



**Okoti & 8 others v Attorney General & another (Constitutional Petition
E258 & E339 of 2021 (Consolidated)) [2023] KEHC 22343 (KLR)
(Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E258 & E339 OF 2021 (CONSOLIDATED)
AC MRIMA, J
SEPTEMBER 21, 2023**

BETWEEN

**OKIYA OMTATA OKOITI 1ST PETITIONER
VICTORIA COURTS TRADING LTD. 2ND PETITIONER
DIGNITY COLLECTION LIMITED 3RD PETITIONER
FURNITUTE PALACE INTERNATIONAL (K) LTD 4TH PETITIONER
ODDS AND ENDS LTD. 5TH PETITIONER
TILE & CARPET CENTRE LTD. 6TH PETITIONER
ROSHNI DISTRIBUTORS LTD. 7TH PETITIONER
FURNITURE ELEGANCE LTD. 8TH PETITIONER
SUPER COMMODITIES LTD. 9TH PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
NATIONAL ASSEMBLY 2ND RESPONDENT**

JUDGMENT

Introduction:

1. Okiya Omtatah Okoiti, the 1st Petitioner herein, is the Executive Director of Kenyans for Justice and Development Trust, (KEJUDE) a legal trust, incorporated in Kenya with the purpose of promoting democratic governance and sustainable economic development, among other things.



2. Victoria Courts Trading Centre, Dignity Collection Limited, Furniture Palace International (K) Limited, Odds & Ends Limited, Tile and Carpet Centre Limited, Roshni Distributors Limited, Furniture Elegance Limited and Super Commodities Limited, 2nd to 8th Petitioners herein respectively, are registered limited liability companies in the business of importation and sale of furniture in Kenya.
3. The 1st and 2nd Respondents are the National Assembly and the Attorney General respectively.

Background:

4. On 20th November 2020, the National Assembly published the Excise Duty (Amendment) Bill No. 47 of 2020 (hereinafter referred to as ‘the Bill’) which sought to amend the [Excise Duty Act](#), No. 23 of 2015 by imposing 30% excise duty on imported furniture.
5. When the Bill was committed to Departmental Committee on Finance and National Planning (hereinafter referred to as “the Committee”) the public was invited to participate. The 2nd to 9th Petitioners submitted a Memorandum dated 8th March 2021 in opposition to the Bill.
6. Upon further hearing the said Petitioner’s representative, various stakeholder views and general public, the Committee prepared a report dated 4th May 2021 recommending the proposed Bill to be deleted in its entirety.
7. It is the Petitioners’ case that, subsequently, on 24th June 2021, the Chairperson of the Committee moved amendments on the Finance Bill 2021, among them Clause 25 which sought to insert an Excise Duty rate of 25% on imported furniture of any kind used in offices, kitchen, bedroom and other wooden furniture of tariff number 9403.30.00, 9403.40.00, 9403.50.00 and 9403.60.00.
8. The foregoing turn of events aggrieved the Petitioners herein.

The Petitions:

9. The 1st Petitioner and the 2nd to 8th Petitioners challenged the amendments to the [Excise Duty Act](#) 2020 through the Amended Petition dated 19th July 2021 and the Petition dated 24th August 2021 respectively.
10. The 1st Petitioner’s Amended Petition was supported by the Affidavits of Okiya Omtatah Okoiti deposed to on 15th July 2021, 19th July 2021 and 15th March 2022.
11. The 2nd to 8th Petitioner’s Petition was supported by the affidavit of Amar Shah deposed to on 25th August 2021.

The 1st Petitioner’s case:

12. The 1st Petitioner posited that the 25% excise duty on imported furniture was not subjected to public participation.
13. It was his case that the excise duty was introduced despite Parliament having already considered and rejected the Excise Duty (Amendment) Bill (National Assembly Bill No. 47 of 2020) in order to protect local furniture producers.
14. The Petitioner averred that Sections 23, 24, 25 and 26 of the Bill, which made proposals to amend the [Excise Duty Act](#), 2015 did not propose to impose any duty on imported furniture.



