



**Okoiti v Cabinet Secretary, National Treasury & 5 others (Petition 337 of 2019)
[2025] KEHC 4444 (KLR) (Constitutional and Human Rights) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 337 OF 2019

EC MWITA, J

APRIL 4, 2025

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

CABINET SECRETARY, NATIONAL TREASURY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

COMMERCIAL BANK OF AFRICA 3RD RESPONDENT

NIC GROUP PLC 4TH RESPONDENT

NCBA GROUP 5TH RESPONDENT

**THE CABINET SECRETARY, LANDS AND PHYSICAL
PLANNING 6TH RESPONDENT**

The exemption payment of stamp duty on the instruments relating to the merger between the Commercial Bank of Africa and NIC Group PLC is unconstitutional

The petitioner challenged the exemption payment of stamp duty on instruments executed in the merger of the NIC Group PLC and Commercial Bank of Africa. The court held that public interest under section 106 of the Stamp Duty Act required clear demonstration of the benefit to the public. The court found that the reasons advanced for the exemption served private interests rather than public interest. The court thus declared the exemption unconstitutional. The court also stated that it could not determine the constitutionality of section 106 of the Stamp Duty Act as it was not pleaded.

Reported by Kakai Toili

Tax Law – tax exemption – exemption from paying stamp duty tax - discretionary power of the Cabinet Secretary, National Treasury to exempt payment of stamp duty tax – requirements for the exercise of the discretionary power – public interest - when was the discretionary power of the Cabinet Secretary, National Treasury to exempt any



instrument from payment of stamp duty to be exercised - what was the nature of public interest in the exemption of payment of stamp duty - whether the exemption of payment of stamp duty was unconstitutional where it was in the commercial interest of the merging entities and not public interest – Constitution of Kenya, article 201; Stamp Duty Act (cap 480), section 106; Banking Act (cap 488), section 9.

Civil Practice and Procedure – pleadings – failure to raise an issue in pleadings – effect of - whether courts could consider an issue that was not raised in pleadings but was raised in submissions.

Brief facts

On June 26, 2019, the Cabinet Secretary, National Treasury (the 1st respondent) published a gazette notice exempting registrable instruments for merger between Commercial Bank of Africa and NIC Group PLC (the 3rd and 4th respondents respectively) from the provisions of the Stamp Duty Act. The waiver was made on the recommendation of the Cabinet Secretary, Lands and Physical Planning (the 6th respondent) following a request from the 3rd and 4th respondents. The petitioner argued that the 1st and 6th respondents' action violated various provisions of the Constitution for failing to demonstrate the basis for the recommendation and justification for the exemption.

The petitioner further argued that there was no Act of Parliament authorising the exemption as contemplated by article 210 of the Constitution and section 77 of the Public Finance Management Act. The petitioner sought for among other orders; a declaration that the decision to exempt the instruments executed in respect of the transactions relating to the merger from tax was unconstitutional.

The respondents on their part, maintained that the exemption was lawfully granted under section 106 of the Stamp Duty Act following the letter from the 6th respondent recommending exemption on grounds of public interest. The 1st respondent considered the recommendation and being satisfied by the reasons provided by the 3rd and 4th respondents for seeking the exemption, approved the exemption by letter dated June 27, 2019. The 1st respondent then issued the impugned gazette notice exempting registrable instruments in respect of the merger from the provisions of the Stamp Duty Act.

The respondents stated that the reasons for the exemption included; contribution to economic stability, reduced transaction costs and regional expansion of the merged bank. The respondents maintained that the Stamp Duty Act did not require disclosure of the amount involved when seeking exemption and that public interest justified the exemption. They maintained that public participation did not apply in such situations and that the exemption was made in compliance with the Constitution and the applicable law.

Issues

- i. Whether the exemption from the payment of stamp duty on instruments executed in respect of a merger was unconstitutional where it was in the commercial interest of the merging entities and not public interest.
- ii. When was the discretionary power of the Cabinet Secretary, National Treasury to exempt any instrument from payment of stamp duty to be exercised?
- iii. What was the nature of public interest required in an exemption from payment of stamp duty?
- iv. Whether courts could consider an issue that was not raised in pleadings but was raised in submissions.

Relevant provisions of the Law

Constitution of Kenya

Article 201 - Principles of public finance

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

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

(b) the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

(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 provision for marginalised groups and areas;

(c) the burden 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.

Stamp Duty Act (cap 480)

Section 106 - Power to exempt instruments

(1) The Cabinet Secretary may on the recommendation of the Cabinet Secretary for the time being responsible for matters relating to land, by notice in the Gazette, direct that any instrument or any class of instruments shall be exempted from the provisions of this Act if he is satisfied that it is in the public interest so to do.

Banking Act (cap 488)

Section 9 - Amalgamations and transfers of assets and liabilities

No transfer fees, stamp duty, registration fees, licence duty or other charges shall be payable in respect of—

(a) a transfer of assets and liabilities under subsection (3); or

(b) any endorsement or alteration made to record such transfer, upon submission to the Registrar of Companies, Registrar of Titles or any other person referred to in subsection (8).

