



Benjamin & 4 others v Cabinet Secretary Lands, Public Works, Housing and Urban Development & 4 others; National Land Commission & 16 others (Interested Parties) (Petition E154, E173, E176, E181, E191 & 11 of 2024 (Consolidated)) [2024] KEHC 13060 (KLR) (Constitutional and Human Rights) (22 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E154, E173, E176, E181, E191 & 11 OF 2024 (CONSOLIDATED)
OA SEWE, JM CHIGITI & JWW MONG'ARE, JJ
OCTOBER 22, 2024**

IN THE MATTER OF ILLEGAL AND IRREGULAR AFFORDABLE HOUSING ACT 2024 AND RIGHTS VIOLATIONS & ARTICLES 22(1) & (2)(C), 23, 50(1), 159, 165(3)(D), AND 258(1) & (2)(C) OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF ALLEGED THREATS POSED BY SECTIONS OF 3(B), 4(2)(A), 4(2)(B), 4(3)(B), 5, 6, 7, 11(3), 11(4)(A) & (C), 12, 14(5)(D), 15(2) & (3), 16, 25, 32, 34, 41, 42, 43, 44, 45, 48, 49, 51, 52, 58 OF THE AFFORDABLE HOUSING ACT, 2024 TO ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 24, 25(A) & (C), 27(1) & (2), 28, 29, 36, 40, 43, 46(1)(C), 47(1), 48, 50(1) & (2), 93(2), 94(1), (4), (5) & (6), 109, 129, 131(2); 153(4), 159(1), 160, 185 (2), 186 (1) & 187 (2); 258 & 259(1) OF THE CONSTITUTION.

AND

IN THE MATTER OF ALLEGED FAILURES OF THE CS HOUSING & CS NATIONAL TREASURY, THE NATIONAL ASSEMBLY & SENATE TO UPHOLD THE CONSTITUTION AS EXPRESSLY REQUIRED OF THEM, RESPECTIVELY, AT ARTICLES 153(4)(A), AND 93(2) AND 94(4) OF THE CONSTITUTION.

AND

IN THE MATTER OF RULE 4, 10, 11, 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL FREEDOMS)- HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF INHERENT NATURAL LAW AND CONSTITUTIONAL LIMITATIONS ON THE TAXING POWER OF THE NATIONAL GOVERNMENT & RIGHTS VIOLATIONS.

AND



**IN THE MATTER OF UPHOLDING CONSTITUTIONAL AND
PROTECTING TAXPAYERS FROM UNCONSTITUTIONAL TAXES/LEVY**

AND

**IN THE MATTER OF THE DOCTRINES OF NON-DISCRIMINATION,
BILL OF RIGHTS, NATURAL JUSTICE, CONSTITUTIONALISM,
RULE OF LAW AND LEGITIMATE EXPECTATIONS.**

BETWEEN

DR MAGARE-GAKENYI BENJAMIN 1ST PETITIONER
PAULIE NDUTA KINYANJUI 2ND PETITIONER
PHILEMON ABUGA NYAKUNDI 3RD PETITIONER
SHALLUM KAKA NYAKUNDI 4TH PETITIONER
JAMLICK OTONDI ORINA 5TH PETITIONER

AND

**THE CABINET SECRETARY LANDS, PUBLIC WORKS, HOUSING AND
URBAN DEVELOPMENT 1ST RESPONDENT**
**THE CABINET SECRETARY, THE NATIONAL TREASURY AND ECONOMIC
PLANNING 2ND RESPONDENT**
THE HON ATTORNEY GENERAL 3RD RESPONDENT
NATIONAL ASSEMBLY 4TH RESPONDENT
THE SENATE 5TH RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY
KENYA REVENUE AUTHORITY INTERESTED PARTY
CONTROLLER OF BUDGET INTERESTED PARTY
AUDITOR GENERAL INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY
OPERATION LINDA JAMII INTERESTED PARTY
KITUO CHA SHERIA INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY
TUNZA MTOTO COALITION INTERESTED PARTY
CONSUMERS FEDERATION OF KENYA INTERESTED PARTY
KENYA FEDERATION OF EMPLOYERS INTERESTED PARTY
KENYA MEDICAL ASSOCIATION INTERESTED PARTY
KENYA NATIONAL TEACHERS UION INTERESTED PARTY



KENYA UNION OF POST-PRIMARY EDUCATION TEACHERS INTERESTED PARTY

KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS UNION INTERESTED PARTY

KENYA NATIONAL UNION OF NURSES INTERESTED PARTY

KENYA UNION OF CLINICAL OFFICERS INTERESTED PARTY

Affordable Housing Act is constitutional

The consolidated petitions challenged the constitutionality of the Affordable Housing Act that sought to create a framework for affordable and institutional housing. Petitioners argued that several provisions of the Act, including the 1.5% income levy, the delegation of fund management, and the public participation process, violated constitutional rights. They sought declarations of unconstitutionality, judicial review orders, and the refund of collected levies. The court dismissed the petition, finding that the Act was lawfully enacted and that the housing levy was a valid taxation measure within the government's constitutional mandate. It held that the legislative process, including public participation, had been adequately conducted and that the petitioners failed to demonstrate violations of constitutional rights. Consequently, the court upheld the Act, allowing its full implementation.

Reported by John Ribia

Constitutional Law – fundamental rights and freedoms – right to equality and freedom from discrimination – housing levy – contention that the housing levy was discriminatory for only having a structure for taxing persons in the formal sector - whether the collection of the housing levy under the Affordable Housing Act was discriminatory in that it only provided a structure for how the formal sector was to be taxed and provided no structure for the taxation of the informal sector – Constitution of Kenya article 27; Affordable Housing Act (Act No. 2 of 2024) section 4; Employment Act (cap 226) sections 2, 19(3), and 31; Finance Act (No. 4 of 2023) section 84; Income Tax Act (Cap 470) sections 3, and 52B

Constitutional Law – right to property – taxes – contention that a tax was a violation of the right to property – housing levy - whether collection and setting the housing levy at 1.5% of the gross salary of an employee was ambiguous and an infringement of their right to property - Constitution of Kenya articles 25, 40, 95, 201, and 209

Constitutional Law – national values and principles – public participation – contention that an Act was passed without adequate public participation – Affordable Housing Act - whether an opportunity was afforded to the public to air their views and adequately participate on the implementation of the Affordable Housing Act – whether in passing national legislation, the National Assembly and Senate were required to conduct public participation in all 47 counties - Constitution of Kenya articles 10, 118, and 259

Constitutional Law – national values and principles – public participation – elements – principle of reasonableness – number of counties that public participation must be conducted on national legislation for the public participation to be adequate – modes – contention that public participation was conducted on another act that preceded the act in contention - what was the doctrine of reasonableness and how was it applicable in respect to the principle of public participation - whether a short period of public engagement could comply with the doctrine of reasonableness when it concerned public participation - whether an opportunity was afforded to the public to air their views and adequately participate on the implementation of the Affordable Housing Act - whether in passing national legislation, the National Assembly and Senate were required to conduct public participation in all 47 counties – whether public participation conducted on the housing levy as raised in a Finance Act was adequate and could be deemed to carry over as public participation for the Affordable Housing Act - Constitution of Kenya articles 10, 118, and 259; Finance Act (No. 4 of 2023) section 84

Civil Practice and Procedure – res judicata – constitutional petitions – one raising a challenge on a memoranda that invited the public to comment or participate on the Affordable Housing Act vis-à-vis a petition



that challenged whether there was sufficient public participation in the enactment of the Affordable Housing Act - whether the issues of public participation raised in a petition challenging the issue of a memoranda by the National Assembly inviting public participation on the Affordable Housing Act made a subsequent petition that challenged whether there was sufficient public participation in the enactment of the Affordable Housing Act res judicata - Constitution of Kenya articles 10, 118, and 259.

Devolution – roles of the County Government vis-à-vis roles of the National Government – housing – contention that the Affordable Housing Act granted the National Government functions of the County Government - whether the section 50(2) of the Affordable Housing Act that mandated the Cabinet Secretary to make housing regulations offended the principle of devolution as that was the function of county executive committees in charge of housing – Constitution of Kenya article 185(4), 201(1)(b), 202, 218, and 220; Affordable Housing Act (Act No. 2 of 2024) sections 9, 10, 15(2) and (3), and 50(2)

Constitutional Law – constitutional bodies – National Land Commission – function in managing public land – contention that the Affordable Housing Act in using public land breached the functions of the National Land Commission - whether the use of public land in the development of affordable housing infringes on the functions of the National Land Commission – Constitution of Kenya articles 62(2) and (3), 67(2); Affordable Housing Act (Act No. 2 of 2024) sections 41, 42, 43, 44, and 45;

Constitutional Law – constitutional bodies – Commission on Revenue Allocation – contention that the Affordable Housing Act was unconstitutional for failure by the Commission on Revenue Allocation (CRA) to consider the Bill - whether the Affordable Housing Act was unconstitutional for failure by the Commission on Revenue Allocation (CRA) to consider the Bill - Constitution of Kenya article 205(1)

Statutes – prospective application of Acts – taxes/levies – housing levies – Affordable Housing Act - whether the Affordable Housing Act could be applied retrospectively – Constitution of Kenya article 204; Affordable Housing Act (Act No. 2 of 2024) section 60; Finance Act (Act No. 4 of 2023) section 84

Taxation Law – housing levy – collector – Commissioner General KRA - whether the appointment of the Commissioner General of Kenya Revenue Authority as collector of the housing levy was in accordance with the Constitution – Constitution of Kenya articles 2(2), 10(2); Kenya Revenue Authority Act (Cap 469) sections 2, 5, and 11(2)

Constitutional Law – socioeconomic rights – right to accessible and adequate housing – contention that the housing levy and the Affordable Housing Act violated the right - whether the Affordable Housing Act that provided for the housing levy was a contravention of the right to the highest attainable standards of health - Constitution of Kenya articles 43(1)(b), and 205

Brief facts

The Affordable Housing Act (the Act) was assented to on March 19, 2024, as part of the government’s effort to implement affordable housing. The Act was designed to provide a comprehensive framework for the development and access to affordable and institutional housing across Kenya. It established mechanisms for housing construction, management, and funding, including the imposition of a 1.5% levy on income to support its initiatives.

The operationalization of the Act prompted a series of legal challenges, leading to the filing of multiple petitions in the High Court of Kenya. Petition E154 of 2024, serving as the lead case, was consolidated with five related petitions (E173, E176, E181, E191, and Petition No. 11 of 2024). The petitioners, comprising individual citizens and civic organizations, challenged various provisions of the Act. They contended that measures such as the income levy, delegation of powers for fund management, and the public participation process raised concerns over adherence to constitutional principles and the protection of socio-economic and property rights.

They sought several remedies, including declarations that certain sections of the Act were unconstitutional, judicial review orders (*certiorari*) to quash the impugned provisions, mandates (*mandamus*) compelling the government to adhere to constitutional requirements, and prohibitions against the retroactive application of



the Act. Additionally, they demanded that all levied amounts be refunded in full, asserting that the measures imposed were excessive and contrary to the principles of fairness and justice.

Issues

- i. Whether the issues of public participation raised in a petition challenging the issue of a memoranda by the National Assembly inviting public participation on the Affordable Housing Act made a subsequent petition that challenged whether there was sufficient public participation in the enactment of the Affordable Housing Act *res judicata*.
- ii. Whether an opportunity was afforded to the public to air their views and adequately participate on the implementation of the Affordable Housing Act.
- iii. Whether in passing national legislation, the National Assembly and Senate were required to conduct public participation in all 47 counties.
- iv. Whether by conducting public participation for National Legislation in a select number of counties as opposed to all the 47 counties rendered the public participation inadequate.
- v. What was the doctrine of reasonableness and how was it applicable in respect to the principle of public participation?
- vi. Whether a short period of public engagement could comply with the doctrine of reasonableness when it concerned public participation.
- vii. Whether public participation conducted on the housing levy as raised in a Finance Act was adequate and could be deemed to carry over as public participation for the Affordable Housing Act
- viii. Whether the collection of the housing levy under the Affordable Housing Act was discriminatory in that it only provided a structure for how the formal sector was to be taxed and provided no structure for the taxation of the informal sector.
- ix. Whether collection and setting the housing levy at 1.5% of the gross salary of an employee was ambiguous, and an infringement of their right to property.
- x. Whether the Affordable Housing Act that provided for the housing levy was a contravention of the right to the highest attainable standards of health.
- xi. Whether the section 50(2) of the Affordable Housing Act that mandated the Cabinet Secretary to make housing regulations offended the principle of devolution as that was the function of county executive committees in charge of housing
- xii. Whether the use of public land in the development of affordable housing infringes on the functions of the National Land Commission.
- xiii. Whether the Affordable Housing Act was unconstitutional for failure by the Commission on Revenue Allocation (CRA) to consider the Bill.
- xiv. Whether the Affordable Housing Act could be applied retrospectively.
- xv. Whether the appointment of the Commissioner General of Kenya Revenue Authority as collector of the housing levy was in accordance with the Constitution.

Held

1. Jurisdiction was primordial. A court cannot sit on appeal over the decision of other courts of concurrent jurisdiction. The question of jurisdiction having been disposed of, it could not be revisited in the instant judgment. The respondents were able to deduce and comprehend the case against them and in particular the issues raised by the petitioners. Roundly considered, the petitions set out with a reasonable degree of precision what was said to be infringed, the provisions said to be infringed, and the manner in which they were alleged to be infringed. The petitions met the requirement of specificity.
2. The pre-dominant issue was whether the provisions of the Affordable Housing Act (the Act) were in conflict with the Constitution. The doctrine of avoidance (courts avoiding to determine an issue if there was another mechanism through which the dispute could be resolved) was inapplicable to the petitions as consolidated for that was an issue that could only be resolved by the court as mandated



- by article 165(3)(d) of the Constitution. The respondents' objections to the jurisdiction of the court from the standpoint of article 165(3)(d) of the Constitution lacked merit.
3. Statutes enjoyed the presumption of constitutionality and thus the burden was on the petitioners to establish that the Act was unconstitutional. The burden of proof was on the petitioners to prove all aspects of their petition to the requisite standard.
 4. Courts were enjoined under article 259 of the Constitution to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributed to good governance. In determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act
 5. The doctrine of *res judicata* was designed to bring finality to litigation and provide parties with closure and relief from the burden of being troubled or pursued in connection with issues and lawsuits that had already been resolved by a court of competent jurisdiction.
 6. The court looked into the issues raised on public participation in the instant petitions vis-à-vis the issues raised on public participation in *Apiyo v Attorney General & 2 others (Petition E013 of 2023)* [2024] KEHC 1967 (KLR) (29 February 2024) (Judgment) (the Apiyo case). The issues raised in the instant petitions raised a broader question on whether adequate public participation was conducted at the National Assembly and Senate within the tenets of articles 10, 118 and 201 of the Constitution, while in the Apiyo case, the issue was specific to the Notice dated December 9, 2023, by which the National Assembly invited written memoranda. In any event, the court found that the issue was not ripe for determination as the National Assembly did not only require submissions of memoranda but also held public hearings as a mode of public participation. The issue of public participation, given the context of the instant petitions, was not *res judicata*.
 7. Public participation was essential to the legislative and policy functions of government, both at the National and County levels and was integral to the legislative enactment process. The import of article 118 of the Constitution was that failure by Parliament to ensure public participation is fatal to any legislation passed by it.
 8. Public participation did not necessarily mean that everyone had to express their opinions. Instead, there should be tangible evidence of a purposeful initiative to incorporate a variety of perspectives in the participation program.
 9. The National Assembly and Senate had provided evidence to support their argument that they invited members of the public to take part in the exercise. Public participation was conducted. Although the National Assembly and Senate focused on very targeted and specific stakeholders, it also gave an opportunity to the general public to submit memoranda and attend public stakeholder meetings. The petitioners took issue with the fact that public participation for an Act that was intended to affect all Kenyans was only conducted in 19 counties and not in all the 47 counties. There was no requirement in the law that public participation be conducted in all 47 counties.
 10. A short period of public engagement could comply with the doctrine of reasonableness. It largely depended on the circumstances surrounding the engagement. The doctrine of reasonableness required that actions taken by public authorities, including the duration of public engagement, be proportionate, fair, and justifiable. A short engagement period may still satisfy the following criteria:
 1. nature of the issue: urgency or Simplicity a short period may be reasonable if the issue required urgent action or was relatively simple and did not require extensive public input.
 2. Urgency: in cases where urgent decisions were needed e.g. emergency legislation, a short public engagement period may be justified.
 3. Simplicity of the Issue: where the matter was less complex or controversial, a shorter period might still be considered reasonable.



4. Alternative Methods of Participation: the doctrine of reasonableness allowed for flexibility in how public engagement was conducted. If a short period was compensated for by multiple engagement methods (e.g., online submissions, public hearings, written memoranda), it may still comply with the principles of fairness.
 5. The Senate did not limit itself to just one method of public participation (such as public *barazas*). Instead, it employed multiple methods, including calling for public memoranda and holding a public hearing. That was evidence of the Senate's commitment to inclusivity and its recognition that different stakeholders may prefer different forms of engagement. By using a range of methods, the Senate ensured that a broad spectrum of public opinion could be captured.
 6. Diverse forms of participation: including electronic submissions, public hearings, or written consultations — that enhanced the reasonableness of the engagement period.
 7. Stakeholder Readiness: it can warrant a short consultation period can be reasonable if stakeholders are already well-informed or had prior engagement on the matter.
11. Public participation was conducted in respect of the Finance Act 2023 in which the Affordable Housing Levy was introduced through section 84 of the Finance Act 2023. The steps taken by way of public participation by the National Assembly and the Senate comply with the doctrine of reasonableness, taking into account the following elements:
1. Range of Participation Methods: The Senate's consideration of public input, including the incorporation of amendments that were subsequently adopted by the National Assembly, showed that the Senate gave proper weight to the contributions made by the public. That reflected proportionality; an indication that enough time and opportunities were provided for stakeholders to be heard and for their feedback to influence the process.
 2. Stakeholder Engagement: The Senate made specific efforts to gather stakeholder views through its Roads, Transportation, and Housing Committee. That demonstrated that the Senate made efforts to ensure that its process was inclusive, allowing key stakeholders to participate meaningfully in the legislative process.
 3. Transparency: By directing the court's attention to the annexure containing the views of stakeholders, the Senate had demonstrated that it acted transparently in documenting and considering public input. That reinforced the fairness of the process.
12. Reasonable opportunities were given for public participation before the enactment of the Affordable Housing Act.
13. While the Constitution in principle prohibits discrimination, it also recognized that in certain situations, affirmative action would be necessary to give full effect to the realization of the rights guaranteed in the Constitution.
14. Section 2 of the Employment Act defined an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. Section 3 of the Income Tax Act set out the various categories of income upon which tax was chargeable. An employee for purposes the Employment Act was a person who was employed for wages or a salary and was therefore under obligation to pay tax under section 3(2) of the Income Tax Act. In the same vein, all persons eligible to pay tax for purposes of section 3(2) of the Income Tax Act ought to bear the burden of paying the Affordable Housing Levy equitably, whether in formal or informal employment. That, appeared to us to be the essence of Section 4 of the Affordable Housing Act.
15. The collection of tax in an informal sector may pose difficulties to the Kenya Revenue Authority. However, it was instructive that, under Section 52B of the Income Tax Act the Kenya system of self-assessment system was provided for where a taxpayer assesses himself or herself and made payments to KRA.



16. Section 4 of the Affordable Housing Act was not discriminatory and did not infringe on the provisions of articles 27(1) and (4) of the Constitution. The mode of collection of the housing as provided for by the Act was indeed different but the same did not amount to discrimination as alleged under article 27 (1) and (4) of the Constitution.
17. Taxation in Kenya was based on article 209 of the Constitution, which empowered the National Government to impose taxes. Article 209(2) deterred the imposition of tax or duty by the National Government that had been specified in clause (3) (a) or (b) being property rates and entertainment taxes that were to be imposed by the County Governments.
18. The constitutional authority and functions of the body or organ of government entrusted with a particular function must be respected. Article 210(1) of the Constitution provided that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. In essence, there must be legislation that supports the imposition of any tax or licensing fee. Without such a legal framework, any imposition of tax by either the National or County Government will be unconstitutional. That was one of the grounds upon which section 84 of the Finance Act 2023 was declared unconstitutional.
19. The Affordable Housing Act established a levy known as the housing levy under section 4(1). The levy was properly in place, and was in accord with the Constitution.
20. Section 4(2)(a) of the Act provided that the levy shall be at the rate of 1.5 % of an employee's gross salary while section 4(2) (b) of the Act provided that the levy shall be at the gross income of a person received or accrued which is not subject to the levy under paragraph (a). The National Assembly enjoyed broad powers to levy taxes and to determine the rate thereof, provided that such powers were not exercised in a manner that infringed the Constitution.
21. Under articles 95 and 201 of the Constitution, the authority to impose taxes rests with the National Assembly. The power was typically exercised in alignment with the nation's economic and other policies. In exercising this authority, the National Assembly was responsible for determining how taxes were imposed, administered, calculated, collected, and enforced. All taxes levied must be in consonance with article 201(b)(i) of the Constitution, which recognized that the burden of taxation shall be shared fairly.
22. The right to property was non-derogable. It had limitations for instance article 40(2)(a) which allowed Parliament to legislate for permissible deprivation of property, with the rider that it should not be arbitrary. The National Assembly had the power to determine how taxes were calculated, imposed, collected and administered under articles 95 and 201 of the Constitution. Section 4 of the Act did not amount to an infringement of either articles 27 (freedom from discrimination) or 40 (right to property) of the Constitution.
23. The preamble of the Affordable Housing Act provided that it was an Act of Parliament to give effect to article 43(1)(b) of the Constitution (right to accessible and adequate housing). The purpose and effect of the impugned legislation was to fulfill the constitutional duty of the State to provide housing. The objective was noble. The Act in line with international instruments such as the United Nations Human Rights Declaration of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966 and the Istanbul Declaration and Habitat Agenda of 1966. Sections 3 and 4 of the Act were constitutional and did not in any way infringe article 43(1)(b) of the Constitution.
24. Housing was a shared function between the National Assembly and the Senate. The Act did not offend the principle of devolution because the Affordable Housing Board under section 16 had representation from both the National and County governments. The scheme of the Act worked well towards the promotion of the complementarity of functions and interdependence intended by the article 6(2) and the Fourth Schedule to the Constitution.
25. The Act did not offend the principle of devolution because the Affordable Housing Board under section 16 has representation from both the National and County governments. In any event the



- scheme of the Act worked well towards the promotion of the complementarity of functions and interdependence intended by the article 6(2) and the Fourth Schedule to the Constitution.
26. It was the constitutional mandate of the National Land Commission (NLC), which was established under article 67(1) of the Constitution, to, *inter alia*, manage public land on behalf of the National and County Governments. Since section 41 provided for the use of public land in accordance with the provision of the Land Act, there was no conflict between the Act and the Constitution. The scheme of the Act accorded well with the constitutional mandate of the NLC. Section 41 of the Affordable Housing Act was not in conflict with article 67 of the Constitution as it provided that the use of public land for purposes of the Act in consonance with the Land Act.
 27. Article 205 of the Constitution provided that when a Bill that included provisions dealing with any financial matter concerning county governments was published, the Commission of Revenue Allocation (CRA) shall consider those provisions and may make recommendations to the National Assembly. It further provided that any recommendations made by the CRA shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill. Article 205(1) the Constitution placed a mandatory duty on CRA to consider Bills that include provisions dealing with any financial matter concerning County governments, and to make recommendations to the National Assembly for consideration.
 28. The Act included no provision authorizing direct allocation of funds to the County Governments without going through the established procedure in existence for sharing of revenue. Whereas the Act created the housing levy, it did not allocate a specific portion fund or amount of the levy collected under it to the County Governments. To the contrary, section 11(3) of the Act was explicit that the monies may be allocated to county governments in accordance with the Public Finance Management Act and on such conditions as may be prescribed by the Cabinet Secretary for the time being responsible for the National Treasury.
 29. The Board was expected to formulate an annual investment programme that must first be approved by Parliament in the manner set out in section 15 of the Act before implementation. It would be at that stage that the advice of CRA would be critical. Failure by CRA to comment on the Bill before it was passed by the National Assembly was not necessarily fatal to the Act. Whether or not CRA participated in the process of enactment of the Act was inconsequential.
 30. There was a general presumption that statutory provisions were not meant to have a retrospective effect. However, the presumption could be rebutted if the intention of the legislature was clear, either by way of the express wording of the statute in question or by necessary implication.
 31. Section 60(2) of the Act provided that all monies which immediately before the commencement of the Act, that were held by the National Housing Corporation under the Housing Fund Regulations, 2018 shall vest in the Fund and shall be deposited into the Fund. Section 60 of the Act was intended by Parliament to have a retrospective effect.
 32. Section 60 also sought to preserve the transactions that had taken place under section 84 of the Finance Act 2023 prior to the determination of Petition 181 of 2023 that declared the Finance Act unconstitutional. That did not give the Act a retroactive effect as alleged, but was intended to manage the transition involving ongoing projects. Therefore, the provision was not unconstitutional. Section 60 of the Act was not inconsistent with Article 205 of the Constitution.
 33. Through the KRA Amendment Act dated May 9, 2024, section 5 of the KRA Act was amended to provide that the Authority would be an agent of the Government for purposes of the collection and receipt of all revenue. In section 11, one of the functions of the Commissioner-General was the management of funds, property and affairs of the Authority. The law has clearly designated that the collector of the Housing Levy was the Commissioner General, KRA and there was no conflict in the said designation.