15. Contrary to the foregoing, the Petitioner claimed that the Finance Act, No. 8 of 2021, assented to by the President on 29th June, 2021 and published in the Kenya Gazette on 30th June, 2021, imposed excise duty at the rate of 25% per unit on imported furniture of any kind under tariff number 9403.
16. It was his case that the Excise Duty was irregularly sneaked into the Finance Bill when Clause 25 was amended on the floor of the National Assembly at the Committee of the Whole House when the Bill was read for a Third and final time.
17. The 1st Petitioner further impugned the amendment stating that, in the advert done by the Clerk to the National Assembly calling for public participation, the amendments were not mentioned in both the Bill and in its Memorandum of Objects and Reasons.
18. The 1st Petitioner averred that there was no justification for the proposed imposition in the National Assembly's Departmental Committee on Finance and National Planning's Report.
19. The 1st Petitioner further averred that the Report did not produce any evidence that the amendments were approved by the Cabinet Secretary in compliance with Article 114(2) of *the Constitution* of Kenya.
20. In reference to the Hansard of 24th June 2021, the 1st Petitioner averred that, at the Committee of the whole House, when the Bill was debated at its Third Reading, no contribution was made on the floor of the House by MPs on the proposal to impose the tax on imported furniture.
21. It was his case, therefore, that the traders in, and consumers of, imported furniture were condemned unheard and discriminated against.
22. The 1st Petitioner urged that public participation in the legislative process is a fundamental constitutional principle under Article 10, 118, 124, 201, 221 and 232 as appreciated alongside National Assembly Standing Order 133(5).
23. In conclusion the 1st Petitioner posited that the 25% Excise Duty on imported furniture was unconstitutional and unlawful, and, therefore invalid ab initio.
24. The 1st Petitioner sought the following reliefs;
 - i. A Declaration That:
 - a. The 25% excise duty on imported furniture is invalid, null and void ab initio because the National Assembly sneaked it into the Finance Bill, 2021, and the same was enacted without public participation and without taking into account the views of the Cabinet Secretary responsible for finance.

A1. The National Assembly had no capacity in law, at the Committee of the whole House when the Bill was read a third and final time, to effect the new substantive amendment to the Finance Bill 2021, imposing the 25% excise duty on imported furniture.
 - b. By sneaking the 25% excise duty into the Finance Bill Act, 2021, the President and the National Assembly violated Articles 1(1), 2(1) (2) & (3), 3(1), 10, 24, 27, 40, 43, 46, 47(1), 73, 93, 94, 95, 109(1), 115, 118, 129(1) & (2), 131(2)(a), and 259(1) & (3) of *the Constitution* of Kenya 2010; sections 3, 4 and 5 of the *Fair Administrative Action Act*, 2015; and sections 4, 5, 6, 7, and 8 of the *Statutory Instruments Act*, 2013.



- c. The imposition through the Finance Act, 2021 of the 25% excise duty on imported furniture is unlawful and unconstitutional and, therefore, invalid, null and void ab initio.
- e. The Respondent should pay the Petitioner's costs of this suit.
- ii. An Order That:
 - a. Quashing the imposition of the 25% excise duty on imported furniture through the Finance Act, 2021.
 - b. Permanently prohibiting the imposition of the 25% excise duty on imported furniture through the Finance Act, 2021.
 - c. Compelling the Respondent to pay the Petitioner's costs of this suit.
- iii. Any other relief the court may deem just to grant.

