Law Society of Kenya v National Assembly of Kenya & 3 others (Petition E004 of 2025) [2025] KEHC 5472 (KLR) (Constitutional and Human Rights) (2 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5472 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E004 OF 2025

LN MUGAMBI, J

MAY 2, 2025

BETWEEN

LAW SOCIETY OF KENYA ..... PETITIONER

AND

THE NATIONAL ASSEMBLY OF KENYA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY AND ECONOMIC PLANNING ..... 3RD RESPONDENT

KENYA REVENUE AUTHORITY ..... 4TH RESPONDENT

JUDGMENT

Introduction

1. The petition dated 2nd January 2025 is supported by the Petitioner's Chief Executive Officer, Florence Muturi's affidavit of even date and a further supplementary affidavit dated 27th February 2025.

2. This petition challenges the constitutionality of Section 2 of the Tax Procedures Amendment Act, 2024. The Petitioner alleges the said section violates Article 2(6), 10 and 118 of *the Constitution*.

3. Accordingly, the petitioner seeks the following reliefs against the respondents:

    a. A declaration be issued that Section 2 of the Tax Procedures Amendment Act, 2024 is marred with impropriety and discrimination and thus unconstitutional in toto.

b. A declaration be issued that there was no public participation on Section 2 of the Tax Procedures Amendment Act, 2024 contrary to Articles 10 and 118 of *the Constitution* and the same is, therefore, unconstitutional, null and void.

c. A declaration be issued that Section 2 of the Tax Procedures Amendment Act, 2024 is inconsistent with Kenya's regional international obligations under Article 2(6) of *the Constitution*.

d. An order of prohibition be issued prohibiting the respondents whether by themselves or any other person or entity working under their instructions from undertaking any action to, give effect to Section 2 of the Tax Procedures Amendment Act 2024.

e. Any other relief deemed just and expedient by this Court to uphold the rule of law and constitutionalism.

f. Cost of this petition to be awarded to the petitioner.

Petitioner's Case

4. On 1st November 2024, the Tax Procedures Amendment Bill No. 2 of 2023 was published. Fundamentally, the Bill sought to amend various Sections in the *Tax Procedures Act* so as to bring clarity to the nature of electronic tax invoices, simplify compliance for small businesses and provide incentives for the construction industry.

5. In line with Article 10 and 118 of *the Constitution*, the 1st respondent on 14th November 2024 placed an advertisement on print media inviting the public to submit written memoranda and comments on the Bill. In addition, key stakeholders vide letters dated 18th and 19th November 2024 were invited to provide their views on the Bill in a public forum set for 25th to 28th November 2024.

6. Following completion of this process, the views collected from 37 stakeholders and memoranda received from the public were compiled by the 1st respondent's Departmental Committee on Finance and National Planning. The Committee then tabled its Report on 2nd December 2024.This Bill was subsequently passed and assented to by the President on 11th December 2024 and was scheduled to commence on 27th December 2024.

7. For context, the petitioner contends that both the Bill as initially published and the Committee's Report, proposed amendments as follows:

a. Clause 2 seeks to amend section 23A of the TPA to prescribe information that must be contained in an electronic tax invoice. This clarity will guide taxpayers in the contents of a valid electronic tax invoice.

b. Clause 3 seeks to amend section 37E of the TPA to extend the tax amnesty period from 30th June 2024 to 30th June 2025.

c. Clause 4 proposes inserting a new section 37F to provide relief because of doubt or difficulty in tax recovery (tax abandonment).

d. Clause 5 of the Bill proposes to amend section 42A of the principal Act by deleting the proviso to subsection (1) and inserting a new subsection (4C) to prescribe a penalty of 10% for persons who fail to withhold and remit tax.

e. Clause 6 proposes amending section 47 to provide timelines for the application of offset of overpaid tax. For income tax, within five years and for any other tax, within six months.

f. Clause 7 seeks to amend section 59A to provide for the integration of an electronic tax system with iTax to submit electronic documents and facilitate, uptake and deployment of technology to facilitate cost effective revenue collection.

g. Clause 8 proposes to amend section 77 to provide that in the computation of the period for lodgment of objections to the Commissioner under section 51, appeals to Tax Appeals Tribunal under section 52, appeals to the High Court under section 53 and appeals to the Court of Appeal under section 54, computation of time shall not include Saturday, Sunday or a public Holiday.

h. Clause 9 proposes to amend section 83 to provide for a penalty of twenty thousand shillings per month for an export processing zone enterprise that fails to submit required returns.

i. Clause 10 proposes to amend the First Schedule to require for registration of an employee working remotely outside Kenya for an employer in Kenya. Excluding an employee outside Kenya working for the national carrier.

8. It is averred that when the Tax Procedures Amendment Act was passed, it became apparent that a new clause, Section 2 seeking to amend Section 6A of the *Tax Procedures Act* by inserting a new sub-section, was included. It is asserted that this was not part of the Bill that was published and submitted for public participation. The Section reads as follows:

2. Section 6A of the *Tax Procedures Act*, hereafter referred to as the "principal Act", is amended by inserting the following new sub section immediately after subsection (3) -

(4) A provision in any multilateral agreement or treaty that has been entered into by or on behalf of the Government of Kenya, or made pursuant to such agreement or treaty, relating to the imposition of import duty on –

a. imported steel billets of tariff heading 7207.11.00; and

b. imported wire rods of tariff headings 7213.91.00 and 7213.91.90 shall not apply for a period of two years from the commencement of this subsection or for such other longer period as the Cabinet Secretary may, by notice in the Gazette, prescribe.

