



Rift Valley Railways (Kenya) Limited v Attorney General & 4 others; Kenya Roads Board & another (Interested Parties) (Petition 56 of 2015) [2023] KEHC 22361 (KLR) (Constitutional and Human Rights) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 56 OF 2015
HI ONG'UDI, J
SEPTEMBER 22, 2023**

BETWEEN

RIFT VALLEY RAILWAYS (KENYA) LIMITED PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY MINISTRY OF TRANSPORT AND
INFRASTRUCTURE 2ND RESPONDENT**

MINISTRY OF TRANSPORT AND INFRASTRUCTURE 3RD RESPONDENT

CABINET SECRETARY NATIONAL TREASURY 4TH RESPONDENT

**MINISTRY OF FINANCE AND THE NATIONAL TREASURY 5TH
RESPONDENT**

AND

KENYA ROADS BOARD INTERESTED PARTY

KENYA RAILWAYS CORPORATION INTERESTED PARTY

JUDGMENT

1. The petitioner filed a petition dated 16th February 2015 which was later on amended. The amended petition dated 11th September 2015 was filed under Article 22(1) of *the Constitution* for the alleged violation of Articles 10, 27, 40 and 201 of *the Constitution*. The amended petition seeks the following orders that:-



- i. Pending the hearing and determination of this petition, conservatory orders be issued in terms of the Chamber summons filed herewith.
- ii. A declaration be issued that to the extent that Section 3 of the [Road Maintenance Levy Fund Act](#), Cap 425D of the Laws of Kenya applies to the petitioner, the same is unconstitutional and therefore null and void. This is since the Section is inconsistent with and contradicts the express provisions of Article 27(1) of [the Constitution](#).
- iii. A declaration be issued that to the extent that Section 3 of the [Road Maintenance Levy Fund Act](#), Cap 425D of the Laws of Kenya applies to the petitioner, the same is unconstitutional and therefore null and void as the Section is inconsistent with and contradicts the express provisions of Article 40(2) (a) of [the Constitution](#).
- iv. A declaration be issued that to the extent that Section 3 of the [Road Maintenance Levy Fund Act](#), Cap 425D of the Laws of Kenya applies to the petitioner, the same is unconstitutional and therefore null and void as the Section is inconsistent with and contradicts the express provisions of Article 201(b)(i) of [the Constitution](#).
- v. A declaration be issued that the imposition of the Road Maintenance Levy on the petitioner violates the cardinal taxation principles of equity, equality and fairness.
- vi. A declaration be issued that Section 3 of the [Road Maintenance Levy Fund Act](#), Cap 425D of the Laws of Kenya shall henceforth have no application whatsoever to the petitioner.
- vii. A declaration be issued that the petitioner is entitled to a refund of the entire amount that it has paid to the Government of the Republic of Kenya as Road Maintenance Levy.
- viii. The amount referred to in prayer No.7 above being Ksh.1,349,357,042.00, be quantified and refunded to the petitioner within fourteen days of the Court's judgment, together with interest thereon at such rate and for such period as the Court may direct.
- ix. This honourable Court do issue such orders and gives such directions as it may deem just and appropriate in the circumstances of this matter.
- x. The costs of the petition be awarded to the petitioner.

The Petitioner's case

2. The petition as supported by the averments in the petitioner's Chief Financial Officer, Bong Yoon's affidavit dated 16th February 2015 is based on the assertion that the respondents' imposition of the road maintenance levy by virtue of Section 3 of the Road Maintenance Levy Funds Act (1993) with reference to the Automotive Gas Oil (AGO) known as diesel that it uses, violates its rights under Articles 10, 27, 40 and 201 of [the Constitution](#). This is pegged on the ground that it is a non-road user. The petition was as well supported by the petitioner's supplementary affidavits dated 11th December 2018 and 4th February 2019 respectively in reply to the respondents and the 1st and 2nd interested parties' responses.
3. The genesis of this matter commenced when the petitioner and Rift Valley Railways (Uganda) (RVRU) were awarded a concession by the Kenyan and Ugandan governments in 2005 to take over the operations and some of the assets of Kenya Railways Corporation (KRC) and Uganda Railways Corporation (URC) in an Agreement dated 23rd January 2006. The Concession Agreement's term was to commence on 7th April 2006.