34. Section 27 of the Civil Procedure Act provided that costs follow the event. While the law gave the court discretion over the costs associated with all suits, including the power to determine who should bear those costs and to what extent, the court must evaluate whether the particular circumstances of this case justify awarding costs. Rule 26(1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms practice and Procedure Rules 2013) recognized that the award of costs was at the discretion of the court. The petitions were brought in public interest. Therefore, it was only just and fair that the petitioner should not be burdened with costs.

Petition dismissed, each party was to bear their own costs.

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] KLR 154; (1976 – 1980) KLR 1272 - (Explained)
2. *Andayi, Nelson Havi v Law Society of Kenya & 3 others* Petition 607 of 2017; [2018] KEHC 8791 (KLR) - (Explained)
3. *Apiyo v Attorney General & 2 others* Petition E013 of 2023; [2024] KEHC 1967 (KLR) - (Explained)
4. *Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others* Petition 56 of 2014; [2014] KEHC 7524 (KLR) - (Explained)
5. *Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties)* Constitutional Petition E473 of 2023; [2024] KEHC 8255 (KLR) - (Explained)
6. *Azimio La Umoja One Kenya Coalition Party v President of Kenya & 9 others* Petition E153 of 2023; [2023] KEHC 21602 (KLR) - (Explained)
7. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Explained)
8. *Cereal Growers Association & another v County Government of Narok & 10 others* Petition 385 of 2013; [2014] KEHC 8205 (KLR) - (Explained)
9. *Commissioner of Income Tax v Pan African Paper Mills (EA) Ltd* Civil Appeal 29 of 2005; [2018] KECA 585 (KLR) - (Mentioned)
10. *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 6 others* Petition 14 of 2014; [2014] KESC 52 (KLR) - (Mentioned)
11. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 15 (KLR) - (Explained)
12. *Council of County Governors v Attorney General & 19 others* Petition 278 of 2017; [2023] KEHC 21855 (KLR) - (Explained)
13. *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* Petition 150 & 234 of 2016 (Consolidated); - (Explained)
14. *Faraj & 3 others v Police & 2 others* Constitutional Petition 165 of 2020; [2022] KEHC 287 (KLR) - (Explained)
15. *Feisal, Hassan & 2 others v Public Service Board of Marsabit County & another* Constitutional Petition 329 of 2016; [2016] KEHC 3640 (KLR) - (Applied)
16. *Gakuru, Robert & others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR) - (Explained)
17. *Gwer & 5 others v Kenya Medical Research Institute & 3 others* Petition 12 of 2019; [2020] KESC 66 (KLR) - (Explained)
18. *In the matter of Council of Governors & 47 others* Reference 3 of 2019; [2020] KESC 65 (KLR) - (Explained)



19. *In the Matter of the National Land Commission* Advisory Opinion Reference 2 of 2014; [2015] KESC 3 - (Explained)
20. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Explained)
21. *Institute for Social Accountability & another v National Assembly & 5 others* Petition 1 of 2018; [2022] KESC 39 (KLR) - (Explained)
22. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Explained)
23. *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* Petition 17 of 2015; [2021] KESC 39 (KLR) - (Explained)
24. *Katiba Institute v Attorney General & 9 others* Civil Application 201 of 2018; [2018] KECA 115 (KLR) - (Explained)
25. *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* Motion 42 & 43 of 2014; [2016] KESC 6 (KLR) - (Explained)
26. *Kenya Hotel Properties Limited v Attorney General & 5 others* Petition 16 of 2020; [2022] KESC 62 (KLR) - (Explained)
27. *Kenya Human Rights Commission & another v Attorney General & 6 others* Civil Appeal 147 of 2015; [2019] KECA 182 (KLR) - (Applied)
28. *Kenya Revenue Authority v Export Trading Company Limited* Petition 20 of 2020; [2022] KESC 31 (KLR) - (Applied)
29. *Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others (Interested Parties)* Civil Appeal E591 of 2021; [2022] KECA 1306 (KLR) - (Explained)
30. *Kiumo, Amos & 19 others (Vide Attached List on Behalf of Themselves and Residents of Igembe Central District) v Cabinet Secretary Ministry of Interior and Coordination of National & 3 others* Petition 16 of 2013; [2014] KEHC 4373 (KLR) - (Explained)
31. *KKB v SCM & 5 others* Constitutional Petition 014 of 2020; [2022] KEHC 289 (KLR) - (Explained)
32. *Law Society of Kenya v Cabinet Secretary, Ministry of Lands Housing and Urban Development & 3 others* Petition 618 of 2014; [2017] KEHC 8707 (KLR) - (Explained)
33. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
34. *Manani, Jacqueline Okeyo & 5 others v Attorney General & another* Petition 36 of 2018; [2018] KEHC 9395 (KLR) - (Explained)
35. *Masai Mara (SOPA) Limited v Narok County Government* Petition 336 of 2015; [2016] KEHC 7616 (KLR) - (Explained)
36. *Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Applied)
37. *Mitu-Bell Welfare Society V Attorney General & 2 others* Petition 164 of 2011; [2013] KEHC 6337 (KLR) - (Explained)
38. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)
39. *Mohammed, Abduba Dida v Debate Media Limited & another* Civil Appeal 238 of 2017; [2018] KECA 642 (KLR) - (Mentioned)
40. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014; [2015] eKLR - (Explained)
41. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
42. *National Assembly & another v Okoiti & 55 others* Civil Appeal E003 of 2023 & . E016, E021, E049, E064 & E080 of 2024 (Consolidated); [2024] KECA 876 (KLR) - (Explained)



43. *National Assembly & another v Okoiti & 55 others* Civil Appeal E003 of 2023 & . E016, E021, E049, E064 & E080 of 2024 (Consolidated); [2024] KECA 876 (KLR) - (Explained)
44. *Oindi Zaippeline & 39 others v Karatina University & another* Civil Appeal 52 of 2014; [2015] KECA 799 (KLR) - (Explained)
45. *Okoiti & 2 others v Attorney General & 14 others* Petition (Application) 2 (E002) of 2021; [2023] KESC 31 (KLR) - (Applied)
46. *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties)* Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated); [2023] KEHC 25872 (KLR) - (Explained)
47. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) - (Explained)
48. *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* Petition 353 & 505 of 2017; [2017] KEHC 9684 (KLR) - (Explained)
49. *Pharmaceutical Manufacturing (K) Co Ltd & 3 others v Commissioner General of Kenya Revenue Authority & 2 others* Civil Appeal 283 of 2014; [2017] KECA 729 (KLR) - (Explained)
50. *Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae)* Civil Appeal 1 of 2016; [2016] KECA 534 (KLR) - (Explained)
51. *Republic v Kenya Revenue Authority Ex-Parte Aberdare Freight Services Ltd & 2 others* Miscellaneous Civil Application 946 of 2004; [2004] KEHC 1238 (KLR) - (Explained)
52. *Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti* Judicial Review Application 102 of 2018; [2018] KEHC 9745 (KLR) - (Explained)
53. *Republic v Nairobi City County & 2 others exparte Wainaina Kigathi Mungai* Judicial Review Miscellaneous Application 356 of 2013; [2014] KEHC 4095 (KLR) - (Explained)
54. *Republic v Vice Chancellor Moi University & 2 others ex-parte Benjamin J Gikenyi Magare* Judicial Review 3 of 2018; [2018] KEHC 5531 (KLR) - (Explained)
55. *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 6 others; Parliament & 4 others (Interested Parties)* Petition 208,185 and 339 of 2019; [2020] KEHC 10370 (KLR) - (Explained)
56. *SBM & another v Attorney General* Constitutional Petition 21 of 2021; [2022] KEHC 13920 (KLR) - (Explained)
57. *Senate & 2 others v Council of County Governors & 8 others* Petition 25 of 2019; [2022] KESC 7 (KLR) - (Explained)
58. *Speaker of the National Assembly & another v Senate & 12 others* Civil Appeal E084 of 2021; [2021] KECA 282 (KLR) - (Explained)
59. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
60. *Thuku Kirori & 4 others J(Suing for and on behalf of the Private Veterinary Professional of Murang'a County) v County Government of Murang'a & another* Petition 1 of 2014; [2014] KEHC 4667 (KLR) - (Explained)
61. *Wakhungu & 2 others v Republic* Criminal Appeal E039 of 2022 & 077 & 078 of 2023 (Consolidated); [2024] KECA 1426 (KLR) - (Explained)
62. *Wamwere & 5 others v Attorney General* Petition 26, 34 & 35 of 2019 (Consolidated); [2023] KESC 3 (KLR) - (Explained)
63. *Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties)* Constitutional Petition E005 & E001 (Consolidated) of 2021; [2021] KEHC 9748 (KLR) - (Explained)



South Africa

1. *Doctors for Life International v Speaker of National of the National Assembly & others* (CCT12/05) [2006] ZACC 11 - (Mentioned)
2. *Harksen v Lane* NO [1998] 1 SA 300 - (Explained)
3. *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) - (Explained)
4. *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) - (Explained)
5. *South African Veterinary Council v Szymanski* (79/2001) [2003] ZASCA 11; 2003 (4) SA 42 (SCA); 2003 (4) BCLR 378 (SCA) - (Explained)

United Kingdom

1. *Entick vs Carrington* (1965) 2 WILS - (Explained)
2. *R (on the application of Greenpeace Ltd) v. Secretary of State for the Environment, Food and Rural Affairs* [2007] EWCA Civ 589 - (Mentioned)
3. *R (on the application of Moseley) v Haringey London Borough Council* [2014] UKSC 56 - (Explained)
4. *R v Gloucestershire County Council, ex parte Barry* [1997] 1 WLR 915 - (Explained)
5. *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 3 WLR 1301 - (Explained)
6. *R v. Secretary of State for the Environment, ex parte Spath Holme Ltd* [2001] 2 AC 349 - (Explained)
7. *Wilson & others vs Secretary of State for Trade and Industry* [2003] UKHL 40 - (Explained)

India

Lal Chand v Radha Kishan AIR 1977 SC 789 - (Mentioned)

United States

1. *Citizens Savings and Loan Association v Topeka* 20 Wall 655,662,664 87 US 655 (1874) - (Explained)
2. *Osborn v Bank* 22 US 738 (1824) - (Explained)

Canada

R v Big M Drug Mart Ltd [1985] 1 SCR 295 - (Explained)

Regional Court

1. *Hardware & Ironmongery v Attorney General* 41 ER 469 - (Explained)
2. *Ndyanabo v Attorney General* [2001] EA 485 - (Explained)

China

Ng Ka Ling & another v The Director of Immigration (1999) 1 HKLRD 315 - (Explained)

Statutes

Kenya

1. Affordable Housing Act, 2024 (Act No 2 of 2024) section 1(a);3(b); 4(2)(a); 4(2)(b); 4(3)(b); 5; 6; 7; 9(1)(b), (g),(2); 10; 11(3),(4)(a) (c); 12; 14(5)(d); 15(2),(3); 16; 17; 22; 24; 25; 26; 28(3); 30(3); 32; 34; 41; 42; 43; 44; 45; 48; 49; 50; 51; 52; 58; 59; 60(2),(3),(4); 61; 62(4); Schedule Third- (Interpreted)
2. Constitution of Kenya articles 1; 2; 3(1); 6(2); 10; 19; 20; 22; 21; 24; 25(a), (c); 27(1) & (2); 28; 29; 36; 40; 43; 46(1)(c); 47(1); 48; 50(1),(2); 59(1); 62(2)(3)(4); 66; 67(2); 86; 93(2); 94(1), (4), (5), (6); 109; 110 (4); 112; 114 (3)(d); 118; 129; 131(2); 153(4); 159(1); 160; 165(3)(d)(i)(ii)(iii); 174; 185(2); 186(1) ; 187(2); 201; 205; 206 (1)(a); (207); 209(5); 210; 218; 220; 228(4)(5); 249; 258; 259(1); part 3; Schedule Fourth; part I, II- (Interpreted)
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, (Constitution Sub Leg) rule 10(3)(4) - (Interpreted)
4. Employment Act (cap 226) sections 19(3); 31 - (Interpreted)
5. Environment And Land Court Act (cap 8D) section 13 - (Interpreted)
6. Evidence Act (cap 80) section 85 - (Interpreted)



7. Fair Administrative Action Act (cap 7L) section 4, 5- (Interpreted)
8. Finance Act, 2023 (Act No 4 of 2023) section 84 - (Interpreted)
9. Housing Act (cap 117) sections 3(2); 3(2)(d); 3(3); 4(2), (3); 5(4),(5),(6); 6; 8; 9; 10(e); 11 - 21; 22 – 32 - (Interpreted)
10. Income Tax Act (cap 470) sections 3, 52B - (Interpreted)
11. Kenya Revenue Authority Act (cap 469) section 11(1) - (Interpreted)
12. Land Act (cap 280) In general - (Cited)
13. Leadership And Integrity Act (cap 185C) section 11- (Interpreted)
14. Sectional Property Act (cap 286) In general - (Cited)
15. State Corporations Act (cap 446) sections 2; 8(1)(e)- (Interpreted)
16. Statutory Instruments (Exemption from Expiry) Regulations (cap 2A Sub leg) In general - (Cited)
17. Statutory Instruments Act (cap 2A) section 21(1-3) - (Interpreted)

Instruments

1. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
2. Istanbul Declaration and Habitat Agenda, 1996
3. Universal Declaration of Human Rights (UDHR), 1948 article 25(1)

Advocates

None mentioned

JUDGMENT

A. Introduction & Background

1. The *Affordable Housing Act* No 2 of 2024 was assented to on March 19, 2024 (“the Act). The objective of the Act was to give effect to article 43(1)(b) of the *Constitution*; to provide a framework for development and access to affordable housing and institutional housing; and for connected purposes.
2. The operationalization of the Act precipitated the filing of the 6 petitions. Petition E154 of 2024, being the lead file, was consolidated with Petition E173 of 2024; E176 of 2024, E181 of 2024 and E191 of 2024 and 11 of 2024.
3. In the course of the proceedings some of the petitioners sought leave of the court to amend their petitions. Their prayers were granted vide a ruling of the court dated June 3, 2024.

B. Summary of Reliefs Sought

Petition E154 of 2024

4. The petitioners in Petition E154 of 2024 are Dr Magare Gikenyi Benjamin, Pauline Nduta Kinyanjui, Philemon Abuga Nyakundi, Shallum Kaka Nyakundi and Jamlick Otondi Orina. They seek the following reliefs:
 - a. A declaration that there are inherent natural law and constitutional limitations on the power of the political arms of Government (the Executive and the Legislature) to impose taxes, levies which limitations protect taxpayers from capricious, unreasonable, arbitrary, excessive, cruel, and significantly unpatriotic taxes/levies.
 - b. A declaration that the action of legislating the Affordable Housing Act, 2024 which contains threats to the *Constitution*, Parliament (the National Assembly and Senate) failed in its duty to uphold the *Constitution* as required at articles 93(2) and 94(4) of the *Constitution* and in



effect the 4th and 5th respondents failed the obligatory and constitutional duty of legislating and oversighting and protecting Kenyans against excessive and illegal taxation/levying.

- c. A declaration that the action of initiating/tabling the [Affordable Housing Act 2024](#) which contains threats to the [Constitution](#), the Cabinet Secretary for Lands, Public Works, Housing and Urban Development and the Cabinet Secretary for National Treasury and Planning failed in their duty to uphold the [Constitution](#) as required at article 153(4)(a) of the [Constitution](#).
- d. A declaration that inter alia section(s) 3(b), 4(2)(a), 4(2)(b), 4(3)(b), 5, 6, 7, 11(3), 11(4)(a) & (c), 12, 14(5)(d), 15(2) & (3), 16, 25, 32, 34, 41, 42, 43, 44, 45, 48, 49, 51, 52, 58 and other unconstitutional sections of the Affordable Housing Act, 2024 are contrary to constitutional provisions inter alia articles 1, 2, 3(1), 10, 19, 20, 21, 24, 25(a) & (c), 27(1) & (2), 28, 29, 36, 40, 43, 46(1)(c), 47(1), 48, 50(1) & (2), 93(2), 94(1), (4), (5) & (6), 109, 129, 131(2); 153(4), 159(1), 160, 185 (2), 186 (1) & 187 (2), 258 & 259(1) and hence unconstitutional, invalid, null and void ab initio.
- e. An order of judicial review by way of certiorari, quashing inter alia the section(s) 3(b), 4, 5, 6, 7, 9, 11(3) (4), 12(2), 14(3), 15(2), 23(1), 30, 31, 32, 33, 34, 35, 36, 38, 39, 42, 43, 46, 47, 48 and all unconstitutional sections of the [Affordable Housing Act, 2024](#).
- f. A declaration that the state/respondent's actions of improperly exercising powers pursuant to article 209(4) without due regard and conformity with article 10(2) of the [Constitution](#) and part 3 of the Bill of Rights is unconstitutional null and void.
- g. A declaration that at all times the respondents or any other person must conduct meaningful (as opposed to cosmetic) public participation for purposes of article 10(2) of the [Constitution](#) as held in many Supreme Court decisions inter alia Petition 5 of 2017 - [British American Tobacco Kenya, PLC \(formerly British American Tobacco Kenya Limited\) v Cabinet Secretary for the Ministry of Health & 5 others](#) [2019] eKLR and that the input of the said public participations must at all times be meaningfully considered for purposes of article 10(2) of the [Constitution](#).
- h. An order of judicial review by way of mandamus, compelling respondents and/or any other person to strictly follow the finding of public participation while enacting laws and/or any issue done pursuant to article 10(2) of the [Constitution](#).
- i. An order of judicial review by way of Prohibition, prohibiting/barring them from evicting Kenyans from public land ostensibly for purposes of [Affordable Housing Act](#) and/or any other purpose except as provided by the law/Constitution.
- j. Any other order and/or modification of petitioner's prayer(s) which this honourable court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.
- k. Costs of this petition to be borne by respondents.
- l. That the court be pleased to issue judicial review order of mandamus to the respondents and/or government to refund in full the affordable housing levy to all Kenyans and/or entities who have been illegally and unconstitutionally levied since the inception of the [Affordable Housing Act 2024](#) within 6 months or any other duration which the court might deem fit so as to achieve justice for majority of Kenyans as a whole.

Petition No E173 of 2024

5. The petitioner, Trade Union Congress of Kenya, seeks for the following reliefs;



- a. A declaration that sections 3 and 4 of the [Affordable Housing Act](#), 2024 are unconstitutional, null and void for infringing the rights to equality, dignity and social economic rights.
- b. A declaration that sections 3 and 4 of the [Affordable Housing Act](#), 2024 are a threat to social economic rights and are void to the extent of their inconsistency with the [Constitution](#) and violate/or threaten employees' rights to human dignity, right not to be subjected to servitude, right to property, the right to fair labour practices and the economic and social rights.
- c. A permanent injunction restraining the respondents either jointly or severally by themselves, officers subordinate of them, agents, assigns, representatives, employees, servants or otherwise howsoever from taking any steps to enforce or in any way implement sections 3 and 4 of the Affordable Housing Act.
- d. Any other orders that the honourable court may deem fit to grant.
- e. Costs of the petition.

Petition No 176 of 2024

6. The petitioner in petitioner No 176 of 2024 is Moses Nthurima. He prays for the following orders;
 - a. The [Affordable Housing Act](#) be declared null and void on the ground that it did not meet the constitutional parameters of public participation under article 201 of the [Constitution of Kenya](#)
 - b. A declaration of unfair labor practices in contravention to Article 41 of the [Constitution of Kenya](#) .
 - c. A declaration that the [Affordable Housing Act](#) section 48(1) is inconsistent with section 49(2) (c) of the Act.
 - d. A declaration that *inter alia* section(s) 3(b), 4(2)(a), 4(2) (b), 4(3)(b), 5, 6, 7, 11(3), 11(4) (a) &(c), 12, 14(5) (d), 15(2) & (3), 16, 25, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,44, 45, 48 and 49 of the [Affordable Housing Act](#) are contrary to constitutional provisions, *inter alia* articles 1, 2, 3(1), 10, 19, 20, 21, 24, 27(1) & (2), 28, 29, 36, 40, 43, 46(1) (c), 47(1), 48, 50(1) & (2), 93(2), 94(1), (4), (5) & (6), 109, 129, 131(2), 153(4), 159(1), 160, 185(2), 186(1) & 187(2), 258 & 259 (1) and hence unconstitutional, invalid, null and void *ab initio*.
 - e. A declaration that the state/respondent's actions of improperly exercising powers pursuant to article 209(4) without due regard and conformity with article 10(2) of the [Constitution](#) and part 3 of the Bill of Rights is unconstitutional null and void.
 - f. That the respondents be ordered to pay costs and interest of the suit at court rates and at the court's discretion.
 - g. Any other or better relief the honourable court may deem fit to grant.