9. The petitioner alleges that this Section is a new provision that had been reserved in the first instance only to be included in the Bill at the final stage right before assent. It is argued that this mischief is unlawful and unconstitutional. Likewise, the same goes against the Supreme Court's guidance in Petition No. E031 of 2024 as Consolidated with Petition Nos. E032 & E033 of 2024 - CS National Treasury & 4 Others vs Okiya Omtatah & 15 Others on introduction of amendments on the floor of the House once public participation has already been carried out.

10. The petitioner also contends that this action offends the East African Community Customs Management Act and the Protocol on the Establishment of the East African Customs Union, 1999. It is claimed that the impugned provision has exposed Kenya to the possibility of being in dispute with the regional partners. This is because the impugned provision purports to exempt Kenya from its obligations under the multilateral agreements and treaties for 2 years with respect to imposition of import duties.

11. The petitioner states that the Protocol on the Establishment of the East African Customs Union, 1999 requires partners to harmonize their exemptions regimes in respect of goods that are excluded from payment of import duties. Moreover, Section 253 of the East African Community Customs Management Act provides that its provisions take precedence over domestic laws of an individual state.

Additionally, the impugned provision is argued to be inconsistent with Kenya's obligations under the African Continental Free Trade Area (ACFTA) Agreement. In view of the foregoing, the petitioner seeks this Court's intervention as the impugned amendment constitutes a substantive change which ought to have been submitted to public participation.

1st Respondent's Case

12. In reaction to the petitioner's case, the 1st respondent filed grounds of opposition dated 13th January 2025 and a replying affidavit by the Clerk of the National Assembly, Samuel Njoroge sworn on even date.

13. The grounds of opposition are on the basis that:

    i. The petitioner is in breach of the duty of full and frank disclosure required in applications for ex parte orders.

    ii. The petitioner deliberately misrepresented and misled the Court by annexing a copy of the Report of the Departmental Committee on Finance & National Planning relating to the Tax Laws (Amendment) Bill, 2024 to further the allegation that the impugned provision did not arise from public participation (Annexure FM-4 at page 25 of the petitioner's bundle).

    iii. The petitioner failed to make proper and sufficient inquiries on the material facts and any relevant additional facts before instituting these proceedings.

    iv. The Report of the Departmental Committee on Finance & National Planning on the Tax Procedures (Amendment) Bill, 2024 confirms that the impugned provision arose from public participation.

    v. By failing to make full and fair disclosure of all the material facts, the petitioner cannot obtain any advantage and should be deprived of any advantage that it may have already obtained. Any ex parte order based on breach of the duty of candor should be set aside ex debito justitiae.

    vi. These proceedings have not been filed in good faith and are an abuse of process.

    vii. Section 2 of the Tax (Procedures) Amendment Act, 2024 does not violate Articles 209 and 210 of *the Constitution* or any other provision as alleged by the petitioner.

    viii. The constitutionality of Section 2 of the Tax (Procedures) Amendment Act, 2024 cannot be questioned on the grounds of inconsistency with the Africa Continental Free Trade Agreement (AfCFTA), the Protocol on the Establishment of the East African Community Customs Union, 2019, the East Africa Community Customs Management Act and the Regulations made thereunder and the *Treaty for the Establishment of the East African Community Act*. These treaties and agreements, all form part of the laws of Kenya and stand on equal footing with the Tax Procedures (Amendment) Act, 2024.

    ix. Any inconsistency between Section 2 of the Tax (Procedures) Amendment Act, 2024 with AfCFTA, the Protocol on the Establishment of the East African Community Customs Union, 2019, the East Africa Community Customs Management Act and the Regulations made thereunder and the *Treaty for the Establishment of the East African Community Act*, is one of conflict of laws, which can be resolved through statutory interpretation in the appropriate forum.

    x. Under Article 54(2) of the Protocol on the Establishment of the East African Community Customs Union, 2019 as read with Article 27 of the EAC Treaty, the East African Court of

Justice has exclusive jurisdiction on questions of breach of the EAC Treaty or the Protocol on the Establishment of the East African Community Customs Union, 2019, including the interpretation of these treaties or regulations made under them.

14. In the reply, reiterating the undisputed facts of this case, he notes that following the public participation exercise the 1st respondent received over 35 memoranda on the various clauses.

15. Particularly, the 1st respondent received memoranda from the firm of Kiarie Mungai & Associates Advocates on behalf of the steel industry. In a nutshell, the firm pointed out the irregularities in the ratification of the African Continental Free Trade Area (ACFTA) Agreement by Kenya. In that the ACFTA permits importation of steel products from the South African region without payment of import duty thus making the imported steel cheaper than the locally manufactured one. The firm argued that this creates unfair competition for local steel manufacturers and threatens to kill the local industry.

16. As a result, the Firm proposed that the Committee investigates how steel from the South African Region was allowed to be imported to Kenya duty free; suspend ACFTA import duty exemption on steel as was not approved by Parliament; suspend importation of steel from South African Region for a period of 3 years to allow growth of local industries and protect them from collapse and finally consider countervailing measures to protect the domestic steel industry in Kenya. The 1st respondent issued its response to the Firm on 28th November 2024.