4. He deposes that their task as per the Agreement was to operate the railway service between Kenya and Uganda. Furthermore it was responsible for the provision of freight and passenger services and maintenance of the railway tracks in Kenya. In keeping with the said Agreement terms, the petitioner was also required to invest at least 5,000,000 US dollars per financial year in providing rail, freight and passenger services for not less than five years. He informs that the petitioner uses Automotive Gas Oil (AGO) known as diesel to power its locomotives. Likewise, the petitioner was required from its own resources to finance the development, improvement and maintenance of the national rail infrastructure from its own resources without recourse to public funds.
5. To appreciate the core of the petitioner's mandate, he avers that Kenya is the principal gateway for the supply of goods to the land locked countries being, Uganda, Rwanda, Burundi, Eastern Democratic Republic of Congo and Southern Sudan. He asserts that the petitioner inherited a dilapidated and run down rail line which had resulted in slow and inefficient cargo delivery and passenger services. Additionally, the railway system was in need of a modernized upgrade all of which involved investments of funds by the petitioner.
6. It is emphasized that the petitioner made a significant investment in Kenya so as to improve the efficiency and easy access to rail transportation in Kenya. What is more through the investments the cost of doing business in Kenya and the region was bound to reduce significantly.
7. On the matter at hand, he avers that the Road Maintenance Levy Funds Act (1993) provides for the imposition of a Road Maintenance Levy on some petroleum products including diesel. As per Legal Notice 138 of 2015, diesel was subjected to the levy at the rate of Ksh.12 per litre. This is payable by motorists as part of the cost of fuel. The purpose of this levy is to provide a fund for the repair and maintenance of certain classified roads within the country. He informs that the petitioner's monthly consumption of diesel at the time of filing the amended petition was more than Kshs.100,000,000 on account of this levy.
8. He deposes that in line with the Concession Agreement, the petitioner is solely responsible for maintenance of railway tracks in Kenya whereas the levy as per the [Road Maintenance Levy Fund Act](#) is used to repair and maintain the roads not the rail. The petitioner decries this levy on its part as its locomotives do not operate on any road, making it unfair, inequitable, unjust and unconstitutional.
9. He deposes that subjecting the petitioner to the road maintenance levy puts the company at an economic and competitive disadvantage as its competitors who use the road network are not required to incur any extra expense for the purpose of improving and maintaining the national rail infrastructure making it discriminatory and in violation of Article 27 of [the Constitution](#).
10. Furthermore none of its competitors are required to apply their private funds as it does to the development and maintenance of the national rail infrastructure. He deposes that as at January 2015, the petitioner had paid in excess of Ksh.1,349,357,042.00 of the road maintenance levy. To him the requirement to pay this levy amounts to double taxation violating Article 201(b)(i) of [the Constitution](#).
11. He deposes that in exercise of the powers conferred by Section 3 of the [Road Maintenance Levy Fund Act](#) in 2006 the Minister for Roads and Public Works in consultation with the Minister for Finance vide Road Maintenance Levy Fund (Imposition of Levy) Order, 2006 exempted from the road maintenance levy petroleum fuels purchased by Kenya Electricity Generating Company (KenGen) and supplied to M/S Aggreko International Projects Limited for use in power generation for their generators. According to the petitioner, this exemption was because the diesel consumed by KenGen is used for non-road purposes such as its use.



