



**Nusu v National Assembly & 6 others; Law Society of Kenya (Interested Party) (Constitutional Petition E009 of 2023) [2025] KEHC 7162 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 7162 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CONSTITUTIONAL PETITION E009 OF 2023**

**FR OLEL, J**

**MARCH 20, 2025**

**IN THE MATTER OF ARTICLES 1, 2, 3, 22, 23, 24, 32, 33, 35, 43, 46, 75, 93, 94, 95, 114, 159, 165, 201, 206, 209, 213, 214, 225 AND 226 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS ENshrined UNDER THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THREAT TO SOVEREIGNTY, SUPREMACY OF THE KENYA CONSTITUTION 2010, CONTRAVENTION OF THE RIGHT TO JUDICIAL AUTHORITY, THREAT TO INDEPENDENCE OF THE ARMS OF THE GOVERNMENT, IN THE MATTER OF ILLEGAL PROCESS OR FAILING TO EXERCISE POWERS, RIGHT TO ECONOMIC & SOCIAL RIGHTS, ILLEGAL DISTRIBUTION OF NATURAL RESOURCES**

**AND**

**IN THE MATTER OF THE SUPREMACY OF THE CONSTITUTION OF KENYA 2010 VIS A VIS REGIONAL, TRIPARTITE LEGISLATIONS AND TREATIES AND INTERPRETATION OF LAWS**

**BETWEEN**

**PAUL LIHANDA NUSU ..... PETITIONER**

**AND**

**THE NATIONAL ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**THE SENATE ..... 2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY IN CHARGE OF FINANCE ..... 3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY IN CHARGE OF FOREIGN AFFAIRS ..... 4<sup>TH</sup> RESPONDENT**



HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT  
AUDITOR GENERAL ..... 6<sup>TH</sup> RESPONDENT  
CENTRAL BANK OF KENYA ..... 7<sup>TH</sup> RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

## JUDGMENT

### A. Introduction

1. The petitioner initially moved this court vide his petition dated 23rd May 2023, and simultaneously filed his Notice of Motion Application dated 24<sup>th</sup> May 2023 seeking various orders to wit; conservatory orders to prohibit further disbursement of funds by the 3<sup>rd</sup> Respondent to EADB, and for the 6<sup>th</sup> Respondent to be directed to produce true records of the status of accounts the public charge, debt, and liability directly released from the consolidated funds to East Africa Development Bank LTD(EADB) from the year 2014 to 2023.
2. The petitioner also sought for minutes, memoranda, and public participation records (records that precipitated the ratification of the EADB Act 2014). The said notice of motion Application was heard on merit and its ruling was delivered on 22<sup>nd</sup> April 2024.
3. During the pendency of the Application, the Petitioner Amended his petition, Citing various provisions of the Constitution of Kenya 2010, and statutes, the Petitioner sought for the following reliefs;
  - a. A declaration that the petitioner's rights as aforementioned have been breached, infringed, and threatened by the Respondents actions as referred to in the petition
  - b. A declaration that in the management of public funds, the 3<sup>rd</sup> Respondent by dint of the East African Development Act has violated the principles enshrined in Article 10 of the Constitution.
  - c. A declaration that the said East African Development Act Cap 493A was ratified by the National Assembly of Kenya un-procedurally without regard to the Rule of law, Supremacy of the Constitution and in a manner that offends the Constitution of Kenya 2010 and in particular Article 118 (1) (b).
  - d. A declaration that by providing immunity from judicial proceedings to the EADB, Article 44 of the EADB Charter contained in the schedule to the EADB Act, contravenes Articles 50 as read with Article 25 of the Constitution on the right to a fair trial and is therefore unconstitutional.
  - e. A declaration that by providing immunity from judicial proceedings to the EADB, Article 44 of the EADB Charter contained in the schedule to the EADB Act, contravenes Article 48 of the Constitution on access to justice and is therefore unconstitutional.
  - f. A declaration that by providing immunity from judicial proceedings to the EADB, Articles 44 and 51 of the EADB Charter contained in the schedule to the EADB Act contravenes Articles 1, 2, 10, 22, 23, 25, 48, & 50 of the Constitution and is therefore unconstitutional.



- g. A declaration that by providing immunity of assets to the EADB, particularly of deposits and funds, Article 45 of the EADB Charter contained in the schedule to the EADB Act, contravenes Articles 46 of the Constitution.
- h. A declaration that Section 2(1), (2) of the EADB Act and 44 (1), (2) contained in the schedule respectively of the EADB Act Cap 493A are inconsistent with the constitution of Kenya, undermine the spirit of the Constitution and therefore the said is unconstitutional as far as the said clauses are concerned.
- i. A declaration that section 2 (1) & (2) of the EADB Act is unconstitutional and violates Articles 10, 95 (4) (b), 201, 206, 228 of the Constitution.
- j. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Respondents have acted in violation of Article 35 of the Constitution by failing to provide access to information on the public participation conducted pursuant to Article 118 (1) (b) of the Constitution prior to the enactment of the EADB Act No. 38 of 2013.
- k. A declaration that in enacting the EADB Act No. 38 of 2013 without conducting public participation as mandated by Article 118 (1) of the Constitution, the 1<sup>st</sup> & 2<sup>nd</sup> Respondent violated Article 94 (4) and 95 (4) (c) of the Constitution.
- l. A declaration that the EADB Act No. 38 of 2013 is unconstitutional for having passed without public participation as required by Article 118 (1) (b) of the Constitution.
- m. That an order by way of judicial review of certiorari be hereby issued by this court to quash the decision of the National Assembly of ratifying the EADB Act.
- n. A declaration that section 2 (1) & (2) of the EADB Act is unconstitutional to the extent that it provides for payment of public funds out of the Consolidated Fund by the 3<sup>rd</sup> Respondent in an opaque manner, without the participation of the public and in violation of Article 10 (2) (a) and 118 (1) (b) of the Constitution.
- o. An order of Mandamus directing the 3<sup>rd</sup> Respondent to produce records of all payments made from the Consolidated Fund pursuant to the EADB Act since the year 2014 and avail the same to the Auditor General for audit purposes.
- p. An order of prohibition prohibiting the 3<sup>rd</sup> Respondent from withdrawing public funds from the Consolidated Fund under section 2 (1) & (2) of the EADB Act until such time as the EADB Act is amended to provide a parliamentary process for such withdrawal.
- q. A declaration that any private entity that receives public funds and other state resources is obliged to account for the utilization of the same to the public and the Auditor General is mandated to investigate the same and report to parliament for appropriate action.
- r. A declaration that by conducting banking business and/ or mortgage finance in Kenya without having obtained a license, the entity created by the EADB Act is operating in Kenya in a manner contrary to section 4 (1) of the Banking Act.
- s. A declaration that the 7<sup>th</sup> Respondent has acted in contravention of Article 231 (2) of the Constitution by failing to regulate the entity created by the EADB Act which conducts banking business in Kenya in a manner contrary to section 4 (1) of the Banking Act.
- t. Any further relief, writs, or directions as the honourable court may consider appropriate.



4. In Response, the 1<sup>st</sup> Respondent did file their Grounds of opposition dated 30<sup>th</sup> June 2023, the Replying Affidavit dated 14<sup>th</sup> December 2023, sworn by Mr Samuel Njoroge CBS the clerk to the National Assembly, and Supplementary Replying Affidavit dated 11<sup>th</sup> November 2024 sworn by Jeremiah Ndombi MBS, the deputy clerk to the National Assembly.
5. The 2<sup>nd</sup> Respondent did not participate in these proceedings and did not file any pleadings.
6. The 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondent in response to the Amended petition did file grounds of opposition dated 6<sup>th</sup> November 2024, while the 6<sup>th</sup> Respondent only filed their Preliminary objection dated 29<sup>th</sup> June 2023, which was disposed of by the ruling dated 30<sup>th</sup> October 2023.
7. The Interested party (Law Society of Kenya) supported this petition through the Replying Affidavit dated 5<sup>th</sup> February 2024, sworn by its CEO, Ms Florence Muturi.