The 2nd - 8th Petitioners' case:

- 25. The 2nd to 8th Petitioners faulted the amendments made on the floor of the House claiming that they were neither published nor the public invited to participate before enactment contrary to Article 10 of *the Constitution*.
- 26. They averred that the Respondents actions were done without the laid procedure being followed.
- 27. The Petitioners posited that amendments were contrary to Standing Order No 127 which requires that after the 1st Reading, a Bill should be committed to a Committee which shall then conduct public participation and subsequently incorporate views and recommendation of the public in its report for tabling in the House.
- 28. The 2nd Petitioner averred that the 1st Respondent's conduct was unlawful lacking in legitimacy and in bad faith for depriving the members of the public the right to participation in legislative process.
- 29. It was their case that the Respondents violated their legitimate expectation by reintroducing the amendments on imported furniture despite having invited them to make on the *Excise Duty Act* where they recommended its deletion
- 30. On the foregoing factual and legal basis, the 2nd - 8th Petitioners prayed for the following reliefs: -
 - i. A declaration do issue that the process through which the provision of section of the Finance Act, 2021 with respect to the imposition of Excise Duty on imported furniture was not procedurally debated and passed by the National Assembly in accordance with *the Constitution* of Kenya and is unconstitutional and therefore a nullity, in that;
 - a. The 1st respondent failed to comply with mandatory provisions of Article 10(2)(a) of *the Constitution* on public participation.
 - b. The proceedings of the National Assembly on 24th June 2021 were conducted in a manner that violated Article 10,73 and 94 of *the Constitution*.
 - ii. An order of Certiorari do issue to remove into this Honourable Court and to quash the 1st Respondent's enactment of the provisions of section 32 of the Finance Act 2021 with respect to imposition of Excise Duty on imported furniture.



- iii. An order of Certiorari do issue to remove into this Honourable Court and to quash the presidential assent to the provisions of Section 32 of Finance Act, 2021 with respect to the imposition of Excise Duty on imported furniture.
- iv. An order of prohibition do issue prohibiting the collection of Excise Duty on imported furniture of any kind used in offices, kitchen, bedroom and other wooden furniture of tariff number 9403.30.00, 9403.40.00, 9403.50.00 and 9403.60.00 as provided for under section 32 of the Finance Act, 2021 by the Respondents, their agents, servants or anybody directed to act on their behalf;
- v. The Honourable Court do issue such further orders and give such directions as it may deem fit to meet the ends of justice; and
- vi. The costs of the Petition be provided for.

The 1st Petitioner's submissions:

- 31. The 1st Petitioner filed written submissions dated 15th March 2022 to further urge its case.
- 32. He rebutted the 1st Respondent's claim that it had no locus standi by submitting that Article 22(1) & 2(c) and 258(1) & 2(c) of *the Constitution* allows public interest litigation.
- 33. The 1st Petitioner relied on the decision in *Albert Ruturi, JK Wanywela & Kenya Bankers# Association v The Minister of Finance & Attorney General and Central Bank of Kenya* where public interest litigation was discussed as follows: -

In constitutional questions, human rights cases, public interest litigation and class actions...any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented or for a contravention of *the Constitution*, or injury to the nation

- 34. As regards jurisdiction of this Court, the 1st Petitioner submitted that under Article 23 of *the Constitution*, this Court had jurisdiction to resolve disputes involving violation of fundamental rights under the Bill of rights.
- 35. Support was drawn from *Judicial Service Commission v Gladys Shollei and Another* [2014] eKLR where The Court of Appeal stated as follows: -
 - [40] Article 23(1) & Article 165(3)(b) of *the Constitution* grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights.
- 36. On the main substance of the dispute the 1st Petitioner submitted that, the non-compliance with Article 114(2) of *the Constitution* which requires the National Assembly to proceed only in accordance with the recommendation of the relevant Committee of the Assembly after considering the views of the Cabinet Secretary responsible for finance, amounted to sneaking the impugned taxes into the Finance Bill, 2021.
- 37. On public participation, the 1st Petitioner submitted that the Respondents have not provided any proof that the impugned tax was subjected to public participation contrary to Article 118(1)(b) of *the Constitution* and Standing Order 127(3) of the National Assembly.