17. It is deponed that the 1st respondent's Committee considered this new proposal alongside the other proposals from the public and issued its Report. With regard to the new proposal by the Firm, the Committee in its Report at page 48 observed that: "the implementation of the African Continental Free Trade Area under the Africa Union, where Kenya is a member state, has grossly disadvantaged the local industry from cheap imports from other regions, especially the Southern African region. The dumping of these steel products continues to kill the steel manufacturers, result in job losses, and negatively affect youth employment. Therefore, there is an urgent need to protect the public interest as the National government relooks the implementation of the African Continental Free Trade Area protocol in Kenya."

18. The Report was tabled on 2nd December 2024 and recommended that the 1st respondent approve the Bill including the impugned amendment. The Bill was read for a Second Time on 3rd December 2024. During the Committee of the whole House on 4th December 2023, the various clauses were deliberated on including the public participation proposals. The House as a policy intervention adopted Kiarie Mungai & Associates Advocates' proposal with the keen interest of protecting the local manufacturers while preserving the multitudes of jobs that are threatened as a result of the unfair competition. The Bill was subsequently passed on the same day during the Third Reading.

19. It is asserted that the petitioner on 3rd January 2025, was issued ex parte conservatory orders on the strength of erroneously pleaded and misleading facts, which led to the suspension of the application of the impugned Section. He further contends that the petitioner in its affidavit relied on an uncertified and incorrect copy of the Report of the Departmental Committee on Finance & National Planning relating to the Tax Laws (Amendment) Bill to claim that the impugned provision did not arise from public participation, which is false.

20. He informs that the correct Report is the Report of the Departmental Committee on Finance & National Planning on the Tax Procedures (Amendment) Bill which was available to the public and shows Kiarie Mungai & Associates Advocates views. As a consequence, it is stressed that the petitioner failed to adduce credible and accurate evidence to support its claim.

21. It is additionally, asserted that the impugned Section is constitutional as Article 209 of *the Constitution*, grants the 1st respondent power to enact legislation to impose taxes, charges and any other tax or duty, which it did in this matter. Equally it is averred that this Section cannot be challenged on the basis of inconsistency with the Protocol on the Establishment of the East African Customs Union and the (ACFTA). This is because all these laws form part of Kenyan law and have equal footing.

22. Moreover, Counsel argued that the petitioner's argument in this regard constitutes one of conflict of laws which should be determined by the East African Court of Justice as provided under Article 27 of the East African Community Treaty. Considering these assertions, the 1st respondent urges that the petition be dismissed with costs.

2nd Respondent's Case

23. In response to the petition, the 2nd respondent filed grounds of opposition dated 3rd February 2025 on the basis that:

    i. The petition and the motion militate against the law-making authority of Parliament as enshrined under Article 94(1) and (5) of *the Constitution*.

    ii. Contrary to averments under paragraph 35, 36, 37 and 38 of the petition, it is not within the jurisdictional remit of the High Court under Article 165 of *the Constitution* to entertain a question on the merit of any policy or legislative enactment.

    iii. The petition is blind to the principle of harmony in interpretation and application of perceived conflicts of laws at a statutory realm.

    iv. The public interest lies in upholding the presumption that all laws enacted by Parliament are constitutional and this Court ought to decline to suspend giving effect to provisions of legislation properly enacted, at an interlocutory stage.

    v. The orders sought are in essence and effect not conservatory orders as envisaged under Article 23 of *the Constitution* as they do not seek to maintain the existing state of affairs but to alter them on the basis of the petitioner's untested allegations.

    vi. The petitioner has not demonstrated any prejudice that they will suffer if the orders sought are not granted before the hearing and determination of the petition.

    vii. There is neither an allegation nor proof by the petitioner that the claim will be rendered nugatory if the interlocutory orders are not extended/granted pending the hearing and determination of the Petition.

    viii. In sum, the petition and the application amount to an abuse of the process of this Court to the extent that the petitioners are seeking to maneuver, in utter disregard of the law, the Court's jurisdiction in a manner incompatible with the goals of justice.

3rd and 4th Respondents' Case

24. These parties' responses and submissions to the petition are not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

25. The petitioner through its Counsel, Mogeni and Company Advocates filed submissions dated 27th February 2025 and further submissions dated 6th March 2025 and 26th March 2025. Counsel

highlighted the issues for discussion as: whether the introduction of Section 2 of the Tax Procedures (Amendment) Act, 2024 constitutes a valid amendment or a new provision; whether the intended introduction of Section 2 of the Tax Procedures (Amendment) Act, 2024 ought to have been subjected to a fresh round of public participation; and whether Section 2 of the Tax Procedures (Amendment) Act is consistent with Kenya's obligations under Article 2(6) of *the Constitution*.

26. In the first issue, Counsel submitted that introduction of the impugned provision constituted a new amendment which was distinct from those that had been submitted to public participation initially, contrary to Article 118 of *the Constitution*. Reliance was placed in Robert N. Gakuru & others v Governor Kiambu County & 3 others (2014) eKLR where it was held that:

> " In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as ii were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous."

27. Like dependence was placed in British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limi2ed 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) [20191 KESC 15 (KLR).

28. Counsel relying on the 1st respondent's Committee Report in the second issue submitted that it was evident that the impugned provision arose as a new proposal which was not originally part of the Tax Procedures (Amendment) (No.2) Bill,2024 that was submitted to public participation. It was argued that this was not a mere amendment but a substantive change to the Bill yet the 1st respondent proceeded to adopt and pass the same without re-submitting the same to public participation.

