the suspension of the CGT in 1985, the establishment of the CDS system and the NSE's automated trading system. Mr. Ngigi has deposed on its behalf that the average volume traded in 2013 was 30,480,497 securities with an average value of US\$ 7,055,797, and the NSE now has an average of over 3000 trades a day. He avers, however, that the trade volume on the NSE has dropped by over 70% since the re-introduction of the CGT on 1st January, 2015. Mr. Ngigi states that he believes that there is no other factor that could have caused the collapse as the market has otherwise remained unchanged.
12. According to the petitioner, in order to ensure the efficiency of trading securities using the system, transaction fees are a standard percentage, and are based on information that is available at the time of trade as the fees are paid immediately on every NSE trade; that there is also stamp duty applied being Kshs 2 for every Kshs 10,000 over and above the transaction fees which is automatically collected and paid at the time of the transaction; that the collection of the transaction fees and stamp duty is designed to ensure the fees are collected expeditiously and automatically in the paperless system without reference to historical data or manual calculations; and that this enables parties to conclude multiple trades within a short period of time, which in turn helps the securities exchange grow.
13. Mr. Ngigi has further deposed that at the end of 2014 and in line with international standards, the Central Depository and Settlement Corporation Limited achieved full dematerialization. He states that it maintains in this state a list of all shareholders and their ownership quantity, and the share certificate is no longer prima facie evidence of ownership. He further contends that under the Automated Trading System (ATS) and the CDS system, all trading, transfers and settlements or payments are done quickly and automatically in a fully computerized paperless environment that requires no paper processing, physical interventions, historical investigations, manual calculations, and paper filings, all of which are in line with global standards of a securities exchange. He avers further that the NSE and the Central Depositories and Settlement Corporation Ltd are currently in the process of upgrading their respective computer systems to increase the speed and volume of transactions which will help attract investors to the Kenyan securities exchange.
14. It is also the petitioner's contention that approximately 60% of the investors on the Kenyan Securities Exchange are foreign investors. It states that these investors rarely invest directly but usually enlist the services of a global custodian whose role includes coordinating local custodians who hold the foreign investor's marketable securities in safekeeping and arrange for the settlement of any purchase and sales and deliveries out of such securities. It is the petitioner's averment that stockbrokers generally do not handle securities and cash for foreign investors; that when investing in frontier markets that use CDS systems like the Kenyan Securities Exchange, foreign investors often participate via omnibus trading accounts where the global custodian would open one CDS account at the local custodian for a number of its clients for purposes of trading in that market as opposed to opening one account for each of its clients. Mr. Ngigi avers therefore that it is impossible for a stockbroker to know which underlying account has benefited from an omnibus account trade. It is his contention further that the global custodian usually has accounts in various jurisdictions around the world, and in order to adequately manage these accounts on behalf of its clients, he or she will contract local custodian banks for each jurisdiction to hold its clients'

accounts.

15. Mr. Ngigi avers further that the global custodian is expected to have certainty on the operation of each market to maximize trading opportunities. It is the petitioner's case that if a market adopts a mode of operation that is time consuming or that hinders trade, the global custodian will not operate in that market. It contends therefore that in order to ensure foreign investors choose the NSE as their securities exchange of choice, the NSE has to ensure it remains competitive. To do this, according to Mr. Ngigi, it must, among other things, ensure that it adopts the most efficient systems for trading securities. He contends that if the NSE does not remain competitive or fails to maintain a conducive environment for trading securities, it risks losing the foreign investors to other frontier markets such as Mauritius, Nigeria, Rwanda and Uganda which do not impose CGT on its securities exchanges, and further, that no modern securities exchange in the world subjects foreign non-resident investors to local capital gains income tax.
16. Mr. Ngigi deposes on behalf of the petitioner that while the CGT may exist in neighbouring countries like Uganda, Tanzania, Rwanda, Mauritius, Nigeria, Ghana, Zambia and Botswana, it does not apply to securities as the securities exchanges in those countries are explicitly exempt from CGT, the primary reasons for such exemptions, in his view, being to promote their growth. According to the petitioner, the one frontier or emerging exchange in Africa which imposed a transactional based CGT collectible by stockbrokers is Zimbabwe. It contends that the effect of introducing the tax in Zimbabwe has been a fall in the total market capitalization from approximately USD 15 billion in 2002 to less than USD 5 billion presently, with a commensurate fall in trading volumes, as investors and companies have effectively fled the market.
17. Mr. Ngigi maintained that the financial instrument which trades the most in terms of value on the NSE is the Treasury Bond. It was his case, however, that such bonds are primarily traded in commercial banks, pension funds and insurance companies which either already pay income tax on trading profits or are exempt from CGT. It was the petitioner's contention therefore that the amount of potential CGT collections on the trading of Treasury Bonds on the NSE is therefore minimal. He averred further that after Treasury Bonds, common shares or equities is the most actively traded financial instrument on the NSE in terms of value and over 60% of equities trading on the NSE is done by foreign investors which are not subject to local capital gains income tax in any other modern securities exchange in the world, including South Africa, UK, USA, Canada, Brazil, Japan and China among others, while regional securities like Mauritius, Uganda, Tanzania, Rwanda and Nigeria also do not subject foreign non-resident investors to local capital gains income tax filings. His argument was therefore that if Kenya allows best global practice and also exempts foreign non-resident investors from local capital gains income tax filings, then 60% of NSE equities trading would be exempt from the tax.
18. Mr. Ngigi averred that if the 20% of NSE equities trading by local pension funds are included to the 60% of foreign investors, then over 80% of NSE equities trading would be exempt from CGT, and the amount collectible in form of this tax from NSE would therefore not make a material contribution to tax collection. It is the petitioner's contention that on the other hand, the imposition of CGT on the NSE stands to greatly harm the NSE and stockbrokers' ability to compete for investment and grow in today's modern financial world.
19. According to the petitioner, approximately 80% of NSE trades are valued at less than Kshs 100,000 and such trades typically result in minimal gains or losses. It is its contention therefore that the administrative burden of trying to calculate and verify CGT for each of the 3,000 transactions, most of which are miniscule amounts, that are conducted on average each day has been placed on only 19 licensed brokers. The petitioner contends that in the circumstances, it is practically impossible to effect the collection and remission of CGT.
20. The petitioner argues that the Finance Bill, 2014 that was published by the Government with the aim of amending the law relating to various taxes and duties did not contain any amendments touching on CGT. It contends that Sections 10 (a) and 23, whose effect is the re-introduction of

the CGT, were introduced when the Bill was being discussed at the National Assembly. It is therefore its case that these amendments were not shared with members of the public before they were introduced. The petitioner contends further that Section 23 of the Finance Act intends to extend CGT to capital gains that were made even before the enactment of the Finance Act.