Held

1. Stamp duty was a tax levied on registrable instruments, including land transactions and shares and was collected by the Kenya Revenue Authority under section 2 of the Stamp Duty Act which defined the “collector” to mean Kenya Revenue Authority established under the Kenya Revenue Authority Act.
2. Section 106(1) of the Stamp Duty Act gave the 1st respondent discretionary power to exempt any instrument from the provisions of the Act on payment of stamp duty. That discretionary power was, however, to be exercised on grounds of public interest as required by the Act. The Act did not define public interest, which was the basis for granting such exemption. However, public interest must mean the general welfare of people on whose behalf a public officer exercised his powers and discharged his functions. It must be something recognisable in law so as to require regulation such as section 106.
3. Something that was to be done in public interest, must be for the general welfare of the people. In that respect, waiver of stamp duty under section 106 of the Stamp Duty Act must be done for the benefit of the people, a fact that must not only be demonstrated, but must also be justified. That was why the section was clear that the 1st respondent may only direct exemption from the provisions of the Act if he was satisfied that it was in the public interest so to do.
4. The overarching theme in section 106 of the Stamp Duty Act was public interest. Greater public interest must be to comply with the law so that where an action was to be taken in public interest, it must only be for the benefit of the people and nothing else.
5. Although a cursory look at the reasons for seeking exemption may appear to suggest that the merger would benefit the public or in public interest. However, in reality, it would be in the commercial interest of the merging entities. The fact of the matter would be that Kenya would have lost revenue. A matter would not be in public or general interest of the people if behind the beautiful veil of public interest lay a privately vested interest.
6. The petitioner cited the decision in *Eliud Karanja Matindi v Cabinet Secretary, National Treasury and Planning & 4 others* (Petition No. E280 of 2021 (judgment delivered on February 17, 2023) where the court invalidated an exemption given under the Income Tax Act. The decision in that case was stayed by the Court of Appeal in *National Assembly, Republic of Kenya & another v Matindi & 3 others* (Civil Appeal (Application) E176 of 2023) [2023] KECA 1566 (KLR). That did not however



- affect the position in section 106(1) of the Stamp Duty Act that any exemption must be in the public interest.
7. Section 9 of the Banking Act must be read to mean registration after but not before the merger because section 9(3) referred situation after amalgamation or acquisition of one institution by another. That was, upon coming into effect of the merger of acquisition. Section 106 of the Stamp Duty Act related to stamp duty on the registrable instruments including those on the merger and had no reference or was not subject to the Banking Act. If the intention of the Legislature was that no stamp duty should be paid at all in respect of instruments for mergers, nothing would have been easier than stating so in section 106 and without giving discretion to the 1st respondent and making that discretion conditional to public interest. Section 106 did not also state that it was subject to any other law. Neither did section 9 of the Banking Act state its position was notwithstanding any other law.
 8. Section 106 of the Stamp Duty Act operated independent of any other law, including the Banking Act. If the respondent's argument was to be accepted as the correct position, it would defeat the tenor, import and spirit of section 106 and more so, why the application for exemption was made in the first place and the need to justify the public interest requirement.
 9. The exemption did not only fail the public interest test, it also failed the constitutional principle on sharing of tax burdens since the element of public interest was absent when the exemption was granted. The exemption violated both the Constitution and the law as it was to serve a private interest of the merging entities and was not for the public interest.
 10. There was no averment in the amended petition challenging the unconstitutionality of section 106 of the Stamp Duty Act. There was also no prayer seeking to declare the section constitutionally invalid. The issue was only raised in the submissions. The court could not therefore consider the issue of constitutionality of section 106 and whether it was the Act contemplated under the Constitution since the petitioner did not plead the issue but raised it through his submissions.

Petition partly allowed.

Orders

- i. *A declaration was issued that the decision to exempt the instruments executed in respect of the transactions relating to the merger between the 3rd and 4th respondents from paying stamp duty violated section 106(1) of the Stamp Duty Act and article 201 of the Constitution and was unconstitutional and illegal thus, invalid.*
- ii. *A declaration was issued that Legal Notice No. 112 dated June 26, 2019, exempting payment of stamp duty on the instruments executed in respect of the transactions relating to the merger between the 3rd and 4th respondents was unconstitutional and invalid.*
- iii. *An order of certiorari was issued quashing Legal Notice No. 112 of June 26, 2019.*
- iv. *Each party to bear their own costs.*

Citations

Cases

Kenya

1. *Andare, Geoffrey v Attorney General & 2 others* Petition 149 of 2015; [2016] KEHC 7592 (KLR) - (Mentioned)
2. *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR) - (Mentioned)
3. *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) - (Mentioned)
4. *Community Advocacy and Awareness Trust & 8 others v Attorney General; National Gender and Equality Commission & 5 others (Interested Parties)* Constitutional Application 243 of 2011; [2012] KEHC 5981 (KLR) - (Mentioned)



5. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Mentioned)
6. *Kamau, Jesse & 25 others v Attorney General* Constitutional Application 890 of 2004; [2010] KEHC 3172 (KLR) - (Mentioned)
7. *Kenya Human Rights Commission v Attorney General & Law Society of Kenya* Constitutional Petition 87 of 2017; [2018] KEHC 9656 (KLR) - (Mentioned)
8. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* Constitutional Petition 86 of 2017; [2018] KEHC 7494 (KLR) - (Mentioned)
9. *Kenya Revenue Authority v Export Trading Company Limited* Petition 20 of 2020; [2022] KESC 31 (KLR) - (Mentioned)
10. *Kiambu County Government & 3 others v Robert N Gakuru & others* Civil Appeal 200 of 2014; [2017] KECA 459 (KLR) - (Mentioned)
11. *Kibaki, Mwai v Daniel Toroitich Arap Moi* Civil Application 172 of 1999; [1999] KECA 158 (KLR) - (Mentioned)
12. *Law Society of Kenya v Attorney General & another; Warsame & another (Interested Parties)* Petition 307 of 2018; [2019] KEHC 10881 (KLR) - (Mentioned)
13. *Matagei v Attorney General; Law Society of Kenya (Amicus Curiae)* Petition 337 of 2018; [2021] KEHC 460 (KLR) - (Mentioned)
14. *Matindi v CS, National Treasury & Planning & 4 others* Constitutional Petition E280 of 2021; [2023] KEHC 1144 (KLR) - (Explained)
15. *Murambi, Isaac Robert v Attorney General & 3 others* Constitutional Petition 3 of 2016; [2017] KEHC 3034 (KLR) - (Mentioned)
16. *Murungaru, Christopher Ndarathi v Kenya Anti-Corruption Commission & another* Civil Application 43 of 2006; [2006] KECA 341 (KLR) - (Mentioned)
17. *Mwiti, Kevin & others v Kenya School of Law & 2 others* Constitutional Petition 377 of 2015; [2015] KEHC 2294 (KLR) - (Mentioned)
18. *Nation Media Group Limited v Onesmus Kilonzo* Civil Appeal 108 of 2015; [2017] KECA 181 (KLR) - (Mentioned)
19. *National Assembly of Republic of Kenya & another v Matindi & 3 others* Civil Appeal (Application) E176 of 2023; [2023] KECA 1566 (KLR) - (Explained)
20. *Njoya, Timothy & 17 others v Attorney General & 4 others* Petition 137 of 2011; [2013] KEHC 6000 (KLR) - (Mentioned)
21. *Njuguna, Peter Muturi v Kenya Wildlife Service* Civil Appeal 260 of 2013; [2017] KECA 42 (KLR) - (Mentioned)
22. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2017] KESC 32 (KLR) - (Explained)
23. *Owino, Peter - Chairman & 3 others v Nairobi City County & 2 others* Constitutional Petition 97 of 2016; [2017] KEHC 3281 (KLR) - (Mentioned)
24. *Rawal v Judicial Service Commission & another; Omtatab (Interested Party); International Commission of Jurists (Kenya Chapter) & another (Amicus Curiae)* Petition 386 of 2015; [2015] KEHC 784 (KLR) - (Mentioned)
25. *Reminisce Sports Bar Limited t/a Reminisce Bar & Grill & 2 others v Cabinet Secretary Ministry of Transport & 6 others* Civil Appeal 219 of 2014; [2017] KECA 613 (KLR) - (Mentioned)
26. *Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 7 others* Judicial Review 378 of 2017; [2017] KEHC 4663 (KLR) - (Mentioned)



27. *Republic v Public Procurement Administrative Review Board & 2 others ex parte Pelt Security Services Limited* Judicial Review Application 74 of 2018; [2018] KEHC 2068 (KLR) - (Mentioned)

28. *Speaker of the National Assembly & another v Senate & 12 others* Civil Appeal E084 of 2021; [2021] KECA 282 (KLR) - (Mentioned)

Uganda

Tinyefuza v Attorney General of Uganda Constitutional Petition No 1 of 1996; [1997] UGCC 3 - (Mentioned)

South Africa

1. *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009) - (Mentioned)

2. *Hoffman v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1235 (CC); [2000] 12 BLLR 1365 (CC); (2000) 21 ILJ 2357 (CC) (28 September 2000) - (Mentioned)

3. *Matatiele Municipality & Others v The President of South Africa & Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2007 (6) SA 477 (CC) (18 August 2006) - (Mentioned)

4. *Minister of Health and Others v Treatment Action Campaign and others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002) - (Mentioned)

United Kingdom

Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 23 - (Mentioned)

India

1. *Arikala Nasara Reddy v Ventaka Ram Reddy Reddygari & another* [2014] 2 SCR 291 - (Explained)

2. *Ashok Kumar Pandey v The State Of West Bengal* AIR 2004 Supreme Court 280, 2004 (3) SCC 349 - (Explained)

United States

1. *Carr v State* (1890) 127 Ind 204, 26N E778; 11 LRA 370 - (Mentioned)

2. *Chicago, Indianapolis & Louisville Ry v Hackett* (1912) 227 US 559, S Ct, 57 L Ed 966 - (Mentioned)

3. *Louisiana v Pillsbury* [1881] 15 Otto 287, 26 L Ed 1090 - (Mentioned)

4. *Norton v Shelby County* [1886] 118 US 425, 6 S Ct 1121, 30 L Ed 178; - (Mentioned)

5. *United States v Butler* 297 US 1 [1936] - (Mentioned)

Regional Court

1. *Ndyanabo v Attorney General of Tanzania* [2001] EA 495 - (Mentioned)

2. *Olum & another v Attorney General* [2002] 2 EA 508 - (Mentioned)

Texts

Central Bank of Kenya (2013), Central Bank Regulations and Prudential guidelines Nairobi: The Central Bank of Kenya

Statutes

Kenya

1. Banking Act (cap 488) section 9 - (Interpreted)

2. Constitution article 1(1); 2(1); 2(2); 2(4); 3(1); 4(2); 10; 23; 27; 47; 73; 75; 94(6); 109(5); 114; 153(4); 159(2) (e); 165(3)(d)(i); 165(3)(d)(ii); 201; 210; 232; 259(1) - (Interpreted)