12. He avers that when the petitioner approached the two ministries also seeking an exemption, the call was rejected. Correspondingly further attempts to engage the respondents over the issue proved futile and unsuccessful. For instance the petitioner wrote to the 4th respondent on diverse dates on 1st March 2012, 18th March 2013, 13th August 2013, 18th November 2013 and 3rd September 2014 but never received any response. He depones that failure to grant the petitioner a similar exemption as a non-road user is a violation of the principle of equity and fairness as enshrined in Articles 10(2)(b) and Article 201(b)(ii) of *the Constitution*. The same amounts to unequal treatment which is discriminatory yet no reason has been given for the treatment.
13. In its affidavit dated 11th December 2018 the petitioner deposes that due to the continuing nature of the road maintenance levy, prayer 7 and 8 in the amended petition was worded in a manner to accommodate this continual increase of the road maintenance levy. As such the petitioner in this affidavit, in addition to opposing the averments in the 2nd interested party's replying affidavit, seeks to update its claim to Kshs.270,692,256.00 as at February 2017. In support the petitioner relied on the attached annexures to sustain the claim. Taking into consideration this amount, the petitioner's total claim from the year 2015 to February 2017 is Kshs.1,620,049,298.00.
14. Subsequently, it is claimed in the other affidavit that the petitioner left some of the key documentation at the 2nd interested party's premises after termination of the Concession Agreement. He avers that upon the request to access this documentation, the endeavor proved futile as the 2nd interested refused to grant the petitioner access to the documents which would have been instrumental in proving its case.

The Respondents' case

15. In reply the respondents' filed the following grounds of opposition dated 9th March 2015:
 - i. The orders sought by the petitioner cannot lie in law as they offend the provisions of Article 209(1) (c) of *the Constitution*.
 - ii. The Road Maintenance Levy Fund is a tax that is constitutionally allowed under Article 209(2) of *the Constitution*.
 - iii. The conservatory orders prayed by the petitioner are contrary to the provisions of Article 210 (1) of *the Constitution*.
 - iv. The petitioner cannot claim discrimination under Article 27 of *the Constitution* since the Road Maintenance Levy is applied uniformly and came into operation in 1993 whereas the Concessionaire Agreement clearly contemplates any change in laws post 2006.
 - v. The Government of the Republic of Kenya has not made any changes in the laws of Kenya post the Concessionaire Agreement that constitutes a default under part M.2 of the Agreement.

The 2nd and 3rd Respondents' case

16. These respondents vide a replying affidavit sworn by the 3rd respondent's Principal Secretary, Eng. John Kipngetich Mosonik on 15th February 2016, aver that Road Maintenance Levy Funds Act (1993) (RML Act) is in line with Article 209 and 210 of *the Constitution*. He as well notes that imposition of tax by a statute is general in application and hence not discriminatory as argued. Nevertheless, he notes that grant of the sought orders would be in breach of the doctrine of separation of powers.
17. He depones that the road maintenance levy is imposed on all petroleum products including the ones used in homes, agricultural implements and electricity generation. Contrary to the petitioner's



assertion it is noted that it does not only apply to road users. He points out that this levy as imposed by the [Road Maintenance Levy Fund Act](#) was enforced in 1993 before the Concession Agreement was effected in 2006. Considering this, he states that the petitioner is estopped from challenging the constitutionality of the Act as it was well aware of its implication before coming into Agreement with the Government. Likewise, aware of its provisions the petitioner had an opportunity to negotiate the terms of the said Agreement which it has never done to date.

18. Speaking to the exemption of KenGen from paying the road maintenance Levy, he deposes that the exemption was necessary and for a short term so as to serve an emergency purpose. This is because the exemption was geared towards reducing the high cost of electricity consumed by the public during the drought season when the hydroelectricity power systems were operating below the usual capacity. All the same he avers that the petitioner has failed to demonstrate that it fits under the special category under Section 3 of the Act that qualifies for exemption. Furthermore, that there is no legal obligation under [the Constitution](#) and statute on the respondents to accord the petitioner special treatment.
19. Disparaging the assertion that the petitioner is being discriminated against in view of the players in the road transport sector, he avers that this is false. He points out that the petitioner enjoys monopoly on rail transport business as opposed to the players in road transport. He therefore avers that the petitioner has approached this Court for selfish reasons and as such the prayers sought are not merited.