Petition No E181 of 2024

7. The petitioners filed an amended petition on May 28, 2024 seeking the following reliefs:
 - a. A declaration that the Housing Act (Chapter 117, Laws of Kenya), in its entirety, is unconstitutional, null, and void.



- b. A declaration that sections 3(2), 3(2)(d), 3(3), 4(2 & 3), 5(4, 5 & 6), 6, 8, 9, 10(e), 11 - 21, and 22 - 32 of the [Housing Act](#) (Chapter 117 of the Laws of Kenya) are unconstitutional, null and void.
- c. A declaration that the Government Financial Management (Kenya Slum Upgrading, Low Cost Housing and Infrastructure Trust Fund) Regulations, 2006, are unconstitutional, null and void.
- d. A declaration that regulations 4, 7, 8 and 10 of the [Government Financial Management \(Kenya Slum Upgrading, Low Cost Housing and Infrastructure Trust Fund\) Regulations](#), 2006 are unconstitutional, null and void.
- e. A declaration that the [Government Financial Management \(Kenya Slum Upgrading, Low Cost Housing and Infrastructure Trust Fund\) Regulations](#), 2006, lapsed on 25.01.2024.
- f. A declaration that the National Housing Policy (Sessional Paper No 3 of 2016) is unconstitutional, null and void.
- g. A declaration that the Commission on Revenue Allocation's failure to consider sections 4 to 7 (ie, Part II) of the Affordable Housing Bill, 2023, which raise financial matters concerning county governments by imposing the affordable housing levy, voided the resultant Act.
- h. A declaration that the Senate's failure to conduct and/or facilitate adequate public participation on the Affordable Housing Bill, 2023, voided the resultant Affordable Housing Act, 2024.
- i. The [Affordable Housing Act](#), 2024, is unconstitutional, null and void in its entirety.
- j. A declaration that sections 1(a), 2 (on definition of affordable housing, and the appointment of KRA Commissioner General as fund collector), 3(1), 4, 5, 9(1)(b), 10(1), 11, 14, 15, 16(3), 22, 24, 25, 28(3), 30(3), 32, 33(1), 34 - 40, 42, 43, 44 - 47, 48(1), 49, 50, 52(2 & 4), 53, 54, 59, 60(2, 3 & 4), 61, and 62(4) of the Affordable Housing Act, 2024, are void for contravening the [Constitution](#).
- k. A declaration that the [Affordable Housing Act](#), 2024 is void for duplicating the [Housing Act](#) (chapter 117, Laws of Kenya).
- l. A declaration that the Senate failed to protect devolution by passing the Affordable Housing Bill, 2023.
- m. A declaration that the Council of Governors has failed to protect devolution by not standing up for the devolved function of housing.
- n. A declaration that The inclusion of institutional housing within the ambit of article 43(1)(b) of the [Constitution](#) is void for being an unlawful attempt to irregularly amend the [Constitution](#) by extending the right to accessible and adequate housing to non-natural persons.
- o. A declaration that the failure to guarantee how all contributors to the fund will personally benefit directly from their contributions violates article 40 of the [Constitution](#).
- p. A declaration that the Commissioner General of the Kenya Revenue Authority cannot be the designated collector of the affordable housing levy.
- q. A declaration that the National Government cannot constitutionally and legally use public land for the construction of houses to be privatised under the Affordable Housing Act, 2024.



- r. A declaration that the National Land Commission failed to protect public land from being misused and/or stolen through the ongoing Affordable Housing projects.
- s. A declaration that the Controller of Budget failed to protect public funds from being misused and/or stolen by approving the ongoing Affordable Housing projects.
- t. A declaration that the Affordable Housing Levy rate of 1.5% as provided in the Affordable Housing Act, 2024, was set arbitrarily and, therefore, it is unconstitutional, null and void.
- u. A declaration that The Affordable Housing Act, 2024, cannot be applied retrospectively to legitimize, by deeming them to have been paid under the Act, previous deductions of the Housing Levy under the *Employment Act*, 2007, pursuant to the unconstitutional Section 84 of the *Finance Act* 2023?
- v. An order directing the National Government to refund all the money that was deducted from employees and employers under the void section 84 of the *Finance Act* 2023.
- w. A declaration that no money can be raised under the *Affordable Housing Act*, 2024, before and until the Affordable Housing Fund is fully operational.
- x. A declaration that the ongoing affordable housing projects cannot lawfully be undertaken under any other unconstitutional law, including the void section 84 of the *Finance Act*, 2024.
- y. A declaration that the Senate Standing Order 111(1 to 3) of 2023 is unconstitutional, and its application to the 2nd and 3rd Readings of Affordable Housing Bill, 2023, voided the resultant *Affordable Housing Act*, 2024.
- z. That the costs of this amended petition should be awarded to the petitioners or, in the alternative, each party should bear their costs.

The petitioners also prayed for orders: -

- i. Quashing the Housing Act (chapter 117, Laws of Kenya), in its entirety or, in the alternative, sections 3(2), 3(2)(d), 3(3), 4(2 & 3), 5(4, 5 & 6), 6, 8, 9, 10(e), 11 - 21, and 22 - 32 of the Act.
- ii. Quashing the Government Financial Management (Kenya Slum Upgrading, Low Cost Housing and Infrastructure Trust Fund) Regulations, 2006, in its entirety or, in the alternative, regulations 4, 7, 8 and 10 thereof.
- iii. Quashing the National Housing Policy (Sessional Paper No. 3 of 2016) in its entirety.
- iv. Quashing the Affordable Housing Act, 2024, in its entirety or, in the alternative, sections 1(a), 2 (on definition of affordable housing, and the appointment of KRA Commissioner General as fund collector), 3(1), 4, 5, 9(1)(b), 10(1), 11, 14, 15, 16(3), 22, 24, 25, 28(3), 30(3), 32, 33(1), 34 - 40, 42, 43, 44 - 47, 48(1), 49, 50, 52 (2 & 4), 53, 54, 59, 60(2, 3 & 4), 61, and 62(4) thereof.
- v. Quashing the imposition of the Affordable Housing Levy at the rate of 1.5% as provided in the Affordable Housing Act, 2024.
- vi. Quashing the Senate Standing Order 111(1 to 3) of 2023.



- vii. Quashing all ongoing affordable housing projects being undertaken under any unconstitutional law, including the unconstitutional section 84 of the Finance Act, 2024.
- viii. Prohibiting the National Land Commission, the State Department for Housing and Urban Development, and any other State organ or agency from approving the use of or using public land for the construction of houses to be privatised under the Affordable Housing Act, 2024.
- ix. Prohibiting the application of the Affordable Housing Act, 2024, retrospectively.
- x. Prohibiting the taxing of Kenyans separately through the Affordable Housing Fund or any other contributory Fund to finance the construction of institutional housing.
- xi. Prohibiting the use of the Affordable Housing Act, 2024, to amend the Constitution to expand the rights and fundamental freedoms in article 43(1)(b) of the Constitution to include the right to 'Affordable Housing'.
- xii. Prohibiting the Commissioner General of the Kenya Revenue Authority from collecting the affordable housing levy.
- xiii. Compelling the respondents, or the Government of Kenya in its entirety as represented by the Hon Attorney General, to refund all and any money collected from the public under the impugned Affordable Housing Act, 2024.
- xiv. Compelling the Council of Governors to protect devolution by standing up for the devolved function of housing.
- xv. Awarding the costs of this amended petition to the petitioners or, in the alternative, directing each party to bear their costs.
- xvi. Any other appropriate relief the court may deem just to grant.

Petition No E191 of 2024

8. The petitioners in Petition E191 of 2024 were Katiba Institute and Kenya Human Rights Commission and Katiba Institute. They filed an amended petition on May 20, 2024 seeking the following reliefs:
- a. A declaration that the Affordable Housing Act 2024 is unconstitutional;
 - b. A declaration that sections 4, 5, 6, 7, 9, 10, 16, 25, 29, 34-40, 41-47 and section 60 of the Affordable Housing Act are unconstitutional;
 - c. A declaration that the continued imposition of the Affordable Housing Levy and subsequent enforcement of the Affordable Housing Act by the respondents is unconstitutional and invalid;
 - d. An order of prohibition prohibiting the respondents from charging, levying or in any way collecting the Affordable Housing Levy.
 - e. An order of mandamus compelling the respondents to refund the already collected amounts to the respective employers and employees.
 - f. A declaration that articles 10, 21(3), and 201 require tax measures to be socially just, adequate, equitable, and progressive and must not disproportionately shift the tax burden to the poor and marginalised.



- g. A structural interdict directing the respondents to conduct a human rights impact assessment of the tax measures proposed to fund any governmental program.
- h. A permanent injunction barring the respondents from imposing any tax without conducting a human rights impact assessment of that tax measure under articles 10, 21(3), and 201 of the Constitution.
- i. Any other relief that this honourable court may deem fit to grant.
- j. Costs of this petition.

Petition No 11 of 2024

9. The Petition No 11 of 2024 was originally filed at the registry of the High Court in Nakuru and was there registered as Nakuru High Court Petition No E007 of 2024. Upon its transfer for consolidation with the other Petitions, it was assigned a manual number as Nairobi High Court Petition No 11 of 2024. The petitioner therein, Peter Okiro, is seeking the following reliefs;
 - a. A declaration that sections 4 and 5 of the Affordable Housing Act, 2024 in so far as they impose mandatory Affordable Housing Levy are unconstitutional as they violate articles 10, 40 and 209(5) of the Constitution.
 - b. A declaration that sections 16, 17 and 26 of the Affordable Housing Act, 2024 to the extent that it vests the National Government with the function of housing violates articles 10, 86, 207 and the Fourth Schedule to the Constitution.
 - c. A declaration that sections 4 and 5 Affordable Housing Act, 2024 in so far they affect the remuneration and benefits of the Judges are unconstitutional as they violate articles 2(4) of the Constitution.
 - d. In the alternative, an order that sections 4 and 5 of the Affordable Housing Act, 2024 in so far as they adversely affect the remuneration of and benefits of the Judges shall not apply to persons holding the office of the Judge in the Republic of Kenya.
 - e. A declaration that the Government of Kenya has attempted to overthrow the Constitution 2010.
 - f. Costs to be paid the to the petitioner by the respondent.

C. Summary of the Petitioners' Case

10. The petitioners faulted various provisions of the Affordable Housing Act, contending that they infringe the provisions of the Constitution. In particular, they took issue with various provisions of the Act as will be apparent here below.
11. The petitioners faulted section 4(2)(a) of the Act which introduced a levy known as the affordable housing levy ("the Levy") which taxes one's gross salary at the rate of 1.5% for being unconstitutional.
12. The petitioners further faulted section 4(2) and (b) for taxing 1.5% of the gross income of a person received or accrued, which is not subject to the Levy in respect of section 4(2)(a). It was their case that section 4(3)(b) of the Act is unconstitutional in so far as it provides that the Levy shall be paid to a collector as opposed to being collected by Kenya Revenue Authority (KRA) and paid into the consolidated fund as envisaged at article 206(1)(a) of the Constitution.



13. The petitioners also took issue with section 11(4)(a) which permits the allocation of 0.5-2% of the collected funds to the collector, contending that this will expose the fund abuse. They likewise averred that section 11(4)(a) &(c) of the Act seeks to use funds of up to 1% of administrative aspects contravenes article 6(2) of the [Constitution](#) on separation of government function.
14. The petitioners also impugned section 11(3) of the Act gives the Cabinet Secretary, Treasury power to direct the County government on “how” to use the funds, contrary to paragraph 8(d) of Part 2 of the Fourth Schedule to the [Constitution](#). They further averred that section 11(3) of the Act, which sets up a Board to carry out the functions of the executive is contrary to the Fourth Schedule of the [Constitution](#).
15. The petitioners faulted section 6 of the Act which provides for levy exemptions to a class of people, contending that it is contrary to articles 27 and 201 of the [Constitution](#) which outlaw discrimination. They also averred that the 3% penalty that is recoverable as a civil debt under section 7 of the Act amounts to a forced civil debt contrary to article 43.
16. Regarding section 10(1) of the Act which provides that the purpose of the Fund shall be to provide funds for the design, development and maintenance of affordable housing, institutional housing and associated social and physical infrastructure, it was the contention of the petitioners that is a usurpation of functions supposed to be undertaken by the County governments and is therefore in conflict with article 6(2) of the [Constitution](#) and paragraph 8(d) of Part 2 of The Fourth Schedule to the [Constitution](#).
17. It was the petitioners’ further assertion that the Board as created under sections 15(2) and (3) together with its composition as provided in section 16, is entirely made up of National government appointees. They contended that section 25 which envisages the appointment of the chief executive officer who takes up County Governments functions and section 34 which creates the county rural and urban affordable housing committee offend not only the Fourth Schedule but also articles 10 and 232 of the [Constitution](#).
18. It was further the petitioners’ case that for purposes of section 51 of the Act the Board has not been registered as a financial institution and is therefore shielded from scrutiny by the Controller of Budget, contrary to article 228(4) and (5) of the [Constitution](#).
19. The petitioners further claim that section 58 of the Act exposes the collected funds to pilferage contrary to article 201(d) of the [Constitution](#).
20. They were also concerned that section 12 of the Act creates a saving and investment fund, that gives no dividends or returns subjecting citizens to servitude contrary to article 25 of the [Constitution](#).
21. The petitioners relied on article 62(2) and (3) of the [Constitution](#), which provides that all public land is held and managed and/or allocated by the National Land Commission (NLC) to buttress their assertion that sections 41-45 of the Act offends the [Land Act](#) 2012.
22. They averred that section 44 is unconstitutional since it purports to create room for the entry of contracts with private institutions to build on public land and sell the same to private individuals/entities thereby offending article 62(2) and (3) of the [Constitution](#).
23. The petitioners asserted that that sections 48 and 49(2)(d) discriminate against people by introducing classes of people when it comes to allocation of housing units contrary to article 27 of the [Constitution](#).
24. It was the averment of the petitioners case that the Act will arbitrarily deny people their right to property contrary to article 40(2) & (3) of the [Constitution](#). It was also their case that section 52 of the Act amounts to double taxation.



25. The petitioners further contended that the Act limits what the owner of the housing unit can do with it by setting up a precondition for getting consent of the Board, notwithstanding absolute ownership. In addition, they asserted that that section 54 of the Act goes against the *Sectional Property Act* on the right to own property as further guaranteed in articles 29, 40 and 46 of the *Constitution*.
26. The petitioners also took issue with the fact that under section 50(2) the Cabinet Secretary is authorized to make housing regulations, contending that this is contrary to articles 185(2), 186 (1) & 187(2).
27. The petitioners further argue that the Act is silent on what happens to contributions made by formerly employed Kenyans who have since retired.
28. They further contended that the Act grants free land to various agencies as provided in the Third Schedule of the Act without the mechanism of superintending it.
29. It was petitioners' case that contributing Housing Fund at 1.5% offends article 47(1) of the *Constitution* as well as section 19(3) of the *Employment Act* (Chapter 226 of the Laws of Kenya) which provides that:

“...the total amount of all deductions which under the provisions of subsection (1), may be made by an employer from the wages of his employee at any one time shall not exceed two-thirds of such wages or such additional or other amount as may be prescribed by the Minister either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry...”
30. They argue that this goes against articles 24, 40, 201 and 210 of the same Constitution that protects citizens from arbitrary, unfair, and excessive taxation.
31. According to the petitioners, the Act is blind to the fact that employers are already under a legal obligation under section 31 of the *Employment Act* to provide accommodation to their employees or to pay sufficient money as rent, in addition to wages or salary paid. They argue that the levy amounts to a gross violation of the national values and principles of governance under article 10 of the *Constitution*.
32. The petitioner also contended that the Act offends article articles 1, 2 and 6(2) of the *Constitution*. They averred that Parts 1 and II of the Fourth Schedule to the *Constitution* as read with articles 185(2), 186 (1) and 187 (2) assign the National Government the exclusive function of formulating housing the Policy, while in Part II, the exclusive mandate on implementation of the Housing policy is assigned to County Governments.
33. The petitioners also deposed that the Act defies the public participation principles, and that the respondents blatantly disregarded the results of public participation contrary to the provisions of articles 10, 118 and 201 of the *Constitution*.

Petitioner's submissions:

34. In support of their averments, the petitioners submitted that the rights and fundamental freedoms belong to each individual and are not granted by the respondents/State. They relied on the case of *Institute of Social Accountability & another v National Assembly & 4 others High Court*, (2015) eKLR for an exposition of the principles set out under article 259 of the *Constitution*.
35. They submitted that the respondents have acted in contravention of common law principles established in *Entick v Carrington* (1965) 2 WILS to the effect that the state or state agencies can only do that which is permitted by the law. They also relied on the cases of *Hardware & Ironmongery v Attorney General* (EA) 1972 and *Salaries and Remuneration Commission & another v Parliamentary*



- Service Commission & 15 others; Parliament & 4 others (Interested Parties)* [2020] eKLR in support of the submission.
36. The petitioners further placed reliance on the case of *Katiba Institute & 3 others v Attorney General & 2 others* [2018] eKLR, wherein Hon Mwita J, referred to the case of *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, for the proposition that both purpose and effect are relevant in determining constitutionality; and that either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. The court also went ahead to cite the case of In *Ng Ka Ling & another v The Director of Immigration* (1999) 1 HKLRD 315 where the court observed that in the interpretation of a Constitution such as the Basic Law, a purposive approach is to be applied and that this approach is necessary because the *Constitution* states general principles and expresses purposes without condescending to particularity and definition of terms. As such gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the *Constitution* and relevant extrinsic materials.
37. The petitioners also placed reliance on the case of *Republic v Vice Chancellor Moi University & 2 others Ex parte Benjamin J Gikenyi Magare* [2019] eKLR where the court quoted *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300 on what constitutes an illegality by a decision-making authority.
38. According to the petitioners, the Act disrupts the functional assignment under Devolution in the context of article 6(2) as read with articles 185(2), 186(1) & 187(2) and paragraph 8(d) of the Fourth Schedule of the *Constitution*.
39. The petitioners further submitted that the respondents blatantly dismissed/disregarded the results of public participation contrary to the provisions of articles 10, 118 and 201 of the *Constitution*.
40. To buttress their argument, the petitioners placed reliance on the case of *British American Tobacco Kenya, Plc (Formerly British American Tobacco Kenya Limited) Vs Cabinet Secretary For The Ministry of Health & 5 others* [2019] eKLR and *Robert N Gakuru & others v Governor Kiambu County & 3 others*[2014] eKLR where Hon Odunga, J (as he then was) illuminated the law of public participation.
41. In respect of their assertion that sum provisions of the impugned Act are discretionary, the petitioners' made reference to *Masai Mara (SOPA) Limited v Narok County Government* [2016] eKLR and urged the court to adopt the principles set in that case. This case defines discrimination as any distinction, intentional or not, based on personal characteristics that impose disadvantages on certain individuals or groups, limiting their access to opportunities and benefits available to others.
42. The petitioners further suggested that our analysis of discrimination should follow the framework established in *Harksen v Lane* NO [1998] 1 SA 300, which emphasizes an objective evaluation of whether differentiation occurs on specified or unspecified grounds; that if no discrimination is found, the inquiry should end there. They also submitted that if differentiation is confirmed, the next step is to assess whether the discrimination is unfair.
43. On legitimate expectation the petitioners relied on the case of *Oindi Zaippeline & 39 others v Karatina University & another* [2015] eKLR where the court elaborated on the doctrine of legitimate expectation. They also made reference to *Republic v Nairobi City County* and *Republic v Kenya Revenue Authority*, where it was determined that legitimate expectation cannot override the law and that public authorities cannot alter their statutory powers due to their own errors.
44. Reliance was also placed by the petitioners on the case of *Republic v Nairobi City County & another ex parte Wainaina Kigathi Mungai*, High Court Judicial Review Misc Case No 356 of 2013 [2014] eKLR where the court held that legitimate expectation cannot override the law. The court in *Republic*



- v Kenya Revenue Authority ex parte Aberdare Freight Services Limited* [2004] 2 eKLR 530 is said to have held that a public authority may not vary the scope of its statutory powers and duties as a result of its errors or the conduct of others. The petitioners also relied on *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) at [paragraph 28] where the court outlined the requirements of legitimate expectation. The Supreme Court of Kenya in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, Petition No 14 of 2014 also set out the emerging principles on legitimate expectation.
45. According to the petitioners, the provision of accessible and adequate housing is exclusively a county government function and the nationwide imposition by the National government of standards as to what amounts to accessible and adequate housing, as enacted in the impugned Act offends the national values and principles of governance and the objects of devolution.
 46. They submitted that under Part 1 of the Fourth Schedule of the *Constitution*, the National government is charged with the responsibility of setting a national housing policy, while County Governments, have the responsibility to plan and develop housing. That enabling the national government, through its State departments and other agencies, as set out in the First Schedule of the Act, to plan and develop housing alongside county governments, offends both the division of functions between the two levels of government as well as the national values and principles of governance.
 47. They urged that a key object of devolution under article 174(i) of the *Constitution*, binds State departments of the national government and other national government entities as enumerated in the Act's First Schedule. The Petitioners relied on the case of the *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* (Petition 1 of 2018) [2022] KESC 39 (KLR) to buttress this point.
 48. The petitioners submitted that the planning and development of housing is not even a concurrent function shared between national and county governments under article 186(2) of the *Constitution*, as read together with the Fourth Schedule thereof.
 49. The petitioners made underscored the provisions of article 10(1) of the *Constitution* which stipulates that all state officers must adhere to the National Values and Principles when interpreting the *Constitution*, enacting laws and implementing policy decisions. According to them, Parliament forcefully introduced an egregious tax contrary to the *Constitution*. He relies on the Court of Appeal case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*, Civil Appeal No 224 of 2017 [2017] eKLR. The Petitioners submit that the import and powers given to the National and County Governments to impose taxes under articles 209 and 210 ought to be exercised in a manner that is envisaged by this Constitution and should comply with the principles laid out in article 201.
 50. The petitioners posited that the *Constitution* intends to create a self-sustaining economy by imposing reasonable and necessary taxes but does not in any way intend for Kenyans to be excessively taxed through unconstitutional laws. To buttress this point, the Petitioners placed reliance on the Court of Appeal decision in *National Assembly & 2 others v Okoti & 55 others* Nairobi COA Civil Appeal No E003 of 2023 which cited with approval Justice Miller of the US Supreme Court in *Citizens Savings and Loan Association v Topeka, 20 Wall 655,662,664 (1874)* on what can pass constitutional muster.
 51. In response to the respondents' attack on the jurisdiction of this court, the petitioners submitted that the court is clothed with the requisite jurisdiction to hear and determine the matter. In their submission, their petitions are hinged on the posturing that the Act does not meet the obligation of realizing the right to access to housing under article 43 and that its entire framework does not uphold



- the special obligation on the state under article 21 to fulfil the Bill of Rights and address the needs of the vulnerable thereby failing the Purpose and effect test.
52. They further submitted that the Act failed to meet the bare minimum of public participation laid out by the 3-Judge Bench of the court in *Enock Aura (supra)* (SHIF case) in that in promulgating the Act, the public was not sensitized prior to the invitation of comments.
 53. It was their contention that the senate only gave citizens seven days to submit a written memorandum; there was no deliberate attempt to reach the common ‘mwananchi’ by other means than the print media alone and the reports of the committee show that the majority of those who participated were opposed to the Bill yet the committee ignored those Submissions without offering reasons.
 54. The petitioners also submitted that Parliament failed to involve the National Land Commission which is the body charged with public land management. In their view, the Act does not explain the role the NLC will undertake and the procedure to be used in identifying public land suitable for Affordable Housing projects as required under article 62(4) and in effect the National Government through the Board usurps the constitutionally restricted roles of the NLC under article 67 as it assigns the Board the same functions contrary to article 249 that guarantees its functional independence.
 55. They submitted that in duplicating the functions of NHC under section 16, the Act lacks elements of good governance and prudence in public finance. They relied on the Supreme Court’s advisory opinion in *In the Matter of the National Land Commission* [2015] eKLR on functional independence of commissions, the role of NLC in protecting public land and to support the proposition that NLC cannot be taken out of the picture and replaced with a board created by National Government. They also relied on the High Court decision in *Azimio la Umoja One Kenya Coalition party v the President of Kenya* (Petition no E153 of 2023), to the effect that the President cannot take away the specific constitutional mandate of an independent constitutional commission and assign them to another body created by him and that courts must protect functional independence of commissions.
 56. The petitioners also impugned the Act contending that it violates the principle of non-retroactive application of a statutory provision by seeking to retroactively validate payments made under Section 84 of the *Finance Act, 2023* that was declared unconstitutional. In buttressing this argument, they relied on US Supreme Court decision in *United States v Carlton*, 512 US 26 which made a finding that Parliament cannot pass laws to defeat or amend a court decision.
 57. The petitioners relied on the case of *Law Society of Kenya v Kenya Revenue Authority & Attorney General* [2017] KEHC 8539 (KLR) and *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* [2024] KEHC 2890 (KLR) to support the argument that the Levy imposed under section 4 of the Act is not only discriminatory but also lacks a clear legal administrative framework. They submitted that these two reasons are among the very concerns raised by the High Court on November 28, 2023 when it declared section 84 of the Finance Act, 2023 unconstitutional. They submitted that the Affordable Housing Programme offends article 10 of the *Constitution* on the principles and values of good governance as well as the provisions of section 11 of *Leadership and Integrity Act* and the Fourth Schedule of the *Constitution*.
 58. In connection with the role of the Commission on Revenue Allocation (CRA), it was the contention of the petitioners that the Act is unconstitutional, null and void in so far as Parliament did not benefit from the advice of the CRA on the Bill. They submitted that it is mandatory for the CRA to advise the National Assembly and the Senate on the Act’s provisions, (which have financial implications on county government functions), and therefore that Act was passed in violation of article 205 of the *Constitution*. In this regard, reliance is placed on the Supreme Court decision *in the matter of Council of*



Governors & 47 others [2020] KESC 65 (KLR) and Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae) [2013] KESC 7 (KLR).