3. Income Tax Act (cap 470) In general- (Cited)

4. Interpretation and General Provisions Act (cap 2) section 31(b) - (Interpreted)

5. Kenya Revenue Authority Act (cap 469) In general - (Cited)

6. Public Finance Management Act (cap 412A) section 77 - (Interpreted)

7. Stamp Duty Act (cap 480) section 106 - (Interpreted)

8. Stamp Duty Act (Legal Notice No 112 of 2019) (cap 480) - (Unconstitutional)



9. Statutory Instruments Act (cap 2A) section 13(a); 13(b); 24(2) - (Interpreted)

Advocates

None mentioned

JUDGMENT

Introduction

1. On June 26, 2019, Cabinet Secretary, National Treasury published [Legal Notice No 112](#) of June 26, 2019 (the Legal Notice), exempting the instruments executed in respect of the merger between NIC Group PLC and Commercial Bank of Africa from the provisions of the [Stamp Duty Act](#). This followed a recommendation from the Cabinet Secretary, Lands and Physical Planning. This meant that no stamp duty was to be paid in respect of instruments for the merger.
2. On August 16, 2019, Okiya Omtatah Okoiti, (the petitioner), filed a petition dated August 23, 2019 and amended on 16th December 2019 against the Cabinet Secretary, National Treasury; the Attorney General; Commercial Bank of Africa; NIC Group PLC; NCBA Group and the Cabinet Secretary, Lands and Physical Planning, (the 1st to 6th respondents), challenging that [legal notice](#) and the ensuing exemption. The amended petition is supported by an affidavit and was moved by way of written submissions with oral highlights.

Petitioners' case

3. The petitioner argued that the 1st respondent's action effectively exempted payment of stamp duty on the transfer of CBA shares into NIC Bank. The assets and stocks involved in the merger was valued at more than Kshs 7 billion were thus, exempted from stamp duty.
4. It is the petitioner's case, that the 1st and 6th respondents violated the provisions of articles 10, 27, 47, 73, 75, 201, and 232 of the [Constitution](#), because they failed to demonstrate the basis for the recommendation and justification for the exemption, respectively.
5. The petitioner asserted that contrary to the requirements of article 210 of the [Constitution](#) and section 77 of the [Public Finance Management Act](#), 2012 (PFM Act), there was no valid Act of Parliament authorising the exemption because section 106(1) of the [Stamp Duty Act](#) impugned section is unconstitutional.
6. According to the petitioner, section 106 of the [Stamp Duty Act](#) is not the law contemplated under article 210(1) as read with articles 109(5) and 114 of the [Constitution](#). This is because the section did not originate and was not processed as a money Bill enacted pursuant to articles 109(5) and 114 of the [Constitution](#).
7. The petitioner maintained that section 106 is void because, one; it does not disclose the amount involved and reasons for the exemption; it contradicts article 210 read with articles 109(5) and 114 of the [Constitution](#) which expressly vest power to grant waiver to Parliament and it empowers the Cabinet Secretary to act contrary to article 153(4) of the [Constitution](#). In the premise, the section is void in terms of article 2(4) of the [Constitution](#).
8. The petitioner relied on *Matindi v Cabinet Secretary, National Treasury & Planning & 4 others* (Constitutional Petition E280 of 2021) [2023] KEHC 1144 (KLR); *United States v Butler*, 297 US 1 [1936]; *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR and *Olum and another v Attorney General* [2002] EA, among others.



9. The petitioner again cited the decisions in *Carr v State* (1890) 127 Ind. 204, 26N E778; 11 LR A 370; *Chicago, Indianapolis & Louisville Ry. v. Hackett* (1912) 227 US 559, S Ct, 57 L. Ed. 966; *Louisiana v Pillsbury* [1881] 15 Otto 287, 26 L Ed 1090; *Norton v Shelby County* [1886] 118 US 425, 6 S Ct 1121, 30 L Ed 178; among others on the effect of an unconstitutional statute.
10. According to the petitioner, the tax exemption is void as it contravenes articles 201(a), 10 and 232(1) (d), (e), & (f) of the *Constitution*. The *legal notice* did not disclose the amount of taxes waived; the reasons for the waiver and was not subjected to public participation. The petitioner relied on *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR; *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR; and *Matatiele Municipality & Others v The President of South Africa & Others* (2) (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC) on public participation.
11. The petitioner again argued that section 106 is unconstitutional for violating the non-delegation doctrine. The section contravenes article 94(6) of the *Constitution* since it does not expressly specify the purpose and objectives for which the delegated authority to grant waivers is conferred, the limits of the authority, the nature and scope of the waivers that may be granted and the principles and standards applicable to the waivers made under such authority. Further, that subsidiary legislation cannot be used to impose, waive, or vary tax or licensing fees. Only an Act of Parliament, enacted in compliance with articles 109(5) and 114(3), can so authorise. The petitioner argued.
12. The petitioner asserted that the *Legal Notice* offends sections 13(a) & (b) and 24(2) of the *Statutory Instruments Act* and section 31(b) of the *Interpretation and General Provisions Act*, and is therefore, void. Reliance was placed on *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, for the proposition that the *Legal Notice* and section 106 are inconsistent with the *Constitution*, *PFM Act* and *Statutory Instruments Act*.
13. The petitioner further relied on *Timothy Njoya & 17 others v Attorney General & 4 others* [2013] eKLR for the argument that the 3rd to 5th respondents should pay stamp duty with accrued interest on the instruments executed and on the immovable property transferred. According to the petitioner, the cumulative transaction on the merger ought to have raised some Kshs. 7 billion in tax revenue.
14. The petitioner contended that as a result of the impugned action, the 1st respondent violated the *Constitution* and public legitimate expectation. He relied on *Kevin K. Mwiti & others v Kenya School of Law & 2 others* [2015] eKLR; *Kalpana H. Rawal v Judicial Service Commission & 4 others* [2015] eKLR; and *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* (2014) eKLR.
15. The petitioner further relied on articles 2(4), 3(1), 159(2) (e), 165(3)(d)(i) & (ii) and 259(1) of the *Constitution* and decisions in *Minister of Health and Others v Treatment Action Campaign and others* (2002) 5 LRC 216, 248; *Republic v Independent Electoral and Boundaries Commission Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR and *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another* [2006] eKLR and support his position.
16. The petitioner again cited article 23 of the *Constitution* and the decisions in *Law Society of Kenya v Attorney General & another; Mohamed Abdulabi Warsame & another (Interested Parties)* [2019] eKLR and *Hoffman v South African Airways* (CCT17/00) [2000] ZACC 17 and urged the court to grant appropriate relief.
17. On costs, the petitioner relied on *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (*supra*) and *Biowatch Trust v Registrar Genetic Resources and others* (CCT 80/08)