The Interested Parties' case

1st Interested Party

20. The 1st interested party filed a replying affidavit dated 4th May 2015 sworn by Eng. Jacob Ruwa and a further affidavit dated 21st January 2019. He avers that the petitioner's petition is founded on a misinterpretation that the road maintenance levy as established by the [Road Maintenance Levy Fund Act](#), 1993 is a 'road users tax'. He notes that this is erroneous since Section 3 of the Act makes it apparent that the road maintenance levy is a tax imposed on all petroleum fuels imported in Kenya for home use hence making it a general tax not a user charge contrary to the petitioner's allegation.
21. He avers furthermore that the imposition of taxes by the government is a constitutional mandate under Article 209 hence the [Road Maintenance Levy Fund Act](#) was enacted pursuant to this provision. Considering the general nature of the levy, all persons in Kenya are required to pay the road maintenance levy including the petitioner. He deponed that the petitioner's business also benefits from the road maintenance levy since in absence of the road network its operations would be halted. He depones that as per the Act, the Cabinet Secretary can grant exemptions subject to certain circumstances which have not been substantiated by the petitioner. It is his averment that the petitioner's prayers are geared towards attaining preferential treatment at the expense of other tax payers.
22. Confirming the factual background of the Concession Agreement entered into in 2006, he avers that the petitioner was granted the exclusive right to use public assets to carry on its commercial business. Further that as per the Agreement the petitioner was only protected from discriminatory tax treatment with reference to a change of law from the date of entering into the Agreement as per Section L. As such, the petitioner's claim with reference to the [Road Maintenance Levy Fund Act](#), 1993 has no legal basis. He further emphasizes that as per the Agreement all disputes arising therefrom were to be resolved through arbitration as seen under Section N which the petitioner failed to utilize. That granting the sought orders would amount to amending of the Concession Agreement.



23. He further deposes that the 1st interested party and other public entities depend on the road maintenance levy to finance road maintenance programmes. These agencies are required to prepare Annual Public Roads Programmes which informs the Country's Annual Road Programme which is funded by the road maintenance levy on a monthly basis. Further that the Road maintenance levy is used to finance the operational expenditure of the road agencies and the 1st interested party. He deposes that grant of the orders sought would disrupt the road main tenance programmes and handicap their day to day operations.
24. He deposes that the petitioner in its supplementary affidavit dated 11th December 2018 sought to increase its claim of Kshs.1,349,357,042.00 with an additional Kshs.270,692,256.00 totaling to Kshs.1,620,049,298.00. He states that the petitioner has failed to provide evidence to support its claim that it did indeed make these payments to the respondents. He notes that the 1st interested party never received the alleged Ksh.1,620,049,298.00 from the petitioner. While in the affidavit the petitioner attached invoices it was noted that no receipts or RTGS or other form of confirmed payment was attached to support the claim.

The Preliminary Objection

25. The 1st interested party subsequently filed a preliminary objection dated 4th October 2016. By a Court order dated 13th March 2017 and issued by Justice E.C. Mwita it was directed that the preliminary objection would be determined alongside the petition. The preliminary objection is filed on the grounds that:
 - i. This Court lacks jurisdiction to hear and determine the petition herein.
 - ii. The petition has been filed contrary to the mandatory provisions of Section N.1 of the Agreement providing for the Concession of Kenya Railway Freight and Passenger Services between the Kenya Railways Corporation and the Government of Kenya and the Rift Valley Railways (Kenya)Limited dated 23rd January 2006.
 - iii. The petition is otherwise an abuse of the court process.

2nd Interested Party

26. The 2nd interested party through a replying affidavit sworn by its Corporation Secretary, Hellen Mungania on 25th October 2018 made a response to the petitioner's allegations. The 2nd interested party's case is also supported by two further affidavits dated 21st January 2019 and 25th January 2019.
27. Affirming the petitioner's factual background, she avers that the Concession Agreement was entered into on 23rd January 2006. Prior to affirming the Agreement, the Terms and Conditions of the Agreement were negotiated by the parties and eventually acquiesced to by the parties being the Government of Kenya, the petitioner and the 2nd interested party. She depones that the determination of this petition will affect the 2nd interested party since it was the principle party in the negotiation and execution of the Agreement. Further, the obligations therein are owed to it by the petitioner as the State Agency in charge of the conceded assets and administration of the Agreement.
28. She further deposes that pursuant to the said Agreement the petitioner contractually obligated itself to be bound by the provisions of the *Road Maintenance Levy Fund Act*, 1993 which it had done for 10 years prior to filing the instant petition. She informs that the only instance where the petitioner would challenge the effect of a change of law as per Section L of the Agreement is any law that would be enacted after creation of the Agreement. She depones that the Agreement was based on all the existing



laws at the time and would only be shielded from any future changes in law that would adversely affect it.