21. The petitioner further avers that it is apprehensive that KRA intends to collect CGT as a transactional tax, a situation that is different from the previous position where it was assessed by the taxpayer and paid at the end of the year along with the taxpayer's annual personal income tax. It is its case that the provisions governing the charging of CGT are vague with regard to the rate at which the tax is to be charged. The petitioner pointed out that Section 10 (a) of the Finance Act makes reference to a rate of five per cent while paragraph 16 of the Eighth Schedule provides for a rate of seven and a half percent. It is its contention therefore that there is a patent uncertainty created by these two conflicting provisions.
22. The petitioner also impugns the provisions of these sections as being vague. It is its case that it is unclear whether CGT is a "final tax" which in effect means it is a transactional tax to be paid at the end of each transaction, or if it is a regular tax which ought to be assessed by the taxpayer and paid at the end of the year with the taxpayer's annual personal income tax filing. Mr. Ngigi averred with regard to paragraph 18 of the Eight Schedule to the Income Tax Act that the provision is subject to two contradictory interpretations. According to the petitioner, the section requires stockbrokers to collect and remit CGT in accordance with Section 35 (5) of the Income Tax Act, thereby making the tax a final tax which ought to be paid at the end of each transaction and thereby placing an obligation on each stockbroker to retain the CGT before releasing the money to the investor and requiring the tax retained to be forwarded to the KRA on the twentieth day of each month. It is also its argument that Section 11 (c) of the Finance Act repealed Section 35 (3A) and (3B), and so the stockbrokers would have no basis for withholding taxes under Section 35 (5), and therefore the CGT would have to be assessed by the taxpayer and paid at the end of the year along with the taxpayer's annual personal income tax filing, thus making it a final tax.
23. The petitioner also impugns the CGT on the basis that its re-introduction relied on the provisions of the Eight Schedule to the Income Tax Act which was drafted in the 1970s and has consequently resulted in provisions which cannot be enforced in the Kenyan securities exchange today. Mr. Ngigi contended on its behalf that if CGT is to be charged on capital gains that were acquired before the enactment of the Finance Act and the stockbrokers are required to collect and remit the tax to KRA, the stockbrokers have the duty to assess capital gains on marketable securities that have been acquired as early as in the 1970s or 1980s and they would have no means of ascertaining the transfer value of the marketable securities at the time they were purchased; the Eight Schedule seeks to introduce a paper system through the filing of CGT forms in an industry that has used a paperless system for over 10 years; and the introduction of statutory forms (form CGT2) which have to be filed on every transaction would mean the ATS and CDS systems which work to complete each securities trading transaction within 3 days will be rendered obsolete.
24. It contends further that the Eighth Schedule also places an obligation on the stockbrokers to collect and account for CGT on behalf of their clients and remit this payment to KRA. In this regard, the petitioner argues that while that may have been possible in 1985 when few trades occurred per day, it is practically impossible for the 19 licenced stockbrokers to prepare and file CGT forms for the average 3,000 transactions that happen each day today; that in order to correctly calculate the CGT payable, the law requires information that is not available at the time of trading, for example the incidental costs which would take over 3 days to be retrieved if it exists; and further, that this information is not verifiable by the stockbroker, yet it exposes the stockbrokers to liability for failure to collect and remit the correct amount of tax which is not practical and makes it extremely difficult to run a viable stockbroker business.
25. The petitioner argues that if the amendments seeking to introduce CGT had been shared with the public and the National Assembly facilitated public participation, the Finance Act would not have

- introduced the two provisions which are either vague or cannot be enforced. It is its case that it attempted through its officials to meet the Cabinet Secretary for the National Treasury in order to explain that the Finance Act as enacted could not be enforced and a meeting was scheduled for 12th January 2015 but that the meeting was cancelled and never rescheduled. The petitioner further alleges that it had also engaged KRA in writing to inform it that the tax cannot be enforced and outlining the challenges of enforcement but that KRA maintained its position that the stockbrokers ought to collect and remit CGT and are expecting to receive the initial payments from the stockbrokers on 20th February, 2015, in default of which KRA would proceed to take enforcement action against the stockbrokers.
26. The petitioner contended that the re-introduction of the CGT has left the Kenyan securities exchange in disarray and, due to the ambiguity and vagueness, some of the petitioner's members are withholding 5% of the proceeds without deducting the incidental costs in order to prevent enforcement action being taken against them by KRA. It contends that as a result, a number of the petitioner's members' clients have communicated their frustration at the introduction of the tax especially because of lack of clarity in the mode it is to be charged. It was also its case that other stockbrokers are releasing all the proceeds of the sale to their clients on the understanding that the tax ought to be assessed by the taxpayer and paid at the end of the year along with the taxpayer's annual personal income tax filing, which has left some of the petitioner's members susceptible to enforcement action by KRA due to failure to collect and remit the tax.
27. In his submissions on behalf of the petitioner, Mr. Kiragu Kimani submitted that the petitioner's case was built on three principles. The first was the principle of public participation, the second related to the lack of clarity in the legislation which in the petitioner's view arose from the lack of public participation. The third limb of the petitioner's attack on the legislation was that in so far as it has retroactive effect, it was an infringement of property rights protected by the Constitution.
28. Mr. Kimani submitted that in determining the petition, the Court should be guided by the principle of the supremacy of the Constitution; that the Constitution is binding on all parties including the respondents, and it is from the Constitution that the respondents draw their authority. Counsel also drew attention to the national values and principles contained in Article 10 and 201 which require openness and transparency in all financial matters. It was his submission that the Court should ask whether the process of enacting the Finance Act 2014 was open and whether there was public participation.
29. According to Mr. Kimani, the petitioner was not challenging the legislative process. Rather, it was asking the Court to scrutinize the process followed by the National Assembly in passing the Finance Act, specifically Section 10 and 23, to find out whether the process met the threshold set by Article 10 and 201.
30. Counsel submitted that it was not disputed that Sections 10(a) and 23 were introduced on the floor of the House. It was his submission that as the two Sections were not in the Finance Bill but were introduced on the floor of the House, there was no openness and accountability. It was Counsel's further submission that the right to participation involves elective participation in that people have elected representatives, but that it was not the intention of the people to delegate their right to participate in its entirety. Mr. Kimani contended, in reliance on the affidavit of Mr. Ngigi, that 60% of investors on the Nairobi stock exchange is by foreigners. It was his submission that as the amendment introducing the two sections was introduced on the floor of the House, it cannot be said that there was an opportunity for participation by the petitioner or the 60% foreign investors. It is the petitioner's case that if there had been public participation, the vagueness and lack of clarity, which the petitioner submits makes the law void, could have been avoided.
31. Mr. Kimani reiterated the petitioner's averments that its members were being thrown from the digital back to the paper world in respect of trading on the NSE, and that the petitioner is being asked to compute gains from information which is not readily available. Counsel posed the question how one was to compute gains for shares given on a will.

32. It was also the petitioner's submission that as the CGT was suspended in 1985, persons who have invested in the Stock Exchange have proceeded on the basis that no CGT is payable on the disposition of their securities. Mr. Kimani submitted that the tax seeks to calculate the gains from the date the shares were acquired, and it therefore operates retroactively. Its effect, according to the petitioner, is that any person who disposes of their shares is subject to a tax which was not there when they acquired their investments, and the petitioner's rights to property and those of investors are being violated. Counsel submitted that there were breaches of the Constitution which would allow the Court to intervene and issue the orders and declarations sought by the petitioner, namely:

1. A declaration that Section 10 (a) and Section 23 of the Finance Act are unconstitutional as they were enacted contrary to the mandatory provisions of Article 201 of the Constitution which requires public participation in financial matters and are therefore null and void.

2. A declaration that Section 10 (a) and Section 23 of the Finance Act are inconsistent with Article 10 of the Constitution due to their contradictory and vague nature and are therefore null and void.

3. A declaration that Section 10 (a) and Section 23 of the Finance Act are unconstitutional as they constitute a violation of the fundamental rights guaranteed by Article 40 of the Constitution in so far as they provide for charging capital gains tax on capital gains that were acquired before 1st January, 2015 and are therefore null and void.

4. An order restraining the Kenya Revenue Authority from commencing, instituting or proceeding with any enforcement action against taxpayers and specifically members of the petitioner in relation to and/or on account of their failure to file returns on and/or pay taxes charged under Section 10 and 23 of the Finance Act.

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 provided for.

The Case for the 1st Respondent

33. The AG relied on Grounds of Opposition dated 5th February, 2014 and written submissions dated 12th February 2015. In the said Grounds, the AG argued that the petition was not based on any empirical incident but was entirely premised on apprehensions sustained by the petitioner's individual benefits. He argued, further, that the provisions of Article 209 of the Constitution empowers the National Government to impose taxes and charges, and that the manner in which the tax is defined, administered and collected is a matter for Parliament to define. It was the AG's view that it was not for the Court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection.

34. The AG also took the position that every statute enjoys a presumption of constitutionality and the Court should presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner. With regard to the impugned provisions, the AG's view was that the provisions were enacted for a legitimate purpose and objective which have not been alleged or proved to be unconstitutional. It was therefore his position that the Court lacks the jurisdiction to question the propriety and appropriateness of the policy pursued by the Finance Act, 2014, as to question the policy would be a violation of the doctrine of separation of powers.