[2009] ZACC 14 that he should be awarded costs if the petition succeeds, but the respondents should not be awarded costs if the petition fails.

18. Based on the above arguments, the petitioner sought the following relief:
- i. A declaration that the decision to exempt the instruments executed in respect of the transactions relating to the merger of NIC Group PLC and Commercial Bank of Africa from tax is irregular, unlawful and unconstitutional and, therefore, invalid, null and void.
 - ii. A declaration that [*Legal Notice No 112*](#) of June 26, 2019, is unconstitutional and, therefore, invalid, null and void *ab initio*.
 - iii. An order quashing [*Legal Notice No 112*](#) of June 26, 2019.
 - (iii)A. An order quashing the 6th respondent's recommendations to exempt the merger of NIC Group PLC and Commercial Bank of Africa from payments of tax.
 - (iii)B. An order compelling the 3rd, 4th and 5th respondents to pay with accrued interest to the Government of Kenya the full tax that was due on the instruments executed in respect of the transactions relating to the merger of NIC Group PLC and Commercial Bank of Africa resulting in the formation of NCBA Group.
 - (iii)C. An order compelling the 3rd, 4th and 5th respondents to pay with accrued interest to the Government of Kenya the full tax that was due on the immovable property transferred.
 - iv. An order compelling the respondents to pay to the petitioner the costs of this suit.
 - v. Any other relief this honourable court may deem just to grant.

1st, 2nd and 6th Respondent's Case

19. The 1st, 2nd and 6th respondents opposed the petition through a replying affidavit sworn on November 15, 2019, contending that the [*Legal Notice*](#) was properly issued under section 106 of the [*Stamp Duty Act*](#). According to the 1st, 2nd and 6th respondents, by letter dated May 16, 2019, the 6th respondent recommended exemption of the instruments in relation to the merger of the 3rd and 4th respondents on grounds of public interest.
20. The 1st respondent considered the recommendation and was persuaded by the reasons the 3rd and 4th respondents gave in seeking exemption. Consequently, by letter dated June 27, 2019, the 1st respondent published the Gazette Notice exempting instruments executed in respect of the merger between the 3rd and 4th respondents from the provisions of the [*Stamp Duty Act*](#). The 1st, 2nd and 6th respondents took the position, that the [*Stamp Duty Act*](#) does not require disclosure of the amount involved in the waiver and the public interests that justified the exemption. Public participation does not also apply.
21. The 1st, 2nd and 6th respondents asserted that the 1st respondent maintains a public record on stamp duty exemptions together with reasons for the exemption which can be accessed. The 1st respondent also makes a report to the Auditor General on the exemptions and reasons for any such exemptions at the end of the financial year in compliance with article 210 (2) of the [*Constitution*](#). The 1st, 2nd and 6th respondents stated, therefore, that the exemption was made in compliance with the [*Constitution*](#) and the applicable law.
22. Miss Mwasao who represented the 1st, 2nd and 6th respondents argued that the challenge to the constitutional validity of section 106 of the [*Stamp Duty Act*](#) was not pleaded and that there is no prayer seeking to declare it constitutionally invalid. They relied on the decision in [*Arikala Nasara Reddy v*](#)



- Ventaka Ram Reddy Reddygari & another* [2014] 2 SCR 291, for the proposition that an issue cannot be raised through submissions.
23. Learned counsel disagreed with the petitioner's argument that section 106 of the *Stamp Duty Act* is not the law contemplated by articles 210(1) as read with articles 109(5) and 114 of the *Constitution*. They maintained that the petitioner did not demonstrate how the effect and purpose of the *Stamp Duty Act* is inconsistent with the *Constitution*. Counsel relied on article 259 of the *Constitution* and the decision in *Centre for Rights Education and Awareness & another v John Harun Mwangi & 6 others* [2012] eKLR, for the argument that the purpose and effect of the *Stamp Duty Act* is consistent with the *Constitution*.
 24. On the principles to be considered in determining the constitutionality of statutory instruments, learned counsel relied on *Isaac Robert Murambi v Attorney General & 3 others* [2017] eKLR and *Matagei v Attorney General; Law Society of Kenya (Amicus Curiae)* (Petition 337 of 2018) [2021] KEHC 460 (KLR). Counsel argued that the 1st respondent's power to issue the Gazette Notice was derived from the *Stamp Duty Act*, which enjoys the presumption of constitutionality. According to Miss Mwasao, section 106 of the *Stamp Duty Act* does not require the Gazette Notice to disclose the value of the transactions in the instruments.
 25. On whether the 1st respondent's decision was lawful, learned counsel argued in the affirmative. She maintained section 106 grants the 1st respondent discretion to direct exemption of any instrument from the provisions of the *Act*. The section provides the procedure to be followed which the 1st respondent complied with in causing publication of the Gazette Notice.
 26. On the reasonableness of the decision, counsel relied on the decision in *Republic v Public Procurement Administrative Review Board & 2 others ex parte Pelt Security Services Limited* [2018] eKLR, to contend that the 1st respondent considered the recommendation and was persuaded by the reasons given in seeking exemption. Counsel further relied on the decision in *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others* [2012] eKLR and urged the court not to substitute its decision for that of the decision-making body.