29. Counsel stressed that this proposal being substantive amendment ought to have been subjected to public participation as had the capacity to affect bilaterally and multilaterally all manufacturers and traders of steel billets and imported wire rods.

30. To buttress this point reliance was placed in Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR) where it was observed that:

> " 110. Similarly, H. Khurana and S. Vasudevan, in Clarificatory Amendments to Indian Tax Laws (2022, International Tax Review), describe 'substantive amendments' as those that "modify existing rights, impose new obligations, or impose new duties, or attach a new disability". Additionally, the Supreme Court of Canada, in Bathurst Paper Limited v. Minister of Municipal Affairs of New Brunswick, [1972] S.C.R. 471, held that an amendment is presumed to be substantive unless it is shown that only language improvements, meant solely to enhance drafting, were intended. Therefore, a substantive amendment is to be understood as one that changes the substance or meaning of an existing provision, particularly by addressing policy questions, altering

the purpose, scope, or content of a provision, by adding new provisions or removing old ones.

111. In contrast, V.C.R.C. Crabbe in Legislative Drafting (Cavendish Publishing, 1993) at p. 189, defines 'minor amendments' drawing from section 2 of the English statute The Consolidation of Enactments (Procedure) Act, 1949, to mean "amendments of which the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies that are not of substantial importance, and amendments designed to facilitate improvement in the form and manner in which the law is stated ...". Similarly, Lawrence E. Filson and Sandra L. Strokoff, in The Legislative Drafter's Desk Reference (CQ Press, 2008) at p. 60, further differentiate substantive amendments from technical and conforming amendments by noting that "technical and conforming amendments are never substantive—they are merely the device the drafter uses to clean up the inconsistencies in the law created by the substantive things the bill does. And [do not touch on] policy questions".

31. Additional dependence was placed in Institute of Social Accountability & another v National Assembly & 4 others [2015] KEHC 6975 (KLR).

32. Counsel further argued that the impugned amendments offend the salient features and provisions of the East African Community Customs Management Act and the Protocol on the Establishment of the East African Customs Union, 1999 by excluding Kenya from its obligations under the existing agreements and treaties. Reliance was placed in Article 27 of the Vienna Convention on the Law of Treaties of 1969 which states that: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

33. In light of the stated arguments, Counsel was certain that the petitioner is entitled to the reliefs sought.

1st Respondent's Submissions

34. On 12th March 2025, the 1st respondent's Counsel, Mbarak Awadh Ahmed filed submissions and underscored the issues for discussion as follows: whether Section 2 of the Tax Procedures (Amendment) Act, 2024 was introduced without public participation and is therefore unconstitutional and whether Section 2 of the Tax Procedures (Amendment) Act, 2024 is unconstitutional because it is in conflict with the East African Community Customs Management Act, 2004 (the "EACCMA") and Kenya's international obligations under Article 2(6) of *the Constitution*.

35. Counsel on the first issue referring to the averments in the 1st respondent's replying affidavit submitted that the impugned provision arose from the public participation exercise that had been conducted for the Bill. Reliance was placed in Cabinet Secretary for the National Treasury and Planning & 4 others (supra) where it was held that:

> "Where new substantive amendments are effected pursuant to public participation, Parliament is not required to undertake fresh public participation."

36. On the second issue, Counsel submitted that the ACFTA, the Protocol on the Establishment of the East African Community Customs Union, 2019, the EACCMA and the Regulations and the Treaty for the Establishment of the East African Community form part of the laws Kenya and are at par

with all Kenyan laws. Additionally, any conflict between their provisions and the Tax Procedures (Amendment) Act, 2024, is a question of conflict of laws and not a question of constitutional interpretation.

37. That said, Counsel stressed that the petitioner's allegation that the impugned provisions contravene Kenya's international obligations contrary to Article 2(6) of *the Constitution* is flawed. This is because, this Article does not provide that any provision of a statute is unconstitutional for violating Kenya's international obligations. Further, that the petitioner failed to cite the actual provision in the ACFTA and EACCMA that conflicts with the impugned provision. Equally, that an allegation that the impugned provision violates Kenya's international obligations can only be resolved by examining the impugned provision against the EAC Treaty and the Customs Protocol made thereunder and be presented before the East African Court of Justice which has exclusive jurisdiction to entertain this matter not this Court.

38. Reliance was placed in East African Law Society v Secretary General of the East African Community [2013] eKLR where it was held that:

> " We have very carefully read, understood and appreciated the definition as provided. Having done so, we do not find, within the Customs Union and the Common Market Protocols, a provision that confers jurisdiction to resolve disputes arising from the interpretation of provisions of both Protocols either to an organ of a Partner State or of the Community, save this Court. Flowing from the above, it would appear that nothing suggests that the Court lacks jurisdiction over disputes arising out of the interpretation and application of both Protocols so long as they form an integral part of the Treaty. It is also noteworthy, that the Court remains, under the Treaty, the final authoritative forum in matters of interpretation and application of the Treaty. (See: Articles 5 33(2), 34 and 37)
>
> In essence, therefore, on a proper reflection on the whole matter, we are inclined to conclude that this Court has jurisdiction over disputes arising out of the interpretation and application of the Treaty which, for re-emphasis, includes the Annexes and Protocols thereto."