35. The AG further opposed the petition on the grounds that there are in existence Parliamentary Standing Orders which require that before enactment, any legislation must be published as a bill and go through various stages in the National Assembly whose proceedings are usually broadcast

live. It was his case that Courts in this country have, on various instances, taken judicial notice that the Standing Orders provide for a modicum of public participation in the sense that bills must be advertised and taken through various committees of the National Assembly which admit public hearings and submission of memorandum. It was also his contention that there is no ambiguity or contradiction in the provisions of the statutes in issue; that the imposition of taxes is a constitutional imperative and the power to impose taxes is reposed in the legislature; and further, that the imposition of tax by statute cannot of itself amount to arbitrary deprivation of property.

36. The AG argued that the petitioner had not demonstrated that there has been no public participation to the extent that would render the law invalid, nor was it a constitutional requirement that the public must participate in every single clause in every piece of legislation given the provisions of Article 1 (2) which allows democratically elected representatives such as members of the National Assembly to exercise sovereignty on behalf of the people. It was the AG's contention that the purpose of the impugned sections is to ensure that the tax burden is shared fairly as required by Article 201 (b) (i) of the Constitution. In his view, there was no dispute before the Court, and the petition was essentially seeking an advisory opinion on interpretation of the sections in issue. Further, it was the AG's position that problems of implementation of statutory provisions are outside the jurisdiction of this Court, and in the event that there is ambiguity in the law, such ambiguity would be interpreted in favour of the tax payer as is the practice.
37. The AG concluded its objections by observing that the petitioner had not demonstrated any definite property that has been or is likely to be compulsorily acquired and had therefore not made out a claim based on Article 40 of the Constitution.
38. In his oral submissions on behalf of the AG, Learned Principal State Counsel, Mr. Emmanuel Bitta, submitted that the petitioner, in alleging that section 23 had retrospective application, had misunderstood the provision. It was his submission that the tax is charged on gain accrued on or after 1st January 2015, and it is therefore immaterial when the property was acquired.
39. Mr. Bitta submitted that the petition and affidavits in support were in essence questionings the wisdom of the legislature in removing the suspension on the CGT, and also questioning the implementation of the tax. It was his submission that that cannot render the Act unconstitutional. He elaborated the AG's objection that the entire petition is premised on supposition by observing that the petitioner is an association of stockbrokers which had no property or had not described any of its property chargeable with CGT; nor had it, or its members, provided any particulars of any property that they are likely to be deprived by the tax. Mr. Bitta submitted that the petition is premised on a hypothetical scenario; no individual had been cited as having been charged by KRA with the tax and been unable to meet it; and that the petitioner is asking the Court to give an advisory opinion in the absence of a real controversy with empirical facts presented to the Court.
40. On the question of public participation and the provisions of Article 10, Counsel submitted, in reliance on the decisions in **Law Society of Kenya vs Attorney General Nairobi Petition No. 318 of 2012**, **Association of Gaming Operators-Kenya & 41 others vs Attorney General & 4 others (2014) eKLR**, **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) vs Kenya Revenue Authority & 3 others, Petition No. 544 of 2013** that it has been held that it is in the public domain that Parliament has prescribed Standing Orders on how it undertakes its mandate, and that the Standing Orders have presented various opportunities and avenues for the public to inform the content of any legislation.
41. Counsel observed that the petitioner has admitted that parliamentary procedure was followed in the enactment of the Act, which has about 42 sections, only two of which the petitioner was challenging. In his view, if the procedure under the Standing orders did not make provision for public participation, then the entire Act is void, as are all Acts of Parliament. Counsel relied on the decision of the Court in the case of **Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya & 2 Others [2013] eKLR** to submit that one of the points made in that case is that it is not necessary that public participation takes place at the pre-enactment stage; that even after an

Act is passed, it must get presidential assent, and a party has an opportunity to present a memorandum to the President.

42. Further, it was the AG's submission that as the petitioner contends that its operations are digital, it had ample opportunity to access the Finance Bill as the Parliamentary website has a Bill tracker which contains all pending Bills, the stage the Bill is at, and Bills availing assent; and further, that the proceedings in the House are also open to the public. Counsel submitted therefore that the issue of public participation should not be used to overrule or veto Acts of Parliament. Mr Bitta submitted that the legislative function of Parliament is an act of sovereignty of the people of Kenya which under Article 1 can be undertaken either directly or through democratically elected representatives; that a committee of Parliament considering a money Bill can, in accordance with Article 114(2), make recommendations to the entire Assembly which can make amendments to the Bill. It was his submission that this would be in consonance with Article 1(2) of the Constitution as well as Article 94.
43. Counsel urged the Court to be guided by the decisions in **Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 Others -vs- Commissioner of Domestic Taxes & 2 Others Petition No 383 of 2013** and **Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA Workers Union) Union v Kenya Revenue Authority and 3 Others Nairobi Petition No. 544 of 2013** for the proposition that it is not for the Court to question the merits or demerits of legislation, which is what the petition is doing. It was his submission also that the fact that the impugned provisions are capable of manifold interpretations does not render the law unconstitutional. He asked the Court to dismiss the petition with costs.

The Case for the 2nd Respondent

44. KRA's case is contained in its Replying Affidavit sworn by Mr. James M. Ojee on 2nd February 2015 and a Further Affidavit also sworn by Mr. Ojee on 11th February, 2015 in response to the petitioner's Supplementary Affidavit. Submissions dated 11th February, 2015 were also filed and highlighted by Learned Counsel, Mr. David Ontweka, assisted by Ms. Carol Mburugu.
45. The 2nd respondent agreed with the submissions made on behalf of the Attorney General. Mr. Ontweka submitted on its behalf that Section 10 of the Finance Act 2014 is an amendment to Section 34 of the Income Tax Act and introduces paragraph 34(1)(i), while Section 34 of the Income Tax Act deals with the rates of taxation. At Section 3, the Income Tax Act imposes income tax, which includes capital gains, while Section 3(2)(f) refers to tax under the Eighth Schedule, which is amended by section 23 of the Finance Act, 2014 and lifts the suspension of the capital gains tax.
46. According to Mr. Ontweka, the law in the Eighth Schedule to the Income Tax Act is supposed to deal with the computation of capital gains, not just with respect to securities, but to real estate as well. It was his submission that Article 201 of the Constitution requires that when levying tax, the tax should be fair and equitable to all citizens. In further exposition of this submission, he argued that the objective of the re-introduction of the CGT at this time was to achieve equity requirements as stipulated under the public finance provisions contained in Chapter 12 of the Constitution.
47. It was also KRA's submission that the re-introduction of CGT was consistent with ensuring horizontal equity, where individuals with similar economic circumstances should bear a similar tax burden, irrespective of the source of the income, and vertical equity, which requires that taxpayers with greater ability to pay bear a larger tax burden than those with lesser ability. It was also its submission that the absence of CGT ensures that those who earn income from capital gains do not bear a similar burden to those who earn labour or other incomes, and since capital gains tend to disproportionately accrue to wealthier segments of society, failure to tax these gains undermines the principles of horizontal and vertical equity in taxation. It was also its submission

that the re-introduction of CGT was necessary for ensuring economic efficiency, was common practice in regional and international tax systems, and was essential in order to minimize tax avoidance and evasion.