4th respondent's case

27. The 4th respondent opposed the petition through a replying affidavit. The 4th respondent contended that section 106(1) does not require the Gazette Notice to provide details of the amount involved or the public interest that justified granting of the exemption. It was the 4th respondent's position that public interest considerations for the merger with the 3rd respondent were contained in the letter dated May 14, 2019 to the 1st respondent. The 1st respondent took into account the relevant factors and complied with section 106 in arriving at the decision to grant exemption. According to the 4th respondent, the exemption was also in tandem with the incentive provided for in section 9 of the *Banking Act* and the *Prudential Guidelines* No. 12(CBK/PG/12) on mergers, amalgamations, transfers or assets and liabilities. The 4th respondent maintained that there was no violation of articles 1(1), 2(1), & (2), 3(1), 4(2), 10(1)(c), 10(2)(a), 47(1), 201(a), and 232(1) (d) of the *Constitution*.
28. The 4th respondent argued that the 1st respondent's discretion under section 106 is not subject to the *Statutory Instruments Act*, being an administrative discretion.
29. The 4th respondent denied allegations of discrimination and maintained that the court cannot review the merits of the 1st respondent's decision; that article 47 of the *Constitution* is inapplicable because the 1st respondent's exercise of power is not likely to adversely affect any personal or individual right to due process.



5th respondent's case

30. The 5th respondent opposed the petition through grounds of opposition. According to the 5th respondent, there is no legal requirement that a statutory instrument must be gazetted; the 1st respondent was not required to prepare a regulatory impact statement since the 1st respondent's mandate under section 106(1) is discretionary.
31. Mr. Deya who represented the 4th and 5th respondents argued that article 201 of the *Constitution* as read with articles 114(3) and 209 does not anticipate enactment of another legislation to give effect to the article 210. This is because, the *Stamp Duty Act* and other tax related statutes are all in the nature of Money Bills as contemplated by article 114(3) read with article 210 of the *Constitution*. Reliance was placed on *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR).
32. Learned counsel further relied on articles 259 and 159(2)(e) of the *Constitution* and the decisions *in re the matter of the Interim Independent Electoral Commission* [2011] eKLR; *Tinyefuza v Attorney General of Uganda* (1997 UGCC 3) and *Jesse Kamau & 25 others v Attorney General* [2010] eKLR on the interpretation of the *Constitution*.
33. It was argued that the *Eliud Karanja Matindi* case (*supra*) is distinguishable and is not binding on this court. That case was on exemption granted under the *Income Tax Act* while the present case concerns exemption granted under the *Stamp Duty Act*. Reliance was placed on the decisions in *Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another* [2017] eKLR; *Mwai Kibaki v Daniel Toroitich Arap Moi* [1999] eKLR and *Nation Media Group Limited v Onesmus Kilonzo* (2017) eKLR.
34. learned counsel relied on article 210 of the *Constitution*, section 77 of the *PFM Act* and the decisions in *Peter Muturi Njuguna v Kenya Wildlife Service* [2017] eKLR and *Associated Provincial Picture Houses Limited v Wednesbury Corporation* (1948) 1 KB 23 to assert that the 1st respondent exercised administrative discretion and cannot be faulted for issuing the impugned Gazette Notice.
35. On whether section 106 of the *Stamp Duty Act* is unconstitutional Mr Deya argued in the negative. Learned counsel took the view, that the section allows an exemption on payment of stamp duty on any class of instruments making it to be in accord with article 210 of the *Constitution*. Article 210 of the *Constitution* read with section 77 of the *PFM Act* only requires a public record of each waiver to be maintained together with the reasons for the waiver and be reported to the Auditor General. Reliance was placed on *Ndyanabo v Attorney General of Tanzania* [2001] EA 495 and *Reminisce Sports Bar Limited t/a Reminisce Bar & Grill & 3 others v Cabinet Secretary Ministry of Transport & 7 others* [2017] eKLR, among other decisions.
36. Learned counsel further relied on *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, for the argument that non-delegation doctrine is inapplicable in the circumstances of this case and that the text of the *Constitution* does not expressly prohibit delegation of legislation to other bodies.
37. On the reliefs sought, he argued that the prayers sought in the petition cannot lie as against the 5th respondent. On costs, counsel relied on the decisions in *Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) and *Speaker of the National Assembly & Another Case* (*supra*) and urged the court to dismiss the petition with costs.