## **B. Pleadings**

### **i. The Petition.**

8. The Petitioner averred that he was a Kenyan citizen and had filed this petition on his own behalf and in Public interest on behalf of other concerned citizens. He outlined the constitutional roles of all the respondents as stipulated under the Constitution and further averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had jointly and severally ratified, passed, amended, or facilitated the ratification, passage, and/or amendment of the *East Africa Development Bank Act*, Cap 493A, (Revised 2014-hereinafter referred to as EADB) in an opaque manner, which was inconsistent with Articles 94(4), 95(4), 114 and 118 of the *Constitution of Kenya* 2010 rendering the said Amended Act to be null and void.
9. The petitioner's main contention in the petition was that under Section 2(1) and (2) of the *EADB Act*, the government of Kenya was required to pay out of the consolidated fund and/or make all other payments required to be made from time to time under the terms of the treaty to EADB and the same was being effected without further appropriation other than as provided for under the said *EADB Act*.
10. This in effect, had bestowed on the 3<sup>rd</sup> Respondent the sole responsibility, without parliamentary oversight and accountability, to charge on and issue public debt out of the consolidated fund in breach of the clear principles of public finance accountability as stipulated under Article 201(d) &(e) as read with Article 232 of the *Constitution of Kenya* 2010.
11. Further to the extent that, the 3<sup>rd</sup> Respondent could unilaterally withdraw money from the consolidated fund, without the oversight of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and/or approval of the 6<sup>th</sup> Respondent, offended and ran contrary to provisions of Articles 95(4),(b) & (c), 201, 214 and 2016 of the *constitution of Kenya* 2010. The petitioner urged this court to remedy this situation as this process clearly lacked transparency and accountability. It also offended the principles of good governance as enshrined under the constitution.
12. Secondly the petitioner contended that the *EADB Act*, Revised 2014, was passed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in an omnibus manner without reviewing the constitutionality of each provision of the *Amended EADB Act*, and thus ended up passing legislation that was manifestly unconstitutional. He also noted that there was a complete lack of Public participation in the process of amending the said *Act*, in line with Article 118(1) of the *Constitution of Kenya* 2010, which also reinforced his view that the whole Amended *Act* as passed was null and void *ab initio*.
13. Finally, the other legal handicap identified by the petitioner related to the passing of the impugned *EADB Act*, Rev 2014 were that;



- a. The said *Act* was a money bill as contemplated under provisions of Article 114 of the *constitution*, and the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not produced any information or documentation to demonstrate that, they had complied with this provision of the constitution.
  - b. Section 4(1) of the *Banking Act*, enacted pursuant to Article 231 of the *Constitution* did not exempt any institution from applying to the Central Bank of Kenya for licensing to transact Banking business, financial business, or mortgage finance. In offering the aforesaid services, EADB was operating in a manner that contravened the law and the constitution.
  - c. Article 43, 44, 45(3) as read with Article 46 of the *EADB charter* as contained under the schedule of the *EADB Act*, provided blanket immunity of Assets of the Bank and immunity from judicial and administrative action and this infringed on the citizen's right to information, consumer rights and access to justice as protected under Article 35,46, 48 and 50(2) of the *constitution of Kenya* 2010.
14. The petitioner, therefore urged this to find that it was egregious to allow unrestricted access and use of Public funds by the 3<sup>rd</sup> respondent without corresponding checks and balances as stipulated under the constitution and thus urged the court to allow/ grant the prayers as sought in the petition.

## ii. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondent's pleadings

15. In opposing this petition, the 1<sup>st</sup> respondent relied on their Grounds of opposition dated 30<sup>th</sup> June 2023, the Replying Affidavit dated 14<sup>th</sup> December 2023, sworn by Mr Samuel Njoroge CBS the clerk to the National Assembly, and Supplementary Replying Affidavit dated 11<sup>th</sup> November 2024 sworn by Jeremiah Ndombi MBS, the deputy clerk to the National Assembly.
16. They contended that under Articles 93 and 94 of the *constitution of Kenya* 2010, they had representative, legislative, and oversight powers and while undertaking this role were responsible for the protection of the constitution and the promotion of the democratic governance of the Republic. On 2<sup>nd</sup> July 2013, the Finance Bill was read for the first time and referred to the departmental committee on Finance, Planning & Trade.
17. The said committee pursuant to provisions of Article 118 of the *constitution* and *standing order* 127 facilitated public participation by engaging various stakeholders including Kenya Bankers Association, Pricewaterhouse Coopers, an Independent Audit firm, Institution of Certified Public Accountants of Kenya (ICPAK), amongst others. During this process, the said organizations gave their views, made presentations, and submitted their memorandum for consideration, all of which were considered before the said Act was passed.
18. The Finance Bill, amongst other matters proposed to make amendments to various Acts, which had Financial implications, to wit;
  - a. The *Customs and Excise Act* 472, laws of Kenya.
  - b. The *Income Tax* Cap 470, laws of Kenya
  - c. The *Value Added Tax*, Cap 476, law of Kenya.
  - d. The *Banking Act*, Cap 488, laws of Kenya.
  - e. The *Retirement Benefits Act* ( No 3 of 1997), laws of Kenya.
  - f. The *East Africa Development Bank Act*, Cap 493, laws of Kenya.



- g. The *Prevention of Terrorism Act* (No. 30 of 2012) law of Kenya.
19. Clause 29 of the *Finance Bill*, 2013 proposed the amendment to the *EADB Act* as follows

“The schedule to the *East African Development Bank Act* is Amended:-

- a. In Article 24, by inserting the following new paragraph immediately after paragraph 4- 5 The Bank shall be accorded, in the territories of the Member states, a creditor status no less than that Accorded to the International Monetary Fund, the International Bank of Reconstruction and Development, The International Development Association, The Africa Development Bank and the African Development Fund.
- b. By deleting Article 25 and renumbering- Articles 43 to 50 as Articles 42 to 49 respectively, and Article 52 as Article 51. In the re-numbering, Article 4 by deleting paragraph (L) and substituting therefor the following Paragraph (L)The Bank shall enjoy immunity from every form of Legal process except in any case where it has Expressly waived its immunity in writing when it may Be sued in a court of competent jurisdiction in a Member state in which the Bank has an office has Appointed an agent for the purpose of accepting Service or notice of process. It is however understood that no waiver of immunity shall be implied or Extend to any measure of execution.
- (d) In the renumbering Article 45;
- (i) by inserting the word “nationalization”
- (ii) by inserting the following new paragraph Immediately after paragraph 2:- (3)
- For the purpose of this charter, the term “property” Shall include property and assets owned or held by The bank, the bank premises, and deposits and Funds entrusted to the bank in the ordinary course of fulfilling its mandate.
20. The 1st Respondent further contended that the amendments proposed were to align the *EADB Act*, with the charter establishing the said Bank, and after public participation and deliberations by the committee on Finance, planning, and Trade, the said committee’s report was tabled in the National Assembly on 19<sup>th</sup> September 2013.
21. The *bill* was read for the 2<sup>nd</sup> time on the said date and subsequently on the 24<sup>th</sup> and 25<sup>th</sup> of September 2013 during which time the members debated and gave their views on the proposed amendments and after the third and final reading on the 25<sup>th</sup> of September 2013 the same was passed by the committee of the whole house.
22. The *bill* was thereafter assented to by His Excellency, the President on 21<sup>st</sup> October 2013 with Section 30 introducing the impugned amendments. From the foregoing, it is clear that the said bill was debated upon and passed by the house procedurally contrary to the petitioner’s averments.
23. In their further Affidavit filed, the 1<sup>st</sup> respondent further averred that Section 2(1) and (2) of the *EADB Act* did not violate the provisions of Article 95(4),(b), and (c) of the *Constitution* since it was the National Assembly that enacted the said *Act* and Authorized withdrawal of funds from the Consolidated Fund in accordance with Article 206(2) of the *Constitution of Kenya*.