48. To the petitioner's contention that the introduction of the tax would adversely affect the NSE and lead to investors moving to other markets, KRA submitted that the petitioner is exaggerating the effect of CGT by stating that it will be detrimental to the competitiveness of the Nairobi Securities Exchange. It was its submission that while there are many jurisdictions that do not impose CGT on their foreign investors, there are those that do, and in any event, each jurisdiction has discretion on its taxation policy in order to get as many people as possible to bear and close loopholes that encourage movement of funds where they are least taxed for minimum gain. It was its case, further, that under Article 4 (1) of the Constitution, Kenya is a sovereign State and has the discretion therefore to determine the country's tax policy; and further, that it need not have similar or identical CGT policies as other jurisdictions due to peculiarities that are determined and attendant to each jurisdiction.
49. According to KRA, should Sections 10 and 23, be declared unconstitutional, then investors in the real estate sector will also not pay the tax. Mr Ontweka submitted that if there are challenges to the implementation of the tax, some of which are said to be structural, then it is those challenges which should be discussed. With respect to the challenge that the petitioner expresses with regard to its operating a paper-less system, KRA submits that it also has a paper-less i-tax system, and the systems can therefore be interfaced and the problem resolved. It was its argument further that in a bid to resolve the challenges attendant on implementation of the tax, it had conducted public sensitizations, held stakeholder engagements, and issued public notices and guidelines to assist taxpayers with compliance. In addition, it had constituted a standing taskforce of various stakeholders, including the petitioner, which meets in an effort to address the challenges identified.
50. To the petitioner's contention that the provisions are retrospective in application, the 2nd respondent submitted that under the Eighth Schedules of the Income Tax Act in 1985, the cut - off period with respect to CGT was given as 1975. Section 23 of the Finance Act amended Paragraph 2 of the Eighth Schedule by subjecting the gain accrued by a person on or after 1st January, 2015 on the transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015. Its submission was that the capital gains tax is imposed on gain made upon the transfer of property and only if that transfer was done on or after 1st January, 2015. It was its case therefore that the petitioner's interpretation that the tax is applicable to gains made before 1st January, 2015 is incorrect; and in addition, a person who acquired property and holds it cannot be said to have made a capital gain until he transfers or disposes of such property at a profit. Its submission was that it is not the acquisition of the property that is taxed but the gain made upon the transfer of the property, if that transfer takes place on or after 1st January, 2015.
51. KRA further contended that it has given guidelines to the public in the document titled "**Capital Gains: What You Need to Know**", annexed to the petitioner's affidavit, and had provided a formula on how to compute the tax. Mr. Ontweka submitted that what was being confronted was the implementation process and it cannot be a basis for not deducting tax from investors.
52. KRA also argued that the doctrine of laches applied to the petitioner's claim. It was its contention that, the impugned law was assented to on 14th September 2014 and published on 19th September 2014, yet the petitioner came to Court on 26th January 2015, asserting that there was a due date for the tax of 20th February 2015. To the petitioner's argument that there were investors threatening to take action if the petitioner's members deduct capital gains, it was its argument that no list of the 60% foreign investors has been given, and no complaint demonstrated.
53. With regard to local investors, KRA's position was that it had provided information relating to the central depository company created in 2000 which has all data on securities, transacted in the

market and if the apprehension by the petitioner is that KRA will impose penalties, that becomes a tax dispute to which the petitioner and its members have a defence that they have deducted tax on the information they have, it was its case therefore that such a dispute cannot be a constitutional issue.

54. The 2nd respondent argued that there was, contrary to the petitioner's contention, public participation in the enactment of the impugned legislation. Mr. Ontweka submitted that under Article 118, the Constitution requires that Parliament conducts its business in an open manner, and that the proceedings are open to the public and the media. It was also its submission that Parliament has a committee on budget which scrutinizes Bills and recommends to the House how to proceed, and the Acts that it enacts cannot therefore be said to be unconstitutional on the ground of public participation. It was also KRA's position that the capital gains tax has been in the statute books for the last 30 years and is being reintroduced now, and it prayed that the petition be dismissed with costs.

The Petitioner's Submissions in Reply

55. In its reply to the respondents, the petitioner argued, inter alia, that it was challenging the two provisions as it is an association of stockbrokers who represent a specific industry and has therefore brought before the Court the specific aspects of the Finance Act that concern stockbrokers and their clients. It is its case that by dint of Article 258, it can speak for stockbrokers.

56. With regard to the question of delay, the petitioner submitted that there had been attempts to resolve the matter with the respondents, but that in any event, if there was such delay, it would not take away the power of the Court to intervene.

57. In response to the 2nd respondent's submission that it has issued guidelines with respect to the computation of capital gains tax, the petitioner argued that guidelines cannot cure a deficiency in the law. It was its argument, further, that the cut-off period of 1998 in the guidelines is not in the Finance Act. In addition, the petitioner contended that the fact that upholding the petition will affect the real estate sector is not a good reason not to consider the petition and give the orders that it was seeking.

58. The petitioner contended, in response to the submissions by KRA that it also has a paper-less digital system for collection of taxes, that the problem was not what happens at KRA. Its contention was that the problem arising from the CGT could not be cured by interfacing the systems, and its view was that it would be impractical to impose capital gains tax even if the law had been properly passed.

59. It is its position that the public sensitizations, public notices and stakeholder engagements were conducted after CGT was re-introduced without public participation. In its view, if this sensitization had been done prior to the re-introduction, the respondents would not be facing administrative challenges in its implementation.

60. It contended further that the respondents have neither provided any evidence to support the assertions that the Finance Act went through the proper legislative process and neither have they provided any evidence showing the National Assembly was briefed on the mode in which NSE trades presently and how it differs from how it traded in 1985 or how the settlement system works. The petitioner argues that together with the CDSC, it explained to the respondents the practically insurmountable problems with the implementation of the tax given the manner in which the NSE operates today. Its position is that until and unless the client information databases, computer systems and software programs are developed, installed and tested, it is an impossible task for its members to account for and collect capital gains tax for each and every daily transaction on the NSE today, and that KRA has also failed to address the impossibility of the petitioner's members remitting and collecting the tax.

Issues for Determination

61. What emerges from the pleadings and submissions of the parties set out above is that the petitioner is aggrieved in three respects by the provisions of Sections 10 and 23 of the Finance Act, 2014. First, it alleges that the provisions are unconstitutional as they were enacted in contravention of the requirements of Article 201 of the Constitution which requires public participation in the enactment of legislation. They are also impugned, secondly, on the basis that they are contradictory and vague, and therefore inconsistent with the Constitution, specifically Article 10 thereof. Thirdly, it is argued that these provisions are unconstitutional as they are retrospective in application and will result in violation of the petitioner's clients' right to property guaranteed under Article 40.

62. In determining the matter before me therefore, I will do so by considering three main issues:

1. *Whether Section 10 (a) and Section 23 of the Finance Act 2014 are unconstitutional for being enacted contrary to the mandatory provisions of Article 201 of the Constitution which requires public participation in financial matters;*
2. *Whether Section 10 (a) and Section 23 of the Finance Act 2014 are inconsistent with Article 10 of the Constitution due to their contradictory and vague nature;*
3. *Whether the said sections contravene the right to property guaranteed under Article 40 of the Constitution in so far as they provide for charging capital gains tax on capital gains that were acquired before 1st January 2015.*
4. *If the answers to the above are in the affirmative, whether to grant the reliefs sought by the petitioner.*

Preliminary Observations

63. Before embarking on a consideration of these issues, let me make some observations with regard to some of the matters that have been placed before me by the petitioner. Key among these are, first, the challenge by the petitioner of the practicability of implementation of the CGT, and secondly, the consequences on the local securities market of the re-introduction and charging of the tax.

64. As will be observed from the pleadings and submissions set out above, the central *motif* of the petitioner's case is that CGT is impossible to implement, that the petitioner and the CDSC had explained to the respondents the practically insurmountable problems with the implementation of the tax, and that therefore, even had the impugned legislation been properly passed, it would have been impossible to implement. In addition, the petitioner has argued strongly against the imposition of the tax. Put simply, its argument is that the imposition of the tax on the securities market will affect foreign investors, and will lead them to flee the local market to other markets where the capital gains tax is not chargeable.