59. The petitioners also contended that the Act contains ambiguous and uncertain clauses, for instance, that it fails to provide a clear definition of ‘gross income’. They submitted that all tax must be premised on the law to engender certainty and accord with ordinary notions of equity and fairness. They relied on the Court of Appeal decision in Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others (Interested Parties) [2022] KECA 1306 (KLR) and this court’s decision in Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) [2021] KEHC 9748 (KLR).

D. The Respondents Case

60. The respondents, that is, the National Assembly, the Senate, the CS, Lands, Public Works, Housing and Urban Development; CS National Treasury and Economic Planning, the Attorney General, the Kenya Revenue Authority (KRA), the National Housing Corporation, Consumer Federation of Kenya’s (COFEK), the Commission on Revenue Allocation, Council of Governors, Controller of Budget and the Auditor General filed their respective responses to the petitions. The National Assembly relied on the replying affidavit of Samuel Njoroge dated 7th June 2024. The Senate relied on the replying affidavit by its Clerk, Jeremiah Nyegenye dated 18th July 2024. The CS, Lands, Public Works, Housing and Urban Developments National Treasury and Economic Planning and the Attorney General rely on four affidavits sworn by Charles Hinga, the PS, for the State Department for Housing and Urban Development. The Kenya Revenue Authority relied on their grounds of opposition dated April 15, 2024 and two replying affidavits sworn by Josephine Mugure on April 18, 2024 and July 19, 2024 respectively.
61. These responses appear aligned on most of the key issues and we do not propose to rehash the same as we will be reverting to them shortly in our analysis. In support of those averments, the respondents relied on the following submissions:

Issue No.1; Precision of Constitutional Pleadings

62. The respondents inveigh the petitioners’ lack of particularity in their pleadings; that there are no proper petitions before the court and, that they should be dismissed as they do not meet the threshold set out in Anarita Karimi Njeru v Republic (1979) eKLR reiterated by the Court of Appeal Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No 290 of 2012, which requires a petitioner to specifically demonstrate with reasonable precision how the respondents have violated their constitutional rights.

Issue No 2: Facilitations of Public Participations

63. The respondents contended that the National Assembly took elaborate steps in passing the Act as follows: The Affordable Housing Bill was published on December 4, 2023 and underwent first reading on December 7, 2023 and was subsequently committed to the Joint Committee consisting of the Departmental Committee of Finance and National Planning and that of Housing, Urban Planning and Public Works for review, consideration and report to the House pursuant to the provisions of Standing Order 127(1). That pursuant to article 118 of the Constitution and Standing Order 127(3) of the National Assembly, the Joint Committee carried out the following actions in a bid to ensure that public participation took place:



- a. Issued an advertisement in daily newspapers inviting the public to submit views on the Bill by the deadline of December 28, 2023;
 - b. Identified and extended invitations to key stakeholders who participated in public hearings held on diverse dates, across nineteen counties (19) including Narok, Kisii, Homa Bay, Vihiga, Uasin Gishu, Turkana, Baringo, Nakuru, Nyandarua, Machakos, Kirinyaga, Embu, Kiambu, Wajir, Tana River, Lamu, Kilifi, Mombasa and Nairobi City.
 - c. Invited stakeholders *vide* various letters dated January 11, 2024, January 13, 2024, January 29, 2024 for stakeholders to make oral presentations before the Committee in sittings that were held in Parliament Buildings on 29th and January 30, 2024, 6th and February 7, 2024;
 - d. Held meetings on various dates with the State Department of Housing, the National Treasury and the State Law Office among other governmental agencies;
 - e. Afforded opportunities for various agencies to make representations to the Joint Committee;
 - f. Promoting civic education in languages comprehensible to the diverse communities in various locations prior to public participation sessions;
 - g. Providing factsheets that gave information on the Affordable Housing Bill (including statistics) in languages comprehensible to the diverse communities, before the public participation sessions; and
 - h. Received and reviewed written memoranda that had been submitted by the public and invited stakeholders.
64. The respondents further submitted that majority of the stakeholders overwhelmingly supported the Bill, noting that the promotion of investments in affordable housing has a multiplier effect to the economy through the creation of employment, improved supply chains for construction materials and consequently will improve the general economy. They further submitted that the actions taken by the National Assembly as outlined above was in conformity with the provisions of articles 10 and 118 of the Constitution as well as Standing Order 127 of the National Assembly Standing Orders on public participation. As such, the Respondents contended that extensive public participation was conducted and that the Joint Committee extensively considered the contents of both the oral and written submissions from which it drew its recommendations.
65. The respondents asserted that that the assessment of Parliament’s compliance with its obligation to facilitate public participation in the legislative process is guided by the principle of reasonableness and that there is sufficient evidence to demonstrate that the Act was procedurally and legally subjected to public participation in accordance with the Constitution and the Standing Orders of the House. Further, the Petitioners were aware/duly informed about the forthcoming legislation and afforded a fair chance to present their views to the National Assembly regarding the Bill, subsequently enacted as an Act of Parliament.
66. Additionally, the respondents argued that considering the ample opportunities provided for feedback or memoranda during the public participation process, as well as subsequent debate in the Senate, particularly for the Senators, it is untenable for there to be the present allegations of impropriety. The respondents further affirmed that indeed, in the course of undertaking public participation on the Act, the joint Committee received submissions from the public and various stakeholders including some of the petitioners and it is therefore misleading and untruthful for the said petitioners to allege that there was no public participation in the enactment of the Act.



67. According to the respondents, the Bill was read a second time (second reading) on February 15, 2024 in which Members of the National Assembly debated the nature, extent and effect of public participation and that the National Assembly adhered to the legal procedure provided in the Constitution and National Assembly Standing Orders and eventually had the Bill passed with amendments on February 21, 2024. The Bill was thence referred to the Senate in compliance with article 110(4) of the Constitution.
68. The respondents asserted that, thereafter, on March 12, 2024, the Senate passed the Bill with amendments, the same was considered by the Joint Committee of the National Assembly on March 13, 2024. That upon the National Assembly concurring with the amendments as proposed by the Senate, the Bill was passed. The Speaker of the National Assembly thereafter presented the Bill for Presidential assent in accordance with article 112 of the Constitution and the President gave his assent on March 19, 2024.
69. The respondents argued that the effectiveness and adequacy of a public participation exercise varies according to the specific context and the nature of the issue under consideration and that the court should assess the entire comprehensive process conducted by both chambers in its entirety. Further, that the views gathered by the National Assembly played a significant role in informing the Senate's considerations and subsequent amendments.
70. The respondents also urged the honourable court to dismiss the petitioners' assertion that there was inadequate public participation on another ground. It was their submission that the question of public participation at the National Assembly was *res judicata* as it was conclusively addressed by the High Court sitting in Kisumu in the case of Apiyo v Attorney General & 2 others (*supra*) where the court found that public participation in respect to the Affordable Housing Bill No 75 of 2023 was compliant with the provisions of the Constitution. It was their case that once a court of concurrent jurisdiction had pronounced itself on an issue, the court is estopped from rendering itself on the same issue. In support of this argument the respondents made reference to the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789.
71. In the alternative, the respondents, in particular the Attorney General submitted that further public participation was conducted when Bill was transmitted to the Senate by the National Assembly. They urged the court to consider the averment of the Clerk of the Senate to the effect that on February 22, 2024 he published a notice inviting members of the public to submit their views by way of written memoranda by 5.00 pm on the February 29, 2024.
72. The respondents propounded the argument that public participation can either be direct or indirect, in that members of the public were free to participate directly by addressing select committees of the Houses of parliament or submitting memoranda to the Parliament, they were also at liberty to participate indirectly through their elected representatives in the National Assembly or Senate.
73. It was therefore the submission of the respondents, particularly the Attorney General, that the Bill was subjected to indirect participation by the various debates held by parliament and that the level of engagement before the Bill was passed was sufficient. In the Attorney General's view, the respondents could not be faulted for the manner in which public participation was conducted. The respondents relied on the cases of *Doctors for Life International v Speaker of National of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006; Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR and Amos Kiumo & 19 others v Cabinet Secretary, Ministry of Interior & Coordination of National Government & 8 others [2014] eKLR for the proposition that the key question is whether reasonable mechanisms were used to reach as many people as possible so as to give them an opportunity to participate in a legislative process.



Issue No:3 the constitutionality of the Act.

74. The respondents submitted that the petitioners' contention on the unconstitutionality of the act is unfounded and the court should dismiss such claims especially since, historically, courts have exhibited reluctance to intervene in matters concerning tax legislation and that the court should practice judicial restraint and decline to intervene in the policy determinations of both the Executive and the Legislature.
75. The respondents argued that the Act was enacted and passed in accordance with the requirements of the Constitution and in fulfilment of the State's obligation to provide accessible and adequate housing as outlined in article 21 and 43(1)(b) of the Constitution as well as Article 11(1) of the International Covenant on Economic, Social and Cultural Rights; and that both the process of enactment and the substance of the Act are constitutional. In addition, the respondents asserted that the Act is a commendable piece of legislative effort by the government aimed at realizing the right to adequate housing as enshrined under article 43(1)(b) of the Constitution which obligates the State to ensure that every citizen has access to adequate housing.
76. The respondents further asserted that the Act is necessary to give effect to Kenya's commitments under international conventions, conventions, including the Universal Declaration of Human Rights (article 25(1), which recognizes the right of everyone to a standard of living adequate for the health and wellbeing of himself and of his family, including housing, and that Kenya is also a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which in article 11(1) obliges State parties to recognize the right of everyone to an adequate standard of living for themselves and their families, including adequate housing. Thus, the Act is therefore a proactive step aimed at realizing the right to adequate housing as enshrined under article 43(1)(b) of the Constitution and is therefore a well-considered policy decision by the government which balances various competing societal interests and objectives aimed at benefiting the largest section of the Kenyan population in dire need of adequate and affordable housing.
77. The respondents further submitted that the Act also provides for institutional housing in line with Sessional Paper No3 of 2016 on National Housing Policy and that the inclusion of institutional housing cannot be seen to be an unlawful attempt to irregularly amend the Constitution by extending the right to accessible and adequate housing to non-natural persons given that public institutions have been unable to provide decent housing for its employees offering essential public services.
78. The respondents stated that taxation is a purview of the government and the creation of such policies is a mandate within the National Assembly and Executive as per the provisions of article 209 of the Constitution. Therefore, that implementing the 1.5% Levy provided under the Act cannot be said to be a breach of the Constitution.
79. Further, the respondents urged that the petitioners are misinformed that the Levy whose purpose is to provide affordable housing and associated physical infrastructure violates the right to property under article 40 of the Constitution. It was stated that the Act's intended purpose is to protect, promote and fulfil the right to adequate housing a socio-economic right all persons in Kenya are entitled to. It was added that in this regard imposition of a levy/tax under any statutory provision cannot be held to be an unconstitutional limitation on the right to property.
80. The respondents asserted that any taxation measure enacted by parliament enjoys the presumption of constitutionality, a point which the petitioners did not rebut in their arguments. The court was referred to the Court of Appeal case of Pharmaceutical Manufacturing (K) Co Ltd & 3 others v



Commissioner General of Kenya Revenue Authority & 2 others (2017) eKLR for the proposition that legitimate imposition of taxes does not amount to expropriation of property.

81. The respondents affirmed that the Act complies with National Values and Principles of Governance under article 10 of the Constitution and it provides a detailed and elaborate legal framework for the imposition and administration of the levy. Further, the respondents pointed out that section 59(1) of the Act provides that the Cabinet Secretary may, in consultation with the board, may make regulations for better carrying into effect the provisions of the Act; and therefore the allegation of a lack of a legal framework is not only unfounded but is also premature. They added that the regulations once made will be subject to Parliamentary scrutiny to weed out any excesses and to safeguard from abuse.
82. The respondents also made reference to the judgment of the court in Constitutional Petition No E181 of 2023 (consolidated)(supra) and pointed out that the Act was passed in accordance with that judgment to create a legal framework and establish a Fund for the collection of the levy that separates it from the Consolidated Fund. The respondents, likewise, maintained that the Act establishes the Board to effectively manage the Fund.
83. It was the respondents' further submission that the presumption of constitutionality carries profound importance, as it requires the court to entrust the people's representatives with an understanding of societal needs and the capacity to come up with purposefully crafted laws to address challenges informed by experience. It was their argument that the burden was on the petitioners to prove that the statute or its impugned provisions are constitutionally invalid; which burden the petitions failed to discharge. This court is therefore urged to recognize the historical context, consider the purpose and effect doctrine find that Act is constitutional.

Issue No:4 whether the Act is discriminatory in nature.

84. The respondents asserted that the Act is not discriminatory as alleged. In their view, what was complained of by the petitioners is a case of differentiation which is permissible under article 27(4) and (6) of the Constitution. It was their submissions that the Stated had the obligation to to ensure fair access to housing for all individuals irrespective of their backgrounds or circumstances. The respondent relied on the Supreme Court case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) and stated that the superior court identified the right to housing as a critical right for it obligates the state to formulate and implement policy and legislative measures to overcome lack of land and resources to meet the growing needs of access to housing for its citizens.
85. On the Levy being payable on other income, the respondents submitted that the Levy is a tax payable like the other taxes and that the allegation is not justiciable since the allegation is bereft of specificity, precisions and exactitude. The respondent argued that section 4(2) b of the Act refers to other income that a person receives which is not a salary; and that in so far as the provision targets persons in self-employment, the Act is not discriminatory to the salaried employees. They further pointed out that this provision was informed by the Judgment in Constitutional Petition No. E181 of 2023 (consolidated)(supra) wherein the court stated that it was discriminatory to target salaried employees only. It was therefore their argument that the Act is not discriminatory at all.
86. The respondents further submitted that, even in the instance of absence of a procedure for collecting the housing levy from non-employed individuals, that alone does not constitute discrimination but a legislative gap that would call for the attention of the Houses of Parliament. In the respondents' submission it cannot serve as a basis for deeming the Act unconstitutional. They reiterated their argument that differentiation in taxation based on reasonable and justifiable grounds is generally



permissible under the Kenyan Constitution as long as it does not amount to unfair discrimination or violate the fundamental rights enshrined in the *Constitution*. The respondents relied on the decision of the Court of Appeal in the case of *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR and the High Court case of *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR to buttress their arguments.

87. The respondents also submitted that the petitioners' claim that the Levy overlooks existing contractual obligations on employee salaries is unfounded, as tax obligations are subject to periodic adjustments, and any necessary modifications are made accordingly. Further, the respondents asserted that the petitioners' allegation in this regard is speculative in nature. They urged the court to note that in order to fulfil its constitutional obligations, the Government must employ various revenue-raising mechanisms. They further stated that tax or levies do not necessarily confer a direct benefit to the taxpayers as they are primarily levied by government to generate revenue to fund public services, infrastructure and other government expenditure that benefit the society as a whole. They pointed out that recurrent budgets of both National and County governments vary from time to time, and therefore there is nothing unconstitutional in itself in the mere fact of a budget increase or decrease.
88. According to the respondents, the petitioners have not demonstrated any discrimination beyond mere allegations. In conclusion, the respondents submitted that section 6 of the Act gives the CS, National Treasury the powers to exempt any person from the application of section 4 of the Act, to address to any potential disparities that may inadvertently arise to ensure that there is a fair application of the Act amongst Kenyans.

Issue No:5 whether the housing policy is a shared function

89. The respondents drew the attention of the court to the constitutional functions of the National and County Governments as spelt out under articles 185(2), 186(1) and 187(2) as read with Part I and Part II of the Fourth Schedule of the *Constitution*. On the basis thereof, it was their submission that housing is a shared function between the National and County Government. In this instance, they submitted that, while the National Government is tasked with the development of housing policy the County Government is tasked with county planning and development, including housing.
90. The respondents further submitted that the housing function has never been an exclusive domain of the NHC and historically, the mandate of housing provision and regulation has been a shared responsibility between various government entities, including but not limited to the NHC. They further submitted therefore that housing is not an exclusive function of the Counties but a shared function that requires cooperation between the two levels of governments as provided for under article 186 and article 189 of the *Constitution*. They likewise relied on articles 6(2) and 187 of the *Constitution* which provide for situations where any of the functions of one level of government may be performed by other levels of government, without raising the jurisdiction issue as the functions to either level of government are meant to deliver services to Kenyans as provided under article 1 of the *Constitution*.
91. The respondents further accentuated the constitutional framework Kenya which establishes two levels of government with a measure of autonomy, as outlined in articles 1, 6, 174, 186, 187 and 189, but at the same time recognize and underscore the necessity for interdependence between the national and county governments.
92. Further to the foregoing, the respondents asserted that the Act does not in any way intrude into the functions of the county government and that in fact, the Act, in sections 34, 38, 39 and 40, provides for the functions of the County governments insofar as the implementation of the affordable housing program is concerned. The respondents construed "policy" as involving agenda setting, formulation,



adoption, implementation, monitoring and evaluation and feedback. That these stages encompass identifying issues, crafting solutions, enacting policies, putting them into practice, assessing their effectiveness and making adjustments as needed and that the Intergovernmental Technical Relations Committee, in their November 2017 Report titled “Emerging Issues on Transfer of Functions to National and County Governments,” extensively discussed the subject issue. They therefore submitted that it is misleading to think that housing policy ends with agenda setting, formulation and adoption only.

93. The respondents argued that the interpretation of the Housing Policy should be approached purposively, considering its intended objectives and broader societal implications. They contended that, in this instance, the petitioners’ position is based on a restrictive interpretation, which fails to align with the overarching goals of the Housing Policy. In their view, such a narrow interpretation lacks substantiation and fails to capture the comprehensive scope of the policy’s objectives.

Issue No: 6 NLC involvement in the transfer of the Public land.

94. On the question of whether the Act violates the principles of land use, the respondent submitted that this court lacked jurisdiction to entertain and determine this question as it pertains to land use. That this question can only be answered by the Environment and Land Court as per the provisions of article 162(2) of the [Constitution](#) as read with section 13 of the [Environment and Land Court Act](#). In the alternative, the respondents relied on article 66 of the [Constitution](#) that gives the State the power to regulate the use of land and property in the public interest of the Kenyan people.
95. The respondents submitted that section 41 of the Act anticipates the involvement of the NLC where necessary in the event that there is an issue involving the transfer or any dealing in public land. They pointed out that since the aforesaid section stipulates that the provisions of the [Land Act](#) shall apply to the Act, the petitioners’ allegation is baseless. further, the respondents submitted private contractors do not have ownership rights over the affordable housing units and the contracts in question outline that the affordable housing units are constructed for the Board, which retains ownership of these units. Therefore, the Board is under obligation to cooperate with the NLC, granted that the [Land Act](#) provides for an elaborate alienation process.
96. On whether the Act violates property rights, the respondents submitted that since article 24 of the [Constitution](#) provides for reasonable limitation to some human rights including property rights, the Act is unimpeachable. They pointed out that Affordable Housing Project is aimed at addressing the access to affordable housing and is therefore not for commercial purposes. They further stated that, to protect it from commercial interests, it was important to limit the power to dispose of the units at will without the scrutiny of the Board. The National Assembly also explained that the Act does not stop the disposal of the units by the owners but only provides for a mandatory consent to protect the same; much in the same way consents are provided for under the Land Control Act, prior to disposal of agricultural land.
97. The respondents also stated that, contrary to the petitioners’ allegations, the NLC participated in the enactment of the Act and performed their mandate under article 67(2) of the [Constitution](#). The respondents reiterated that, in any case, the [Affordable Housing Act](#) under Section 41 recognizes the application of the [Land Act](#) in the utilization of public land.

Issue No: 7 the allegations that there is no legal framework for the housing Policy

98. The respondents reiterated their assertion that the Act complies with National Values and Principles of Governance under article 10 of the [Constitution](#), and therefore the allegation that there is no legal framework is not factual. They relied on section 59(1) of the Act, which provides that the Cabinet



Secretary may, in consultation with the Board, make regulations for better carrying into effect the provisions of the Act and therefore the allegation of a lack of a legal framework is unfounded.