24. Further, on the petitioner's allegation that there was no form of checks and balances to ensure accountability in the use of financial resources that were advanced to the bank, the 1<sup>st</sup> respondent averred that under Article 124 of the Constitution the National Assembly had the authority to establish committees and make standing orders to facilitate the orderly conduct of proceedings.
25. Standing Order, 207 established the Public Debt and Privatization Committee, which under Article 207(2),(c) of the constitution had "oversight of consolidated fund services excluding audited accounts". This committee exercised oversight over the consolidated fund services and expenditures and thus there was no lacuna in the law as alleged by the petitioner.
26. The 1<sup>st</sup> respondent also urged the court to note that under Sections 47 and 48 of the Public Finance Management Act, of 2012, they had operationalized these regulations to guide donations and grants by the national government or its entities to third parties and this had been done through the Public Finance Management (National Government) Regulations, 2015, which specifically at Part IV guided donations and grants. It was therefore not true for the petitioner to allege a lacuna in the law in that regard.
27. The petitioner had failed to demonstrate how the impugned provision of the EADB Act had violated any of his fundamental rights and freedom and/or how the purpose and effect of the said Act infringed on any public right as guaranteed under the Constitution. In the circumstance, it was only just and fair that this Petition be dismissed with costs.
28. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed grounds of opposition dated 6<sup>th</sup> November 2024, where they averred that the Amended petition was incurably defective, scandalous, and devoid of substance as the treaty Amending and Re-enacting the charter of EADB of 1980 and EADB Act, Cap 493A were ratified and enacted respectively under the former constitution of Kenya and before the enactment of the treaty-Making and Ratification Act of 2012.
29. The petitioner had not proved and/or demonstrated that the executive or legislature had failed to adhere to the due process then in force for signing, ratifying, and domestication of treaties as provided under the former constitution and laws of Kenya. The EADB Act was therefore constitutional and the petitioner had failed to prove otherwise.
30. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents further averred that Section 2(1) and (2) of the EADB Act did not violate the constitution since the obligations raised thereunder were adequately oversighted by the National Assembly. As regards the amendments effected to the said Act, Article 2(6) of the Constitution of Kenya 2010 provided that any treaty or convention ratified by Kenya shall form part of the laws of Kenya and the said immunity had been accorded in line with international treaties that Kenya had ratified by dint of the above referred to provision of the constitution.
31. Finally it was the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent's contention that this court could not issue an order of mandamus against the 6<sup>th</sup> respondent to direct her on how to perform her duties nor were the orders of prohibition appropriate, to restrain the 3<sup>rd</sup> respondent from undertaking his mandate under the EADB Act, as that too would violate the express provisions of Article 2(6) of the Constitution and lead to neglect of the countries international obligations.
32. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent thus urged the court to find that the petitioner had failed to demonstrate any violation or infringement of his fundamental rights, his petition was non-justiciable, misconceived and they prayed that the Amended petition be dismissed.



### iii. The Interested Party (LSK) Response

33. The Interested party (LSK) relied on the Replying Affidavit sworn by their CEO Ms. Florence Wairimu Muturi and contended that the manner in which the EADB Act, Cap 493A (revised 2014) was enacted, and/or domesticated was fraught with blatant procedural and substantive illegalities and made a mockery of the process of Public participation. The enactment was therefore defective in substance and unsustainable in law.
34. Further, in Undertaking the said amendments to the said Act, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had failed and/or neglected to carry out their mandate of oversight, and legislation on behalf of the people of Kenya, and their indifference was noted by their failure to respond to letters addressed to them, by the petitioner seeking clarity as to how the public participation was undertaken. Their failure to respond therefore led to one conclusion that the whole process lacked transparency and ran afoul of the provisions of Articles 10 and 118 of the Constitution of Kenya 2010.
35. As regards provisions of Section 2(1) and (2) of the EADB Act, ( Rev 2014), the Interested party supported the petitioner's averments and further stated that Articles 1(3) and 2(2) of the Constitution of Kenya 2010 EXPLICITLY and MANDATORILY provided that every state organ including parliament and the executive shall perform its functions ONLY in accordance with the constitution. Similarly, all laws enacted by the August house if found to be inconsistent with the constitution or contravened the said constitution, would be held to be null and void Abinitio.
36. To the extent that the 3<sup>rd</sup> respondent was given a carte blanc to withdraw and expend funds from the consolidated fund in favour of EADB without corresponding accountability mechanisms being put in place to account for use of the said public funds, made the said provisions of the EADB statute unconstitutional and the same had to be declared unlawful.
37. The Interested party therefore urged the court to find that public interest and prudence dictated that the orders sought in the petition be granted to protect public funds.

## C. Parties Submissions

### I. The Petitioner's Submissions

38. The petitioner filed their submissions dated 11<sup>th</sup> September 2024 and reiterated the facts pleaded in the Petition. He further presented the following issues for determination;
  - i. By amending the EADB Act as at 2013 July did the 1<sup>st</sup> respondent act, carry out their duties in a manner that is envisaged or pursuant to the principles of the Constitution?
  - ii. Is the EADB Act as at 2013 contrary, conflicting, inconsistent to various Articles, provisions of the constitution of Kenya?
  - iii. Are the sections 2 (1) & (2), 44, 45, 46 and 51 of the EADB Act No. 38 of 2013 Cap 493A unconstitutional?
  - iv. Were relevant provisions of the Public Finance Management Act 2012, which mandates parliament to formulate a legislative framework to guide such donations and grants by the national government or its entities or third parties adhered to?
  - v. Are the orders for judicial review sought available?
  - vi. Whether the petition is justiciable.



39. The petitioner submitted that Article 165(3) and (6) of the [constitution of Kenya](#) 2010, gave this court original jurisdiction to handle this petition as the issues raised were justiciable given that parliament had failed to exercise its duty, exceeded its powers, and/or acted contrary to the provisions of the law. Reliance was placed on [Macharia v Murathe & Another, William Odhiambo Ramogi & 2 others v Attorney General & 6 others](#) 2018 eKLR, [Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others](#) to support this contention.
40. The Amendments to the [EADB Act](#), carried out in July 2013 were done contrary to provisions of Articles 10 & 118 of the [Constitution of Kenya](#) 2010, which expressly provided for wholesome/ meaningful public participation, and more pertinently the amendments undertaken were inconsistent with the spirit and letter of the law.
41. Reliance was placed in the case of [Mui coal Basin local community & 15 others v Permanent Secretary Ministry of Energy & 17 others](#) (2015) eKLR, [Robert N. Gakuru & Others v Governor Kiambu County & 3 others](#) (2014) eKLR, [Doctors for Life International v Speaker of the National Assembly & others](#) ( CCT 12/05 ),[2006] ZACC 11, & [Matatiele Municipality and others v President of the Republic of South Africa and others](#) (2), (CCT 73/05A),[2006] ZACC 12;2007(1) BCLR 47 (CC)where the various court emphasized the need of meaningful facilitate and structured public participation before any law is passed.
42. The second issue raised by the petitioner was that the [Treaty-making and Ratification Act](#), 2012 provided that where the government intended to ratify a treaty, the Cabinet secretary of the relevant Ministry would in consultation with the Attorney General submit to the cabinet the treaty, together with a Memorandum outlining the objectives, constitutional implications, and National Interest that would be affected by the said ratification.
43. The respondents had failed in their duty to act in accordance with this provision of the law, by allowing passage of the [EADB Act](#), Rev 2014, while it had provisions that were grossly inconsistent with the [Public Finance Management Act](#), 2012, constitutional values, and national interest. The result was that funds expended out of the Consolidated fund in favour of EADB could not be Audited to the detriment of the Taxpayer.
44. Article 2 of the [Constitution of Kenya](#) provided for the supremacy of the [Constitution](#) and any law, whether in Kenya, the East African community, or any other international law that had to be applied in Kenya and was in conflict with the [Constitution](#) was void to that extent. To this extent, Sections 2(1) & (2) 44,45,46, and 51 of the [EADB Act](#) No 38 of 2013, Cap 493A were unconstitutional for breaching the provisions of the said constitution as pointed out in the pleadings. Reliance was placed on [East African Community v Republic](#) (1970) EA 457 to emphasize this point
45. The Petitioner, was in particular peeved with clause 29 of the [Finance Bill](#) 2013, which gave blanket immunity to the bank from legal process “except in a case where the bank expressly waived its immunity in writing”. The said clause was retrogressive to the realization of his fundamental right as espoused under Articles 2, 27, 47, 48 and 50 of the [constitution of Kenya](#) 2010.
46. He noted that the right to a fair hearing was a non-derogable, progressive right, which could not be limited by law and this position too had been adopted by “[Dakar Declaration and Recommendations of the Right to a fair trial in Africa](#) “. To that extent clause 29 of the [Finance Act](#) 2013, was unconstitutional. Reliance was placed in the case of [Nthabiseng Phoko v Ekurhuleni Metropolitan Municipality & another](#) CCT 19/11( 75/2015) & [Canadian Metal Co Ltd v Canadian Broadcasting Corp](#), (No 2), (1975) 48 D.L.R (30)



47. The petitioner further submitted that by his pleadings, he had demonstrated malfeasance on the part of the respondents and the court could therefore issue a writ of Mandamus and certiorari, to call for a public Audit of the Concerned funds. This would safeguard the citizen's rights for accountability, and transparency in the management of public funds. Reliance was placed in [\*Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge & others\*](#) Civil Appeal No. 266 of 1996(1997), [\*Rep v Cabinet Secretary for Internal Security, Ex parte Gregory Oriaro Nyauchi & 4 others\*](#) (2017) eKLR and [\*National Commission on Human Rights v Attorney General & Another\*](#) (2015) eKLR
48. Finally, the petitioner submitted that he had demonstrated that the amended petition raised pertinent matters of general public importance to wit; protection of public funds, transparency, accountability, and right to information, and also that the impugned [\*Act\*](#), infringed on the bill of rights. It was thus in Public interest that the orders sought to be allowed.
49. The petitioner also prayed to be awarded the costs of this Petition.