39. Regardless, Counsel submitted that the impugned provision having been enacted by the 1st respondent under the authority provided in Article 209 of *the Constitution* means that any conflict between this provision and EACCMA or any other treaty should be resolved in favour of sustaining the impugned provision. Reliance was placed in Attorney General (On Behalf of the National Government) v Karua [2024] KESC 21 (KLR) where the Supreme Court held that:

> " Further, as alluded to above, *the Constitution* also envisions a situation where international law (treaty and customary law) to which Kenya is a party is subject to *the Constitution* within the domestic sphere. Therefore, if any provision of a treaty conflicts with *the Constitution*, the provision of *the Constitution* prevails because *the Constitution* is the supreme law of the Republic of Kenya and binds all persons and all State organs and 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

40. Counsel in conclusion underscored that the petitioner in presenting its case had misled the Court with the erroneously pleaded facts. Counsel stressed that such conduct ought not to be condoned by the

Court. Reliance was placed in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR where it was held that:

> "It is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make fullest possible disclosure, then he cannot obtain any advantage from the proceedings, he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

41. Like dependence was placed in Pevans East Africa Limited & anor. v Chairman, Betting Control & Licensing Board & ors. Nairobi Civil Appeal Number 11 of 2018).

2nd Respondent's Submissions

42. On 24th March 2025, Deputy Chief State Counsel, Kaumba S.O. filed submissions for the 2nd respondent. Counsel highlighted the single issue for determination as: whether the amendment to clause 6A of the Tax Procedures (Amendment) Bill, 2024 brought by a stakeholder at the Committee stage ought to have been subjected to fresh round of public participation.

43. Counsel commenced by appreciating that it was not in dispute that public participation was carried out for the Tax Procedures Amendment Bill No. 2 of 2023 and that the impugned provision arose from the public participation exercise. What is in issue is that the impugned provision was not subjected to public participation.

44. Counsel submitted that the 1st respondent as a representative of the people is empowered under Article 94 (5) and 95(3) of *the Constitution* to enact laws. This includes the mandate, during debate, to change the contents of any Bill submitted to it for enactment by adding, modifying or removing the proposals contained in the Bill. As such, Counsel stressed that the 1st respondent can cause amendments to a Bill during the Committee Stage.

45. Counsel contended that to imply that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. Reliance was placed in Institute of Social Accountability & another (supra) where it was held that:

> "79. We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation."

46. Like dependence was also placed in the Cabinet Secretary for the National Treasury and Planning & 4 others (supra).

47. Counsel relying on these authorities emphasized that it was evident that although the amendment was substantive, the amendment was considered and introduced upon a proposal from a stakeholder as related to a clause subjected to the exercise hence passes the constitutional test.

48. On the impugned provision's effect on regional relations, Counsel submitted that multilateral legal instruments have the same legal standing as statutory provisions. Further that any conflicting positions may be harmonized through tools of statutory interpretation that a latter law is deemed to have by implication amended a former law and that a specialized law, in this case tax laws, takes precedence over laws of general application.

49. Reliance was placed in Martin Wanderi & 19 others vs Engineers Registration Board of Kenya & 5 others (2014) eKLR where it was noted that:

> " This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal, which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one...."

50. Equal dependence was placed in Kutner vs Philips (1891] 2 QB 2 267 (QB).

Analysis and Determination

51. It is my considered take that the issues that arise for determination in this matter are as follows:

    i. Whether Section 2 of the Tax Procedures Amendment Act, 2024 is unconstitutional due to alleged failure to comply with the public participation requirement under Articles 10 and 118 of *the Constitution*.

    ii. Whether Section 2 of the Tax Procedures Amendment Act, 2024 is inconsistent with Kenya's regional international obligations which by virtue of Article 2 (6) of *the Constitution* are part of the laws of Kenya and what are the Constitutional/legal implications thereof.

    iii. Whether the petitioner is entitled to the relief sought.

Whether Section 2 of the Tax Procedures Amendment Act, 2024 is unconstitutional due to alleged failure to comply with the public participation requirement under Articles 10 and 118 of *the Constitution*.

52. Public participation is a constitutional principle that represents the direct exercise of sovereignty by the people who despite having elected representatives to whom they have delegated sovereign power under Article 1 (2) of *the Constitution*; they nevertheless have embedded the principle of public participation process in *the Constitution* to ensure they are directly consulted and their contributions taken and are given due consideration before any major decision affecting the people is made. Public participation must be inclusive and meaningful whether it is intended to generate public input around a particular issue or build consensus.

53. The Court of Appeal in Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] KECA 381 (KLR) underscored the importance of public participation as follows:

> " The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision.

Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."

54. Two key Constitutional clauses that underpin public participation in legislative process as a constitutional command are: Article 118 (b) of *the Constitution* and Article 10 (1) (b) as read with 10 (2) (a). These two Constitutional clauses provide thus:

118. Parliament shall-

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

55. In addition, Article 10 (1) states the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them

a. ....

b) enacts, applies or interprets any law

c) ....

and Article 10 (2) (a) is where the principle of participation the people is provided.

56. According to the Petitioner, public participation was conducted in respect of various proposed amendments to *Tax Procedures Act* in a process that started by placing of an advert on 14/11/2024 inviting submissions of memorandum or comments on the proposed changes. It was followed by letters on 18th and 19th November, 2024 inviting stakeholders to give their views in a public forum that took place between 25-28 November, 2024. Thereafter, the views from 37 stakeholders and written memoranda receiving from the public were analyzed by the Departmental Committee on Finance and National Planning which tabled its report on 2/12/2024 and subsequently, the Bill was passed on 11/12/2024 to commence on 27/12/2024.