99. The respondents submitted that in compliance with the judgment of the court in in *Okoti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties)* (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated)) [2023] KEHC 25872 (KLR) (Constitutional and Human Rights) (28 November 2023) the Act creates a legal framework and a separate Fund from the Consolidated Fund, in addition to creating a Board to effectively manage the Fund. Hence, the respondents reiterated their stance that the Petitioners' allegations on this limb are premature and non-justiciable and that the issues raised concerning the Act are questions of law reform. They added that the Senators have an avenue of reforming the laws in the Houses of Parliament and cannot purport to use the courts to achieve the reforms as pleaded.
100. Regarding the issue raised by the petitioners on the composition of the Board as stipulated in the Act, the respondents submitted that since housing is a shared one, the composition of the Board, comprised of appointees of the Executive, is lawful, constitutional and aligned with the national government's function and mandate in housing matters. On the issue of quorum, the respondents stated that the quorum as provided for is constitutional, legally sound and in conformity with section 2 and 8(1)(e) of the *State Corporations* (chapter 446 of the Laws of Kenya).
101. On the functions and objective of the Board, the respondents submitted that the same do not encroach upon the operational scope of County Governments and that the functions and objectives of the Board are expressly designated as functions falling under the purview of the national government, as articulated in sections 9 and 10 of the Act. Further, the Respondents stressed that the Fund lapsed on January 25, 2024 by effect of section 21(1-3) of the *Statutory Instruments Act* (chapter 2A, Laws of Kenya) as read together with the *Statutory Instruments (Exemption from Expiry) Regulations, 2022 (Legal Notice No 218 of 2022)*.
102. The respondents urged the court to note that the Levy is a revenue ring-fenced for a particular public purpose like many other levies eg Road maintenance levy, Petroleum development levy; all of which are collected by KRA on behalf of state agencies concerned.
103. On KRA as the collector of the Levy, the respondents submitted that the Collector is defined at section 2 of the Act to mean the Commissioner-General of KRA, appointed under section 11(1) of the *Kenya Revenue Authority Act* and that the petitioners have not shown how this violates the *Constitution* or statute. They stressed that the Commissioner General will not collect the Levy in his personal capacity or apart from KRA or outside the KRA revenue collection infrastructure.
104. Further, the respondents stressed that article 206(1)(a) of the *Constitution* provides for the establishment of other funds under an Act of Parliament where public funds for a specific purpose may be paid and that the provision of Affordable Housing Fund is such specific purpose Fund; and therefore the description by the petitioners of the collector as a faceless, shadowy entity is therefore misconceived and unfounded. That the Commissioner General is in fact an office established under section 11 of the *Kenya Revenue Authority Act*.
105. On the Levy being recoverable as a civil debt, the respondents submitted that this argument overlooks the fundamental principles of tax administration and enforcement mechanisms. They stated that section 7 of the Act, which imposes a penalty for unpaid levies, is a standard practice in tax legislation and the imposition of penalties serves as a deterrent against non-compliance and ensures the effectiveness of revenue collection systems. They added that it is not unusual for enforcement measures to include punitive actions, as this is essential for maintaining the integrity of tax systems



and safeguarding the interests of all citizens. The Respondents, further submitted that the Petitioners failed to consider the social contract between citizens and the State, wherein citizens agree to adhere to laws and regulations enacted for the collective benefit of society and the government, in turn, contracts to provide services for purposes of promoting the public good.

Issue No.8: the tax exemption under the Act

106. The respondents submitted that there are always cases for exemption in any legislation. The rationale for exempting some people from a levy is often based on principles of fairness, social welfare, economic policy, and public interest. The objective, they argued is to strike a balance between generating revenue for the procurement of goods and services for the public, while ensuring that the tax burden is distributed fairly and equitably across society. The respondents further stressed that the Act provides that the Cabinet Secretary shall in consultation with the Board make regulations for the better carrying out of the Act and that section 59(2) of the Act provides that the regulations shall among other things provide for the criteria for exemptions granted under the Act. In their view, the Regulations will provide safeguards to ensure that the exemptions are carried out in accordance with the relevant laws.
107. On the issue of investment of funds without dividends, the respondents urged that it is permissible for the government to invest funds, with resulting profits considered part of the revenue stream to support governmental objectives. They submitted that the *Constitution* under articles 10, 114(3)(d), and Paragraph 33 of the Fourth Schedule to the *Constitution* envisage that part of government source of revenue includes revenue from public investments and therefore it is in constitutional spirit that section 9(1)(g), 9(2) of the Act anticipates investments of the Funds from which proceeds shall be paid into the Fund. According to the Respondents, the concept of an Affordable Housing Fund engaging in investment activities is not unprecedented, as evidenced by existing funds such as the National Social Security Fund and the Retirement Benefits Fund, which also invest funds to generate revenue for their respective purposes. They explained further, that the Affordable Housing Fund is not a contributory scheme but a tax imposed by government.

Issue No 9: the retrospective application of the Act

108. The respondents refuted the submissions of the petitioners in connection with the principle of non-retroactive application of statutes. They submitted that it is the sole domain of the legislature to determine whether or not Act will apply retrospectively. They relied on *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR in support of their submissions. Hence, the Respondents argued that in view of section 60 of the Act, which explicitly states that the Act would apply retrospectively, it cannot be said that the statute is unconstitutional for its retroactive approach. The court was also referred to the Court of Appeal case of *Commissioner of Income Tax v Pan African Paper Mills (EA) Limited* [2018] eKLR.
109. The respondents reiterated their stance that the Act was enacted in line with the High Court's decision in Constitutional Petition No. E181 of 2023 (consolidated)(supra) that expressly indicated that funds collected under the impugned section 84 of the *Finance Act* 2023 would not be available for refund to members of the public. Subsequently, the Court of Appeal in *National Assembly & another v Okiiti & 55 others* (Civil Appeal E003 of 2023 & E016, E021, E049, E064 & E080 of 2024 (Consolidated)) [2024] KECA 876 (KLR) (31 July 2024) (Judgment) upheld that monies collected would not be available for refund to the taxpayers.



E. Analysis and Determination

110. We have carefully considered the petitions as consolidated, the responses, the rival submissions, oral highlighting of the submissions and the authorities cited by counsels for the parties.
111. From the material placed before the court, we have identified 3 broad issues for determination: to wit:
- a. Whether or not the court has the requisite Jurisdiction to hear and determine the consolidated petitions; and,
 - b. The constitutionality or otherwise of the [Affordable Housing Act](#) 2024.
 - c. Who bears the costs.

a. Whether this court has the requisite jurisdiction to hear the six (6) Petitions before it:

112. The question of jurisdiction was raised by the respondents. In advancing their argument that the court lacked the requisite jurisdiction to handle the consolidated petitions, they relied on the case of [Anarita Karimi Njeru v Republic](#) [1979] 1 KLR 154 (Anarita Karimi case) and urged the court to consider the following questions:
- (a) Whether the petitioners identified the rights that had been denied, violated, infringed, or threatened.
 - (b) Whether the petitioners identified the articles in the [Constitution](#) alleged to have been denied, violated or infringed.
 - (c) Whether the petitioners identified the actors responsible for the denial, violations or infringements complained of.
113. The petitioners were of a contrary view. They asserted that this court has the jurisdiction to hear and determine the Petitions as consolidated. They anchored their submissions on article 165(3)(d) (i), (ii) and (iii) and the ruling of the court in the instant case, delivered on the 3rd May 2024 by Hon Mwita, J, whereby the court found that it had the requisite jurisdiction to hear and determine the six petitions herein.
114. A perusal of the court record confirms that, indeed, the first three respondents filed a notice of preliminary objection dated April 15, 2024 on the grounds that:
- (a) The court lacked jurisdiction to hear and determine the petitions under article 165(3)(d)(i) of the [Constitution](#).
 - (b) That the petitions did not specifically demonstrate with reasonable precision how the respondents violated the petitioners' constitutional rights as per the principles enunciated in the *Anarita Karimi* case;
 - (c) That the petitions lacked precision as to which human rights have been denied, violated and/or infringed and to what degree;
 - (d) That the petitions did not indicate whether the said limitation is not that which is provided for under article 24 and whether the same did not qualify under article 25 of the [Constitution](#);
 - (e) That the petitions violated the doctrine of presumption of constitutionality of statutes, constitutional avoidance and separation of powers;



- (d) That the petitioners had not demonstrated the unconstitutionality of the impugned provisions of the Affordable Housing Act and that the petitions only sought to restrict the legislative authority of Parliament.
115. It cannot be gainsaid that jurisdiction is primordial. The Court of Appeal in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, aptly stated (per Hon Nyarangi, JA): -
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”
116. Similarly, in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR the Supreme Court held:
- “(68) A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”
117. We note that the preliminary objections were given attention by Hon Mwita J before the empanelment of this bench. The court identified the issues arising for determination from the various Notices of preliminary objection to be:
- (a) That the petitions do not call upon the court to express itself as enabled under article 165(3)(d)(i) of the Constitution.
- (b) That the petitions do not meet the threshold set out in *Anarita Karimi Njeru*.
- (c) That the petitions lack precision as to which human rights have been infringed and do not indicate whether the said limitation is not that which is provided for under article 24 and does not qualify under article 25.
- (d) The petitions violate the doctrine of presumption of constitutionality of statutes, constitutional avoidance and separation of powers.



118. A perusal of the court record confirms that the court did not resolve all the four issues aforementioned; being of the view that they were, in the main, grounds of opposition to the petition as opposed to pure points of law. Nevertheless, one point that the court determined conclusively was the assertion that that this court lacked jurisdiction to entertain and determine the question pertaining to land use. The contention of the respondents was that this question could only be answered by the Environment and Land Court in accordance with the provisions of article 162(2) of the *Constitution* as read with section 13 of the *Environment and Land Court Act*. In respect of this ground the court held:

“48. The import of article 165(3) is to authorise the High Court to decide all matters other than those reserved for other courts as contemplated in article 162(2) and as restricted by 165(6). The sweep of the constitutional authorisation given to the High Court cannot be lightly taken and should not be easily compromised or given up. That is: the court has wide jurisdiction to hear and determine various matters that may be brought before it. The question of whether or not this court has jurisdiction to hear and determine the consolidated petitions, must, therefore, be viewed from the lens of article 165(3)(d)(i)(ii).

49. The consolidated petitions, in the main, challenge the constitutionality of various aspects of the Act, whether in the manner it was enacted, whether it complied with the requirements of public participation and the purpose and effect of implementing the provisions of the Act. In other words, looking at the totality of the issues raised in the consolidated petitions, it leaves no doubt that the issue of constitutionality of the Act whether at the point of its enactment or the point of its implementation and the effect thereof is at the centre stage.”

119. We are therefore of the view that, that aspect of the question of jurisdiction having been disposed of, it cannot be revisited in this judgment. In Criminal Appeal No E039 of 2022 Consolidated with Criminal Appeal No 077 of 2023 and Consolidated with Criminal Appeal No. 078 of 2023: *Grace Sarapay Wakhungu & 2 Others v Republic*, the Court of Appeal pointed out that:

“52. As we pen off, we wish to restate that if the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which it is sacredly entrusted, it must uphold the dictate that when the courts higher in the hierarchy make decisions, the decisions bind the lower courts. Further, a court cannot sit on appeal over the decision of other courts of concurrent jurisdiction.”

120. The Supreme Court in *Kenya Hotel Properties Limited v Attorney General & 5 others* Petition No 16 of 2020 [2022] KESC 62 (KLR) had restated the principle as follows:

“As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.”

121. That said, it is plain from the ruling dated May 3, 2024 that the other points raised by way of preliminary objection were not fully resolved. They include the question whether the petitions offend the doctrines of presumption of constitutionality of statutes and separation of powers. We will revert to these two issues shortly while addressing the issue of constitutionality. The other two issues raised in



the respondents' notices of preliminary objection, which were not addressed in the ruling dated May 3, 2024 are:

(a) Whether the petitions before the court meet the threshold set out in *Anarita Karimi Njeru v Republic (supra)*; and

(b) Whether the doctrine of avoidance is applicable to the petitions as consolidated.

122. As has been pointed out herein above, the respondents were of the view that the petitions fall short of the threshold laid down in the case of *Anarita Karimi Njeru v Republic (supra)* in terms of specificity. In that case it was held:

“...if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

123. The principle was reiterated by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR as follows:

“...the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, MR said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

124. Similarly, in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR, the Supreme Court held:

“Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a



foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

125. We have gone through the petitions and note that they challenge general and specific provisions of the Act, namely, sections 1(a),3, 4, 5, 6, 7, 9, 10, 11, 12(2), 14, 15, 16(3), 22, 23(1), 24, 25, 28(3), 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 33, 45, 46, 47, 48, 49, 50, 52(2), & (4), 53, 54, 59, 60(2), (3) & (4), 61 and 62(4) vis-à-vis the Constitution. We are further satisfied that sufficient detail and particulars were provided on how the impugned sections allegedly violate specific provisions of the Constitution, namely articles 1, 2, 3(1), 10, 19, 20, 21, 24, 27(1) & (2), 28, 29, 36, 40, 43, 46(1) (c), 47(1), 48, 50(1) & (2), 93(2), 94(1), (4), (5) & (6), 109, 129, 131(2), 153(4), 159(1), 160, 185(2), 186(1) & 187(2), 258 & 259(1). There is, therefore, a link between the Petitioners as the aggrieved parties who contend that the Act has violated or threatens to violate their rights and fundamental freedoms as well as the rights and freedoms of others, the provisions of the Constitution alleged to have been contravened and the alleged manifestation of contravention or infringement. (see the Supreme Court’s decision in Communications Commission of Kenya, Attorney General, Ministry of Information Communications & Technology, Signet Kenya Limited, Pan African Network Group Kenya Limited & Startimes Media Limited v Royal Media Services Limited, Nation Media Services Limited, Consumer Federation of Kenya (COFEK), Standard Media Group Limited, GOTV Kenya Limited & West Media Limited [2014] KESC 53 (KLR).
126. We further find that the respondents were able to deduce and comprehend the case against them and in particular the issues raised by the petitioners. They were able to respond in detail and with particularity to each and every one of those issues. Therefore, we are of the view that, roundly considered, the petitions meet the conditions set out in Anarita Karimi Njeru(*supra*). We bear in mind the expressions of the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [Supra], that:
- “...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand *exactitude ex ante* is to miss the point.”
127. Accordingly, we find no merit at all in the respondents’ contention that the petitions do not meet the requirement of specificity. Moreover, rule 10(3) and (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:
- “(3) Subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the court.”
128. As was noted by Hon Mwita, J in addition to allegations of violation of rights pursuant to article 22, the petitioners also alleged inconsistencies between various provisions of the Act and the Constitution. Article 258 is explicit that:
- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.



- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
- (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.

129. Consequently, we are in full agreement with the position taken by Hon Mwita, J in the ruling dated May 3, 2024 that:

“50. Article 165(3)(d) confers on this court jurisdiction to determine “(i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.”

51. The main issues in the petitions, as I perceive them, centre on whether the Act or its provisions are inconsistent with or in contravention of the *Constitution*. The manner of enactment of the Act is also questioned, that it was not done in accordance with the *Constitution*. In that respect, these issues fall within the ambit of article 165(3)(d)(i)(ii) and, therefore, the jurisdiction of this court.

53. To be precise, the consolidated petitions raise issues including, whether the levy that has been introduced is constitutional. The fact that the Act is called “Affordable Housing Act”, and the levy and the “Affordable Housing Levy”, these do not translate into occupation, ownership, trespass, or title, and use of land. The levy does not also lead to automatic ownership of a house. There are also other issues that have nothing to do with land, such as whether the levy contravenes article 160(4) of the *Constitution* and the principle of devolution.

54. Even if a petition or two raise an issue that touches on land or use thereof that would ideally be for determination by the ELC, the pre-dominant question(s) in the consolidated petitions still fall within the jurisdiction of this court. As already alluded to, and as a matter of emphasis by way of example, the constitutionality of the Act, whether its enactment complied with the requirements for public participation; whether the impugned provisions contradict or are inconsistent with the *Constitution* or some provisions of the Act contradict each other, are issues that fall within the ambit of article 165(3) (d) of the *Constitution* and, therefore, predominantly under the jurisdiction of this court. (see *Suzanne Butler & 4 others v Redhill investments & another (supra)*).

130. The doctrine of avoidance was well-discussed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra)* thus:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may



properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the appellate court...”

131. In the case of *KKB v SCM & 5 others* (Constitutional Petition E014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Hon Mativo, J (as he then was) also expressed himself on the doctrine as hereunder:

“In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause...”

132. Further in the case of *Faraj & 3 others v Police & 2 others* (Constitutional Petition 165 of 2020) [2022] KEHC 287 (KLR) (27 April 2022) (Judgment) it was held:

“27. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a court will not determine a constitutional issue when a matter may properly be decided on another basis.

...

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



and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system...”

133. Having acknowledged that the pre-dominant issue is whether the provisions of the Act are in conflict with the *Constitution*, it is our considered view that the doctrine of avoidance is inapplicable to the petitions as consolidated for that is an issue that can only be resolved by the court as mandated by article 165(3)(d) of the *Constitution*. The respondents’ objections to the jurisdiction of the court from the standpoint of article 165(3)(d) of the *Constitution* lacks merit in our view, noting that the matter was also discussed at length by Hon Mwita, J in his ruling dated May 3, 2024.

b. On whether the Act is constitutional or not:

134. Having disposed of the technical points, we now turn our attention to the merits of the petition. The brief background is that by a judgment of the court (differently constituted) various provisions of the Finance Act 2023 were declared unconstitutional. By the decision rendered on November 28, 2023, section 84 of the Finance Act, 2023 was declared unconstitutional. The provision sought to amend the *Employment Act* in the following terms:

“Section 84. The *Employment Act*, 2007, is amended by inserting the following new sections immediately after section 31A— Insertion of new section of No 11 of 2007 Affordable Housing Levy.

- 31B. Notwithstanding the provisions of section 3(2)(a), (b), (c) and (d) of the Act,
- (1) each employee and employer shall pay a monthly levy to be known as the Affordable Housing Levy.
 - (2) The purpose of the Affordable Housing Levy shall be to provide funds for the development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans.
 - (3) The Affordable Housing Levy shall not be used for any other purpose other than the development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans.
 - (4) The monthly levy payable by the employer and employee shall be –
 - (a) one point five per centum of the employee’s gross monthly salary for the employee;
 - (b) one point five per centum of the employee’s monthly gross salary for the employer.”

135. In the judgment aforementioned the court took the view that section 84 proposed to introduce a new levy known as the Affordable Housing Levy without a proper statutory framework to govern the imposition and administration of the levy. Accordingly, the court held that the provision was in conflict with article 210 of the *Constitution*. The provision was therefore declared unconstitutional. However, the court granted stay to allow Parliament to put in place an appropriate legal framework.
136. We note that the 4th respondent (the National Assembly) proceeded with speed and published the Affordable Housing Bill, No 75 vide the Kenya Gazette Supplement No 236 of December 4, 2023. The Bill was processed and passed on the February 21, 2024. It was thereafter forwarded to the Senate on



March 12, 2024 and upon being passed by the Senate, was given presidential assent on March 19, 2024. Sections 4 and 5 of the Act became operational immediately, by dint of section 1(a) of the Act. It was on the same date that the President appointed the Chairman of the Board. The rest of the provisions of the Act were operationalized on March 22, 2024 vide a Special Issue of the Kenya Gazette Supplement No 70 of March 21, 2024 through Legal Notice No 54.

137. The Court takes judicial notice, pursuant to section 85 of the *Evidence Act* that, following the operationalization of the Act the 1st and 2nd respondents proceeded to implement the Act vide Gazette Notices No 4350 and 4351 dated April 12, 2024, and Gazette Notice No 4495 of April 17, 2024, by which the CS Lands appointed members of the Affordable Housing Board pursuant to section 16 of the Act. It was the operationalization of the Act that precipitated the filing of the instant Petitions.

138. It is trite law that statutes enjoy the presumption of constitutionality and thus the onus was on the petitioners to establish that the impugned Act is indeed unconstitutional as alleged.

139. We bear in mind that the burden of proof is on the petitioners to prove all aspects of their petition to the requisite standard. We are guided by the decision of the Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, where it held that: -

“(47) It is a timeless rule of the common law tradition, Kenya’s juristic heritage, and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the “balance of probability”. Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

140. The position was reiterated by the Supreme Court in *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019 Consolidated) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) thus:

“A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof.”

141. On the principle of presumption of constitutionality, Hon. Mativo, J. had the following to say in *Council of County Governors v Attorney General & another* [2017] eKLR: -

“There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional).

In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. the *Constitution* should be given a purposive, liberal interpretation and that the provisions of



the Constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. It is important to bear in mind that the spirit of the Constitution must, preside and permeate the process of judicial interpretation and judicial discretion.

Constitutional questions must be determined in formidable terms guided by some constitutional principles that transcend the case at hand and which are applicable to all comparable cases. Court decisions cannot be ad hoc but must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case.”

142. Further, the East African Court of Appeal in the case of *Ndyanabo v Attorney General* [2001] EA 485 at p 493, held:

“the Constitution... is a living instrument, having a soul and a consciousness of its own ... Courts must... endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it... fundamental rights have to be interpreted in a broad and liberal manner... ensuring that our people enjoy their rights, our young democracy not only functions but grows, and the will and dominant aspirations of the people prevail...”

143. The guiding principles in determining whether sections of an Act of Parliament are unconstitutional were succinctly laid out in the case of *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR by a 3-Judge bench of this court as follows:

- “56. First, this court is enjoined under article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this court is obliged under article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.
57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see *Ndyanabo v Attorney General of Tanzania* [2001] EA 495). We therefore reiterate that this Court will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners.
58. Third, in determining whether a statute is constitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security and others* Nairobi Petition No 3 of 2011 [2011] eKLR, *Samuel G Momanyi v Attorney General and another (supra)*). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect...”



144. Additionally, in Petition No 150 of 2016 as consolidated with Petition No 234 of 2016 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, a three-judge bench held:

“...The technique of paying attention to context in statutory construction is now required by the *Constitution*. As pointed out earlier, the *Constitution* introduced a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.’[199]

348. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[200] The often quoted dissenting judgment of Schreiner JA eloquently articulates the importance of context in statutory interpretation thus:-

“Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.”[201]

349. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation, which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required to declare the legislation unconstitutional and invalid. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it.

350. It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that the law be articulated clearly and in a manner accessible to those governed by the law [202]A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.

351. Mindful of the imperative to read legislation in conformity with the *Constitution*, but only to do so when that reading would not unduly strain the provisions, we turn to an analysis of the impugned provisions...”

145. With the foregoing authorities in mind, we identified the following points for determination under the broad issue of constitutionality:

- a. Whether there was adequate public participation.
- b. Whether the *Affordable Housing Act* violates the Petitioners’ rights under articles 27 and 40 of the *Constitution*.