Determination

38. Upon considering the petition, responses and arguments by parties, the issues for determination are whether exemption of stamp duty on instruments for the merger was unconstitutional and whether section 106 is constitutionally invalid.
39. The facts of this petition are not in dispute. On June 26, 2019, the 1st respondent published a Gazette Notice exempting registrable instruments for merger between the 3rd and 4th respondents from the provisions of the *Stamp Duty Act*. The waiver was made on the recommendation of the 6th respondent following a request from the 3rd and 4th respondents.
40. The petitioner argued that the 1st and 6th respondents' action violated articles 10, 27, 47, 73, 75, 201, and 232 of the *Constitution* for failing to demonstrate the basis for the recommendation and justification for the exemption. The petitioner again argued that there was no valid Act of Parliament authorising the exemption as contemplated by article 210 of the *Constitution* and section 77 of the *PFM Act*.
41. The respondents on their part, maintained that the exemption was lawfully granted under section 106 of the *Stamp Duty Act* following the letter from the 6th respondent recommending exemption on grounds of public interest. The 1st respondent considered the recommendation and being satisfied by the reasons provided by the 3rd and 4th respondents for seeking the exemption, approved the exemption by letter dated June 27, 2019. The 1st respondent then issued the impugned gazette notice exempting registrable instruments in respect of the merger from the provisions of the *Stamp Duty Act*.
42. The respondents maintained that the *Stamp Duty Act* does not require disclosure of the amount involved when seeking exemption and that public interest justified the exemption. They maintained that public participation does not apply in such situations and that the 1st respondent maintains a public record of all exemption on stamp duty together with the reasons thereof; makes a report to the Auditor General regarding such exemptions and the reasons thereof at the end of the financial year as required by article 210(2) of the *Constitution*. The exemption was thus, made in compliance with the *Constitution* and the applicable law.
43. Section 106 of the *Stamp Duty Act* under the sub title "Power to exempt instruments" provides as follows:
- (1) The Minister may on the recommendation of the Minister for the time being responsible for matters relating to land, by notice in the Gazette, direct that any instrument or any class of instruments shall be exempted from the provisions of this Act if he is satisfied that it is in the public interest so to do. (underlining)
44. The long title to the Act shows that the *Stamp Duty Act* is
- An Act of Parliament to make provision for the levying and management of stamp duties; and for purposes connected therewith and incidental thereto."
45. In that respect, stamp duty is a tax levied on registrable instruments, including land transactions and shares and is collected by the Kenya Revenue Authority under section 2 of the *Stamp Duty Act* which defines the "collector" to mean Kenya Revenue Authority established under the *Kenya Revenue Authority Act*.
46. Section 106(1) gives the 1st respondent discretionary power to exempt any instrument from the provisions of the Act on payment of stamp duty. This discretionary power is, however, to be exercised



- on grounds of public interest as required by the Act. The Act does not define public interest, which is the basis for granting such exemption. However, public interest must mean the general welfare of people on whose behalf a public officer exercises his powers and discharges his functions. It must be something recognisable in law so as to require regulation such as section 106.
47. Something that is to be done in public interest, must be for the general welfare of the people. In that respect, waiver of stamp duty under section 106 must be done for the benefit of the people, a fact that must not only be demonstrated, but must also be justified. That is why the section is clear that the 1st respondent may only direct exemption from the provisions of the Act if he is satisfied that “it is in the public interest so to do.”
 48. The overarching theme in section 106 is public interest. I must add here, that greater public interest must be to comply with the law so that where an action is to be taken in public interest, it must only be for the benefit of the people and nothing else.
 49. In this regard, the Supreme Court of India stated in *Ashok Kumar Pandey v The State of West Bengal*, AIR 2004 Supreme Court 280, 2004 (3) SCC 349, that

a matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.”
 50. The respondents argued that the waiver was granted in public interest since it was intended to encourage mergers. According to the respondents, public interest was demonstrated in the letter by the 3rd and 4th respondents to the 6th respondent and that of the 6th respondent dated June 16, 2019. The 1st respondent then approved the exemption by letter dated June 27, 2019 and subsequently, issued the impugned gazette notice.
 51. I have perused the letter dated May 14, 2019 to the 1st respondent. The public interest to be served as identified in that letter, included positive contribution in the communities where the merged bank would operate: the merger was to act as a springboard to the continent; contribute to economic stability; public participation on the merged bank on being listed in the stock exchange; strong bank designed to reduce systemic risks within the banking system/sector and cost saving in that the exemption makes the transfer less costly. This was also contained at paragraph 10 of the replying affidavit by Waweru Mathenge sworn on September 24, 2019. The 1st respondent’s office communicated approval of the request for waiver of stamp duty in the letter dated May 21, 2019.
 52. Although a cursory look at the reasons for seeking exemption may appear to suggest that the merger would benefit the public or in public interest. However, in reality, it would be in the commercial interest of the merging entities. For instance, acting as a springboard to the continent and cost saving so that the exemption would make the transfer less costly, was to directly benefit the 3rd and 4th respondents and ultimately the 5th respondent and not the public.
 53. It is not clear to this court how it would be beneficial to the public if the merged companies expanded businesses beyond the boundaries of Kenya and the region and if the cost of the merger was significantly reduced. The fact of the matter would be that the country would have lost revenue. A matter will not be in public or general interest of the people if behind the beautiful veil of public interest lies a privately vested interest.