#### iv. The 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents Submissions

50. The 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondent filed their submissions dated 6<sup>th</sup> November 2020<sup>4</sup> and raised four (4) issues for determination, namely;
- a. Whether the enactment and the 2013 amendment of the [\*EADB Act\*](#), breached the [\*Constitution of Kenya\*](#).
  - b. Whether sections 2(1) and (2) of the [\*EADB Act\*](#) violates Articles 95(4)(b), 201, 202 & 228 of the [\*Constitution\*](#).
  - c. Whether the immunity conferred under Articles 44 to 48 of the schedule to the [\*EADB Act\*](#) contravened Articles 48 to 50 of the [\*Constitution\*](#) on the right to fair hearing and access to justice, and
  - d. Whether the concept of non-justiciability was applicable in this petition.
51. On the first issue it was their contention that EADB was established under Article 21 of the *Treaty of East African Cooperation* of 06.06.1967 and that later when it became inoperative, the parties thereto amended and re-enacted the charter which was adopted as signed by Kenya on 23.07.1980. Consequently, the [\*EADB Act\*](#), Cap 493A was enacted by parliament in 1984 and assented to on 01.05.1984.
52. The petitioner had not demonstrated that the executive or the legislature had failed to adhere to the process then in force under the former constitution in ratifying the treaty and/or enacting the statute and in the absence of such evidence, the court had to find that the enactment of [\*EADB Act\*](#), was lawful.
53. On the Amendments effected by [\*Finance Act\*](#), 2013, they contended that by the Replying Affidavit filed by the 1<sup>st</sup> Respondent, it had been demonstrated that public participation had been done by the committee on Finance, Planning & Trade in conformity with Article 118 of the [\*constitution\*](#) of the constitution as read with Standing order No 127 of the National Assembly.
54. Reliance was placed in the case of [\*Aura v Cabinet Secretary of Health & 11 others\*](#) (2024) KEHC 8255(KLR) Where the Supreme Court reiterated the position in [\*British American Tobacco Kenya Plc v Cabinet Secretary, Ministry of Health & 2 others\*](#) (2019) KESC 15 (KLR) while giving guidelines on public participation by stating that;



Paragraph 61,

“As a constitutional principle under Article 10(2) of the Constitution public participation applies to all aspects of governance;

- i. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation
- ii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- iii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case; the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.”

55. The 1<sup>st</sup> Respondent having demonstrated that the proper procedure was followed and public participation was facilitated, urged the court to find that the amendment of the schedule to the EADB Act by Section 30 of the Finance Act 2013 was procedural and was done within the confines of the Constitution of Kenya 2010.
56. On Whether Section 2(1) and (2) of the EADB Act violated Articles 95(4),(b), 201, 206 & 228 of the Constitution of Kenya 2010, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent relied on the case of *Ndyanabo v Attorney General* (2001) EA 495, which elucidated the principle that there was a general presumption of the constitutional validity of legislation passed until the contrary was proved by the person challenging the constitutionality of the said legislation.
57. They submitted that obligations under Section 2(1) and (2) of the EADB Act, were overlooked by parliament through the Public debt and Privatization Committee established under Article 124 of the Constitution and standing Order No 2017 of the National Assembly.
58. Further the EADB Act, having been enacted by parliament, then it was an Act which authorize withdrawals from the consolidated fund in accordance with Article 206 of the Constitution. The said transactions and benefits under Section 2 of the EADB Act, were therefore lawful and they urged the court to so find.
59. On the issue of Immunity conferred under Article 44 to 48 of the schedule to EADB Act, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the same did not contravene Articles 48 and 50 of the constitution of Kenya as the immunity was accorded in line with international treaties that Kenya had ratified by dint of Article 2(6) of the Constitution of Kenya.
60. Such immunity was therefore a legitimate limitation to access to justice and fair hearing Under Article 48 & 50 of the Constitution of Kenya 2010. Reliance was placed in the Supreme court case of *Karen Njeri Knadie v Alssane Ba & Another* (2017) eKLR, where the Supreme court held that diplomatic immunity was a  

“reasonable and justifiable limitation of the right to access justice a provided for under Article 48 of the Constitution”.
61. Article 54 of the charter of EADB Act, also provided that in case of any dispute, the parties would submit to an Arbitration tribunal consisting of three arbitrators selected as prescribed under the



charter. This was also an avenue of alternative dispute settlement mechanism that could be used to access justice as provided for under Article 159(2), (c) of the *Constitution of Kenya* 2010.

62. The final issue raised by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents was that the concept of non-justiciability applied to this petition for the reason that the petition raised issues relating to political policy, which were best left to be determined by a separate arm of government. The court also by declaring the *EADB Act*, Cap 493A unconstitutional as sought would amount to removing an Act of Parliament from the Kenyan statute books, while the legislature was the only arm of government with powers to do so.
63. They thus urged the court to observe the principle of separation of powers and delegation of people's sovereign power to parliament. Reliance was placed in *National Conservation Forum v Attorney General* (2019) eKLR, *Bloggers Association of Kenya (BAKE) v Attorney General & others* (2020) eKLR, *Speaker of the Senate & others v Attorney General & 4 others* (2013) eKLR & *Matiba v Attorney General* (1990) KLR.
64. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent therefore urged the court to find that the Amended petition lacks merit and the same be dismissed.

#### **iv. The 6<sup>th</sup> Respondent Submissions.**

65. Though they did not file any pleadings in opposing the Amended petition, apart from the Preliminary objection dated 29<sup>th</sup> June 2023, the 6<sup>th</sup> Respondent also filed their submissions dated 15<sup>th</sup> December 202, Where they clarified that the office of the Auditor General (hereinafter referred to as OAG) derived its mandate from Article 229 of the *Constitution of Kenya* 2010 and the same was operationalized by the *Public Audit Act*, 2015, both which clearly defined their mandate, scope, and responsibility of the Auditor General.
66. Section 3 of the *Public Audit Act* of 2015 provided the guiding values and principles of the office of the OAG based on Articles 10, 27, 73, 75, 201, and 232 of the *Constitution*, and the same had to be read together with Articles 229(4)(b), (5) and (6) of the *Constitution of Kenya* 2010 and Section 7 of the *Public Audit Act* 2015 that provided that they would Audit and report on the accounts of national and county governments only.
67. EADB was an international organization, whose mode of Auditing was provided for under Section 35 of the *Treaty Amending and Re – enacting the charter of the East African Development Bank*, which provided that the bank's accounts would be audited every financial year by auditors of high repute selected by the Board of Directors.
68. It was therefore clear that they did not have a role in Auditing the book of the said Bank and had therefore not breached their duty as provided for under Section 7 of the *Public Audit Act* and/or Articles 229(4)(b), (5) and (6) of the *Constitution of Kenya* 2010.
69. The 6<sup>th</sup> Respondent prayed that this Petition be dismissed with costs.

#### **v. Interested Party's Submissions (LSK)**

70. The Interested Party filed their submissions dated 17<sup>th</sup> October 2024, submitted in the affirmative that the 1<sup>st</sup> Respondent had blatantly contravened Articles 10 and 118 of the *Constitution of Kenya* in amending the provisions of the *EADB Act* without public participation.
71. It is clear that the larger public was neglected and/ or not allowed to give their views on the Amendment sought and noting that it is a money bill within the meaning of Article 114 of the *Constitution*, such failure was catastrophic and rendered the amendments effected illegal, null and void. Reliance was



- placed on the case of *Iron and Steel Institute and others v Speaker of the National Assembly and others* [2023] ZACC 18, *British Tobacco Kenya Plc v Cabinet Secretary for Ministry of Health and others* (2019) eKLR, *Robert N Gakuru & others v Governor Kiambu County & 3 others* (2014) eKLR & *Matatile Municipality and others v President of the Republic of South Africa and others* (2006) ZACC 12.
72. They further submit that Section 2(1) and (2) and Articles 44, 45,46, and 52 as contained under the schedule of the *EADB Act*, CAP 493A were unconstitutional for the reason that it allowed for monies to be expended out of the Consolidated fund without proper oversight as envisioned under Articles 95(4)(b) & (c), 201, 214 and 206 of the *Constitution*. Reliance was placed in *US v Butler*, 297 U.S 1 (1936), *R v Big M Drug Mart Ltd*,(1985) I SCR 295, & *Tinyefuza v Attorney General of Uganda*, Constitutional Petition No 1 of 1997 (1997) UGCC 3.
73. The Charter was subservient to the constitution of Kenya and therefore was subject and bound by all the constitutional provisions including the national values and principles. Reliance was placed on *Abdalab v Chebukati, Chairman, IEBC* (Constitutional Petition E009 of 2022 [2022] KEHC 10911 (KLR) to elucidate on this principle.
74. The Interested party also urged the court to find that the Amendments brought in by Section 30 of the *Finance Bill* 2013 were unconstitutional as the said provisions of the law, espoused blanket immunity to the bank, making a mockery of Articles 22, 48, 50 and 258 of the *Constitution of Kenya* in that no person could institute any court proceedings against the bank or its assets in enforcement of the Bill of rights or the constitution.
75. Further, the said provisions limited the right to a fair administrative action, as the Bank was not subject and/or answerable to the people of Kenya in the manner in which it carries out its administrative functions or spends funds received from the consolidated funds. Reliance was placed on *Kandie v Alassane BA & another* [2017] KESC 13 (KLR) & *Cyprian Andama v Director of Public Prosecution & 2 others* (2021) eKLR
76. In conclusion, the interested party urged the court to find that the respondents had failed to justify why the impugned provisions should not be declared unconstitutional. They urged the court to exercise its discretion in granting the declaratory reliefs sought. Reliance was placed on *Durban City Council v Association of Building Societies* 1942 AD 27 at 32 as confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205(SCA) at para 15 to 17.