38. It was his case that National Assembly sneaked in last minute substantive amendments to the Finance Bill 2021 on the floor of the House after the Bill had been subjected to public participation, a violation of Article 10 of *the Constitution*.
39. The decision in Nairobi Civil Appeal No. 224 of 2017 – Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others was relied upon where the Court of appeal observed as follows: -
- ... leads us to the clear conclusion that Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable.
40. It was further the 1st Petitioner’s case that Parliament failed to apply the provision of Section 3(2) of the *Statutory Instruments Act*, 2013 by failing to subject the statutory instrument to public participation.
41. The 1st Petitioner submitted further that 2nd Respondent’s decision to amend the Finance Bill, 2021 to impose the impugned taxes without giving prior and adequate notice to the affected consumers and traders not only contravened Article 47(2) of *the Constitution* 2010 but also sections 4 and 5 of the Fair Administrative Actions Act 2015 and the very notion of fairness and natural justice.
42. The 1st Petitioner maintained that the totality of the foregoing illegalities violated the doctrine of legitimate expectation. The Supreme court decision was referred to where it was observed: -
- There must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.
43. The 1st Petitioner implored Court to find that the foregoing illegalities, including the fact that the National Treasury was not in support of the amendment proposed in the Bill rendered the impugned taxes unconstitutional, illegal, null and void ab initio.
44. It was urged that since the Respondents were engaged in an illegal enterprise, they should be condemned to pay costs.

The 2nd - 8th Petitioners’ submissions:

45. In their written submissions dated 12th November 2021, the 2nd – 8th Petitioners added their voice to the 1st Petitioner’s case by stating that public participation ought to be real and not illusory as was observed Robert N. Gakuru & Others -vs- Governor of Kiambu County & 3 Others (2014) eKLR.
46. On violation of the principle of legitimate expectation the 2nd to 8th Petitioners submitted that the 1st Respondent conducted public participation on the Excise Duty Amendment Bill, 2020 and thereafter recommended that the Bill be deleted in its entirety.
47. It was their case that the Petitioners relied on the recommendation and had legitimate expectation that no excise duty would be imposed on imported furniture.



48. The decision in Republic -vs- Anti Counterfeit Agency, Director of Public Prosecutions and Mashwa Breweries Limited Ex Parte FRM (EA) Packers Limited and Francis Mathenge Kigo (2017) eKLR was relied upon. It was observed: -

The basic premise underlying the protection of legitimate expectations seems to be the promotional of legal certainty. Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations.

49. To demonstrate the incidence of bad faith on the part of the 1st Respondent, the 2nd – 8th Petitioners drew further support from Republic -vs- Anti Counterfeit Agency, Director of Public Prosecutions and Mashwa Breweries Limited Ex Parte FRM (EA) Packers Limited and Francis Mathenge Kigo (supra) where it was observed: -

Bad faith can be inferred where there is deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations.

50. In conclusion, the 2nd to 8th Petitioners submitted that the Respondents could not argue that enactment of the impugned amendment was in public interest in view of its unlawfulness.

51. It was urged that the Petition be allowed with costs.

The Respondents' case:

52. The National Assembly and the Attorney General opposed the Petitions through Grounds of Opposition dated 11th March 2022 and two Replying Affidavits of Michael Sialai, Clerk of the National Assembly Deposited on 14th July 2021 and 31st August 2021.

53. In the Grounds of Opposition, it was their case that the Petition did not raise any constitutional issues as envisaged under the cited Articles.

54. It was urged that until the contrary is proved, a legislation is presumed to be constitutional and ought to receive construction that will make it operative and not inoperative.

55. The Respondents stated that Parliament acted in accordance with and within the limits of *the Constitution*.

56. To that end, it was stated that Public Participation undertaken in line with provision of Article 118 and was assented to by the President in accordance with Article 116(1) of *the Constitution*.

57. While citing Council of County Governors v Attorney General & another [2017] eKLR, the Respondents submitted that the Petitions failed to precisely demonstrate instance of constitutional violations.