29. It is further averred that, the petitioner in bringing this petition seeks to have this Court alter the negotiated and contracted Terms and Conditions as between the parties to the said Agreement. Additionally it is averred that contrary to the petitioner's claims, it had breached the terms of the Agreement by failing to maintain and invest in the rail infrastructure and also failing to pay the concession fees as agreed thereby incurring huge arrears owed to the 2nd interested party.
30. She depones that a recent investigative report by the World bank into the petitioner's operations discloses that its leaders have been engaged in dishonest, fraudulent and corrupt practices and schemes for evading taxes. In particular it is noted that the petitioner owes the Government Kshs.800,000,000.00 in unpaid taxes. These sums were left unpaid when the petitioner abandoned its offices at Kenya Railways headquarters. She further avers that the petitioner incorporated numerous offshore companies which through its directors and shareholders used to siphon off the loan lent to it by World Bank to purchase locomotives in an attempt to avoid paying concession fees. Interestingly, she notes that the petitioner left its fuel bills unpaid. On the flipside while the petitioner asserts that it had paid Kshs.1,620,049,298.00 for the road levy, she notes that there is no proof of such payment.
31. It is her averment that the petitioner's failure to comply with the Terms and Conditions of the Concession Agreement led to the terminating of the Agreement by the Government and the 2nd interested party on 31st July 2017 and a Termination Notice issued to the petitioner. Following the termination of the said Agreement, the 2nd interested party took over the operation of the conceded assets.
32. Further it is her position that owing to Section N of the Concession Agreement, it is evident that any dispute arising from the Agreement ought to be resolved through Arbitration and hence filing of the instant petition is an abuse of the Court process. Speaking to the Termination Notice, she informs that the petitioner on 30th March 2017 vide High Court Commercial Case No.136 of 2017: Rift Valley Railways (Kenya) Limited V Kenya Railways Corporation & the Government of Kenya sought injunctive orders to allow the matter be referred to arbitration.
33. It is noted that in the end the petitioner failed to initiate the arbitration proceedings and instead admitted to the breaches leading to a consent order in the Commercial Court terminating the Concession Agreement with effect from 31st July 2018. The matter is still ongoing before the Commercial Court with the 2nd interested party having filed a counterclaim for Ksh.1.4 billion. Considering this, she avers that all the issues raised in this petition form part of the commercial dispute between the petitioner and all the relevant parties before the Commercial Court and so it would be best to determine all the issues with regard to the Concession Agreement in that matter as the dispute arises from the same commercial dispute. It is emphasized that the petitioner's filing of multiple suits over the same cause of action is an abuse of the court process.
34. Taking into consideration these facts, she avers that the petitioner's averments were deliberately drafted to misled this Court as the petitioner expressly admitted to breaching Clause B.4,E.1,E.3,E.4 and E.5 of the Concession Agreement before the Commercial Court. Thus the 2nd interested party to that end vehemently opposes the petition arguing that it is an attempt to enrich the petitioner at the expense of the citizens and an attempt to circumvent the express provisions of the Concession Agreement.