#### **D. Analysis and Determination.**

77. I have read through and reviewed all the pleadings, and submissions filed, subjected the same to applicable legal provisions, and identified the following issues for determination:
- a. Whether the concept of non-justiciability is applicable in this petition.
  - b. Whether the Amendment to the schedule of the *EADB Act* in 2013 breached Articles 10 and 118 *Constitution of Kenya*.
  - c. Whether the Immunity Provisions in Articles 44–48 of the *EADB Act* Contravene Articles 48 and 50 of the *Constitution* on the right to fair hearing and access to justice.
  - d. Whether Sections 2(1) & (2) of the *EADB Act* Violate Articles 95(4)(b), 201, 206, and 228 of the *Constitution*.
  - e. Whether EADB is operating without being licensed by the Central Bank of Kenya and is operating contrary to provisions of Section 4(1) of the *Banking Act*.



- f. Whether the writ orders/judicial review orders sought ought to be granted.
- g. Who should bear the Cost of this Petition?

### 1<sup>st</sup> Issue

#### a. Whether the concept of non-justiciability is applicable in this petition.

78. The Respondents posited that the petition sought declarations, which if granted, would encroach on “the doctrine of separation of powers and delegation of the people’s sovereign power”, vested in the other arms of government. In particular, the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents posited that If the prayer to have the court declare that the *East African Development Bank Act*, Cap 493A unconstitutional was allowed, the same would amount to removing an Act of Parliament from the Kenyan statute book, when such powers were exclusively vested in the legislature.
79. Such a declaration would also encroach on the executive arm of government and would be tantamount to directing the executive on how to perform its foreign/international diplomatic relations.
80. The *Black’s Law Dictionary*, 9<sup>th</sup> Edition, Thomas Reuters Publishers at Page 943-944 Defines Justiciability as follows
- “proper to be examined in courts of justice” or “ a question as may properly come before a tribunal for decision”.
81. The court must satisfy itself that the case before it is not caught up by the bar of Non-Justiciability concept, which is comprised of three doctrines;
- a. The political question Doctrine, which focuses on the limitation upon adjudication by courts of matters generally within the area of responsibility of other arms of government.
  - b. Constitutional-avoidance Doctrine, which states that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.
  - c. Ripeness Doctrine focuses on the time when a dispute is presented for adjudication. Courts should not entertain hypothetical, premature, or academic disputes that have not fully matured into justifiable controversies
82. In *William Odhiambo Ramogi & 2 others v Attorney General & 6 others* Mombasa High court Petition No 159 of 2018 (2018) eKLR a five-bench observed as follows;
- (79) It was held in the *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374 at 418,

“ That a challenge is referred to as being non- Justiciable because its nature and subject matter is Such as not to be amenable to the judicial process.

The “justiciability” doctrine is rooted in both Constitutionality and prudential considerations and Evince respect for the separation of powers, Including a properly limited role of the courts in a Democratic society. One justiciability concept is the “political question” doctrine- according to which Courts should not adjudicate certain controversies Because their resolution is more proper within the Political branches.”



83. In *Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another* HCCP 628 of 2014 [2015] eKLR, the Court cited the case of *Patrick Ouma Onyango & 12 Others v AG & 2 Others*; Misc. Appl No. 677 of 2005 wherein the Court endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise *American Constitutional Law*, 2<sup>nd</sup> Ed. Page 92 as follows:

“In order for a claim to be justiciable as an article III matter, it must “present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted.” In part, the extent to which there is a real and substantial controversy is determined under the doctrine of standing; by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself—an aspect of ‘the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that Courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of ripeness; which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of mootness; which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the political question; doctrine, barring decision of certain disputes best suited to resolution by other Governmental actors.”

84. Finally in *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling); The Court stated;

“The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realization that all legislative or common-law remedies are part of the legal system.”

85. The petitioner alleges a violation of the constitution in the process of enactment of the Amendments effected to the *EADB Act* 493A vide Section 30 of *Finance Act* 2013 and also questions the validity of Sections 2(1) and (2) 44, 45 and 51 of the *EADB Act*. In instances, where a petitioner alleges that his rights have been breached, he/she have the right under Article 20(1), 22(1), and 165(3) of the *Constitution of Kenya* 2010 to approach the court for redress of the same.

86. It is important to point out that this Court is obligated to conform to its Constitutional mandate and in that regard also pay homage to the first Article of the Constitution, which declares the sovereignty of the people and that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the *Constitution*. In addition, State organs, in the exercise of delegated power, shall perform their functions in accordance with this *Constitution*—at the National level and at the County level.



87. The contention that the Petition filed herein is not ripe or justiciable, in my view, holds no water because the Petitioner is not raising issues that fall for determination by other arms of government. The issues raised involve interpretation of statutes vis a vis its compliance with constitutional dictates, which are matters to be squarely dealt with by the courts

## 2<sup>nd</sup> Issue

### ii. Whether the Amendment to the schedule of the EADB Act breached in 2013 Articles 10 and 118 Constitution of Kenya.

88. The supreme court of Kenya in *Aura v Cabinet Secretary, Ministry of Health & 11 others* (2024)KEHC 8255 (KLR) held as follows while discussing the law and principles of Public participation.

55. Public participation stands as a fundamental national value and governance principle prominently enshrined in the *Constitution of Kenya* and highlighted in Articles 10, 118, and 232. Article 10 (2) (a) specifically emphasizes "Participation of the people" as a cornerstone of Kenya's governance ethos. It reinforces Article 1 of the *Constitution* on the sovereignty of the people. Its spirit is that decisions should not be made affecting the people of Kenya without recourse to them.

56. Article 118 of the *Constitution* requires Parliament to ensure public participation in the process of legislation. Parliament is required to conduct its business transparently and in the open and hold its sittings and those of the Committees in a place open and accessible to the public. The importance of this requirement is that participation of the people in their own affairs gives impetus to good governance, improves service delivery and responsiveness of government and its agencies.

57. Article 118 (1) provides thus;

“Parliament shall;

a. ...

b. facilitate public participation and involvement in the legislative and other business of Parliament and its committees”

58. The principle of public participation extends beyond Parliament. Articles 10 and 232 binds all state organs, state officers, public officers, and all persons when applying, interpreting, enacting the *Constitution* or implementing public policy directions. Article 232 (1) (d) provides;

“1. The values and principles of public service include;

(d) involvement of the people in the process of policymaking”

59. A perusal of Standing Order No. 127 (6<sup>th</sup> edition) of the *National Assembly Standing Orders* shows that, aware of the importance of the aspect of public participation, Parliament captured the principle well when it required that Bills should first be sent to the relevant Departmental



Committees which shall conduct public participation. Standing Orders 127(2) and (3A) provide;

- “(2) The Departmental Committee to which a Bill is committed shall facilitate public participation on the Bill through an appropriate mechanism, including inviting submission of memoranda; holding public hearings; consulting relevant stakeholders in a sector; and consulting experts on technical subjects
- (3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House.”

60. In the same manner, the Senate Standing Order No. 145 provides for the Committal of Bills to Committees and public participation as follows: -

- “(1) A Bill having been read a First Time shall stand committed to the relevant Standing Committee without question put....
- (5) A committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the Senate.”

61. The Supreme Court in *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment) set out the following guidelines on public participation.

“As a Constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.

- i. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- ii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this Constitutional principle using reasonable means.
- iii. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a Constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- iv. Public participation is not an abstract notion; it must be purposive and meaningful.