58. It was their position that the Petitioners failed to demonstrate how the Finance Act was passed without procedure.

59. In the end, it was urged that the Petitions be dismissed with costs.

60. In the Replying Affidavits, Mr. Sialai deposed that on 2nd and 4th June 2021, the Committee on Finance and National Planning held public hearings on Finance Bill 2021 at Trademark Hotel where the Committee heard views from stakeholders and the public and compiled its report to that end.

61. It was his deposition that in paragraph 420 of the Report, the Committee recommended insertion of new items including excise duty on imported furniture of any kind.



62. Accordingly, Mr. Sialai deposed that the Petitioners had misled the Court.
63. He further deposed that at the sitting of the National Assembly held on 24th June 2021, the Chairperson of the Departmental Committee on Finance and National Planning duly moved amendments to the Finance Bill 2021 introducing excise duty on imported furniture and was passed by the House.
64. It was his case that the purpose of the Excise Duty (Amendment) Bill was to amend the [Excise Duty Act 2015](#) to increase taxation of wooden furniture at the rate of 30%.
65. He deposed that, in compliance with Article 118 of [the Constitution](#), the National Assembly facilitated public participation of the Bill through print media by placing an advertisement in both the Standard and Daily Nation Newspapers and that by the time the Committee was considering the Bill, two stakeholders Furniture Importers Group and The National Treasury had submitted memoranda on the Bill.
66. It was his case that although the amendment was initially deleted by the Committee, the amendment to impose excise duty on Finance Act 2021 was in substance within the parameters of what had been subjected to public participation.
67. He deposed that Article 94 of [the Constitution](#) vests legislative authority in Parliament and National assembly according to Standing Order No. 133 of the National Assembly is allowed to amend legislative proposal as the Bill goes through various stages of enactment of legislation.
68. It was his case that contrary to the Petitioners allegations the Departmental Committee on Finance and National Planning held a meeting with the National Treasury in line with Article 114 of [the Constitution](#).
69. While speaking to the purpose and effect of the amendment, Mr. Sialai deposed that it did not infringe on the rights guaranteed by [the Constitution](#), rather, it widened the revenue base of the Government.
70. In the end, Mr. Sialai deposed that the Petitions were argumentative and an abuse of Court process and ought to be dismissed with costs.

The Submissions

71. The 1st and 2nd Respondents filed separate written submissions both dated 5th May 2022.
72. The 1st Respondent submitted that the only issue that fell for determination is whether the Purported imposition of 25% excise duty on imported furniture through the Finance Act, 2021 violated the Petitioner's constitutional rights.
73. It was its case that the Petitioners only mentioned the provisions of [the Constitution](#) alleged to have been violated but failed to demonstrate how the Respondents violated the said provisions and the alleged harm occasioned by the violation.
74. It was submitted that Petitioner has not adduced any evidence demonstrating how the said 25% excise duty on imported furniture was allegedly sneaked in to the Finance Act, 2021 without following due procedure.
75. It was its case that, in line with Article 209(2) of [the Constitution](#), Parliament in every year enacts the Finance Act measures and impose taxes to raise national revenue.