57. The bone of contention by the Petitioner is that the Bill as initially conceived and presented as well as the ensuing Report of the Departmental Committee of Finance and National Planning had proposed clauses which were considered during public participation. However, when the Act was passed, it became manifest that a totally new clause under Section 2 was introduced that Section 6A by inserting a new subsection yet it never formed part of what was presented to the public during public participation. The impugned clause reads:

2. Section 6A of the *Tax Procedures Act*, hereafter referred to as the "principal Act", is amended by inserting the following new sub section immediately after subsection (3) -

(4) A provision in any multilateral agreement or treaty that has been entered into by or on behalf of the Government of Kenya, or made pursuant to such agreement or treaty, relating to the imposition of import duty on –

a. imported steel billets of tariff heading 7207.11.00; and

b. imported wire rods of tariff headings 7213.91.00 and 7213.91.90 shall not apply for a period of two years from the commencement of this subsection or for such other longer period as the Cabinet Secretary may, by notice in the Gazette, prescribe.

58. The Petitioner complained that the introduction of the new clause after public participation was completed violates the principle of public participation.

59. In the submissions by the Petitioner's Advocate on this issue, he maintained that the new amendment was substantive in nature and ought to have been subjected to public participation as it had the implication of affecting bilateral and multilateral manufacturers and traders of steel billets and imported wire rods. He relied on Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR) to buttress his submissions on this issue.

60. The Petitioner's assertions were vehemently opposed by the 1st and 2nd Respondents.

61. Through the grounds dated 13/1/2025 as well as the replying affidavit sworn by the Clerk of National Assembly, Samuel Njoroge on 13/1/2025; the 1st Respondent accused the deponent of the Petitioner's affidavit of misleading the Court by annexing the Report of the Departmental Committee on Finance & National Planning that related to Tax laws (Amendment Bill) as evidence that the impugned provision did not emanate from public participation (annex FM4) which was however the wrong report because that was the report meant for Tax (Laws) Amendment Bill and not the Tax Procedures (Amendment) Bill.

62. The 1st Respondent explained that in response to invitation to the members of public to submit memoranda, the 1st Respondent received a memorandum from Kiarie Mungai & Associates Advocates on behalf the local industry steel players which highlighted the negative impacts faced by local steel manufacturers as a result of implementation of African Continental Free Trade Area (AfCFTA) agreement because of permits issued to import steel and wire billets from South Africa without being charged import duty thereby making those imports cheaper than locally manufactured steel.

63. That this reasoning that informed the amendment to suspend import duty exemption of steel and imported wire billets from South Africa for two years to allow growth of the local industry.

64. In view of these facts, Counsel for the 1st respondent argued that the impugned provision is as a result of the views gathered from the public during the public participation exercise on the Tax Procedures Amendment Bill hence the introduction of the same is not unconstitutional. Like the Petitioner, Counsel for the 1st Respondent also relied on the Supreme Court case of Cabinet Secretary for the National Treasury and Planning & 4 others (supra) to buttress his submissions.

65. The 2nd Respondent took the position that the 1st respondent as the representative of the people is empowered under Article 94 (5) and 95(3) of *the Constitution* to enact laws. That in exercise of that mandate, the 1st respondent may, during debate change the contents of any Bill submitted to it for enactment by adding, modifying or removing the proposals contained in the Bill. As such, 2nd respondent maintained that the 1st respondent can cause amendments to a Bill during the Committee Stage and holding otherwise would negate and undermine the legislative process.

66. The Petitioner did not rebut the assertion made by the 1st Respondent to the effect that views were received by the Departmental Committee on Finance and National Planning from local steel manufacturers through Kiarie Mungai & Associates Advocates during the public participation exercise which upon due consideration by the 1st Respondent informed the introduction of a new clause 6A to the *Tax Procedures Act* during debate on the Bill although it was not initially included in the Bill. The Petitioner however maintains that the new provision is substantive in nature and has severe consequences considering that it contradicts the regional and multilateral agreements on

imposition of import duty on steel billets and imported wire billets hence should have undergone public participation.

67. The issue of how clauses introduced post public participation exercise into Bills should be dealt with has already received judicial consideration from the highest Court, the Supreme Court of Kenya and this is the authority that both the Petitioner and the 1st Respondent cited but with varied interpretation.

68. The Petitioner's advocate was of the view that that the decision is in support of the view that new amendment which is substantive in nature introduced after public participation should undergo public participation. The 1st Respondent's counsel on the other hand argued that the position of the Supreme Court was that where the amendment arises from consideration of inputs made by the public during public participation, then no public participation is again required.

69. This decision of the Supreme Court is thus the decisive factor here. Article 163 (7) of *the Constitution* declares that

> " All Courts, other than the Supreme Court are bound by decisions of the Supreme Court..."

70. The Supreme Court in Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR) laid down on the principle on this issue as follows:

> " 115. The fact that the new provisions introduced into the Bill after the process of public participation are substantive amendments is not the end of the question as to whether they should be subjected to a fresh round of public participation. A second consideration comes to the fore, in this aspect we draw from the Constitutional Court of South Africa which held in the case of South African Iron and Steel Institute and Others v. Speaker of the National Assembly and Others [2023] ZACC 18 at paragraph 2 as follows:
>
> "The central issue in this case is whether material amendments to a Bill without further public involvement passes constitutional muster. There are two aspects that must be addressed: first, whether the amendments are material, and second, whether these amendments triggered the need for further public involvement." [Emphasis added]
>
> 116. We are persuaded that a court has a duty to consider whether the subject substantive amendments triggered the need for further public participation. It is with this in mind that we need to answer the question whether substantive amendments consequent to the process of public participation, and intended to give effect to views and suggestions from the public participation process, ought to be subjected to a fresh round of public participation.
>
> 117. Our starting point, once again, must be the principles articulated in the BAT Case. This Court, in that case, established as a guiding principle the requirement that:
>
> 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."