- v. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vi. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- vii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- viii. Components of meaningful public participation include the following:
  - a. clarity of the subject matter for the public to understand;
  - b. structures and processes (medium of engagement) of participation that are clear and simple;
  - c. opportunity for balanced influence from the public in general;
  - d. commitment to the process;
  - e. inclusive and effective representation
  - ;f. integrity and transparency of the process;
  - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter”.

62. Beyond our borders, Ngcobo J in *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 CC, held:-

“The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.... Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a



duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realized.”

63. The Learned Judge further observed:

“Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process.”

64. In view of the foregoing, we opine that public participation requires the following bare minimum: -

- i. Proper sensitization on the nature of legislation to be enacted or policy to be effected;
- ii. Adequate notice depending on the circumstances which must however be reasonable;
- iii. Facilitation of the public to ensure that members of the public are able to access the information required in a convenient and practical manner, understand the same, have a meaningful opportunity to attend, contribute and provide their views;
- iv. The views of the public should be considered and where they are to be rejected or declined, reason for such rejection and dismissal should be stated; This will obviate the public participation being a cosmetic or a public relations act;
- v. Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;
- vi. There must be integrity and transparency of the process

89. The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents in response to this issue averred that there was adequate public participation conducted by the Departmental Committee on Finance, Planning & Trade pursuant to the provisions of the standing order No 127 of the *National Assembly standing orders*. The said committee received numerous submissions from stakeholders including the Kenya Bankers Association, Pricewaterhouse Coopers (An Independent auditing firm), and the Institute of Certified Public Accountants of Kenya (ICPAK) amongst other stakeholders.

90. When the petitioner had filed this petition, he simultaneously filed an application dated 24<sup>th</sup> May 2023, wherein he sought for various orders including prayers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be compelled by virtue of Article 35 of the *Constitution* to supply him with minutes, memorandum, public participation (minutes) that precipitated the ratification of *EADB Act*, (Rev 2014).

91. This court did grant this prayer vide its ruling dated 22nd April 2024 and gave the 1<sup>st</sup> and 2<sup>nd</sup> Respondent 30 days to file the said set of documents to confirm their compliance with the dictates



of Articles 10 and 118 *Constitution of Kenya*. The 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to comply as directed and the only inference that can be drawn is that they had failed to comply with the dictates of the Constitution as regards to public participation when passing the aforesaid amendments to the *EADB Act*, (Rev 2014).

92. The upshot is that all amendments introduced into the *EADB Act*, Cap 493A ( Rev 2014) by Section 30 of the *Finance Act* 2013 are illegal, null, and void *ab initio*.

### 3<sup>rd</sup> Issue

#### iii. Whether the Immunity Provisions in Articles 44–48 of the EADB Act Contravene Articles 48 and 50 of the Constitution on the right to fair hearing and access to justice.

93. Articles 44, 45 & 46 of the *EADB Act*, Rev 2014 provide for immunity of the Bank from every form of legal process except where it has expressly waived its immunity in writing and also confirms the said immunity extends to all the banks assets howsoever held. It was the petitioner’s contention that these provisions impose unjustifiable restrictions/limits to his rights to fair trial, fair hearing, and access to justice as protected by Articles 24, 47 48 & 50 of the *Constitution of Kenya* 2010.
94. For any limitation to a right or fundamental freedom in the *Constitution* to be sustainable, it must be within the parameters set by Article 24 of the *Constitution*.
95. Article 24(1) of the *Constitution* states as follows:
- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
- (a) the nature of the right or fundamental freedom;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
  - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
96. Article 24(2) of the *Constitution* further confines within which a legislation may limit a right and fundamental freedom, while Article 24(3) places the burden on the state or person seeking to justify the limitation.
97. The said provisions state that;
- (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom;
- a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom and the nature and extent of the limitation;
  - b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and



- c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

24(3) The state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal, or other authority that the requirements of this Article have been satisfied.

98. Article 24 of the *Constitution of Kenya* 2010, reveals a deliberate scheme to safeguard rights and fundamental freedoms in the Bill of Rights such that their limitation is only permissible within structured and strict parameters.

99. This was a question of inquiry by the court in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017 eKLR (Civil Appeal 172 of 2014)] and the court held that:

“While Article 19(3)(c) recognizes that the rights and fundamental freedoms in the Bill of Rights are only subject to the limitations contemplated in the Constitution, Article 25 identifies only four rights and fundamental freedoms that cannot be limited. It follows that by Article 24 the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations.

First, it must be demonstrated that the limitation is imposed by legislation, and even then only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further it must be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose”.

100. Specifically, the issue of whether “immunity granted to diplomatic and International organizations operating within Kenya,” is a justifiable limitation under Article 24 of the Constitution was discussed extensively by the Supreme Court in *Kandie v Alassane BA & Another* (Petition 2 of 2015), (2017)KESC 13(KLR) where the court held that;

(77) After carefully considering Article 24 of the constitution and the above case, we find that the test to be applied in order to determine whether a right can be limited under Article 24 of the constitution, is the “reasonable and justifiable test”, that must not be conducted mechanically. Instead, the court must, on a case-to-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word “including” in Article 24 also indicated that the factors to consider while conducting the balancing act are not exhaustive but act as a guide as to the main factors to be taken into account in that consideration”.

(78) Before Applying the “reasonable and justifiable” test, Therefore, a court must first determine whether a right Has been limited under a particular law, and in this case, we have held that the appellant cannot proceed With the case against the respondent because the respondents are clothed with immunity from legal Processes, which applies to the arrest and detention of The 1<sup>st</sup> respondent. Thus, the appellant's right to access Justice through court is necessarily limited as the Respondents' immunity which Is provided for in the law and arises from treaties and conventions which form Part of the laws of Kenya under Articles 2(6) of the Constitution.

(79) Is this limitation reasonable and justifiable? It is important to consider the factors set out in the Constitution, that will assist us to answer this question including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual does not prejudice the rights of



others, as well the consideration the relationship between the limitation and its purpose, and whether there is a less restrictive means to achieve that purpose. We will here below carry out an analysis on the rights that the appellant alleges were unjustifiably limited."

101. To aid and guide the other courts, the Supreme Court in *Karen Njeri Kandie v Alassane Ba* (*supra*), while concurring with the test established in *R v Oakes*, 1986 Can LII 46 (SCC), [1986] 1 SCR 103, *S v Makwanyane & Another* (1995) ZACC 3; 1995(6) BCLR 665 & *S v Manamela & Another (Director General of Justice Intervening)*, [200] ZACC 5; 2000(3) SA developed a criterion for determining whether a right or fundamental freedom is appropriately limited, which criterion may be summed up as under: -

- a. Whether the limitation has been specifically provided for by legislation.
- b. The nature of the right or fundamental freedom to be limited;
- c. The importance or the purpose of the limitation;
- d. The nature and extent of the limitation;
- e. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;
- f. The relation between the limitation and its purpose (the effect of the limitation); and
- g. Whether there are less restrictive means to achieve the purpose.

102. By applying these criteria, the Supreme Court still in the same *Njeri Kandie v Alassane Ba* (*supra*), held with specific regard to the, "diplomatic immunity question" that;

(84) In this regard, it must be noted that the right of access to Justice as provided under Article 48 is not an absolute right listed under Article 25 of the Constitution, and therefore it can, in proper circumstances be limited by law. In invoking Article 24(3), the respondents have presented submissions as to why this right is reasonable and justifiably limited. It was argued on their behalf that, immunity is only a procedural bar, and not a limitation of the right to access justice, and it was not a disproportionate limitation as it served the purpose of fulfilling international law obligations of allowing Diplomatic missions and its employees to carry out their functions. We agree with those submissions, and find that it is not unjustified to hold that the legitimate aim of diplomatic immunity is for the state to meet its obligations under international law and to allow Diplomats and those clothed with diplomatic immunity like the respondents to effectively conduct their official functions, without any hindrance.

103. This court is bound by the findings of the Supreme Court with regard to this issue under the principle of stare decisis and I do find and hold that the provision under Article 44, 45 & 46 of the *EADB Act*, are not unconstitutional.

#### 4<sup>th</sup> Issue

#### iv. Whether Sections 2(1) & (2) of the EADB Act Violate Articles 95(4)(b), 201, 206, and 228 of the Constitution.

104. Section 2 of the *EADB Act*, Cap 493A does provide that;

- (1) There shall be charge on and paid out of the Consolidated Fund without further appropriation than this Act all payments required to be made from time to time by the Government to the Bank under the terms of the Treaty.