76. While relying on *Kizito Mark Ngaywa V Minister of State for Internal Security and Provincial Administration & another* [2011] eKLR the 1st Respondent submitted that declaring the impugned section on the imposition of 25% excise duty unconstitutional will result into a very serious crisis on the entire budget for the 2021/2022. In the case it was observed: -
- I am still persuaded by the above - mentioned principles of Constitutional interpretation. In the BISHOP JOSEPH KIMANI case, the court observed as follows: -
“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stay actually show that the operation of the legislative provision are a danger to life and limb at that very moment.
77. In buttressing the propriety of the impugned Bill, it was submitted that public participation does not mean that the views collected must prevail.
78. It was urged that all stakeholders were duly informed to present their views on the Bill.
79. The 2nd Respondent identified five issues for determination as; whether the tax violated Article 114(2) of *the Constitution*, whether there was public participation, whether it violated the Fair Administrative Actions Act and *Statutory Instruments Act*, 2013, whether it violated National Assembly Standing Orders 117(1) and 114(1) and whether it violated the doctrine of legitimate expectation.
80. On the first issue, it was submitted that contrary to the allegation that there was violation of Article 114(2) of *the Constitution*, the 2nd Respondent, referred to the minutes of the Departmental Committee on Finance and National Planning held with the National Treasury.
81. Further to the foregoing, it was its case that there was no dispute between the National Assembly and the Cabinet Secretary National Treasury and Planning regarding approval of the impugned amendments.
82. It was its case that the mere fact that the Cabinet Secretary responsible for finance was not incorporated in the enactment does not justify the Court in invalidating the impugned enactment.
83. On the issue regarding public participation, it was the 2nd Respondent’s case that it conducted extensive public participation which included publication of the Bill in the Kenya Gazette, advertisements in the newspapers as well as in Parliament’s website, Departmental Committee meetings with various stakeholders, receipt of memoranda from the public, consideration by the Committee of the views received from public and through tabling of the report before the National Assembly and adoption of the same with requisite amendments.
84. It was the 2nd Respondent’s position that contrary to the Petitioner’s allegations, amendments effected was within the parameters of what was submitted to the public for input and did not touch new issues.
85. It asserted the position that Clause 25 which introduced amendments to the second schedule of Excise Duty was in the Finance Bill 2021 published on 5th May 2021.
86. In submitting on the issue of failure of Memorandum of Objects and Reasons for the Finance Bill to mention *Excise Duty Act*, the 2nd Respondent submitted that since it read “an Act of Parliament to amend the law relating to various taxes and duties: and matters incidental thereto” it was in public domain that the Bill was meant to amend the law relating to taxes and duties.



87. Further, the 2nd Respondent submitted that Standing Order 133 of the National Assembly allows amendments to the Bill to be moved during the committee stage and as such there was nothing unconstitutional in instances where National Assembly amends a legislative proposal from the initial form.

88. To buttress the foregoing, the decision in Kenya Bankers Association -vs- Attorney General & Another; Central Bank of Kenya (Interested Party) (2019) was relied upon where it was observed: -

Article 94 vests legislative authority in parliament and therefore the National Assembly House is allowed to amend a legislative proposal as Bill goes through various stages of enactment of legislation. Such that the final statute passed by National Assembly and which the President assented to is different from the Bill published at the first instance.

89. The 2nd Respondent further submitted that the fact that legislature rejected a similar bill earlier on did not necessarily mean that its subsequent approval was unconstitutional.

90. On the issue whether there was violation of Fair Administrative Action, the 2nd Respondent submitted that the provisions of Article 47 of *the Constitution* and Fair administrative Actions Act could not be invoked.

91. To that end, it drew the Court's attention to Kenya Bankers Association -vs- Attorney General & Another; Central Bank of Kenya (Interested Party) (supra) where it was observed: -

Therefore, the National Assembly when enacting legislation is not carrying out an administrative action in the strict sense, but exercising its constitutional duty to enact legislation as the legislative branch of government.

92. The 2nd Respondent submitted on the issue of legitimate expectation and stated that it could not arise in favour of the Petitioners against clear provisions of a statute. It was its case that the impugned legislation having been lawfully enacted overrides the expectation if any by the Petitioners.

93. The decision in Pevans East Africa Limited & Another -vs- Chairman Betting Control and Licensing Board and 7 Others (2017) eKLR was relied upon where it was held that: -

It follows that the statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provision of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law.

94. In conclusion the 2nd Respondent urged the Court not to interfere with the impugned Bill by stating that taxation by state is necessary for the life of a nation because it sustains the public welfare and public good.