- c. Whether the Act infringes article 43 of the Constitution.
- d. Whether or not the Act amounts to a claw back on devolution.
- e. Whether the use of public land for the development of affordable houses infringes on the functions of the National Land Commission.
- f. Whether the Act is unconstitutional for failure by the CRA to consider the Bill as per article 205(1):
- g. Whether section 60 of the Act is unconstitutional for retrospectivity
- h. Whether the Appointment of the Commissioner General of Kenya Revenue Authority as Collector of the Levy is in accordance with the Constitution

i. On whether Public Participation was undertaken:

146. The petitioners argued that the enactment of the Act was not done in conformity with various tenets of the Constitution, one of them being public participation. While they conceded that some measure of public participation was conducted, it was their submission that it was not adequate. It was therefore their case that, at best, what was done was a cosmetic exercise and a waste of public resources. The petitioners therefore argued that whatever was done by way of public participation went contrary to the provisions of articles 10, 118 and 201 of the Constitution.
147. In particular, the petitioners argued, that the invitation notice to members of the public to present memoranda on the Bill to the National Assembly within seven (7) days was too short a period and, thus the purpose of public participation cannot be said to have been achieved thereby. Similarly, they contended that the deliberations of the Senate at the 2nd and 3rd reading stages was also constrained; with the result that it limited public participation to seven (7) days only, such that no public hearings could be conducted in any of the 47 counties.
148. The petitioners also took issue with the fact that public participation was only conducted in nineteen (19) counties. They pointed out that twenty-eight (28) Counties were excluded from the exercise, and that the said exclusion was in blatant violation of articles 10(1) & (2)(a) and 27 of the Constitution. That the discrimination of the Twenty-Eight (28) Counties and refusal of the committee mandated with conducting public participation and/or collecting the views of the persons from the 28 Counties is in flagrant disregard of article 47 of the Constitution of Kenya 2010 as read with the provisions of sections 4 and 5 of the Fair Administrative Action Act, 2015 which require administrative action to be expeditious, efficient, lawful, reasonable and procedurally fair.
149. The petitioners argued that the lack of proper public participation is evident from the reports of the committees in the National Assembly and the Senate. It was their case that both the National Assembly and the Senate did not provide adequate opportunities for people's involvement in the legislative process of the Affordable Housing Act. In the same vein, the petitioners also submitted that Kenyans had legitimate expectation that the Constitution would be followed in conducting public participation.
150. In conclusion, the petitioners urged the court to find that the Affordable Housing Act did not meet the parameters for public participation under articles 10, 118 and 201 of the Constitution of Kenya.
151. In response to this issue of public participation, the respondents did not dispute that participation is a cardinal requirement under the Constitution. They however submitted that they did carry out adequate public participation before the Act was passed. To illustrate how they went about the exercise, the National Assembly averred that it conducted civic education in languages comprehensible to



- the diverse communities in various locations before public participation sessions were conducted by providing factsheets that gave information on the Affordable Housing Bill.
152. In addition, they added that newspaper advertisements were placed in the local daily newspapers with wide circulation inviting members of the public to submit views on the Bill by the deadline of December 28, 2023. They further added that key stakeholders were identified and invited to participate and make oral presentations before the Committee in sittings that were held in Parliament Buildings on 29th and 30th January 2024, 6th and 7th February 2024.
 153. The respondents further submitted that public hearings by key stakeholders were held on diverse dates across nineteen (19) counties including Narok, Kisii, Homa Bay, Vihiga, Uasin Gishu, Turkana, Baringo, Nakuru, Nyandarua, Machakos, Kirinyaga, Embu, Kiambu, Wajir, Tana River, Lamu, Kilifi, Mombasa and Nairobi City. Additional meetings were held on various dates with the State Department of Housing, the National Treasury and the State Law Office among other governmental agencies and allowed various agencies to make presentations to the Joint Committee. It was therefore the contention of the National Assembly that it received and reviewed written memoranda submitted by the public and invited stakeholders, in addition to conducting physical public hearing sessions.
 154. It was further the submission of the National Assembly that the majority of the stakeholders overwhelmingly supported the Bill, noting that the promotion of investments in affordable housing has a multiplier effect on the economy through the creation of employment, improved supply chains for construction materials and consequently will improve the general economy.
 155. According to the National Assembly the assessment of Parliament's compliance with its obligation to facilitate public participation in the legislative process is guided by the principle of reasonableness and there is sufficient evidence to demonstrate that the Act was procedurally and legally subjected to public participation per the Constitution and the Standing Orders of the House. As a result, the National Assembly urged the court to find that the Act was compliant with the provisions of articles 10, 118 and 201 of the Constitution.
 156. Further to the foregoing the National Assembly as well as the Attorney General argued that the question of public participation was res judicata, having been determined by a court of concurrent jurisdiction in the case of Apiyo v Attorney General & 2 others (Petition E013 of 2023) [2024] KEHC 1967 (KLR) (29 February 2024) (Judgment). They pointed out that the court, in the Apiyo case had found as a fact that public participation in respect to the Affordable Housing Bill No 75 of 2023 was compliant with the provisions of the Constitution.
 157. On its part, the Senate also asserted that public participation in respect of the Act was conducted as per the law and its Standing Orders and that there was no particular requirement that public participation be conducted in all 47 counties as alleged by the petitioners. It denied that Senators were gagged from fully or freely debating the Bill. It submitted that no proof of any such obstruction had been provided by the Petitioners.
 158. On their part KRA also submitted that public participation was conducted as required; and that the rate of 1.5% was settled on as a result of public participation carried out in respect of the Finance Act 2023. It submitted that the said Act had undergone the proper public participation channels, stakeholder engagements and the rationalization process which proposed a reduction of the rate from the initially proposed 3% to 1.5%. It was their case that the court did not counter the constitutionality and validity of the rate in the petitions challenging the Finance Act 2023 in their decision on dated November 28, 2023 in Petition 181 of 2023.



159. The respondents' position that public participation was conducted within the principles of the Constitution was supported by the 10th respondent, COFEK. Their argument was that public participation was conducted within the confines of the Constitution; and that the opinion of Kenyans with regard to the provision of the collection of the levy of affordable housing by the state were considered before the impugned law was enacted.
160. Having considered the foregoing arguments, it is important that this court first dispenses with the issue raised on public participation being *res judicata* to the case of *Apiyo* case. The respondents stated that the issue of public participation at the National Assembly ought not to arise in this case as the court already determined that it was compliant with the provisions of the Constitution.
161. Conventionally, the doctrine of *res judicata* is designed to bring finality to litigation and provide parties with closure and relief from the burden of being troubled or pursued in connection with issues and lawsuits that have already been resolved by a court of competent jurisdiction.
162. The Supreme Court in the case of *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* [2016] eKLR, held:
- (52) *Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of *res judicata* is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of *Hon Norbert Mao v Attorney-General*, Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in *Hon Ronald Reagan Okumu v Attorney-General*, Misc Application No 0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The constitutional court dismissed the petition, on a plea of *res judicata*, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.
- (53) In *Silas Make Otuke v Attorney-General & 3 others*, [2014] e KLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v The AG of Trinidad and Tobago* (1991) LRC (Const) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of *res judicata*".
- (54) The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
- (55) It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of *res judicata* is not affected by the substantial-justice principle of article 159 of the Constitution, intended to override



technicalities of procedure. *Res judicata* entails more than procedural technicality, and lies on the plane of a substantive legal concept.

...

- (58) Hence, whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

163. The Supreme Court reaffirmed its finding on the *Muiiri Coffee* case (*supra*) in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where it stated that: -

“59. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 (2013) eKLR)...

81. We reaffirm our position as in the *Muiiri Coffee* case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. To further bolster our position we borrow from the decision from India in *Karam Chand another v Union Of India and others* on 24 April, 2014 where it was restated the principles upon which the doctrine of *res judicata* is founded as follows:

29... it is clear that the rule of *res judicata* is mandatory in its application and should be invoked in the interest of public policy and finality. The matters which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be



applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of *res judicata* is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:

- (1) *nemo debet bis vexari pro una et eadem causa*: no man should be vexed twice for the same cause.
- (2) interest *republicae ut sit finis litium*: it is in the interest of the State that there should be an end to a litigation; and
- (3) *res judicata pro veritate occipitur*: a judicial decision must be accepted as correct.

...The doctrine of *res judicata* is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice and good conscience.”

82. If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of article 159 of the [Constitution](#) in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of *res judicata*, they only need to invoke some constitutional provision or other.
83. However, though the doctrine of *res judicata* lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the *Danyluk* case from Canada the court cited the dissenting opinion of Jackson JA, in *Iron v Saskatchewan (Minister of the Environment & Public Safety)*, 1993 CanLII 6744 (SK CA), [1993] 6 WWR 1 (Sask C A), at p 21 where he stated:

“The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.”
84. Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of *res judicata*. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.



85. In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception...”
164. We have perused the *Apiyo* case and noted that the petition before that court was pegged on an impugned notice dated December 9, 2023 issued by the National Assembly in the local dailies requiring that public participation be by way of submissions of memoranda for the Affordable Housing Bill No 75 of 2023. The court noted, at paragraphs 47 and 48 of the Judgment, that the petition only challenged this mode of public participation on the ground that marginalized communities of persons living in the slums of Korogocho, Mathare and Kibra were not able to submit memoranda in the manner prescribed in the notice.
- “47. The petition herein is solely grounded on the impugned notice issued by the Clerk of the National Assembly as advertised on the local dailies on December 9, 2023.
48. The gravamen of the petitioner’s case is what he terms as inadequacy of the prescribed mode of public participation with special reference to the marginalized communities who are not able to submit memoranda in the manner prescribed by the impugned notice.
165. It further noted that the Standing Orders of the National Assembly provided for four different methods for public engagement; and that submission of memoranda was just one of them. More importantly, the court in the *Apiyo* case noted that the exercise was ongoing and that public hearing was being undertaken during the pendency of the Petition. It accordingly held, at paragraph 72 of the Judgment that:
- “72. In light of the matters aforesaid, the 3rd respondent cannot be faulted for the manner in which it has conducted public participation in respect of the Affordable Housing Bill No 75 of 2023. This court finds that the public participation conducted by the 3rd respondent was effective and constitutionally compliant.”
166. The court has looked at the issues raised on public participation in the six petitions herein *vis-a-vis* the issues raised on public participation in the *Apiyo* case. It is our view that the issues raised in the instant petitions raise a broader question on whether adequate public participation was conducted at the National Assembly and Senate within the tenets of articles 10, 118 and 201 of the *Constitution*, while in the *Apiyo* case, the issue was specific to the notice dated 9th December 2023, by which the National Assembly invited written memoranda.
167. In any event, the court found that the issue was not ripe for determination as the National Assembly did not only require submissions of memoranda but also held public hearings as a mode of public participation. In the *Apiyo* case the court held: -
- “....
73. This court concurs with the respondents on their position that the petition herein breached the principle of ripeness as the Petitioner presumed that the 3rd respondent intended to conduct public participation through one mode, that is through submission of memoranda when he filed this petition...”



168. In the circumstances, we find that the issue of public participation, given the context of the instant petitions, is not *res judicata*. We now proceed to substantively consider the issue.
169. It is undeniable that public participation is essential to the legislative and policy functions of government, both at the National and County levels and is integral to the legislative enactment process. Under article 10(2)(a) of the *Constitution* public participation is one of the national values and principles of governance.
170. In the same vein, article 118 of the *Constitution* provides that:
- (1) Parliament shall—
 - (a) conduct its business in an open manner, and its sittings and those of its committees shall be in public; and
 - (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
171. It is plain therefore that failure by Parliament to ensure public participation is fatal to any legislation passed by it. In the case of *Doctors for life International v Speaker of National Assembly and Others* (CC12/05)[2006]ZACC 11; 2006(12) BCLR1399 (CC);2006 (6)SA 416(CC), it was held that:
- “the right to political participation is a fundamental human right set out in a number of international instruments. In most of these instruments the right consists of at least 2 elements, a general right to take part in the conduct of public affairs and a more specific right to vote and/or be elected...significantly the ICCPR guarantees not only the right but the opportunity to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.”
172. We are certain that public involvement was crucial prior to the enactment of the Act. The Supreme Court in the case of *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment), held: -
- “ 85. Public participation has been entrenched in our Constitution as a national value and a principle of governance under article 10 of the *Constitution* and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets the *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the appellate court, public participation is anchored on the principle of the Sovereignty of the People “that permeates the *Constitution* and in accordance with article 1(4) of the *Constitution* is exercised at both national and county levels”.
173. The court in *Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties)* (Constitutional Petition E473 of 2023) [2024] KEHC



8255 (KLR) (Constitutional and Human Rights) (12 July 2024) (Judgment) summarized the guiding principles on public participation flowing from the British American Tobacco case (supra) as follows: -

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

- i. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- ii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iii. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- iv. Public participation is not an abstract notion; it must be purposive and meaningful.
- v. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vi. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- vii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- viii. Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter”.



174. In the South African case of *Minister of Health and another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005) it was held that: -

“[t]he principles of fairness are not to be applied by rote identically in every situation.” It cannot be expected of the law-maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations.

175. Hence, public participation does not necessarily mean that everyone must express their opinions. Instead, there should be tangible evidence of a purposeful initiative to incorporate a variety of perspectives in the participation program. This was made clear in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, in which a 5 judge bench held: -

“...public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs...Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account...”

176. The question to be posed therefore is whether an opportunity was afforded to the public to air their views on the implementation of the Affordable Housing Act.

177. We note that the National Assembly and Senate have provided evidence to support their argument that they invited members of the public to take part in the exercise which they stated was conducted by the Joint Committee of the Departmental Committee on Finance and National Planning & Departmental Committee on Housing, Urban Planning and Public Works and Standing Committee on Roads, Transportation and Housing respectively. Both Respondents have shown through their reports of the Committees annexed as annexure SN-1 for the National Assembly and annexures JN 1-3 for the Senate that support their assertion that the public and various stakeholders were invited to participate and their views taken into account before the *Affordable Housing Act* was enacted. The two national organs detailed the chronology of public participation events as follows:

- a. Initial Reading and Committee Referral: The Affordable Housing Bill (National Assembly Bill No 75 of 2023) was introduced to the National Assembly on December 7, 2023. The Bill was subsequently referred to the Departmental Committee on Housing, Urban Planning and Public Works, as well as the Departmental Committee on Finance and National Planning, for further consideration and reporting to the House.
- b. Public Participation Invitation in National Assembly: On December 9, 2023, the Clerk of the National Assembly published a notice in local newspapers inviting the public to submit memoranda. This notice was issued under article 118(1)(b) of the *Constitution* and Standing Order 127(3) of the National Assembly Standing Orders, which require House Committees considering Bills to facilitate public participation.



- c. Stakeholder Engagement: The National Assembly reached out to key stakeholders, inviting them to participate in public hearings held across nineteen counties on various dates. As was noted in the Apiyo case, this was not the only form of public participation.
- d. Memoranda Collection Period: From 9th to 16th December 2023, the National Assembly collected public memoranda. It explained that this exercise of collection of memoranda was a nationwide exercise. The Respondents explained that during this period, there was a conservatory order in place issued in the Apiyo case prohibiting public participation by way of memoranda as prescribed by the notice published on 9th December 2023, pending the determination of the petition.
- e. Court Orders Clarification: The High Court in clarified its order on January 17, 2024; making it clear that it had only halted the collection of public memoranda by the National Assembly, but did not stop other forms of public participation.
- f. Further Stakeholder Engagement: The National Assembly extended invitations to stakeholders via letters dated 11th, 13th, and January 29, 2024, requesting them to make oral presentations before the Committee. These sessions were held on 29th and 30th January 2024, as well as on 6th and 7th February 2024.
- g. Consultation with Government Agencies: The National Assembly held consultations with various government agencies, including the State Department of Housing, the National Treasury, and the State Law Office, offering opportunities for them to submit representations to the Joint Committee.
- h. Memoranda Review: The National Assembly reviewed written memoranda submitted by the public and the submissions by invited stakeholders. It thereafter prepared its report detailing their consideration of the Affordable Housing Bill. A copy of the report was annexed to the affidavit of the Clerk, Samuel Njoroge, marked 'SN-1'.
- i. Second Reading and Debate: The Bill underwent its second reading on February 15, 2024. During the debate, Members of the National Assembly discussed the nature and effectiveness of public participation. The Hansard Report from the session of February 15, 2024, included in the National Assembly's affidavit as 'SN-2', documents this discussion. The Bill was passed with amendments on February 21, 2024 and subsequently referred to the Senate, as per article 110(4) of the Constitution.
- j. Court Judgment on Public Participation: On February 29, 2024, the High Court in Kisumu delivered its Judgment and held that the notice issued by the Clerk of the National Assembly was valid, dismissing the petition. The Court affirmed that the National Assembly had conducted public participation in a constitutionally compliant manner.
- k. Senate Engagement: In line with article 118(1)(b) of the Constitution and Standing Order 145(5) of the Senate Standing Orders, the Senate Roads, Transportation, and Housing Committee invited the public to submit written memoranda. The invitation was published in the Daily Nation, The Standard, and The Star newspapers on February 23, 2024. These submissions were annexed as "JN-1" to the Senate's response in the affidavit dated July 18, 2024, sworn by Jeremiah Nyengenyee, Clerk of the Senate.
- l. Public Hearings in Senate: The Senate Roads, Transportation, and Housing Committee also sent invitations to key stakeholders to appear before the Committee for public hearings on March 1, 2024. The invitations are annexed as "JN-2" to the Senate's response.



- m. Senate Consideration and Amendments: The Senate Roads, Transportation, and Housing Committee reviewed the memoranda and stakeholder submissions. After considering various proposals, the Committee recommended that the Bill be adopted with the proposed amendments. The stakeholders' views are annexed as "JN-3" in the Senate's response.
 - n. Senate Passage: On March 12, 2024, the Senate passed the Bill with amendments. The Bill was then considered by the Joint Committee of the National Assembly on March 13, 2024.
 - o. Final Review and Presidential Assent: The National Assembly concurred with the Senate's proposed amendments, thus concluding the bicameral passage of the Bill. The Speaker of the National Assembly presented the Bill for Presidential assent on March 19, 2024.
178. It cannot be denied, from the forgoing, that public participation was conducted. As shown, although the National Assembly and Senate focused on very targeted and specific stakeholders, it also gave an opportunity to the general public to submit memoranda and attend public stakeholder meetings. We note that, the Petitioners took issue with the fact that public participation for an Act that is intended to affect all Kenyans was only conducted in 19 counties and not in all the 47 counties. We gave due attention to this concern and noted that there is no requirement in the law that public participation be conducted in all 47 counties.
179. We have considered what happens in other jurisdictions and found that a short public engagement period can nevertheless comply with the doctrine of reasonableness if it is adequate to the issue at hand, proportional to the level of public interest or urgency, and fair in ensuring that stakeholders have meaningful opportunities to participate. Courts have held that engagement periods must be flexible and proportional, with the overall context (urgency, complexity, stakeholder readiness). Shorter periods may be permissible when combined with diverse methods of engagement, stakeholder awareness, and proportionality to the issue's scale, as demonstrated in cases like *R v Secretary of State for the Environment, ex parte Spath Holme Ltd* and *R (on the application of Greenpeace Ltd) v. Secretary of State for the Environment, Food and Rural Affairs*.
180. While we are persuaded that a short period of public engagement can comply with the doctrine of reasonableness, we are alive to the fact it largely depends on the circumstances surrounding the engagement. The doctrine of reasonableness requires that actions taken by public authorities, including the duration of public engagement, be proportionate, fair, and justifiable. A short engagement period may still satisfy these criteria:
- (a) Nature of the Issue: Urgency or Simplicity a short period may be reasonable if the issue requires urgent action or is relatively simple and doesn't require extensive public input.
 - (b) Urgency: In cases where urgent decisions are needed (eg, emergency legislation), a short public engagement period may be justified. For example, in *R v Secretary of State for the Environment, ex parte Spath Holme Ltd* [2001] 2 AC 349, the House of Lords found that, in cases of urgency, time constraints might justify limited consultation periods, as long as the decision-maker reasonably believed that the process still allowed meaningful participation given the time constraints.
 - (c) Simplicity of the Issue: Where the matter is less complex or controversial, a shorter period might still be considered reasonable. For instance, in *R (on the application of Moseley) v Haringey London Borough Council* [2014] UKSC 56, the Supreme Court noted that the duration of consultation should be proportionate to the complexity of the issue. A simple, well-understood matter might not require an extended engagement process.



- (c) Alternative Methods of Participation The doctrine of reasonableness allows for flexibility in how public engagement is conducted. If a short period is compensated for by multiple engagement methods (eg, online submissions, public hearings, written memoranda), it may still comply with the principles of fairness. In *R (on the application of Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWCA Civ 589, the court upheld the government's decision to shorten the consultation period because alternative methods (such as an online consultation) allowed for significant public engagement, making the process reasonable and fair despite the time constraints. With the *Affordable Housing Act* the Senate and National Assembly conducted several methods of Public participation.
- (d) The Senate did not limit itself to just one method of public participation (such as public barazas). Instead, it employed multiple methods, including calling for public memoranda and holding a public hearing. This is evidence of the Senate's commitment to inclusivity and its recognition that different stakeholders may prefer different forms of engagement. By using a range of methods, the Senate ensured that a broad spectrum of public opinion could be captured.
- (e) Diverse forms of participation: including electronic submissions, public hearings, or written consultations—this enhances the reasonableness of the engagement period. The Court of Appeal in *R (on the application of The Queen (on the application of Telford and Wrekin Council) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1428, emphasized that engagement via a variety of accessible platforms can justify a short consultation period, provided it enables meaningful input from stakeholders.
- (f) Stakeholder Readiness: can warrant a short consultation period can be reasonable if stakeholders are already well-informed or have had prior engagement on the matter. In *R v Gloucestershire County Council, ex parte Barry* [1997] 1 WLR 915, the court ruled that prior public participation on related matters may reduce the need for extensive further consultation. If a proposed change follows from extensive prior consultations or is part of an ongoing policy discussion, a shorter period can still meet the standards of reasonableness, as stakeholders are likely to be already aware of the key issues. Similarly, in *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 3 WLR 1301, the House of Lords found that a council's prior consultation processes with stakeholders may allow for more limited further consultation, as long as the stakeholders had a clear understanding of the matter and the engagement was meaningful.

181. We take judicial notice that public participation was conducted in respect of the Finance Act 2023 in which the Affordable Housing Levy was introduced through section 84 of the Finance Act 2023. The averments set out in the affidavit by the CS for Housing, Mr Charles Hinga in the response to Petition E181 of 2024 demonstrate that the *Affordable Housing Act* had been put through rigorous nationwide public participation. Annexed to that affidavit were documents marked as Annexure CH-1 which show that public participation was conducted at different levels before the parliamentary process. The documents included Briefing Note on the Policy Framework (Page 15-31) Report on Consideration of the Affordable Housing Bill, 2023 (Page 32-249), AHP Delivery Framework Overview (Page 369-435).



182. In respect of the public participation held before the passing of the *Finance Act* 2023, here is what the Bench in Petition 181 of 2023 had to say:

“The public participation exercise was real and not illusory or cosmetic because in response to the invitations, various members of the public and stakeholders gave their views and comments which were received by the Committee. The views of stakeholders and members of the public were considered as some proposals were adopted while others were rejected. The public participation exercise was real and gave diverse stakeholders an opportunity to present their views on the Bill.”

183. Taking all the foregoing into account the foregoing background information, we are satisfied that the steps taken by way of public participation by the National Assembly and the Senate comply with the doctrine of reasonableness, taking into account the following elements:

- (a) Range of Participation Methods: The Senate’s consideration of public input, including the incorporation of amendments that were subsequently adopted by the National Assembly, shows that the Senate gave proper weight to the contributions made by the public. This reflects proportionality; an indication that enough time and opportunities were provided for stakeholders to be heard and for their feedback to influence the process.
- (b) Stakeholder Engagement: The Senate made specific efforts to gather stakeholder views through its Roads, Transportation, and Housing Committee, as reflected in Senate’s Annexure JN.3. This demonstrates that the Senate made efforts to ensure that its process was inclusive, allowing key stakeholders to participate meaningfully in the legislative process.
- (c) Transparency: By directing the court’s attention to the annexure containing the views of stakeholders, the Senate has demonstrated that it acted transparently in documenting and considering public input. This reinforces the fairness of the process.