65. In effect, the petitioner is challenging the wisdom of re-introducing capital gains tax in Kenya, and inviting the Court to make a finding thereon. This, however, is not within the mandate of this Court. As observed by the Court in the case of **Kenya Small Scale Farmers Forum and 6 Others vs Republic of Kenya and 2 Others**, **Petition No 1174 of 2007**:

“Firstly, it has to be borne in mind that this court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. Those are matters of policy of which this court is not best suited to handle. The dissenting decision of the Supreme Court in U.S v Butler, 297 U.S. 1[1936], is apposite in this regard that; “...courts are concerned only with the power to enact statutes, not with their wisdom....For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic

government.” (Emphasis added)

66. The Court also bears in mind the words of the US Supreme Court in **U.S v Butler**, referred to in the **Kenya Small Scale Farmers Forum** case above, in which the Court expressed itself as follows:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

67. Finally, in a decision that closely mirrors the present petition, the Court in the case of **Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes (Supra)**, which the 1st respondent referred this Court to, the Learned Judge observed as follows:

“The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court licence to declare it unconstitutional. The petitioners impugned the Finance Act, 2013 on the basis that it presents difficulties in collecting and implementing the tax.

In response to this argument I reiterate what I stated in Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013[2014]eKLR “[24] Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. Article 209 of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax. (See Bidco Oil Refineries v Attorney General and Others Nairobi Petition No. 177 of 2012, paras. 53 – 56.) ”

68. Similarly, in the present petition, should the Court find that the enactment of the impugned provisions meet constitutional muster, then it cannot go further to inquire into the wisdom or otherwise of the legislation. Should there be problems with the implementation of the capital gains tax provisions, or should they pose difficulties to the market in securities in Kenya, that is a matter to be addressed to the tax authorities and the legislature. It is not a matter that the Court can properly determine.

69. In the circumstances, and while grateful for the extensive pleadings and submissions on the challenges of implementation of the tax, this Court will confine itself to a determination of the questions whether the two impugned provisions are unconstitutional due to the failure to adhere to the process mandated by the Constitution, are vague and contradictory, or have retroactive application and therefore are in violation of the property rights of investors.

Principles of Interpretation

70. In considering the issues set out above, I will be guided by several principles of interpretation applicable when considering the constitutionality of a statute, provided by the Constitution itself, or which have evolved from jurisprudence in this and other jurisdictions.
71. The Constitution of Kenya has provided, at Article 259, the manner of its interpretation. It requires that the Constitution should be interpreted 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. Further, under Article 159(2)(e), the Court, in exercising its judicial authority, is obliged to protect and promote the purpose and principles of the Constitution.
72. Secondly, as was held in the case of **Ndyanabo -vs- Attorney General of Tanzania [2001] EA 495**, there is a general presumption that every Act of Parliament is constitutional. The burden of proving the contrary rests upon any person who alleges otherwise.
73. Thirdly, the Court must be guided by the object and purpose of the impugned statute in determining its constitutionality, which object and purpose can be discerned from the legislation itself- see **Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another** (supra).
74. The Court is also guided by the principle that the Constitution should be given a purposive and liberal interpretation. In this regard, the Supreme Court of Kenya in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011** at para. 51 adopted the words of Mohamed A J in the Namibian case of **State -vs- Acheson 1991(20 SA 805, 813)** where he stated as follows:

“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 ideas and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.”

75. Finally, the Court is guided by the principle enunciated in the case of **Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)** 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.
76. With these principles in mind, I now turn to consider the challenges to the provisions of the Finance Act, 2014 impugned in this petition.

Analysis and Determination

Whether Section 10 (a) and Section 23 of the Finance Act are Unconstitutional

77. As noted earlier in this judgment, the petitioner's challenge to the two provisions is in three limbs. It is its case that the provisions are unconstitutional for lack of public participation in the enactment, and secondly, that they are void for being vague and contradictory. It also contends that the provisions are retroactive in effect and therefore violate Article 40 of the Constitution.

Public Participation

78. The petitioner contends that there was no public participation with regard to the enactment of section 10 and 23 of the Finance Act, 2014. It contends that the two provisions were not included in the Finance Bill that was published in June, 2014, but were introduced during debate on the

floor of the House. Its submission is that it is not asking the Court to investigate or question the propriety and appropriateness of the policy pursued by the Finance Act, 2014 but is challenging the process that was adopted by the National Assembly in enacting the Act. The petitioner bases its arguments with regard to public participation on the provisions of Article 201 of the Constitution, which states, among other things, as follows:

The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters;

79. The petitioner has emphasized the supremacy of the Constitution which, at Article 2, pronounces as follows:

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

80. A failure by the National Assembly to adhere to the requirements of Article 201, according to the petitioner, amounted to a violation of Article 2 of the Constitution and rendered the provisions in dispute unconstitutional.

81. With regard to the power of the Court to inquire into the present matter, the petitioner has relied on the decision in **Keroche Industries vs Kenya Revenue Authority and 5 Others [2007] eKLR** to advance its argument that even in the specific field of tax law, judicial issues cannot be left to the tax bureaucrats and that if the courts were to do this, it would be serious abdication of their core role or duty.

82. The respondents have not disputed the basic facts relating to the enactment of the provisions in question. They are that on 12th June, 2014, the Finance Bill, 2014, which proposed a number of amendments to the Income Tax Act, was published. It did not, however, contain amendments touching on CGT. It was tabled before the National Assembly for debate, and was duly passed. The petitioner's case is that it is upon studying the Act subsequent to its enactment that it noticed a number of key changes that were introduced when the Bill was being discussed in the National Assembly. It argues that had the provisions been subject to public participation as required by the Constitution, the challenges being encountered currently with regard to implementation would have been avoided.

83. The respondents take two positions on this issue. To deal with the position of KRA first, its position on the question of public participation is that it is not its mandate under Section 5 of the KRA Act to ensure public participation in arriving at the Finance Act. It contends, however, that since 1998, it has been involving stakeholders in the budget making process through the Medium Term Expenditure Framework in which sector specific discussions are conducted before coming up with fiscal measures that would promote tax payment as well as spur the sector growth. Its position is that it has a duty to educate stakeholders on the effect of the law and it normally engages stakeholders on the acceptable systems of easing compliance and collection of various taxes as and when they are introduced or adjusted from time to time. It relied on the decision in **Navcom Ltd vs Kenya Revenue Authority, Petition No 86 of 2012** and **Crywan Enterprises Ltd vs Kenya Revenue Authority, Petition No 322 of 2011** to emphasise the importance of the obligation to pay tax.

84. KRA contended that Article 201 does not define what amounts to public participation. It relied on the holdings in **Republic vs Hon Minister for Finance and the Kenya Revenue Authority ex parte Peter Kinyua and 295 Others, Nakuru Misc Civil App No 713 of 2005** and **Republic vs Transition Authority and Another ex parte Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and 2 Others [2013] eKLR** with regard to what amounts to public participation. It submitted that public participation does not amount to conceding to the

stakeholders' interests and fears.

85. It was its contention, further, that the legislative process is a process that has the sanction of the Constitution. It contended further that the budget making process commenced as early as April 2014; that budget proposals were placed before the Parliamentary Committee responsible for scrutinizing taxation measures, the Committee of Ways and Means, and lastly, the Bill went through the readings in the National Assembly. It is its case therefore, that the Bill was duly passed and the petitioner had every opportunity to lobby Members of Parliament against passing the alleged offending provisions for lacking in public participation and involvement. Its position is that the legislation met the constitutional threshold and from 19th September, 2014 the law has been in force and no person or citizen has challenged it.

86. The AG maintained that there is a presumption of constitutionality of legislation, and the allegation that there was no public participation in the enactment of the Finance Act 2014 cannot render it unconstitutional. He urged the Court to be persuaded by the decision in **Law Society of Kenya vs Attorney General Nairobi Petition No. 318 of 2012 (Unreported)**, in which the Court observed, with regard to public participation, as follows:

“[51] In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the Parliamentary Standing Orders that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these Standing Orders provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda.” (Emphasis added).

87. It is also the AG's submission that it is not for the petitioner or any special interest group to determine the manner of public participation to be adopted by the National Assembly, and further, that there is no mandatory requirement for direct public participation in order for the requirements of public participation to be met.