- (2) For the purpose of providing any sums required for making payments under this section, the Minister may, on behalf of the Government, make such arrangements as are necessary, or raise loans by the creation and issue of securities bearing such rates of interest and subject to such conditions as to repayment, redemption or otherwise as he thinks fit, and the principal and interest of those securities and the charges and expense incurred in connection with their issue shall be charged on and issued out of the Consolidated Fund.
- (3) Moneys received by the Government from the Bank, or raised under subsection (2), shall be paid into and form part of the Consolidated Fund and shall be available in any manner in which the Consolidated Fund is available.
105. The petitioner contended that Section 2(1) &(2) of the *EADB Act* bestowed upon the 3<sup>rd</sup> respondent the sole responsibility, without parliamentary oversight and accountability, to charge and/or issue public funds out of the consolidated fund, without oversight and this ran contrary to provisions of Article 95(4),(b)& (c), 214, 216 and 232 of the *Constitution of Kenya* 2010.
106. He further pleaded that EADB was not accountable to any financial regulator, and the *Constitution of Kenya* 2010 could not countenance a situation where monies are paid out of the consolidated funds in an opaque, unaccountable, and injudicious manner. Moreover, the funds paid out of the Consolidated funds were public funds for which the 1<sup>st</sup> -6<sup>th</sup> Respondents remained accountable to the citizens of Kenya and had the obligation to pass legislation and to act in the manner contemplated by the constitution.
107. In response to this issue, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents averred that under Article 95(4) of the *Constitution*, the Public Debt and Privatization Committee established under Article 124 of the *Constitution* and *standing Order* No 207 was granted the responsibility to oversight public debt and it is through this committee that parliament exercised oversight over the disbursement of funds from the Consolidated funds.
108. The 6<sup>th</sup> Respondent also submitted that their role under Articles 229(4)(b),(5), and (6) of the *Constitution of Kenya* as read with Section 7 of the *Public Audit Act* 2015 included auditing and reporting on the accounts of the national and county governments. They were not mandated under the law to audit EADB books of account, whose model of auditing was established under Article 35 of the *treaty Amending and Re-enacting the Charter of the East African Development Bank*.
109. The principles that guide the court in determining the constitutionality of a statute have been discussed in several authorities but were clearly espoused in *U.S v Butler*, 297 US. 1(1936) where the court determined that;
- “When an Act of Congress is appropriately challenged in the court 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 besides 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 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.”
110. It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the



legislation itself. The supreme court of Canada in *R v Big M Drug Mart Ltd*, {1985} I S.C.R. 295 enunciated this principle as follows;

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s objective and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked at for guidance in assessing the legislation’s objective and thus the validity.”

111. Article 95(4)(c) of the *constitution* provides that; the national assembly shall,

“exercise oversight over national revenue and expenditure”

112. Article 201 of the *constitution* provides for principles of public finance, and state that the provided principles shall guide all aspects of public finance. The said Principles include;

- a. There shall be openness and accountability, including public participation in financial matters;
- b. The public finance system shall promote an equitable society and in particular: -
  - i. The burden of taxation shall be shared fairly;
  - ii. Revenue raised nationally shall be shared equitably among national and county governments; and
  - iii. Expenditure shall promote the equitable development of the country, including by making special provisions for marginalized groups and areas.
- c. The burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- d. Public money shall be used in a prudent and responsible way; and
- e. Financial management shall be responsible, and fiscal reporting shall be clear.

113. Article 206 on the other hand provides for the establishment of the consolidated fund and in particular Article 206(3)&(4) provides that;

Article 206(3)

“Money shall not be withdrawn from any national public fund other than the consolidated fund unless the withdrawal of the money has been authorized by an Act of Parliament.”

Article 206(4)

“Money shall not be withdrawn from the consolidated fund Unless the Controller of Budget has approved the withdrawal.”

114. Standing order 207(2),(c) of the *National Assembly Standing Orders* provides that the Public Debt and Privatization committee will, “oversight of consolidated fund services excluding audited accounts”. It is to be noted that Consolidated fund services are mandatory expenditures, including debt repayment,



pensions, and salaries for constitutional offices, that are paid from the consolidated fund. The same does include monies advanced to EADB.

115. The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents' averments that funds advanced to EADB from the Consolidated funds are oversighted by this committee is therefore not factual. It further affirms the fact that there are no statutory regulations within the said EADB Act, which places checks and balances on the 3<sup>rd</sup> respondent action, which guides the expending of public funds from the Consolidated fund and/or permits the bank to table its audited accounts before the national assembly or East African parliament Assembly for verification.
116. To the extent I do find and concur with the petitioner that sections 2(1) and (2) of the EADB Act, when also considered with all other provisions within the said Act, unilaterally bestow upon the 3<sup>rd</sup> Respondent the sole responsibility, to charge on and issue public funds out of the consolidated fund, without parliamentary oversight and/or accountability. This definitely offends the principles of public finance as espoused under Article 201 as read with Article 206 of the constitution and also the values and principles of governance as espoused under Articles 10 and 232 of the constitution. To that extent, the said provisions are a nullity in law.
117. At this point, it is also worth mentioning again that this court had issued interlocutory orders on 22<sup>nd</sup> April 2024 directing the 6<sup>th</sup> respondent to produce and give the petitioner true records of the status of accounts of funds disbursed to EADB directly from the consolidated accounts, and accounts showing the level of public charge, and debt liability arising therefrom. This was to be effected within 30 days of issuance of the said order.
118. This was not done and again the only inference that can be drawn is that the 1<sup>st</sup>, 2<sup>nd</sup> 6<sup>th</sup> respondents have no oversight and control of how funds are disbursed to EADB, which is an antithesis to the principles of public finance and principles of good governance as already determined above.

#### 5<sup>th</sup> Issue

#### **iv. Whether EADB is operating without being licensed by the Central Bank of Kenya and is operating contrary to provisions of Section 4(1) of the Banking Act.**

119. The petitioner averred that EADB was operating illegally as it had not been licensed by the Central Bank of Kenya to undertake banking services within the country as stipulated under Section 4(1) of the Banking Act, Cap 488 Laws of Kenya.
120. The petitioner did not provide any proof to back these allegations, and the rebuttable presumption that EADB is operating within the confines of the law was not displaced.

#### 6<sup>th</sup> Issue

#### **(v) Whether the writ orders/judicial review orders sought ought to be granted.**

122. The petitioner did pray that this court does grant an order of certiorari to quash the decision of the National Assembly of ratifying the EADB Act and for an order of Mandamus for the 3<sup>rd</sup> respondent to produce records of all payments made from the Consolidated fund pursuant to the EADB Act, since 2014 and avail the same to the Auditor for Audit purposes.
123. Finally, the petitioner also did seek orders of prohibition to stop the 3<sup>rd</sup> respondent from withdrawing public funds under Section 2(1)&(2) of the EADB Act until such a time the EADB Act is amended to provide for parliamentary process to allow such withdrawal.



124. Article 23(3),(f) of the *constitution* as read with Order 53 of the *Civil procedure rules* allows the court to intervene and issue appropriate writs of Certiorari, Mandamus, and prohibition directed to an inferior tribunal and/or public body to perform their mandate as provided for in law.

125. Circumstances under which orders of Judicial Review can be issued were elaborated by Justice Kasule in the Uganda case of *Pastoli v Kabale District Local Government Canal & Others* (2008) 2EA 300 at pages 300-304.

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality-----.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of making a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidawi v Secretary of State for the Housing Department* (1990) AC 876”.

126. The Court of Appeal in *Suchan Investment Limited v. Ministry of National Heritage & Culture & 3 others* [2016] KLR noted as follows:

“Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (1) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review.....The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision.”

127. Order 53 rule 2 of the *civil procedure rules*, provides that orders of certiorari must be applied for within six (6) months of the decision(challenged) being made. The petitioner herein moved to court late on this aspect and the prayers sought seeking to quash the decision of the National Assembly to ratify the *EADB Act* cannot be granted.

128. The requirements for an order of mandamus to issue were explained by Mativo J. in *Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* [2018] eKLR as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus



is set out in *Apotex Inc. v. Canada (Attorney General)*, and, was also discussed in *Dragan v. Canada (Minister of Citizenship and Immigration)*.

(24) The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
  - (a) The Applicants have satisfied all conditions precedent; and
  - (b) There must have been:
    - (i) A prior demand for performance;
    - (ii) A reasonable time to comply with the demand, unless there was outright refusal; and
    - (iii) An express refusal, or an implied refusal through unreasonable delay;
    - (iv) No other adequate remedy is available to the Applicants;
    - (v) The Order sought must be of some practical value or effect;
    - (vi) There is no equitable bar to the relief sought;
    - (vii) On a balance of convenience, mandamus should lie"

129. The constitution under Articles 10, 232, 201, and 206 places an onerous duty on the 3<sup>rd</sup> respondent to diligently hand all public finances and to prudently account for expenditure incurred. Further under Articles 94 and 95 of the *constitution*, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have legislative and oversight roles to ensure all public funds collected are well utilized and accounted for.