184. Guided by the principles set out earlier on burden of proof and in particular article 259 of the *Constitution* on interpretation of the *Constitution*, as well as the foregoing authorities on public participation, we are satisfied that, in the circumstances, reasonable opportunities were given for public participation before the enactment of the Affordable Housing Act.

ii. Whether the *Affordable Housing Act* violates the rights under Article 27 and 40 of the *Constitution*:

185. The petitioners argued that the collection of the levy is discriminatory in that, whilst the Act is clear that the formal sector is to be taxed on their gross salary, it does not provide for a structure of how collections from the informal sector will be made.

186. Article 27 of the *Constitution* provides that:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.



- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 - (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
 - (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
 - (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
 - (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.
187. It is plain then that while the *Constitution* in principle prohibits discrimination, it also recognizes that in certain situations, affirmative action would be necessary to give full effect to the realization of the rights guaranteed in the *Constitution*.
188. In *Jacqueline Okeyo Manani & 5 others vs. Attorney General & another* [2018] eKLR it was held that:
- “...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups...the *Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”
189. The Court of Appeal in the case of *Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae)* (Civil Appeal 1 of 2016) [2016] KECA 534 (KLR) (27 May 2016) (Judgment) held:
98. We now turn to consider the appellant’s argument that the respondents violated her right to equality and freedom from discrimination under article 27. In *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, the Supreme Court of Canada explained the essence of discrimination as follows:
- “Discrimination is a distinction which, whether intentional or not (is) based on grounds relating to personal characteristics of the individual or group, (and) has effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.”



99. It cannot be gainsaid that differential treatment per se does not in and of itself constitute a violation of the right to equality or the kind of discrimination prohibited by the Constitution. The differential treatment must be based on the grounds prohibited by the Constitution and be devoid of any reasonable or rational basis. Judge Tanaka, of the International Court of Justice powerfully articulated the essence of equality in his dissenting opinion in the South West Africa Cases (www.icj-cij.org/docket/files/46/4945.pdf) as follows:

“The most fundamental point in the equality principle is that all human beings as persons have an equal value in themselves, that they are the aim itself and not means for others, and that, therefore, slavery is denied. The idea of equality of men as persons and equal treatment as such is of a metaphysical nature. It underlies all modern, democratic and humanitarian law systems as a principle of natural law. This idea, however, does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently. We know that law serves the concrete requirements of individual human beings and societies. If individuals differ one from another and societies also, their needs will be different, and accordingly, the content of law may not be identical. Hence is derived the relativity of law to individual circumstances...We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.”

190. Further, in SBM & another v Attorney General (Constitutional Petition 21 of 2021) [2022] KEHC 13920 (KLR) (19 October 2022) (Judgment), it was held: -

- “27. It is unassailable that the approach to interpreting the fundamental rights and freedoms in the bill of rights by this court has to take the model of looking at the Constitution as a whole which is purposive and generous giving effect to constitutional values including substantive equality. In reaction to the inequality or discrimination advanced by the petitioner the court in *Prinsloo -v- Van Der Linde* [1997] ZACC 5;

“It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as ‘mere differentiation’. In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate government purpose for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.”

...

29. Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: i. Firstly, does the differentiation amount to ‘discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination



will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.ii.If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).“Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.”

191. Section 4 of the [Affordable Housing Act](#) provides that: -

- (1) There is imposed a levy known as the Affordable Housing Levy.
- (2) The Levy shall be at the rate of one point five percent of—
 - (a) the gross salary of an employee; or
 - (b) the gross income of a person received or accrued which is not subject to the Levy under paragraph (a).
- (3) The Levy shall be payable to the collector, for remittance into the Fund, not later than the ninth working day after the end of the month in which the gross salary was due or gross income was received or accrued.

192. The petitioners impugned the above provision and submitted that it is discriminatory in so far as it only gives a framework of how the levy will be collected from Kenyans in formal employment, contrary to article 27(1) and (4) of the [Constitution](#). It was further their contention that enforcing a mandatory uniform deduction indirectly discriminates against individuals who own homes, are paying mortgages, have no interest in the scheme, or are low-income earners.

193. Section 2 of the [Employment Act](#) defines an employee as “a person employed for wages or a salary and includes an apprentice and indentured learner.”

194. Section 3 of the [Income Tax Act](#), sets out the various categories of income upon which tax is chargeable. The Section provides: -

- (1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.
- (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—
 - (a) gains or profits from—
 - (i) any business, for whatever period of time carried on;
 - (ii) any employment or services rendered;



- (iii) any right granted to any other person for use or occupation of property;
- (b) dividends or interest;
- (c)
 - (i) a pension, charge or annuity; and
 - (ii) any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund; and
 - (iii) any withdrawals from a registered home ownership savings plan;
- (ca) income accruing from a business carried out over the internet or an electronic network including through a digital marketplace;
- (d) deleted by [Act No. 14 of 1982](#), s. 17;
- (e) an amount deemed to be the income of any person under this Act or by rules made under this Act;
- (f) gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule;
- (g) subject to section 15(5A), the net gain derived on the disposal of an interest in a person, if the interest derives twenty per cent or more of its value, directly or indirectly, from immovable property in Kenya;
- (h) a natural resource income; and
- (i) gains from financial derivatives, excluding financial derivatives traded at the Nairobi Securities Exchange.

195. From our understanding, an employee for purposes the [Employment Act](#) is a person who is employed for wages or a salary and is therefore under obligation to pay tax under section 3(2) of the [Income Tax Act](#). In the same vein, all persons eligible to pay tax for purposes of section 3(2) of the [Income Tax Act](#) ought to bear the burden of paying the Affordable Housing Levy equitably, whether in formal or informal employment. This, appears to us to be the essence of Section 4 of the Act.

196. The court acknowledges that the collection of tax in an informal sector may pose difficulties to the Kenya Revenue Authority. However, it is instructive that, under section 52B of the [Income Tax Act](#) (cap 470) the Kenya system of self-assessment system is provided for where a taxpayer assesses himself or herself and makes payments to KRA. It provides:

“52B. Notwithstanding any other provision of this Act –

- (1)
 - (a) every individual chargeable to tax under this Act shall for any year of income commencing with the year of income 1992, furnish to the Commissioner a return of income, including a self-assessment of his tax from all sources of income, not later than the last day of the sixth month following the end of his year of income; and
 - (b) every person, other than an individual chargeable to tax under the Act, shall for any accounting period commencing on or after January 1, 1992 furnish to the Commissioner a return of income,



including a self-assessment of his tax on such income, not later than the last day of the sixth month following the end of his accounting period:

- 2) The return of income together with the declared self- assessment of tax on the declared income, shall be prepared on such a form or forms as shall be prescribed by the Commissioner.
- (3) The declared self-assessment shall be calculated by reference to the appropriate relief and rates of tax in force for the year of income.
- (4) Every company liable to tax under this Act, shall also include with the self-assessment and return of income an assessment and return of any compensating tax due with respect to such tax year and the compensating tax so calculated shall be payable at the due date for the self-assessment.
- (5) The Commissioner may, where he considers appropriate, send to any person to whom this section applies in respect of any year of income a form or forms to enable that person to furnish the required return; and failure by the Commissioner to send the return form or forms shall not affect the obligation of that person to furnish the required return by the date specified in this section.”

197. In this regard, the court in *Commissioner of Domestic Services v Galaxy Tools Limited (Income Tax Appeal No E 088 of 2020)* [2021] eKLR, observed as follows: -

- “1. This country operates under a self-assessment tax regime. Under this regime, the tax payer assesses self and declares what he considers to be taxable income on which he then pays tax to the authorities. For this reason, the tax laws are coached in a manner that gives the tax authorities wide powers and discretion in ascertaining ex-post facto, what taxable income is.”

198. It is, therefore, our finding that Section 4 of the *Affordable Housing Act* is not discriminatory and does not infringe on the provisions of articles 27(1) and (4) of the *Constitution*. The mode of collection of the housing as provided for by the Act is indeed different but the same does not amount to discrimination as alleged under article 27(1) and (4) of the *Constitution*.

199. Another dimension of the petitioners’ arguments was that the introduction of a levy and the fact that it has been set at a value of 1.5% of the gross salary of an employee is an infringement of article 40(1) and (2) on the right to property.

200. Article 40(1) and (2) of the *Constitution* provides: -

Protection of right to property.

40. Subject to article 65, every person has the right, either individually or
 - (1) in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person—



- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27(4).

201. The petitioners were of the view that the levy introduces an extra burden on the taxpayer contrary to the provision of section 19(3) of the Employment Act which provides that: -

19. Deduction of wages

- (1) ...
- (2)
- (3) Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any other written law, the total amount of all deductions which under the provisions of subsection (1), may be made by an employer from the wages of his employee at any one time shall not exceed two thirds of such wages or such additional or other amount as may be prescribed by the Cabinet Secretary either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry.

202. The respondents rebutted the claim that the imposition of the levy will have the effect of reducing the net income of workers whose net pay is just one-third (1/3) of their wages and increasing the deductions on their wages above two-thirds (2/3) contrary to section 19(3) of the Employment Act. They justified the housing levy as a commendable initiative aligned with the Constitution as it is aimed at ensuring that Kenyans have access to affordable housing, a move that is aimed at ensuring that every Kenyan enjoys the right to accessible and adequate housing, and to reasonable standards of sanitation as guaranteed under article 43(1)(b) of the Constitution. Hence, the question to pose is whether taxation amounts to deprivation of property for purposes of article 40 of the Constitution.

203. Taxation in Kenya is based on article 209 of the Constitution, which empowers the National Government to impose Income Tax, Value-Added Tax, Excise Duty, Customs Duties on imports and exports, and any other taxes prescribed by an Act of Parliament. Article 209(2) deters the imposition of tax or duty by the National Government that have been specified in clause (3)(a) or (b) being property rates and entertainment taxes that are to be imposed by the County Governments.

204. It is a widely recognized judicial principle to respect the constitutional authority and functions of the body or organ of government entrusted with a particular function. The court in the case of Thuku Kirori & 4 others v County Government of Murang'a [2014] eKLR, held:

“Moreover, where a statute or the Constitution, for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, state or otherwise, this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates; it is the duty of this court to interpret the Constitution in a purposive rather than a restrictive manner...”

205. Article 210(1) of the Constitution provides that “no tax or licensing fee may be imposed, waived or varied except as provided by legislation”. In essence, there must be legislation that supports the



imposition of any tax or licensing fee. Without such a legal framework, any imposition of tax by either the National or County Government will be unconstitutional. This much was made clear by the Court in Petition 181 of 2023 when section 84 of the Finance Act 2023 was declared unconstitutional. The court held:

“Although section 84(3) of the Finance Act provided that the housing levy shall not be used for any other purpose other than development of affordable housing, associated social physical infrastructure as well as provision of affordable home financing to Kenyans, that pronouncement was not anchored by a corresponding legal mechanism demonstrating how that objective would be actualized. That was unlike the other levies cited by the respondents which were collected for a specific purpose and were anchored on legal frameworks that governed them.”

206. In the case of *Cereal Growers Association & another v County Government of Narok & 10 others* [2014] eKLR, the court held: -

“...a tax must be imposed based on legislation and administered in accordance with a certain legal framework and to my mind therefore, tax cannot be an administrative decision...”

207. In the instant case, the legislation providing the legal framework is the *Affordable Housing Act* that established a levy known as the housing levy under section 4(1). It is therefore our finding that the levy is properly in place, and is in accord with the *Constitution*.

208. The next question to pose is whether the imposition of the levy infringes on the rights of Kenyans as alleged by the Petitioners. The Petitioners contended that the levy of 1.5 % of gross salary is not only ambiguous, but was also not premised on any empirical study to show what operating the fund in any financial year or for any period would cost, and that the revenues to be raised by the levy at that rate are required.

209. Section 4(2)(a) of the Act provides that the levy shall be at the rate of 1.5 % of an employee's gross salary while section 4(2)(b) of the Act provides that the levy shall be at the gross income of a person received or accrued which is not subject to the Levy under paragraph (a) . The Petitioners argue that section 4(2)(b) does not give a clear legal framework of how this levy shall be collected from the persons working in the informal sector.

210. The respondents' response to the petitioners' concerns was that section 4(2)(b) as enacted gives clear guidelines on how the levy is to be collected from the Kenyans with no formal work.

211. Under article 95 of the *Constitution* it is clear that the National Assembly enjoys broad powers to levy taxes and to determine the rate thereof, provided that such powers are not exercised in a manner that infringes the *Constitution*.

212. Article 201 of the *Constitution* sets out the principles that guide all aspects of public finance in Kenya. In particular, article 201(b) provides as follows:

201. The following principles shall guide all aspects of public finance in the Republic-

(a)

(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 marginalized groups and areas.

213. It is clear, therefore, that under articles 95 and 201 of the *Constitution*, the authority to impose taxes rests with the National Assembly. This power, naturally, is typically exercised in alignment with the nation's economic and other policies. In exercising this authority, the National Assembly is responsible for determining how taxes are imposed, administered, calculated, collected, and enforced. All taxes levied must be in consonance with article 201(b)(i) of the *Constitution*, which recognizes that the burden of taxation shall be shared fairly. In this regard, we reiterate our findings at paragraphs 210 and 211 on self-assessment tax regime.

214. In *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR, the court held that: -

“ 123. Equity in taxation expresses the idea that taxes should be ‘fair,’ and is a concept used in all tax policy analysis. However, it should be noted that equity/fairness is a normative, value-based concept and its interpretation differs across individuals, countries, cultures and time. Since it depends on one’s particular perspective, as well as the specific circumstances being considered, the concept may at times be difficult to apply in practice.

124. Tax equity is commonly discussed according to four definitions of ‘fairness.’ These definitions are also normative, and sometimes conflict, so they too are difficult to apply in practice. However, they are a common reference point for discussion. Horizontal equity posits that taxpayers who are equally economically situated should be treated equally for tax purposes. Vertical equity posits that taxpayers who are not identical from an economic standpoint, but are differently situated, should be treated differently for tax purposes...”

215. The right under article 40 of the *Constitution* is not one of the non-derogable rights provided for in article 25. It has limitations for instance article 40(2)(a) which allows Parliament to legislate for permissible deprivation of property, with the rider that it should not be arbitrary. Article 209(2) also provides that:

“ An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3)(a) or (b).”

216. In the light of the foregoing, it is our finding that the petitioners have not proved their case in terms of the principles set out in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (*supra*). In any event, the National Assembly has the power to determine how taxes are calculated, imposed, collected and administered under articles 95 and 201 of the *Constitution*. We accordingly adopt the expressions quoted in *Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti* [2018]



eKLR, in which the court relied on an American case *Osborn v Bank of the United States*, 22 US 738 {1824} that:-

“...Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law..”

217. It is our finding therefore that section 4 of the Act does not amount to an infringement of either article 27 or 40 of the Constitution.

iii. Whether the Affordable Housing Act is in contravention of Article 43 (1)(b) of the Constitution:

218. Article 43 of the Constitution provides that: -

“ 43.

- (1) Every person has the right—
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.”

219. The Preamble of the Affordable Housing Act provides that:

“It is an Act of Parliament to give effect to article 43(1)(b) of the Constitution; to provide a framework for development and access to affordable housing and institutional housing; and for connected purposes enacted by the Parliament of Kenya.”

220. The petitioners in Petition E191 of 2024 took issue with the fact that section 10 of the Act establishes a fund for affordable housing and related infrastructure, financed through earmarked taxes designated for specific public purposes. It was their submission that the earmarking of these funds in the manner stated in Section 10 raises several issues; one of them being resource misallocation. According to them, locking funds for specific purposes can lead to unequal distribution, where some areas receive excessive funding while others are neglected, thereby threatening article 43 of the Constitution.

221. The petitioners in Petition E181 of 2024 also submitted that the Affordable Housing Act violates article 43(1)(b) of the Constitution in that it does not provide for the right to accessible and adequate housing and to reasonable standards of sanitation. They also posit that there is nothing in the Act about ensuring that people who live in extreme poverty will obtain and maintain adequate shelter and reasonable standards of sanitation.



222. They further argued that the effect of the Affordable Housing Act, 2024, is that the National Government has in effect amended the Constitution to expand the rights and fundamental freedoms in article 43(1)(b) of the Constitution to include the right to affordable housing.
223. The petitioner in Petition 11 of 2024 added his voice to this argument and submitted that sections 16, 17 and 26 of the Act have, in essence, amended article 43(1) of the Constitution by imposing responsibility under the said Article on suffering Kenyans; yet the provision of adequate Housing lies with the state, not Kenyans. In his view, sections 16, 17 and 26 have introduced a levy that cannot be justified as contributors have no nexus to it.
224. On their part, the respondents submitted that the Act was enacted in accordance with the requirements of the Constitution and in fulfilment of the state's obligation to provide accessible and adequate housing as outlined in articles 21 and 43(1)(b) of the Constitution as well as article 11(1) of the International Covenant on Economic, Social and Cultural Rights. They further argued that both the process of enactment and the substance of the Act are constitutional. The respondents were of the view that the Act is a commendable legislative effort by the government aimed at realizing the right to adequate housing as enshrined under article 43(1)(b) of the Constitution which obligates the State to ensure that every citizen has access to adequate housing.
225. The National Assembly also made submissions in relation to articles 21(2) and 43(1)(b) of the Constitution and pointed out that they obligate the State to observe, respect, protect, promote and fulfil the rights and fundamental freedoms enshrined in the Bill of Rights, including the provision of accessible and adequate housing as well as reasonable standards of sanitation. It was its case that to fulfil its obligations under the Constitution and various international agreements, the State requires resources; and that under Article 209 of the Constitution, the National Government has the authority to levy taxes. Hence, the National Assembly reiterated its stance that the levy constitutes a tax intended to advance the constitutional right outlined in article 43(1)(b) of the Constitution.
226. Therefore, National Assembly submitted that the Act is a proactive step aimed at realizing the right to adequate housing as enshrined under article 43(1)(b) of the Constitution. It was their case that the Act is a well-considered policy decision by the government which balances various competing societal interests and objectives aimed at benefiting the largest section of the Kenyan population in dire need of adequate and affordable housing.
227. The National Assembly averred that Kenya's commitment to the international agreements (Universal Declaration of Human Rights (article 25(1) and International Covenant on Economic, Social and Cultural Rights (ICESCR) further underscores its dedication to upholding human rights and promoting equality and inclusion within its legal framework; and that the Act serves as an example of Kenya's efforts to fulfil its mandate under the international agreements to protect and promote the right to housing.
228. The National Assembly further added that, in giving effect to rights under article 43(1)(b) and especially on sanitation, the government has put in place the Kenya Environmental Sanitation and Hygiene Policy ("KESHP") 2016-2030 which envisions a clean, healthy and economically prosperous Kenya, free from sanitation and hygiene related diseases and seeks to ensure universal access to improved sanitation, clean and healthy environment by 2030. It was their argument that the Act should be construed in tandem with other existing or prospective statutes that contribute to the realization of the rights outlined in article 43(1)(b) of the Constitution in order to ensure a holistic and purposive approach to fulfilling the right to housing with adequate sanitation facilities.



229. In support of the foregoing arguments, the National Assembly placed reliance on the Supreme Court decision in *Mitu-Bell Welfare Society v The Attorney General & 2 others* [2013] eKLR. The National Assembly thus stated that the Levy is a noble idea consistent with the Constitution and international practices and more so that the State has an obligation to put in place legislative, policy and programmatic framework in the context of a national strategic plan for the realization of the entrenched affordable housing right and that these steps must be deliberate, concrete, targeted, adequately financed, and capable of realizing the entrenched rights.
230. The Senate in its response argued that the petitions, if allowed, will impede the State's obligation to ensure that citizens' right to accessible and adequate housing as enshrined under article 43(1)(b) of the Constitution is achieved.
231. The Attorney General responded by arguing that the petitioners are misinformed that the Levy whose purpose is to provide affordable housing and associated physical infrastructure violates article 43 of the Constitution. It was stated that the Act's intended purpose is to protect, promote and fulfil the right to adequate housing; a socio-economic right all persons in Kenya are entitled to.
232. KRA also reiterated the averment that the right to housing, as provided for under article 43(1)(b) of the Constitution, is embedded in various international instruments including the United Nations Human Rights Declaration of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966 and the Istanbul Declaration and Habitat Agenda of 1966. They further argued that sections 3,10 and 49(3) of the Act highlight the essence of article 43(1)(b) of the Constitution, and that the National Government is empowered by the Constitution to develop policy and coordinate with the different County Governments to adopt and implement the policies and laws at the different levels of government.
233. In sum, it was the contention of the respondents that the National Government enacted the Act in cooperation with the County Governments and other agencies to accomplish the delivery of quality and affordable housing with a view of realization and enjoyment of the rights enshrined under article 43 (1)(b) of the Constitution.
234. Section 3(1) of the Act, sets out the objects of the Act to be:-

“3.

- (1) The objects of this Act shall be to—
 - (a) give effect to article 43(1)(b) of the Constitution on the right to accessible and adequate housing and to reasonable standards of sanitation;
 - (b) impose a levy to facilitate the provision of affordable housing and institutional housing; and
 - (c) provide a legal framework for the implementation of the affordable housing programmes and projects and institutional housing.”

235. To our minds, the purpose and effect of the impugned legislation is plain. It is to fulfill the constitutional duty of the State to provide housing. To submit, as did the petitioners, that the Act is an affront to article 43(1)(b) of the Constitution would be anomalous. We are therefore in agreement with the arguments proffered by the respondents that the objective is noble. We took into consideration the



decision of the Supreme Court in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) that:

“ Article 43(1)(b) of the Constitution provided that every person had the right to accessible and adequate housing and to reasonable standards of sanitation. Further, under article 21(1) of the Constitution, the State and State organs had the duty to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms in the Bill of Rights. Under article 21(2) of the Constitution, the State had to take legislative, policy and other measures, including the setting of standards in order to achieve the progressive realization of the rights guaranteed under article 43 of the Constitution.”

236. It is further our finding the Act in line with international instruments such as the United Nations Human Rights Declaration of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966 and the Istanbul Declaration and Habitat Agenda of 1966. Consequently, it is our finding that sections 3 and 4 are constitutional and do not in any way infringe article 43(1)(b) of the Constitution.

ii. Whether the Affordable Housing Act offends the devolution principle:

237. The petitioners submitted that sections 16, 17, 25 and 26 of the Act which establish the Affordable Housing Board and its Chief Executive Officer, reporting solely to the Cabinet Secretary (CS) and their functions offend the devolution principle under articles 10 and 174 by assigning the function of housing development to the national government. They argued that this function is exclusive to county governments under Paragraph 8(d) part 2 of the Fourth Schedule. They also argued that the national government’s role is limited to formulating national policy. They submitted that there is no evidence that county governments have transferred the exclusive housing function to the National Government in accordance with article 187(1) and (2).