88. I observe that there is not much disagreement, in principle, on the requirements of the law with regard to public participation. That it is now a central tenet under our Constitution that the public should be involved in the business of the legislature, which the Constitution decrees should be carried out in an open and accountable manner, has not been challenged. Further, our Courts have had an opportunity to address the question of public participation as a constitutional requirement on several occasions. For instance, in the case of **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs Salaries and Remuneration Commission, Petition No. 294 of 2013**, the Court acknowledged this constitutional requirement and stated that:

“Public participation as a national value is recognized under Article 10 of the Constitution. The Constitution at Article 94 has vested legislative authority of the people of Kenya in Parliament and Article 118 has provided for public participation and involvement in the legislative business.”

89. The Courts have also reaffirmed in several decisions the importance of public participation in the legislative process. See **Kenya Small Scale Farmers Forum and 6 Others vs Republic of Kenya and 2 Others, Petition No 1174 of 2007; Robert N. Gakuru & Others vs The Governor Kiambu County & 3 Others, Petition No 532 of 2013, Moses Munyendo and 908 Others vs Attorney General & Another, Petition No 16 of 2013, and Coalition for Reform and Democracy & Others vs Attorney General, Petition No 628 of 2014.**

90. It has however, been held that Parliament has a wide discretion in determining the manner in which public participation will take place, and it need not take place at the pre-legislation stage -

see **Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya & 2 Others [2013] eKLR** in which the Court held 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.”***

91.The Court cited with approval the decision in the case of **Doctor for Life International vs Speaker of the National Assembly & Others (CCT12/05)[2006] ZACCII;2006 (12)BCLR 1399(CC); 2006 (6) SA 416(CC)** in which the Court explained that the duty to facilitate public involvement in the legislative process is an aspect of the right to political participation recognized in affairs of State and enabled and anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information

92.Similarly, in **Commission for the Implementation of the Constitution vs Parliament of Kenya and Another, Petition No. 454 of 2012**, the Court dealt with the question of the constitutionality of the Leadership and Integrity Act, No. 19 of 2012 which had been challenged on the basis, among others, that there was no public participation in its enactment. The Court observed as follows:

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

93.It is also not in dispute that while the public has a right to participate, there is no requirement that the views held by any particular group or individual on a matter before the legislature must prevail. 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) it was observed at paras 50 and 51 as follows:

“...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."

94. Further, the words of Yacoob J in his dissenting opinion in the Doctors for Life case are apposite for the circumstances of this case:

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

[329] 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. Many have manner and form provisions that are clear and specific and that facilitate a measure of public involvement. 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."

95. The 1st respondent has also referred the Court to the case of **Marshall -vs- Canada, Communication No. 205/1986, UN Doc CCPR/C/43/d/205/1986(1991)**, in which 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. 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. 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 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. 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 that the fact that the State did not directly involve the Petitioners cannot be said to invalidate the whole process, which now, even as we speak is understandably in its final stages....."

96. I am persuaded by the sentiments expressed in these decisions. While the Constitution at Article 10 enshrines the principle of public participation by providing at Article 10(2) that the national values and principles of governance include **(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people**, it cannot have been intended that this principle would negate the principle of indirect participation through duly elected representatives in whom the citizen has vested legislative power under Article 1 of the Constitution. In my view, and in keeping with the principle of harmonization and interpretation of the Constitution as a whole, with no one provision destroying the other (see **Tinyefuza vs Attorney General of Uganda** referred to above, it cannot be that lack of public participation in the enactment of legislation can, in and of itself, lead to invalidation of legislation. The legislature has a constitutional duty to facilitate public participation and involvement, and indeed it must provide the opportunity and facility for such participation. However, it would render legislative business redundant, which would run counter to the provisions of Article 1 of the Constitution, if lack of direct public participation by a particular sector would lead to invalidation of legislation.

97. Having said that, however, the question that arises is whether, in any event, the issue of public participation arises with respect to the re-introduction of capital gains tax. It is common ground that this tax is not new. It is a tax that was already in the statute books, having been provided for under Section 3 of the Income Tax Act, Cap 470 Laws of Kenya, and Schedule Eight of the Act titled *“Accrual and computation of gains from transfer of property”* which provided for the manner of computation of the tax. It is also common ground that it was suspended in 1985, apparently to allow for the development of the real estate sector. The legislation was not repealed- it was merely suspended, meaning it could be re-activated any time. According to the **Concise Oxford English Dictionary, 12th Edition (2011)** to *“suspend”* is to *“halt temporarily”*, to *“defer or delay”* an action or event.

98. I have perused the Hansard of 4th July 1985 when the tax was suspended. The then Minister for Finance and Planning stated as follows at page 313:

“Much more important, under income tax, was the issue regarding the capital gains tax. Hon. Members will realize that capital gains tax has been the subject of a lot of debate in this House, and it was proposed that this time we give an experiment by suspending this rather disliked taxation in the hope that it will bring about some activity within the commercial sector. Therefore, the capital gains tax has been suspended; it has not been removed from the statute books; it can be brought in any time...”

99. It was thus made expressly clear that the tax was being suspended for a time, and would be brought back in certain circumstances- one of the examples given by the Minister then was if the suspension-or ‘abolition’-the word that he employed, of the tax did not *“bring us the goods which we have been promised”*.

100. It may be argued that 1985 is a long time ago, and so there was need for consultation and direct public participation before the tax was re-introduced in 2014. However, from proceedings in Parliament in 2006 and 2013, it is clear that there was an intention expressed in Parliament in recent times to operationalize the provisions of the Income Tax Act in respect of the capital gains tax. At paragraph 22 of the Hansard of 13th June 2013, the then Minister for Finance indicated that:

“...the Government has initiated a review of the Capital Gains Tax under the Income Tax Act with a view to formulating modalities for its effective enforcement. This will allow wealthier members of our society to also make a token contribution towards our national development agenda.”

101. It would appear that a policy decision was finally made in 2014 to lift the suspension of the tax, provide a date for the commencement of its application, and amend the tax rate in respect of the transfer of securities on the stock exchange. Two questions therefore arise: Did the removal of the suspension, or the re-introduction of the tax, require the public participation that is contemplated

under Article 10, 118 and 201 of the Constitution, and if such participation did not take place, would it render the re-introduction of the tax unconstitutional? In my view, the answer must be in the negative. The legislation in respect of the tax was already in place. Section 3 of the Income Tax Act provides as follows:

1. ***Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya...***
2. ***Subject to this Act, income upon which tax is chargeable under this Act is income in respect of –***
 - (f) ***gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule.***

102. Section 34 provided for the tax to be charged, and in 1985, the tax was pegged at 35% of the gain. Section 35 of the Act provided for the tax to be remitted to the respondents. In respect of shares, provisions were made in section 18 of the Eighth Schedule.

103. From the evidence before me, debate on the Finance Bill, including the re-introduction of the capital gains tax, took place in accordance with the standing orders of the National Assembly, and the Finance Act was duly passed. As a provision that was already in the statute books, whose re-introduction was already debated in 2006 and 2013, and was again debated in 2014, I am unable to find a violation of the principle of public participation in the circumstances of this case.

Whether Sections 10(a) and 23 of the Finance Act 2014 are Vague and Contradictory

104. The petitioner has argued that Sections 10(a) and 23 of the Finance Act 2014 are vague and contradictory. It submits that there should be clarity in taxation law, and that there should be no ambiguity in such legislation. It has relied in this regard on the decision in **Commissioner of Income Tax vs Westmount Power (K) Ltd [2006] eKLR**.

105. With regard to Section 10 (a), it is the petitioner's case that the Section introduces taxation of capital gains at the rate of five percent, yet at paragraph 16 of the Eighth Schedule to the Income Tax Act, there is already a provision for capital gains tax at a rate of seven and a half percent on the transfer of investment shares by individuals. Its case is that as matters currently stand, the Income Tax Act provides for two rates for calculating CGT. In response, the 2nd respondent conceded that indeed there is an ambiguity in terms of the rate to be applied. It submits, however, that it has issued guidelines and clarified that the rate applicable is five percent. The petitioner, however, dismisses this explanation, arguing that it is not sufficient to issue guidelines on the matter, and the legislation should be clear.