The Parties' submissions

The Petitioner's submissions

35. The petitioner through the firm of Njoroge Regeru and Company Advocates filed two sets of written submissions and a list of authorities dated 27th September 2016 and 12th March 2020 respectively. A further supplementary bundle of authorities and case digest dated 2nd May 2023, was filed. The submissions were as well highlighted in Court by Mr. Regeru on 10th May 2023.
36. Counsel in the first set of submissions identified the issues for determination as:
- i. Whether this Court has jurisdiction to entertain the petition.
 - ii. Whether the petitioner's constitutional rights under Articles 10(1)(2)(b) and (c); 27(1) and (2); 40(2)(a) and 201 (b)(i) of *the Constitution* were infringed by the respondents.
 - iii. Whether the petitioner is entitled to the reliefs sought.
37. On the first issue Counsel submitted that Articles 165(3)(d) (ii) of *the Constitution* vests the High Court with jurisdiction to determine whether anything done under the authority of *the Constitution* or any law is inconsistent with or in contravention of *the Constitution* as held by the Court of Appeal in the case of Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others (2014) eKLR. Further reference was on the cases of: Robert N. Gakuru and another v Governor Kiambu County and 3 others (2013) eKLR and Stephen Nendela V County Assembly of Bungoma and 4 others (2014) eKLR. Counsel stated that the petition revolves around the violation of the petitioner's constitutional rights and constitutionality of the impugned Statute which are issues within the mandate spelt out under Article 165(3)(d) of *the Constitution*.
38. On the second issue, counsel stated that the 2nd to 5th respondents did not uphold the principles of equity, inclusiveness, equality and non-discrimination, as provided for in Article 10 of *the Constitution*. They further failed to exercise their discretion correctly while implementing the dictates of the road maintenance levy. These acts are said to be prejudicial to the petitioner and in violation of its rights. In support reliance was placed on the case of Ledidi Ole Tauta and others v Attorney General and 2 others (2015) eKLR where it was held that Article 10 of *the Constitution* binds all state organs, state officers, public officers and all persons to observe the national values and principles of governance when interpreting and applying *the Constitution*.
39. On Article 27(1) and (2) of *the Constitution*, Counsel submitted that the petitioner is discriminated against in the application of the impugned provision. This is because the petitioner's competitors on the road network are not required to pay a rail levy and neither are they required to undertake obligations such as repair and maintenance of the road network as it does for the rail network. This conduct was deemed unfair and unjust making the competitors have an advantage over the petitioner. Counsel relied on the case of Rose Wangui Mambo and 2 others v Limuru Country Club and 17 others (2014) eKLR where it was held that discrimination means treating differently without any objective and reasonable justification persons in relevantly similar situations. He also referred to the cases of Peter K. Waweru v Republic (2006) eKLR and State of Keral and another v N.M. Thomas and others 1976 AIR 490,1976 SCR (17906).
40. Moving on to Article 40(2)(a) of *the Constitution*, it was submitted that the respondents by imposing the road maintenance levy on the petitioner arbitrarily deprives it of its property. Counsel noted that



- the petitioner was not consulted or involved in the decision making process and the consequence it would have on it, evidently showing that the respondents exercised their discretion unjustly. Further that their conduct also violated the petitioner's legitimate expectation in that its property would not be capriciously taken without procedural propriety.
41. It was pointed out that all efforts to engage the respondents to discuss the issue failed. Counsel referred to the case of *Crywan Enterprises Limited v Kenya Revenue Authority* (2013) eKLR where it was held that where the basis of deprivation is not founded on law or on a predetermined objective criteria or is done without procedural propriety it is ipso facto arbitrary. Additional reliance was placed on the cases of *Council of Civil Service Unions and others v Minister for the Civil Service* (1983) 3 ALL ER 935 and *Trusted Society of Human Rights Alliance and 3 others v Judicial Service Commission and another* (2016) eKLR.
 42. Submitting on Article 201(b)(i) of *the Constitution* Counsel stated that the respondents requiring the petitioners to pay an additional tax in form of the road maintenance levy subjected it to a greater tax burden than other tax payers. To him this was double taxation which was detrimental to the petitioner as its competitors in the road network are not required to pay rail maintenance levy as it does for the road.
 43. In support reliance was placed on the American Supreme Court case of *Burlington Northern Railroad Company v Commissioner of Revenue No. C1-99-537* (2002) where it was held that a tax imposed on railroads and not other transportation modes treats those engaged in identical activities differently and puts a competitive disadvantage upon them. Counsel thus submitted that indeed the petitioner was entitled to the reliefs outlined in the amended petition as it had proved violation of its constitutional rights. He anchored this argument on Article 23 (1) of *the Constitution* and the case of *Sound Equipment Limited v Registrar of Titles of another* (2011) eKLR that affirmed that the High Court can grant any of the reliefs outlined therein where there has been a breach of the dictates of *the Constitution*.
 44. While relying on the case of *Obongo v Kisumu Municipal Council* (1971) EA 91 and *Isaac Gathungu Wanjohi and another V Attorney General and 6 others* (2012) eKLR counsel stated that the petitioner was also entitled to exemplary damages as the respondents had blatantly violated its rights.
 45. The second set of submissions was in response to the interested parties submissions where he stressed that this court has jurisdiction to hear this case which is purely based on the constitutionality of the *Road Maintenance Levy Fund Act*, 1993 and not the Terms and Conditions of the Concession Agreement as heavily stated by the interested parties. It also raises issues of violation of the petitioner's constitutional rights.
 46. Counsel as such argued that an arbitrator could not make a determination on the constitutionality of a Statute as advanced by the interested parties. In support reliance was placed on the case of *Coalition for Reform and Democracy (CORD) and another v Republic of Kenya and another* (2013) eKLR where Courts were cautioned against the tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is clear. He also referred to the case of *Damaris Wanjiru Ng'ang'a v Loise Naisiae Leiyan and another* (2015) eKLR.
 47. Counsel as well submitted that even if the dispute could be determined through arbitration, the Arbitration Clause does not deprive this Court of its jurisdiction. In support reliance was placed on the case of *Joseph Mwangi Gitundu v Gateway Insurance Company Limited* (2015) eKLR where it was held that the arbitration clause does not preclude parties from accessing the Court. It only acts as a stay while the matter is being referred to Arbitration. Counsel further emphasized that the suit was not a commercial suit despite having commercial elements. Further that even if it was this Court