238. Relying on the Senate & 2 others v Council of County Governors & 8 others (Petition 25 of 2019) [2022] KESC 7 (KLR), the petitioners submitted that the Act violates the principle of distinctiveness and interdependence. They asserted that the National Government should not run the affordable housing fund through the Board. They lamented that the county has only one person on the Board as provided in section 16(3)(d)(i). They further questioned section 32 which provides for delegation of powers of the Board to an administrator as it does not state on which agent or person the delegated powers are conferred.

239. The petitioners also impugned section 50(2) which mandates the Cabinet Secretary (CS) to make housing regulations in consultation with the Board. They contended that this function is for the County Executive Committee (CEC) in charge of Housing, per article 185(4)(b) of the Constitution. Relying on the case of Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018) [2022] KESC 39 (KLR), they argued that national government entities are required to stay within their boundaries and not stray into functions and territories reserved for County Governments and their entities, including county executive committees.

240. The petitioners faulted sections 15(2) and (3) of the Act that provide that the Affordable Housing Board shall prepare the annual investment programmes. The petitioners further pleaded that the Act violates Articles 201(1)(b), 202, 218, 220, on Division of Revenue to the prejudice of County Governments. They argued that the National and County Governments are entitled to participate in the vertical division of nationally raised revenue. They placed reliance on Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018) [2022]



- KESC 39 (KLR), and submitted that the introduction of a third-tier institution would disrupt and water down the system of devolved government. The petitioners also claimed that the Act violates the Constitution by excluding the Senate in the appropriation of funds.
241. In their response, the respondents submitted that housing is a shared function with the national government in charge of housing policy and counties in charge of housing development. They also submitted that the interpretation of the housing policy should be approached purposively, considering its intended objectives and broader societal implications. They relied on the November 2017 Report on Emerging Issues on Transfer of Functions to National and County Governments to argue that apart from agenda setting, formulation and adoption, policy formulation in housing involves implementation. They drew attention to the necessity for interdependence between the two levels of government if the aspirations of Kenyans as set out in the Constitution are to be realized.
242. In particular, the respondents pointed out that sections 34, 38, 39 and 40 provide for the County Governments’ implementation functions under the Act. They submitted that the composition of the Board, comprised of appointees of the Executive, is lawful, constitutional and aligned with the National government’s function and mandate in housing matters.
243. The respondents also asserted that the functions and objective of the Board do not encroach upon the operational scope of County governments and that the functions and objectives of the Board are expressly designated as functions falling under the purview of the national government, as articulated in sections 9 and 10 of the Act.
244. The respondent further pointed out that the Trust Fund lapsed on January 25, 2024 pursuant to section 21(1-3) of the Statutory Instruments Act (Chapter 2A, Laws of Kenya) as read with the Statutory Instruments (Exemption from Expiry) Regulations, 2022 (Legal Notice No 218 of 2022). They argued that there exists a presumption of regularity in government action and that while the courts retain the authority to examine the constitutionality of such actions, this process must be conducted judiciously and with careful consideration.
245. On allocation of funds to the counties, the National Assembly submitted that money can be allocated through the County Governments Additional Allocations Act and that, in any event, the Senate played a key role in the passage of this Act; and therefore that the allegation of the exclusion of the Senate in the passage of appropriation of funds to County governments is unfounded. It restated that allocation is a National government function; and therefore, the Board as a national government entity is well placed to handle the funds.
246. That housing is a shared function should not be in dispute. In Petition 181 of 2023, the court had much to say on this. It held (at paragraph 191 of its Judgment dated November 28, 2023 that:
- “We agree that housing is a shared responsibility between the national and county governments where each level of government has defined roles to play. In this case, the purpose of the levy as stated in the amendment to the Employment Act is to, “provide funds for the development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans”.
247. The court relied on the decision of Hon Lenaola, J (as he then was) in Law Society of Kenya v Cabinet Secretary, Ministry of Lands Housing and Urban Development and 3 others [2017] that:
- “54. The words ‘housing policy’ and ‘housing’ as used in the fourth schedule in respect of National and County Government functions respectively are capable of varied interpretation and application. *Black’s Law Dictionary* 9th



Edition defines a house as a home, dwelling or residence while ‘policy’ is defined as the general principles by which a government is guided in its management of public affairs. The mandate of the National Government involves the accreditation, regulation and promotion of quality assurance and technical capacity assistance in the construction industry at large while the County Government is involved in housing to the extent of planning and development within a County only...”

248. In the *Speaker of National Assembly and others v Senate and 12 others* 2021 KECA 282 (KLR) the Court of Appeal also had occasion to discuss the question whether contributions to the NHDF infringed county government functions. It held:

“...An examination of the Act indicates that notwithstanding that the amendments are housing related, the central theme is the establish a National Housing Development Fund into which employer and employee contributions are to be paid, the sums of which would go towards financing the building of affordable housing units. In so far as the enactments concern the imposition of taxes under article 209 of the *Constitution*, which are paid into the National Housing Development Fund, we find that the national perspective upon which the housing development policy is founded is not a county function to which article 110(3) of the *Constitution* required to be applied...”

249. Having looked at the sections, we are of the view that the Act does not offend the principle of devolution because the Affordable Housing Board under Section 16 has representation from both the National and County governments. In any event the scheme of the Act works well towards the promotion of the complementarity of functions and interdependence intended by the article 6(2) and the Fourth Schedule.

250. In *Senate & 2 others v Council of County Governors & 8 others* (Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment), the court held: -

“...the government at either level will perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level; and finally that, though the two levels of government are distinct and inter-dependent, they conduct their mutual relations on the basis of consultation and cooperation. To achieve that purpose, they are enjoined to set up joint committees and joint authorities...”

iv. Whether the use of public land in the development of affordable housing infringes on the functions of the National Land Commission:

251. The petitioners took issue with sections 41-45 of the Act, contending that the Fund purports to use public/community land pursuant to the *Land Act* 2012 for purposes of selling the housing units built thereon to private individuals/corporates. They submitted that this is unconstitutional and in direct conflict with article 62(2) & (3) of the *Constitution*.

252. That article provides that all public land is held and managed and/or allocated by the National Land Commission (NLC). It was the petitioners’ case the Act does not recognize the constitutional mandate of NLC. The petitioners further argued that there is no rationale for building on public land and then selling the same to the private individuals/private companies, yet under article 63 of the *Constitution*, all community land is held and managed in trust by County governments on behalf of the communities for which it is held.



253. The petitioners also argued that the Act does not explain whether the programme envisaged herein is affordable housing ownership or affordable rentals. They surmised that Parliament failed to involve the NLC in the enactment process and consequently ended up with a piece of legislation that violates the principles governing the use of public land.
254. On their part, the respondent's submitted that section 41 of the Act anticipates the involvement of the NLC where necessary in the event that there is an issue involving transfer or any dealing in public land. That the section imports the provisions of Land Act where applicable and therefore the allegation is unfounded. They further averred that private contractors do not have ownership rights over the affordable housing units and the envisaged contracts are must state that the affordable housing units are constructed for the Board, which retains ownership of the ensuing units. It was therefore the submission of the respondents that the Board cannot bypass the role of the NLC in any manner, given the elaborate procedure provided for in the Land Act for the alienation of public land.
255. The respondents further asserted that the NLC was fully engaged and participated in the enactment of the Act pursuant to its mandate under article 67(2) of the Constitution.
256. The interested parties reminded the court that successive governments had affordable housing on their agenda but that the plans bore no fruits. They lauded the Act contending that it has provided a clear framework for the use of public land to develop the affordable housing units in line with article 62(4) of the Constitution.
257. Part V of the Affordable Housing Act speaks to the implementation of the affordable housing. To that end section 41 provides that: -

“ 41.

- (1) The provisions of the Land Act shall, subject to subsection (2) apply to the allocation of public land for the implementation of the affordable housing scheme and development institutional housing scheme.
- (2) Land held by a county government shall not be allocated unless the Board has, in the prescribed manner, carried out public participation and stakeholder engagement with the affected community within the county.

258. Public Land under the Land Act is defined as follows: -

“ public land” has the meaning assigned by article 62 of the Constitution and includes the coast foreshore, river, dams lakes and other reserves under the Survey Act or under any other law”

259. It is the constitutional mandate of the National Land Commission (NLC), which is established under article 67(1) of the Constitution, to, *inter alia*, manage public land on behalf of the National and County Governments. Since section 41 provides for the use of public land in accordance with the provision of the Land Act, there is no conflict, in our view, between the Act and the Constitution. We entertain no doubt at all that the scheme of the Act accords well with the constitutional mandate of the NLC and the case of *Serah Mweru Mubu v Commissioner of Lands and 2 others* [2014] eKLR, in which it was held that all land management functions must fall under the charge of the NLC.



260. It is therefore our finding that section 41 of the *Affordable Housing Act* is not in conflict with article 67 of the *Constitution* as it provides that the use of public land for purposes of the Act in consonance with the *Land Act*.

v. Whether the Act is unconstitutional for failure by the Commission on Revenue Allocation (CRA) to consider the Bill as per Article 205(1):

261. The petitioners argued that the failure by the CRA to consider the Bill was fatal, making the resultant Act void *ab initio*. That the failure to involve the CRA in advising the National Assembly and the Senate on the Bill which had financial implications for county governments, violated article 205 of the *Constitution*.

262. The respondents, however, relied on *Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others* [2014] eKLR for the proposition that where a matter involves both the National and County governments under the Fourth Schedule to the *Constitution*, the CRA ought to consider the Bill once it is published and make its recommendations; and that in the absence of such recommendations from the CRA, article 205(2) cannot come into play.

263. Article 205 provides that when a Bill that includes provisions dealing with any financial matter concerning county governments is published, the CRA shall consider those provisions and may make recommendations to the National Assembly. It further provides that any recommendations made by the CRA shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill.

264. Article 205(1) the *Constitution* places a mandatory duty on CRA to consider Bills that include provisions dealing with any financial matter concerning County governments, and to make recommendations to the National Assembly for consideration. The Respondents acknowledged that the CRA ought to have considered the Bill once it was published as the Act concerns matters for both the national and county government under the Fourth Schedule of the *Constitution*. The Respondents also acknowledged that the CRA did not consider the provisions as required.

265. *In the matter of Council of Governors & 47 others* [2020] KESC 65 (KLR), the Supreme Court pronounced as follows: -

“56. A critical reading of the provisions cited above, leaves no doubt that Constitution places a very high premium on the recommendations by the Commission for Revenue Allocation. Such recommendations once tabled in Parliament, must be accorded due consideration before a vote takes place in either of the Houses, on the Division of Revenue Bill and the County Allocation of Revenue Bill. This is the unequivocal prescription in article 205 of Constitution. Even where the National Government intends to appropriate money from the Equalization Fund, the Commission must still be consulted, and if following such consultation, it makes recommendations, the National Assembly must consider the same before passing an Appropriation Bill.

57. In view of the foregoing, it is our considered opinion that, where either of the two Houses passes a Bill envisaged under article 205 of Constitution, without considering the recommendations of the Commission on Revenue Allocation, the resultant legislation would be unconstitutional. By the same token, where the National Government appropriates money from the Equalization Fund without consulting the Commission, the resultant legislation would suffer a



similar fate. The same result would obtain were the National Assembly passes legislation authorizing the National Government to appropriate money from the Equalization Fund without considering the recommendations, if any, by the Commission on Revenue Allocation.

266. We have considered the rival submissions made by the parties in this regard. We note that in the advisory opinion rendered in the Council of Governors (*supra*) the key issue was division of revenue between the two levels of government. To our minds, the impugned Act includes no provision authorizing direct allocation of funds to the County governments without going through the established procedure in existence for sharing of revenue. Whereas the Act creates the housing levy, we note it does not allocate a specific portion fund or amount of the levy collected under it to the county governments.

267. To the contrary, section 11(3) of the Act is explicit that:

“The monies may be allocated to county governments in accordance with the Public Finance Management Act, 2012 and on such conditions as may be prescribed by the Cabinet Secretary for the time being responsible for the National Treasury.”

268. Needless to mention the Board is expected to formulate an annual investment programme that must first be approved by Parliament in the manner set out in Section 15 of the Act before implementation. We believe it would be at that stage that the advice of CRA would be critical. Therefore, the conclusion we draw is that failure by CRA to comment on the Bill before it was passed by the National Assembly was not necessarily fatal to the Act.

269. We are persuaded to this conclusion by the decision of the court in *Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others* (Petition No 56 of 2014) [2014] eKLR, where it was held that: -

“34. However, in this case the question is whether there is a violation of article 205. A reading of the provision shows that it is the CRA which ought to consider the bill once it is published and make its recommendation. In this instance, there is no indication that the CRA considered the Finance Bill, 2013 and made recommendations. In the absence of such recommendation by the CRA, article 205(2) cannot come into play.

35. In the absence of recommendation by CRA, I do not think that the resultant legislation can be declared unconstitutional by reason of the CRA failing to discharge its duty to make recommendations on the Finance Bill, 2013.

36. I therefore find and hold that the Finance Act, 2013 cannot be impugned on the basis of want of compliance with article 205.”

270. It is consequently our finding that failure by CRA to make recommendations in respect of the *Affordable Housing Act* does not render the Act unconstitutional in the circumstances of this case. In our view and whether or not CRA participated in the process of enactment of the Act is inconsequential.

vi. Whether the *Affordable Housing Act* can be applied retrospectively:

271. The Petitioners challenge the retrospective application of the Act in so far as it purports to legitimize previous payments of the housing levy under the *Employment Act* through section 84 of the Finance Act 2023 which was declared unconstitutional. The petitioners argued that there is no



mechanism available anywhere for ordinary legislation, such as the Affordable Housing Act, to have the retrospective effect of making the levy constitutional so that the same can be considered as having been enacted under the Act. They further argued the National government cannot legally and constitutionally claim to have collected funds before the Act was enacted.

272. The Petitioners further argued that the introduction of section 60 of the Act which provides for the impugned retroactivity is an attempt by the Parliament to defeat the court decision that rendered the collections before the enactment of the Act unconstitutional and thus violates both the spirit and text of the Constitution, including articles 1, 2, 10 and 159 of the Constitution.
273. On their part, the respondents stated that section 60 of the Act is consistent with the retroactive application of a statutory provision, as it acknowledges the ongoing actions and obligations under the Act. They argued that in addressing the concerns raised by the court regarding section 84 of the Finance Act, 2023, the Legislature took into the continuous affordable housing projects and the need to have them safeguarded.
274. According to the respondents the retrospective application of an Act cannot be the sole reason to declare such an Act unconstitutional. They added that section 60 of the Act does not violate the principles of non-retroactive application of a statute as was set in the Supreme Court decision Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR.
275. In the construction of statutes, there is a general presumption that statutory provisions are not meant to have a retrospective effect. However, the presumption can be rebutted if the intention of the legislature is clear, either by way of the express wording of the statute in question or by necessary implication. In Wilson & others vs Secretary of State for Trade and Industry (2003) UKHL 40 Lord Scott of Foscote had the following to say:

“ 153. It is, of course, open to parliament, if it chooses to do so, to enact legislation which alters the mutual rights and obligations of citizens arising out of events which predate the enactment. But in general Parliament does not choose to do so for the reason that to legislate so as to alter the legal consequences of events that have already taken place is likely to produce unfair or unjust results. Unfairness or injustice may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced if persons are subjected on account of those past events to liabilities that they were not previously subject to. There is, therefore, a common law presumption that a statute is not intended to have a retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect (see Maxwell on Statutes, 12th edition p 215 and Bennion's Statutory Interpretation, 4th edition pp 265-266 and 689-690). The presumption can be rebutted if it sufficiently clearly appears that it was indeed the intention of Parliament to produce the result in question. The presumption is no more than a starting point.

276. Section 60 of the Act provides as follows: -

“ 60.

- (1) The Acts specified in the first column of the Third Schedule are amended in the manner specified in the Second column.



- (2) All monies which immediately before the Commencement of this Act, that were held by the National Housing Corporation under the Housing Fund Regulations, 2018 shall vest in the Fund and shall be deposited into the Fund.
- (3) The National Housing Corporation shall account for and give a record of all contributions made under the Housing Fund Regulations, 2018.
- (4) The administrator of the Fund shall notify the Contributors and create an account for each contributor.”

277. From our reading of the above provisions, it is clear that section 60 of the Act was intended by Parliament to have a retrospective effect. However, the matter does not stop there. The section, in our understanding, also seeks to preserve the transactions that had taken place under section 84 of the Finance Act 2023 prior to the determination of Petition 181 of 2023. This therefore, in our view does not give the Act a retroactive effect as alleged, but is intended to manage the transition involving ongoing projects. Therefore, the provision is not unconstitutional.

278. Therefore, flowing from the above, we find that Section 60 of the Act is not inconsistent with article 205 of the Constitution.

vii. Whether the appointment of the Commissioner General of Kenya Revenue Authority as Collector of the Levy is in accordance with the Constitution:

279. The petitioners also impugned the Act contending that the Commissioner General of KRA cannot be the Collector of the levy. In their submission the appointment of the Commissioner General as the collector under section 2 of the Act is in breach of articles 2(2) and 10(2) of the Constitution. In section 2 of the Act, “collector” for purposes of the Act is defined as follows:

“collector” means the Commissioner-General of the Kenya Revenue Authority, appointed under section 11(1) of the Kenya Revenue Authority Act.”

280. The petitioners submitted that under section 11(2), of the KRA Act, the responsibilities of the Commissioner-General are strictly restricted to the affairs of the Authority, and do not include collection of revenue. In their view collection is the responsibility of KRA as an institution. They posited that the Commissioner-General is not the KRA as established by section 3, Kenya Revenue Authority (KRA) Act. They argued therefore that it is the Authority, not its Commissioner-General that, under section 5 of the KRA Act, has the mandate to collect and account for revenues in accordance with specified laws.

281. In response to the petitioners’ arguments, KRA made reference to section 2(1) of the Kenya Revenue Authority Act in which “collector” is defined as the Commissioner-General of KRA. It also relied on section 5 of the same Act by which the Commissioner-General is designated as a collection agent of the Ministry of Housing of the affordable housing levy. Therefore, the position of KRA was that its Commissioner General is the duly appointed collector for purposes of the Levy.

282. We note that the Third Schedule of AHA amended para 15 of First Schedule Part II. KRA Act (No 2 of 1995) by inserting the following paragraph immediately after para 14 “15. The Affordable Housing Act, 2024”.



283. We further note that later, through the KRA Amendment Act dated May 9, 2024, section 5 of the KRA Act was amended to provide that the Authority would be an agent of the Government for purposes of the collection and receipt of all revenue. And in section 11, one of the functions of the Commissioner-General is the management of funds, property and affairs of the Authority.
284. Therefore, it is our finding that the law has clearly designated that the collector of the Housing Levy is the Commissioner General, KRA and we find no conflict in the said designation.

F. Disposition

285. The burden of proof was on the petitioner to prove all aspects of his Petition to the requisite standard. In this regard, we made reference to *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (*supra*), *Wamwere & 5 others v Attorney General* (*supra*). Granted our findings herein above, it is our conclusion that the Petitioners have not proved their case to the requisite standard and therefore the petitions as consolidated must fail. We reiterate the expressions of Hon Odunga J, (as he then was) in *Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties)* [2021] KEHC 9748 (KLR)

“Tax law and any legislation for that matter is guided by and is a reflection of the policy of the government at any one given point in time ... it is not for this court to determine whether in arriving at a particular policy decision, the policy maker’s decision was wise or merited. It therefore follows that the timing of a policy decision based on the prevailing circumstances do not justify the court’s interference with the policy in question...”

c. What order ought to issue on Costs?

286. We have given consideration as to what orders to make on costs. section 27 of the Civil Procedure Act, provides that costs follow the event and are at the discretion of the court. The Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR set out the guidelines that a court must consider when exercising its discretion to either award or deny costs as hereunder: -

“(14) So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p 94]:

“[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

287. While the law gives the court discretion over the costs associated with all suits, including the power to determine who should bear those costs and to what extent, this court must evaluate whether the particular circumstances of this case justify awarding costs. The Supreme Court in *Jasbir Singh Rai*



(*supra*) also pointed out that the legal principle that costs follow the event is not absolute. The court held: -

- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.....
- (22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant...”

288. Rule 26(1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms practice and Procedure Rules 2013) also recognizes that:

- “26. The award of costs is at the discretion of the court.
- {1}
{2} In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms.”

289. There is no gainsaying that petitions were brought in public interest. Therefore, it is only just and fair that the petitioner should not be burdened with costs. We relied on the following authorities:

- a. In the concurring decision of Hon. Njoki SCJ’s in the matter of Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Application 29 of 2014) [2014] KESC 6 (KLR) (9 December 2014) (Ruling), explained the essence of public interest as follows: -

“89. Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the court has discretion on a case by case basis, to evaluate the terms and public nature of the matter *vis a vis* the status of the parties before it. This discretion is drawn from the command of article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human



rights and fundamental freedoms, permits the development of the law and contributes to good governance...”

- b. The Supreme Court in the case of *Okoti & 2 others v Attorney General & 14 others (Petition (Application) 2 (E002) of 2021)* [2023] KESC 31 (KLR) (21 April 2023) (Ruling), the court stated: -

“vii. Public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest. While doing so, public interest litigants must not themselves fall into the temptation of seeking for costs should they succeed in the litigation because by doing so, self-interest, and not public interest, will be apparent and they would in such situations be amenable to an adverse order on costs should they not succeed. Again, as we have stated above and reiterated the finding by the Constitutional Court of South Africa in *Biowatch*, the primary consideration in public interest constitutional litigation should always be seen to be the need to promote access to justice and not self-interest per se...”

- c. The Supreme Court in *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)* [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment), indicated: -

“62. It is also trite law that an award on costs must be judiciously exercised by invocation of the discretion of the court on a case by case basis and it is the practice that, where suits involve genuine public interest, courts are slow to award costs as against the losing party. Courts have, in addition, found that condemning an unsuccessful party to pay costs in genuine public interest litigation can act as a deterrent factor preventing parties from instituting proceedings that benefit the public generally for fear of being condemned to pay costs. The general rule on costs is therefore not immutable and although deeply entrenched, certain specific circumstances and considerations may necessitate non application of the principle...”

- d. The Court of Appeal in the case of *Kenya Human Rights Commission & another v Attorney General & 6 others* [2019] eKLR, held: -

“...It is therefore clear that in suits involving genuine public interests litigation, courts are slow to award costs.

...

Public interest litigation, in most cases, is for the benefit of the public and not the persons or entities that institute the proceedings. Condemning an unsuccessful party to pay costs in genuine public interest litigation can become a deterrent. More likely than not, many a party would hesitate to institute suits in defence of the Bill of Rights and the *Constitution* for fear of being condemned to pay costs...”



- e. The High Court in *Feisal Hassan & 2 others v Public Service Board of Marsabit County & another* [2016] eKLR, stated: -

“ 3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the *Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of the *Constitution*. Indeed, the rights of access to court under article 22 and 258 of the *Constitution* for the enforcement, respectively, of the Bill of Rights and the other parts of the *Constitution* are in the same terms...”

290. In the result, the petitions as consolidated are hereby dismissed with an order that each party bears own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF OCTOBER 2024

OLGA SEWE

JUDGE

JOSEPHINE MONG'ARE

JUDGE

JOHN CHIGITI SC

JUDGE