106. It is also its contention that the KRA guidelines have interpreted CGT to be a transaction based tax and a "final" tax, which means that the tax ought to be collected and remitted at the time of transfer of property which, for marketable securities, is at the end of every transaction. Its argument is that CGT is not a transactional tax which is required to be collected and remitted at the end of each transaction but rather income tax assessed by the taxpayer and paid at the end of the year along with the taxpayer's annual personal income tax filing.

107. The petitioner further contends that KRA's interpretation of the provisions of the Finance Act with regard to CGT contradict Section 39 (1) of the Income Tax Act which provides for the tax deducted under Section 35 to be available for set-off, the position that subsisted before, under which the stockbroker deducted the tax which was a final tax. It contended therefore that these provisions are unclear and ambiguous on the rate and the mode in which the tax is to be collected and cannot be remedied by interpreting the provisions in favour of the taxpayer.

108. In response, KRA has argued that it has the requisite legal framework to enable the petitioner's

members collect and remit the tax, and by questioning its framework, the petitioner is inviting the Court to decide on KRA's administrative framework for collecting withholding tax. It contends that it is not the function of the Court to determine its regulatory framework, and particularly not in a constitutional petition. KRA has invited the Court to be guided by the decision of the Court in **R v Commissioner of Customs & Excise & 2 others ex parte Mastermind Tobacco [2012] eKLR** in which the petitioner had challenged the mode of computation set out in the schedule. The Court (Majanja J) held in that case that:

“Unfortunately, this is not the appropriate forum for addressing the inadequacies of the tax the legislature has enacted. I adopt the sentiments in Maharashtra State Board of Secondary and Higher Secondary Education and Another v Kurmarsteth [1985] LRC where the court stated inter alia: “It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation...” (emphasis added)

109. The 2nd respondent has also asked the Court to be guided by the decision in **Petition 177 of 2012 – Bidco Oil Refineries Ltd v Attorney General and 3 Others** where the Court (Majanja J.) held:

“It is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced. The arguments made by the Petitioner concern how the customs duty is calculated, that is an issue of the application of the Act, rather than its constitutionality. Since statutory application is really the issue here, the consideration whether Article 47(1) has been violated is dispositive. In any case, the collection of taxes through the procedures provided by the law cannot, at least in the circumstances of this case, constitute an arbitrary deprivation of property. I therefore find and hold that there has been no violation of Article 40.”

110. It is, I believe, not disputed that the Court has the jurisdiction to declare legislation that is vague and contradictory, and therefore infringing or threatening infringement of constitutional rights, unconstitutional. The question is whether the provisions of the Finance Act 2014 relating to capital gains tax are so vague and contradictory as to be rendered invalid, or whether, as the AG submitted, it is all a matter of interpretation and application, which does not render the provisions unconstitutional.

111. Section 10 (a) of the Finance Act provides that:

Section 34 of the Income Act is amended-

(a) in subsection (1), by inserting the following paragraph immediately after paragraph (i)-" (j) tax upon the capital gains of a person charged under section 3(2) (f) shall be charged at the rate of five percent and shall not be subject to further taxation.

112. As I understand it, the petitioner is aggrieved by the fact that the Finance Act has set at Section 10(a) a rate of five percent in respect of CGT, while Section 16 of the Eighth Schedule had already set a rate of seven and a half percent. Is this discrepancy one that renders the Act unconstitutional, or is a matter of clarification and interpretation? It is important to consider various provisions of the Income Tax Act against the disputed provisions to answer this question. Section 15 of the Eighth Schedule to the Income Tax Act provides that:

The gain subject to tax under this Part is the amount by which the transfer value of investment shares transferred by a person who is an individual exceeds the adjusted cost of those shares.

113. Section 16 then makes provision with regard to the rate of tax by providing that:

The gain ascertained under paragraph 15 is subject to a deduction of income tax at the rate of seven and a half per cent of that gain.

114. It is indeed correct that there are now two provisions relating to the rate at which the capital gains tax is to be charged. Section 10 of the Finance Act 2014 has now introduced a new tax rate of five percent to be applied when calculating capital gains tax, while the provision in Section 16 of the Eighth Schedule requires that the tax be charged at seven and a half percent.

115. What is a Court confronted with such a conflict between an earlier and a later statute to do? The principle of statutory interpretation in such circumstances was considered in the case of **Kenya Country Bus Owners Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 Others v Cabinet Secretary For Transport & Infrastructure & 5 Others, Judicial Review Case No. 2 of 2014** in which the Court observed that:

“[95]... According to principles of construction if the provisions of a later legislation are so inconsistent with or repugnant to those of an earlier legislation that the two cannot stand together, the earlier legislation stands impliedly repealed by the later legislation. It is immaterial whether both legislations are Penal legislations or both refer to Civil Rights. The former must be taken to be repealed by implication. Another branch of the proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former legislation are excepted or their operation is excluded with respect to cases falling within the provisions of the legislation. If the provisions of the later legislation were manifestly inconsistent with the earlier, then on general principles of construction the Court would be obliged to treat the earlier as pro tanto repealed by the later.”

116. I am persuaded by the views expressed by the Court in the above matter.

117. Applying the above principle to the present case, I am satisfied, and I do hold, that it was the clear intention of the legislature, through the provisions of Section 10(a) of the Finance Act, to re-introduce capital gains tax and set a rate of five percent in respect thereto. The effect of the Section was therefore, in my view, to impliedly repeal the provision of Section 16 of the Eighth Schedule.

Repeal of Sections 35(3A) and (3B)

118. The petitioner has also challenged the provisions of the Finance Act 2014 due to the fact that Section 11 thereof has repealed Sections 35 (3A) and (3B) of the Income Tax Act. It has contended that as a result of this repeal, one would have no basis under Section 35 (5) of the Income Tax Act to deduct taxes on the sale of marketable securities and remit to KRA, and that stockbrokers would have no basis for withholding taxes under Section 35(5). It has also argued that by repealing Section 35 (3A) and (3B) but retaining paragraph 18 of the Eighth Schedule which refers to Section 35 (5), the National Assembly was not clear on whether it intended capital gains tax to be a transactional tax which ought to be collected at the end of each transaction or income tax to be assessed at the end of each year. The petitioner relied on the decision in **Keroche Industries Ltd** to emphasise the importance of clarity with regard to statutory provisions touching on taxation matters.

119. With respect, these submissions on the part of the petitioner appear to be based on a misreading or misunderstanding of the provisions of Section 35(3A) and (3B). These Sections provided as

follows:

(3A) A person shall upon payment -

(a) to an individual or a non-resident body of persons in respect of the gross amount or aggregate consideration of a transaction the income or proceeds from which is subject to tax pursuant to section 3(2)(f); or (b) to a resident body of persons in respect of the gross amount or aggregate consideration of a land transaction the income or proceeds from which is subject to tax pursuant to section 3(2)(f), deduct tax therefrom at the appropriate rate;

Provided that this subsection shall not apply to the transfer of investment Shares as defined in Part II of the Eighth Schedule in which event tax shall be deducted in accordance with that Part.

(3B) The provisions of subsection (3A) shall not apply where a person entitled to chargeable property by way of security or to the benefit of a charge or encumbrance on that property deals with the property for the purpose of enforcing or giving effect to the security, charge or encumbrance.

120. My reading of the provisions in question is that, as is clear from the proviso to Section 3A, they did not apply to investment shares even prior to the repeal of the sections. The proviso expressly excluded the application to investment shares under Part II of the Eighth Schedule. CGT in respect of investments shares is therefore still chargeable under Section 18 of the Eighth Schedule. The petitioner's contentions are therefore without merit.