118. This means that there is an obligation on Parliament to consider and give effect to the proposals, views, suggestions, and input from the process of public participation. Therefore, it is our considered opinion that it would be circuitous and not amount to prudent use of public resources to expect the National Assembly to subject proposals, views, suggestions, and input from the public participation exercise to a fresh round of public participation. We are also persuaded by the position taken by the High Court in Law Society of Kenya v. Attorney General & Another, HC Petition No. 3 of 2016; [2016] eKLR, where the Court stated thus at paragraph 245:

> Whereas it is true that what were introduced on the floor of the House were amendments as opposed to a fresh Bill, it is our view that for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input."
>
> In that regard, we agree with the submissions by the amicus curiae that amendments which have been made in response to the results of public participation do not need to be subjected to another round of public participation."

71. The above principle emanating from the Supreme Court decision thus resolves this particular question. The argument by the Petitioner that the amendment ought to have undergone through public participation collapses. This is because the decision to introduce this amendment has been demonstrated by the 1st Respondent to have been arrived at upon due consideration of views and memoranda received during the public participation exercise.

Whether Section 2 of the Tax Procedures Amendment Act, 2024 is inconsistent with Kenya's regional international obligations which by virtue of Article 2 (6) of *the Constitution* are part of the laws of Kenya and what are the Constitutional/legal implications thereof.

72. It was contended on behalf of the Petitioner that the impugned amendments offend the provisions of the East African Community Customs Management Act and the Protocol on the Establishment of the East African Customs Union, 1999 by excluding Kenya from its obligations under the existing agreements and treaties. The Petitioner relied on Article 27 of the Vienna Convention on the Law of Treaties of 1969 which states that: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

73. The 1st Respondent response to the petitioner's assertion was three-pronged. First, that African Continental Free Trade Area (ACFTA), the Protocol on the Establishment of the East African Community Customs Union, 2019, the East Africa Community Customs Management Act (EACCMA) and Regulations and the Treaty for the Establishment of the East African Community form part of the laws Kenya and are thus at parity with all other Kenyan laws. That therefore, any conflict between regional and multilateral instruments with domestic law, namely, the Tax Procedures (Amendment) Act, 2024, is a question of conflict of laws and not question of constitutional interpretation.

74. Further, that the petitioner failed to cite the actual provisions in ACFTA and EACCMA that conflicts with the impugned provision.

75. Finally, that the allegation that the impugned provision violates the EAC Treaty and the Customs Protocol is a matter for determination by the East African Court of Justice which has exclusive jurisdiction to entertain this matter not this Court.

76. It is necessary to set out the place of international law or treaties in relation to *the Constitution* first and also with the national legislation.

77. From a Constitutional perspective, the position is absolutely clear to me, no other law is equal to, or superior to *the Constitution*. This is a position *the Constitution* proclaims explicitly in Article 2 (1) which states thus:

> " This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government"

78. In addition, it provides in Article 2 (4)

> " Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of *the Constitution* is invalid"

79. In regard to international law, *the Constitution* provides in Article 2 (5) & (6) as follows:

> " (5) The general rules of international law shall form part of Laws of Kenya.
>
> (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya"

80. The supremacy of *the Constitution* was also emphasized by the Court in Kiriro Wa Ngugi & 19 others v Attorney General & 2 others [2020] KEHC 8819 (KLR) where the Court observed as follows:

> " 54. We shall commence by analysing the applicable legal framework and principles. The amended petition presents interplay between the domestic law and international law. The applicable law includes *the Constitution*, the *Maritime Zones Act* and various international treaties and conventions ratified by Kenya. The relevant treaties and conventions include the United Nations Charter, the Statute of the ICJ and the United Nations Convention of the Law of the Sea (UNCLOS)....
>
> 56. We remain alive that *the Constitution* reigns supreme; any provision in it is not subject to challenge before any court; and, any law inconsistent with it is void to the extent of the inconsistency. Furthermore, it recognizes that the general rules of international law and any treaty or convention ratified by Kenya shall form part of our law.
>
> 57. However, Articles 2 (5) and 2 (6) of *the Constitution* clearly demarcates the place of international law in the hierarchy of Kenyan law. The latter, just like ordinary statutes are subordinate to *the Constitution*..."

81. In view of the foregoing authorities, it is apparent that in the event of a conflict between International or regional treaties with *the Constitution*, it is the Constitutional which shall prevail.

82. The question is what if the conflict is between the International or regional conventions or treaties with the national laws, which law ranks higher or are they at par as submitted by the 1st Respondent and 2nd Respondent?

83. The answer lies in the Supreme Court decision of Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others, Initiative for Strategic Litigation in Africa (Petition 3 of 2018) [2021]KESC 34 (KLR) (11) January 2021) where the Court framed and answered the following issue: 'What is the effect of Article 2(5) and 2 (6) of *the Constitution* in reference to applicability of International law in general and international human rights in particular?'