54. The fundamental question here is whether the exemption was in violation of the *Constitution* and the law. The petitioner argued in the affirmative while the respondents took the opposite position. Article 201(a) on the principles of public finance, provides, among others, that
- (a) there should be openness and accountability, including public participation in financial matters; that
 - (b) the public finance system should promote an equitable society, and in particular—
 - (i) the burden of taxation should be shared fairly.
55. On the other hand, article 210 provides that (1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation. Sub article (2) further states that if legislation permits the waiver of any tax or licensing fee—
- (a) a public record of each waiver should be maintained together with the reason for the waiver; and
 - (b) each waiver, and the reason for it, should be reported to the Auditor General.
56. Article 201 requires openness and accountability in financial matters and fair sharing of the tax burden. Further, where a law permits tax exemption, the reasons for the exemption and the record thereof should be kept and reported to the Auditor General. This must be for openness and financial accountability purposes.
57. The petitioner cited the decision in *Eliud Karanja Matindi v Cabinet Secretary, National Treasury and Planning & 4 others* (Petition No E280 of 2021 (Judgment delivered on 1February 7, 2023) where the court invalidated an exemption given under the *Income Tax Act*. It is important to point out here, that the decision in that case was stayed by the Court of Appeal in National Assembly, *Republic of Kenya & another v Matindi & 3 others* (Civil Appeal (Application) E176 of 2023) [2023] KECA 1566 (KLR). That does not however affect the position in section 106(1) that any exemption must be in the public interest.
58. The 4th and 5th respondents relied on section 9 of the *Banking Act* to support their argument that the section gives incentives to mergers and amalgamations. Section 9(9) of the *Banking Act* which is material provides that:
- (9) No transfer fees, stamp duty, registration fees, licence duty or other charges shall be payable in respect of—
 - (a) a transfer of assets and liabilities under subsection (3); or
 - (b) any endorsement or alteration made to record such transfer, upon submission to the Registrar of Companies, Registrar of Titles or any other person referred to in subsection (8).
59. I have read section 9 of the *Banking Act*. In my view, the section must be read to mean registration after but not before the merger because subsection (3) refers situation after amalgamation or acquisition of one institution by another. That is, upon coming into effect of the merger of acquisition. Section 106 relates to stamp duty on the registrable instruments including those on the merger and has no reference or is not subject to the *Banking Act*. If the intention of the Legislature was that no stamp duty should be paid at all in respect of instruments for mergers, nothing would have been easier than stating so in section 106 and without giving discretion to the Cabinet Secretary (1st respondent) and making that



discretion conditional to public interest. Section 106 does not also state that it is subject to any other law. Neither does section 9 of the *Banking Act* state its position is notwithstanding any other law.

60. Thus, section 106 operates independent of any other law, including the *Banking Act*. If the respondent's argument was to be accepted as the correct position, it would defeat the tenor, import and spirit of section 106 and more so, why the application for exemption was made in the first place and the need to justify the public interest requirement.
61. Based on the analysis above, it is clear to this court, that the exemption did not only fail the public interest test, it also failed the constitutional principle on sharing of tax burdens since the element of public interest was absent when the exemption was granted. The exemption violated both the *Constitution* and the law as it was to serve a private interest of the merging entities and was not for the public interest.

Constitutional validity of section 106

62. The petitioner again argued that section 106 of the *Stamp Duty Act* is not the law contemplated under article 210(1) as read with articles 109(5) and 114 of the *Constitution*. This is because the section did not originate and was not processed as a money bill and was not enacted pursuant to those Articles.
63. The petitioner took the view, that the section is void because it does not also disclose the amount involved; reasons for the exemption and contradicts article 210 read with articles 109(5) and 114 of the *Constitution*. According to the petitioner, the articles vest power to grant waiver to Parliament, yet the section empowers the Cabinet Secretary to act contrary to article 153(4) of the *Constitution*. In the premise, the section is void thus, unconstitutional.
64. The respondents countered that there is no prayer in the petition seeking to declare section 106 constitutionally invalid. According to the respondents, the issue of invalidity was only raised in the submissions which is unacceptable.
65. I have considered rival arguments on this issue and perused the amended petition. There is no averment in the amended petition challenging the unconstitutionality of section 106. There is also no prayer seeking to declare the section constitutionally invalidity. The issue was only raised in the submissions.
66. The position in law is that an issue can only be raised through pleadings and not otherwise. In *Arikala Nasara Reddy v Ventakaram Reddy Reddygari & another* [2014] 2 SCR, 291, the Supreme Court of India stated:

[9]. There can be no dispute to the settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.

See also *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (Petition No 1 of 2017) [2017] eKLR) where the Supreme Court affirmed this legal position.



67. Flowing from the above legal position, this court cannot consider the issue of constitutionality of section 106 of the Stamp Duty Act and whether it is the Act contemplated under the Constitution since the petitioner did not plead the issue choosing to raise it through his submissions.

Conclusion

68. Having considered the pleadings and arguments by parties as well as the decisions relied on, I come to the following conclusions: first, the exemption was not made in public interest thus, violated the principle in section 106(1) so that the discretion conferred by that section was not properly exercised. The interest exhibited in the letter seeking exemption was more private than public interest.

69. Second, there having not been a public interest, the decision to exempt payment of stamp duty on the registrable instruments on the merger between Commercial Bank of Africa and NIC Group PLC violated article 201 of the Constitution.

70. Third, the petition did not plead the issue of constitutionality of section 106 of the Stamp Duty Act. This court cannot therefore determine an issue that was not pleaded or raised in the pleadings of the parties.

Disposal

71. Based on the above conclusions, this court makes the following declaration(s) and order(s) it considers appropriate.

1. A declaration is hereby issued that the decision to exempt the instruments executed in respect of the transactions relating to the merger between NIC Group PLC and Commercial Bank of Africa from paying stamp duty violated section 106(1) of the Stamp Duty Act and article 201 of the Constitution and is unconstitutional and illegal thus, invalid.
2. A declaration is hereby issued that Legal Notice No 112 dated June 26, 2019, exempting payment of stamp duty on the instruments executed in respect of the transactions relating to the merger between NIC Group PLC and Commercial Bank of Africa is unconstitutional and invalid.
3. An order of certiorari is hereby issued quashing Legal Notice No 112 of June 26, 2019.
4. This being a public interest litigation, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH APRIL DAY OF APRIL 2025

E C MWITA

JUDGE