Retrospective Application and Violation of Article 40

121. The petitioner is also aggrieved by the provisions of Section 23 of the Finance Act. Its argument is that the Section, as well as Section 10(a) set out above, has retrospective application and therefore violates the rights of investors to property. The Section is in the following terms:

The Eighth Schedule to the Income Tax Act is amended –

(a) by deleting paragraph 2 and substituting therefor the following new paragraph -

2. Subject to this Schedule, income in respect of which tax is chargeable under section 3(2)(f) is the whole of a gain which accrues to a company or an individual on or after 1st January, 2015 on the transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015";

122. The petitioner argues that this provision means that, when calculating capital gains tax, one has to compute the gains made right from the point at which the property was acquired. It argues, further, that if the property was acquired before 1st January 2015, this means the taxpayer will be forced to pay tax on capital gains that he accrued prior to the re-introduction of the tax. The two Sections therefore, in its view, take away and/or impair vested property rights that were accrued under existing laws, and therefore violate Article 40 of the Constitution. The petitioner relied on the decision in **Kazungu Moli Chogo and 6 Others -vs- Perihan Torun and 6 Others [2014]eKLR** to submit that the Court in that case reaffirmed the position in regard to Article 40 (2) of the Constitution which bars Parliament from enacting laws that permit the arbitrary deprivation of property.

123. In response to these contentions, the respondents have argued that the petitioner has not placed before the Court a factual situation on the basis of which it can determine whether or not there is a violation of Article 40. The 2nd respondent specifically argues that the petitioner has not

demonstrated the manner in which the provisions of sections 10(a) and 23 of the Finance Act 2014 have violated Article 40 of the Constitution, and it is therefore asking the Court to make an academic pronouncement.

124. With respect to this later argument, as the Court observed in **High Court Petition No. 628 of 2014 Coalition for Reform and Democracy and Others vs The Attorney General**, a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. The view of the Court in that matter, which I fully agree with, is that a party has a right to approach the Court for relief if there is a threat of violation or contravention of the Constitution, given the provisions of the Constitution which included a “**threat**” to a right or fundamental freedom as one of the conditions entitling a person to approach the High Court for relief under Article 22 and 165(3)(b) and (d)(i).

125. I am therefore satisfied that the Court has jurisdiction to determine whether there is a violation of the Constitution demonstrated, and I now turn to consider whether the provisions of Section 23 have retroactive effect, and whether its application, alongside Section 10(a), would result in a deprivation of the right to property under Article 40(1) which guarantees to everyone the right:

...either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

126. I have read carefully the provisions of Section 23 of the Finance Act 2014. A plain reading of the section indicates that the income in respect of which tax is chargeable under Section 3 (2) (f) is the whole of a gain which accrues to a company or an individual **on or after 1st January, 2015 on the transfer of** any property situated in Kenya, whether or not the said property was acquired before 1st January, 2015.

127. In explaining the implications of this Section at the hearing of this matter, Mr. Bitta for the AG submitted that the tax is charged on accrued gain on or after 1st January 2015, and it is therefore immaterial when the property was acquired.

128. Mr. Ontweka, while agreeing with the submissions made by Mr. Bitta, submitted that the impugned provisions are not retrospective in application. His argument was that under the Eighth Schedule in 1985, the cut of period with respect to the capital gains tax was given as 1975. Section 23 of the Finance Act 2014 has amended paragraph 2 of the Eighth Schedule to subject to tax the gain accrued by a person on or after 1st January, 2015 on the transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015. He submitted that the capital gains tax is imposed on gain made upon the transfer of property, and only if that transfer was done on or after 1st January, 2015. The tax was therefore not applicable to gains made before 1st January, 2015, and a person who acquired property and holds it cannot be said to have made a capital gain until he transfers or disposes of such property at a profit. What was being taxed was the gain made upon the transfer of the property, if that transfer takes place on or after 1st January, 2015.

129. I have carefully considered the provisions of Section 23 and the submissions of the parties with respect thereto. The stated intention behind the imposition of the capital gains tax is to ensure that those who purchase property and make a gain or profit from the transfer thereof contribute to the tax burden. This, as submitted by KRA accords with the equity requirement which is one of the principles of Public Finance contained in Chapter 12 of the Constitution. Article 201(1)(b) of the Constitution states that:

“the public finance system shall promote an equitable society, and in particular—

i. *the burden of taxation shall be shared fairly.*”

130. Thus, capital gains tax, under the provisions of Section 23, shall be charged on the **gain** made upon a transfer occurring after 1st January 2015. To my mind, if a transfer of property has not taken place, then one cannot be said to have made a gain that is capable of being taxed. Conversely, if a loss is made upon transfer of a property, then there would clearly be no expectation that any tax would be payable by the owner of the property upon its transfer.

131. What I understand the petitioner to be unhappy about, and what probably made the capital gains tax so unpopular or, in the words of the Planning Minister in 1985, so “disliked”, then and today, is that property may have appreciated in value between the time of purchase and the time it is transferred after 1st January 2015, and it is this rise in value that the petitioner and its members appear intent on insulating from taxation.

132. However, a tax that is charged at five per cent of the gain or profit made upon transfer of the property, or the appreciation in value of property, between the date of purchase and the transfer occurring after 1st January 2015 cannot, in my view, be said to be retrospective in effect. The tax would be said to be retrospective if it was charged on gains made on transfer of property, say, in December 2014, before the legislation came into effect. For as long as it applies to gains made on transfer of property after 1st January 2015, it cannot be said to be retrospective and therefore a violation of Article 40. I am therefore inclined to agree with the respondents on this issue, and I find and hold that the provisions of Section 10 (a) and 23 of the Finance Act 2014 are not retrospective in effect and do not therefore violate or threaten the right to property under Article 40.

Lack of Clarity on Whether CGT is a Transactional or Final Tax

133. The petitioner has also made various arguments on whether the tax is a transactional tax or a final tax. It is dissatisfied with the interpretation that it says KRA has given the provisions of section 10(a) and 23 in this regard. However, as was stated in the case of **Bidco Oil Refineries Ltd -vs- Attorney General and 3 Others** cited elsewhere in this judgment, disputes with regard to the application of the statute providing for tax do not render the legislation in respect thereof unconstitutional. These are matters that KRA can address, and from the evidence before the Court, had begun to address with respect to CGT through the consultative meetings held with stakeholders, minutes in respect of which are annexed to the affidavit of Mr James Ojee.

Disposition

134. In the circumstances, I am unable to find a violation of the Constitution or of the petitioner’s or any other party’s rights under the Bill of Rights. In accordance with the analysis set out above, my findings with respect to the three issues raised in this petition are as follows:

- i. ***Whether Section 10 (a) and Section 23 of the Finance Act 2014 are unconstitutional for being enacted contrary to the mandatory provisions of Article 201 of the Constitution which requires public participation in financial matters;***

Debate on the Finance Bill, which re-introduced the capital gains tax took place in accordance with the standing orders of the National Assembly. The provisions with regard to capital gains tax were already in the legislation. They had been debated with a view to their re-introduction in 2006 and 2013, and again in 2014 before enactment of the Finance Act. There was therefore no violation of the principle of public participation in the circumstances of this case.

- ii. ***Whether Section 10 (a) and Section 23 of the Finance Act 2014 are inconsistent with Article 10 of the Constitution due to their contradictory and vague nature;***

It was the clear legislative intent, through the provisions of Section 10(a) of the Finance Act, to re-introduce capital gains tax and set a rate of five percent in respect thereto. The effect of the Section was therefore to impliedly repeal the provision of Section 16 of the Eighth Schedule. The provisions of Section 10(a) and 23 of the Finance Act 2014 are therefore not unconstitutional for being vague and contradictory.

iii. ***Whether the said sections contravene the right to property guaranteed under Article 40 of the Constitution in so far as they provide for charging capital gains tax on capital gains that were acquired before 1st January 2015.***

I find and hold that the provisions of Section 10 (a) and 23 of the Finance Act 2014 are not retrospective in effect and do not therefore violate or threaten the right to property under Article 40.

135. As the responses to the issues above are all in the negative, I find that the petition lacks merit and the petitioner is not entitled to any relief. In the circumstances, the petition is hereby dismissed.

136. With regard to costs, which are within the discretion of the Court, I am satisfied that the matter related to critical issues of great public importance. In the circumstances, I direct that each party bears its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 20th day of March 2015

MUMBI NGUGI

JUDGE

Mr Kiragu Kimani instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for the petitioner

Mr Oduor, Mr Emmanuel Bitta instructed by the State Law Office for the 1st respondent

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