130. Further, under Article 35 of the *constitution*, every citizen has a right to access information held by the state. It would therefore be in the greater interest of justice, accountability, and transparency for the 3<sup>rd</sup> respondent to provide detailed financial information to the 1<sup>st</sup> and 2<sup>nd</sup> respondents showing all financial payments made out of the exchequer in favour of EADB from 2104 to date as sought by the petitioner.

131. The petitioners' prayer for Mandamus is therefore merited but to a limited extent as explained above and will not cover Auditing by the Auditor General as Article 229(4)(b),(5) and (6) as read with Section 7 of the *Audit Act* only allow the 6<sup>th</sup> respondent to Audit books of the National and County government.



132. Finally, the petitioner also prayed for an order of Prohibition to limit the 3<sup>rd</sup> Respondent from withdrawing public funds from the consolidated funds under sections 2(1) &(2) of the [EADB Act](#), until such a time the [EADB Act](#) is amended to provide parliamentary process for such withdrawal.

133. In the book of “[Administrative Law](#)”, Sir. W. Wade and C. Forsyth, Page 605 noted that:-

“I can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction.

Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.”

134. [Kenya National Examination Council v Republic Exparte Geoffrey Gathenji & 9 Others](#), Nairobi Civil Appeal No.266 of 1996, the Court held that:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128.”

135. This court has already determined the constitutionality of Section 2(1) and (2) of the [EADB Act](#) but has to balance public interest and Kenya’s international obligations under the [EADB charter](#) as against granting prohibition orders to bar the 3<sup>rd</sup> respondent from withdrawing public funds from the consolidated fund until such a time that the [EADB Act](#), is amended to provide for parliamentary process allowing such withdrawal.

136. The current rule of the thumb is for courts to exercise judicial restraint from intervening in policy matters. In [U.S v Butler](#) 297 U.S 1(1936) it was the courts unanimous finding that;

“All the court does, or can do, is to announce its considered judgement upon the question. The only power it has, if such, it may be called 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.”



137. Recently in the Supreme court case of Petition E031 of 2024, as consolidated with E032 & E033 of 2024, The *Cabinet Secretary for National Treasury and Planning & 4 others v Okiya Omtatah Okoiti* ( Finance bill case) the apex court all discussed this issue and held as follows;
- (209) Our position therefore remains what we have consistently stated in the decisions we have made reference to, that as a rule of thumb, courts should refrain from intervening in policy matters. However, the high court under Article 165 of the Constitution retains residual jurisdiction to test the constitutionality of policy decisions.....
- (212) Where the courts intervene, they should strive To sustain policy recommendations by the Executive and legislature except in situations Where the policy is outrightly unconstitutional and remedial measures need to be taken in the Meantime, especially in the realm of public policy.
138. Therefore, while considering the circumstance and peculiarity of the facts as pleaded herein, it would be an over-Arch to issue prohibition orders against the 3<sup>rd</sup> respondent stopping any further withdrawal of funds from the consolidated fund in favour of EADB. Other appropriate structural interdicts may be issued instead.
139. It is also noted that Article 226(5) of the *constitution*, holds any public officer who directs or approves the use of public funds contrary to the law or instructions, to account, and they shall be liable for any loss arising from that use and shall make good the loss, whether the person maintains the office or not. This provides a window of remedy should the infraction continue.

## E. Reliefs

140. Articles 22 and 23 of the *Constitution* provide *inter alia* that in Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened, the Court has jurisdiction, in accordance with Article 165, to hear and determine the claim for redress of that denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Right and may as per Article 23(3) grant appropriate relief, including;
- (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - (e) an order for compensation; and
  - (f) an order of judicial review.
141. What amounts to appropriate relief has been the subject of discussions in Constitutional litigation. It emerges that appropriate relief must be a relief that is not only suitable to address the Constitutional infringement but is just in the circumstances of the cases. The relief must uphold the Constitution and ultimately must uphold the human rights of those involved and the rule of law.
142. The relief must also bear in mind that our *Constitution* is a living document whose life is dependent on the realities of the Kenyan people. It is a transformative document carrying in its veins, and its spirit, the transformative power that upholds the citizen's rights and also protect and uplift the afflicted, who seek the court's intervention.



143. The Bill of Rights specifically states at Article 23 that:

- (2) In applying a provision of the Bill of Rights, a Court shall—
  - (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
  - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
- (4) In interpreting the Bill of Rights, a Court, tribunal or other authority shall promote—
  - (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
  - (b) the spirit, purport and objects of the Bill of Rights.

144. On this issue, our jurisprudence has borrowed from South Africa. For instance, in *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; the Judge while discussing the issue of appropriate relief and citing another case *Fose v Minister of Safety and Security* (CCT 14/96) [1997] ZACC 6 stated;

“(45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, “we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source.” [40] (emphasis added).]

145. The Supreme Court, in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment), cited at paragraph [359] the famous United States Supreme Court case of *Marbury v. Madison*, 5 U.S. 137 (1803) on *inter alia* the key place of the Courts in the upholding of the *U.S. Constitution*.

146. The Supreme Court affirmed the principle, that the Courts have the jurisdiction to uphold our *Constitution*, as enshrined under Articles 23(3)(d) and 165(3)(d), and that these provisions show that our *Constitution* requires us to go even further than the U.S. Supreme Court did in *Marbury* because by contrast, Article 23(3) in granting the High Court powers to grant the list of appropriate relief uses the term ‘including’ to mean that that list is not an exhaustive list out of the known reliefs which include ... Interim reliefs, structural interdicts, supervisory orders or any other orders that could be issued by the Courts, [ for as long as they are] ‘ specific, appropriate, clear, effective, and directed at the parties to the suit or any other State agency vested with a constitutional or statutory mandate to enforce the order.’



147. Effectiveness of a relief would mean that the parties are able to not only have their rights declared, but that they get to experience the actual remedy because the infringement is corrected in their lifetime. This has been done through structural interdicts.

#### **F. What Are The Appropriate Remedies?**

148. Based on the reasons stipulated above, I do find that this petition is partially successful and proceed to enter judgement in favour of the petitioner and declare as follows;

- a. A declaration be and is hereby issued that the petitioner's rights as aforementioned has been breached, infringed, by the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> respondent's actions as referred to in the petition
- b. A declaration be and is hereby issued that to the extent that there are no checks and balance mechanisms placed under Section 2(1) and (2) of the *East African Development Act* as to how the 3<sup>rd</sup> Respondent's accesses the consolidated fund to undertake his obligations to EADB, the same violates the principles enshrined in Articles 10, 95 (4) (b), 201, 206, 228(5) & and 232 of the *Constitution* as the process of funding East African Development Bank, lacks transparency, good governance, and accountability.
- c. A declaration be and is hereby issued that section 2 (1) & (2) of the *EADB Act* is unconstitutional and violates provisions of Articles 10, 95 (4) (b), 201, 206, 228(5) of the *Constitution*.
- d. A declaration be and is hereby issued that Amendments effected to the the said *East African Development Act* Cap 493A, through clause 29/30 of the finance bill, 2013 as ratified by the National Assembly of Kenya on 25<sup>th</sup> September 2013, were un-procedurally enacted without regard to the Rule of law, and in a manner that offends Article 10 & 118 (1) (b) of the *Constitution of Kenya* 2010.
- e. An order of Mandamus be and is hereby issued directing the 3<sup>rd</sup> Respondent to produce records of all payments made from the Consolidated Fund to East African Development Bank from 2014 to date and the same be avail to parliament within the next 60 days of delivery of this judgment.
- f. A declaration be and is hereby issued that any private entity that receives public funds and other state resources is obliged to account for the utilization of the same to the public through appropriate legislation to be put in place by parliament.

149. In the interest of justice and placing guidance on the recent finding in Petition E031 of 2024, as consolidated with E032 & E033 of 2024, the *Cabinet Secretary for National Treasury and Planning & 4 others v Okiya Omtatah Okiiti* ( Finance bill case) the declarations made in (c) & (d) above are suspended for one (1) year to allow parliament and the Attorney General to consider appropriate amendments to the *EADB Act*, Cap 493A

150. This being a public interest litigation, each party will bear their own costs.

151. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 20<sup>TH</sup> DAY OF MARCH, 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**



Delivered on the virtual platform, Team this 20th.day of MARCH,2025

In the presence of: -

..... Petitioner

..... 1<sup>st</sup> Respondent

..... 2<sup>nd</sup> Respondent

..... 3<sup>rd</sup> to 5<sup>th</sup> respondent

..... 6<sup>th</sup> Respondent

..... Interested Party

..... Court Assistant