95. Reference to the decision in Gibb Africa Limited -vs- Kenya Revenue Authority (2017) eKLR was relied upon where it was observed: -

In each case, Dickson CJ said, courts will be required to balance the interest of society with those of individuals and group. It is my view that it is in public interest that taxes must be paid.



96. On costs, the 2nd Respondent submitted that since it is a public interest litigation, no award should be made against a litigant. It was urged that the decision in *Harun Mwau & Others -vs- Attorney General & Others* be considered where it was observed inter alia that: -

Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant.

Analysis:

97. Having considered the pleadings, responses, submissions and the decisions referred to, the main issue for determination in this matter is whether the purported imposition of 25% excise duty on imported furniture through the Finance Act, 2021 violated the Petitioners' constitutional rights.
98. The Petitioners' contention under this issue was simply that the excise duty on imported furniture at the rate of 25% (hereinafter referred to as 'the impugned tax') was introduced on the floor of the House during the Finance Bill's third reading and subsequently in the Finance Act, 2021 and that the amendment was not in the Finance Bill, 2021. As such, there was no public participation or at all on the issue.
99. The Respondents held the contrary position. They contended that there was indeed adequate public participation on the impugned tax and that views were collected from the public including from the 2nd – 9th Petitioners herein. That, although the Committee dropped the introduction of the impugned tax during its consideration of the Excise Duty (Amendment) Bill, 2020, the Report was presented to the National Assembly and subsequently the tax imposed. Being the case, the Respondents posited that the National Assembly was within its right to revisit the impugned tax and to even allow it, notwithstanding the fact that the Committee rejected the tax.
100. Apart from contending that there was no public engagement over the impugned tax, the Petitioners did not dispute the Committee's Report on the consideration of the Excise Duty (Amendment) Bill (May, 2021) dated 4th May, 2021 and the Report on the consideration of the Finance Bill, 2021 (June, 2021).
101. In the Report on the consideration of the Excise Duty (Amendment) Bill dated 4th May, 2021), the Committee dealt with the issue of the impugned tax at length. In doing so, the Committee received presentations from the Furniture Importers Group and the National Treasury and Planning.
102. The Furniture Importers Group was represented by Mr. Amar Shah who in turn swore the supporting affidavit in Petition No. E339 of 2021 which Petition was initiated by the 2nd to 9th Petitioners herein and it challenged the impugned tax on the grounds of lack of public participation, bad faith, violation of legitimate expectations, and unlawfulness. The Petition only related to the Finance Bill, 2020 and the Finance Act, 2020.
103. The Report dated 4th May, 2021 gave an analysis of the Excise Duty (Amendment) Bill, No. 47 of 2020. The Report further stated that the Bill intended to increase the excise duty for wooden furniture at a rate of 30% per unit.
104. On 14th April, 2021, Mr. Amar Shah addressed the Committee on the intended impugned tax. On 16th April, 2021 a representative of the National Treasury also addressed the Committee on the impugned tax. The Report was subsequently prepared for presentation before the National Assembly.