84. In answering this question, the Court went as a far as interpreting the meaning of the phrase 'shall form part of the laws of Kenya as used in Article 2 (5) & 2 (6) of *the Constitution* to mean 'domestic courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that the same are relevant, and not in conflict with *the Constitution*, statutes, or a final judicial pronouncement'

85. The Supreme Court laying down this principle reasoned as follows:

> " 123. Article 2 (5) of *the Constitution* provides that "The general rules of international law shall form part of the law of Kenya" While article 2(6) of *the Constitution* provides that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"
>
> 124. These provisions have given rise to different and often conflicting judicial interpretations regarding their import and meaning. One school of thought holds the view that by this declarations, article 2(6) of *the Constitution* has transformed Kenya from a dualist to a monist nation as far as its approach towards international treaties, conventions, and protocols, is concerned. Thus, whereas in the past Kenya had to "incorporate" an international treaty to which it was a State Party into its domestic law, before the former could take effect, article 2(6) now makes such a treaty directly applicable in the country's legal system without more. On the basis of this presumption, a number of courts have declared certain treaties and conventions as "binding" upon all our institutions of governance. Apparently, this conclusion derives from the courts' interpretation of the expression, "shall form part of the law of Kenya" to mean shall be directly applicable in Kenya.
>
> 125. The other school of thought in our courts, has adopted a more restrictive view of article 2(5) and (6) of *the Constitution* regarding the applicability of international law in our legal system. This school takes the position that, international law is subordinate to *the Constitution*, and as such, can only apply subject to the supreme law of the land. Obviously, the proponents of this view do not support the argument that Kenya is now a monist state, by dint of article 2(5) and (6) of *the Constitution*. Before delving further into the anatomy of this article, for purposes of conceptual clarity, let us re-emphasize the fact that article 2(5) refers to the general rules of international law while article 2(6) refers to the treaties or conventions ratified by Kenya.
>
> 126. ...
>
> 127. ...

128. So what meaning is to be attributed to the expression "shall form part of the law of Kenya" as provided in article 2(5) and (6)? This phrase was eloquently elaborated in the Paquete Habana case; Supreme Court of the United States, 1900 20 S Ct. 290. Considering the place and applicability of customary international law in the United States. Mr Justice Gray stated:"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat..." [Emphasis added].

129. ...

130. Where it has been used, as in the judicial pronouncements above, the expression "part of our law" means that domestic courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that the same are relevant, and not in conflict with *the Constitution*, statutes, or a final judicial pronouncement. The phrase rules of international law, viewed restrictively, and at any rate, in the context in which it was used in the American and English cases quoted above, refers to customary international law.

131. It is already clear that in our context, article 2(5) and (6) of *the Constitution* embraces both international custom and treaty law. This provision can be said to be both outward, and inward looking. The article is outward looking in that, it commits Kenya-the State, to conduct its international relations in accordance with its obligations under international law. In this sense, the article can be considered to be stating the obvious, in view of the fact that, as a member of the international community, Kenya is bound by its obligations under customary international law and its undertakings under the treaties and conventions, to which it is a party. Yet, reference to international law by a domestic Constitution is evidence of its progressive nature.

132. On the other hand, article 2(5) and (6) is inward looking in that, it requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, *the Constitution*, local statutes, or a final judicial pronouncement. Where for example, a court of law is faced with a dispute, the elements of which, require the application of a rule of international law, due to the fact that, there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the court must apply the latter, because, it forms part of the law of Kenya. In other words, article 2(5) and (6) of *the Constitution*, recognizes international law (both customary and treaty law) as a source of law in Kenya..."

123. Given the above position adopted by the Supreme Court, it is manifest that in application, our national laws are not at par with international obligations in treaties or regional instruments as it is the national

law that takes precedence and will only be applied by the Court if it is not inconsistent with the national law or there exists a lacuna not covered by the national law where international law can be resorted to fill the void.

124. By parity of reasoning, it would mean therefore that if there are inconsistencies as alleged in this case by the Petitioner between the *Tax Procedures Act* and regional or multilateral instruments, the judicial precedent in this country provide a clear guide on resolution of such conflicts. The domestic law will take precedence. This finds support in the emphasis laid by the Supreme Court in Attorney General (On Behalf of the National Government) v Karua [2024] KESC 21 (KLR) thus:

> " We emphasize that international law, including treaty law, applies in Kenya and by extension to the organs of the state as long as the same are not in conflict with *the Constitution*, local statutes, and final judicial pronouncements. This connotes that *the Constitution* embodies the primacy of domestic laws and the subsidiarity of international laws. The principle of subsidiarity respects national sovereignty by recognizing that each state retains the ultimate authority over matters occurring within its territory, because in the case of Kenya, article 1 of *the Constitution* declares that "All sovereign power belongs to the people of Kenya" power to be exercised only in accordance with *the Constitution*..."

125. Consequently, even without delving further to determining whether indeed there exists any specific inconsistencies between the *Tax Procedures Act* and the regional and multilateral treaties, the legal consequence, is that if inconsistencies exist, the provisions of the *Tax Procedures Act* would prevail over the provision in the regional or multilateral treaties. The only time the Court will strike out a provision in a statute is if it is in conflict with *the Constitution* and not the provisions off treaty law.

126. The upshot of the foregoing is that this Court finds no merit in this Petition which is hereby dismissed.

127. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MAY, 2025.

.....

L N MUGAMBI

JUDGE