would still hear it. He cited the case of *Bia Tosha Distributors Limited v Kenya Breweries Limited and 3 others* (2016) eKLR in support.

48. Speaking to the instant suit and the commercial suit, Counsel submitted that there was no relationship between the two suits whatsoever. This is because the instant suit challenges the constitutionality of the impugned Act and raises constitutional violations while the commercial suit revolves around the termination of the Concession Agreement. Considering this, it was argued that the claim that the instant suit should be determined by the commercial division has no basis. It was also noted that the commercial suit was filed after the instant petition and that the parties are different.
49. On the claim for the sum of Kshs.270,692,256.00 in the petitioner's supplementary affidavit dated 11th December 2018, Counsel submitted that Prayer 7 and 8's wording encompassed the said amount. In that, the prayers indicate that the petitioner is entitled to a refund of the entire amount of the Road Maintenance Levy it has incurred as at the time and which was bound to increase as the years went by. This is because of its continuing nature hence it was not possible to state the full amount at the time. Equally, the petitioner could not be required to amend the petition constantly. Counsel thus argued that the amount's inclusion was not offensive to any law. Regardless Counsel asserted that, highlighting this issue by the interested parties' amounts to a procedural technicality which cannot be allowed to defeat justice.
50. On the issue of public interest, Counsel relying on the holding in the case of *Arnacherry Limited V the Attorney General* (2014) eKLR submitted that the effect of public interest leans in favour of enforcing *the Constitution*. It was argued that that the respondents' actions of arbitrarily depriving the petitioner of its property and imposing taxes unfairly could not be allowed to persist owing to the argument that public interest is in their favour. That the petitioner could therefore not be left without remedy.
51. On whether the claim for monetary relief had been proved by the petitioner, Counsel submitted that this allegation was incorrect since according to Section 4 of the impugned Act, the road maintenance levy is deducted at the source before oil is released to a marketer. This means that no oil marketer can take delivery of oil before paying the levy. Further that Section 5 of the Act contains mechanisms for redress in the event a party fails to pay the levy. He thus submitted that owing to the documents and invoices adduced in the petitioner's evidence it was proved that this levy was paid. Counsel as well submitted that the 2nd interested party's letter from Hass Petroleum (K) Limited dated 1st August 2017 also supports the petitioner's case as it is a confirmation of the payments.
52. On whether the road maintenance levy was negotiated in the Concession Agreement counsel submitted that the road maintenance levy was not discussed in the making of the Agreement as alleged by the interested parties. To buttress this point reliance was placed on the case of *Republic v Lucas M. Maitha, Chairman Betting Control and Licensing Board and 2 others Ex parte Interactive Gaming and Lotteries Limited* (2015) eKLR and *Maritime Electric Company Limited v General Dairies Limited* (1937) 1 ALL ER 748 which held that there can be no estoppel against a statute or the law.