105. The National Assembly subsequently considered the Report of the Committee. Although the Committee had rejected the impugned tax, that was not the case with the National Assembly. On consideration of the issue, the House allowed the amendment on the impugned tax.
106. It seems that the issue of the impugned tax was not per se contained in the Finance Bill, 2020. Instead, it was contained in the Excise Duty (Amendment) Bill No. 47 of 2020. It is the Excise Duty (Amendment) Bill that was taken for public participation and on which the public debated on it.
107. The Petitioners argument is, therefore, that since the impugned tax was not in the Finance Bill, then it could not be introduced in any other manner whatsoever including by way of the Excise Duty (Amendment) Bill, 2020.
108. Parliament, as an arm of Government, manifests the diversity of the nation, represents the will of the people and exercises their sovereignty. In discharging the legislative authority on behalf of the people of Kenya, Parliament can, among other things, even pass some amendments on *the Constitution*. It, hence, without much say goes that Parliament can, as well, amend any law of the land which is properly before the Houses.
109. Whereas the Finance Bill is always a precursor of the Finance Act, the Finance Bill is not the only Bill in Parliament that can be used to amend laws or to introduce taxes. A Bill to amend any law can, at any time, be introduced in the Houses. Further, under Article 119 of *the Constitution* any person may even petition Parliament with a view to amend, review or even enact a legislation.
110. In this case, there is no argument that the Excise Duty (Amendment) Bill, 2020 was an illegal and unconstitutional Bill and that it could not be introduced in the House for consideration. The Petitioners seem to have lumped up the issue of the consideration of the Finance Bill, 2020 and that of the Excise Duty (Amendment) Bill, 2020 together and dealt with them under the rubric of the Finance Bill.
111. That approach could not be right. The two were separate Bills and Parliament considered them as such. Therefore, the Petitioners' argument that since the issue of the impugned tax was not in the Finance Bill, 2020, then it could not be considered during the subsequent readings of the Bill in the House negates, whether by design or otherwise, the cardinal position that the Finance Bill was a separate Bill from the Excise Duty (Amendment) Bill, 2020 and that the impugned tax was not in the Finance Bill, but instead it was contained in the Excise Duty (Amendment) Bill, 2020. The 2nd – 9th Petitioners were well aware of such a position.
112. Having found as much, this Court will now ascertain if there was adequate public participation in the consideration of the Excise Duty (Amendment) Bill, 2020.
113. In delineating the parameters for public participation, the Supreme Court in *Petition No. 5 of 2017 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 (The Affected Party) [2019] eKLR*, upon reviewing several decisions of the High Court and the Court of Appeal on the subject summed up the aspect of public engagement as follows: -
 - (96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line



with this Court's mandate under Section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- (i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) 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.
- (iv) 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.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) 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.
- (viii) 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.
- (ix) 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.

114. Returning to the issue at hand, there is no doubt that the Excise Duty (Amendment) Bill, 2020 was presented for public engagement and the 2nd - 9th Petitioners even presented their views. The Bill was further debated in the House and consequently the impugned tax was passed as a tax. As rightly so stated by the Supreme Court in the British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) case (supra), ‘...the fact that someone was not heard is not enough to annul the process’.
115. As a consequence of the foregoing, this Court finds and hold that there was adequate public participation over the impugned tax.
116. There was also an argument that the impugned tax was dealt with in a manner that contravened Article 114(2) of *the Constitution* since the issue was not part of the report from the Committee that considered the Finance Bill. I believe this Court has already dealt with the issue in the above discussion. However, just to drive the point further home, the argument fails on the fact that the impugned tax was contained in a report of the Committee that dealt with the Excise Duty (Amendment) Bill, 2020 and not in the report on the Finance Bill, 2020. Article 114(2) of *the Constitution* was, hence, not contravened.
117. The Petitions in this matter were centred on the unconstitutionality and illegality of the impugned tax on the basis that the tax was not introduced in the Finance Bill, 2020 in the first instance. Having found to the contrary, then the Petitions can only fail. This Court takes that view since the Excise Duty (Amendment) Bill, 2020 is not under any challenge in any of the Petitions before this Court.
118. Consequently, both Petition No. E258 of 2021 and Petition No. E339 of 2021 be and are hereby dismissed with costs. The costs will, however, be shouldered by the 2nd – 9th Petitioners since they were well aware of the fact that the impugned tax was dealt with under the Excise Duty (Amendment) Bill, 2020 and not under the Finance Act.
119. Lastly, the conservatory orders issued on 19th July, 2021 be and are hereby discharged and set-aside. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A for the 1st Petitioner in person.

N/A for the 2nd – 9th Petitioners.

N/A for the 1st Respondent.

Miss Mawia for Mr. Kuiyoni, Learned Counsel for the 2nd Respondent.

Regina/Chemutai – Court Assistants

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