The Respondents' submissions

53. The respondents through their advocate Rodgers Sekwe filed two sets of written submissions and a list of authorities dated 22nd October 2018 and 9th March 2017 respectively. Senior State Counsel Mr. Thande also underscored these submissions in Court on 10th May 2023. He in the first set of submissions identified the issues for determination as:
 - i. Whether the petition discloses any constitutional breach.



- ii. Whether the petitioner is entitled to exemption from the application of Section 3 of the Roads Maintenance Levy Fund Act.
 - iii. Whether the Concession Agreement overrides Section 3 of the impugned Act.
 - iv. Whether the petitioner is entitled to the prayers sought.
54. Counsel commenced by submitting that the allegation that the road maintenance levy is unconstitutional because it deprives the petitioner of its property contrary to Article 40 of *the Constitution* was misleading and contrary to due process. In support reliance was placed on the case of Leonard Jefwa Kalama and another v Consolidated Bank of Kenya LTD and 3 others (2014) eKLR where it was held that unless it can be shown the law itself is against *the Constitution*, the sale of charged property in accordance with due process of the law cannot be held to be unconstitutional deprivation of property within Article 40 of *the Constitution*.
55. Counsel as such submitted that the road maintenance levy which benefits the general public including the petitioner cannot be deemed to be unconstitutional as the Act is constitutional as supported by Article 209 of *the Constitution*. In this regard he urged the Court to be guided by the principle of statutory interpretation which requires that the object and purpose of the statute be interrogated as held in the case of R. V. Big M Drug Mart Ltd(1985)1 S.C.R 295. and Murang'a Bar Operators and another v Minister of State for Provisional Administration and Internal Security and others (2011) eKLR.
56. Counsel further opposed the petitioner's assertion that the Road Maintenance Levy was in violation of Article 27 of *the Constitution* for being discriminatory. This is because the application of Section 3 of the impugned Act is general as it is levied on all petroleum fuels for home use. He noted that the tax burden therein was shared evenly and equally in accordance with Article 201(b) (i) of *the Constitution*. Fundamentally Counsel stressed that the petitioner had failed to prove his claim of discrimination.
57. It was submitted that while the petitioner accused the respondents of exercising their power arbitrarily, it failed to show the specific acts that amount to constitutional violation under Article 10 (1) &(2) (b) and (c) of *the Constitution*. In support reliance was placed on the case of Revital Healthcare (EPZ) LTD & another v Ministry of Health & 5 others (2015) eKLR where it was held that when the constitutionality of an Act is not in question *the Constitution* should not be invoked. He thus submitted that the petition failed the threshold set out in the case of Anarita Karimi Njeru v the Republic (1976 – 1980) KLR 1272.
58. On the second issue, Counsel submitted that any exemption that was to be accorded ought to be in line with the dictates of the Roads Maintenance Levy Fund Act and allowed by Article 210 of *the Constitution*. He came against the petitioner's misleading account of the exemption accorded to KenGen. It was reiterated that this exemption was solely based on the emergency state during the drought period. He thus stated that the fact that the petitioner is not a road user does not justify its exemption as the levy is of general application. Counsel as well cautioned the Court of the influx of like applications that would be instigated should the orders be granted with the aim of being exempted.
59. On the next issue, Counsel submitted that, the Concession Agreement was agreed to and signed by the petitioner when the *Road Maintenance Levy Fund Act* was already in force. Considering this, it was observed that the argument that the petitioner was unfairly targeted was misplaced and an abuse of the Court process. To that end, Counsel submitted that the petitioner was not entitled to the reliefs sought as its interpretation of *the Constitution* was misleading and self-serving. Accordingly the petition ought to be dismissed with costs.



60. In the second set of submissions, Counsel discussed the issue as to whether this Court has jurisdiction to entertain the instant petition in view of Clause N of the Concession Agreement. He stated that it was not in dispute that the relationship between the petitioner and respondents was as a result of the Concession Agreement as such clause N automatically ousts this Court's jurisdiction. Counsel stressed that Section 6 of the *Arbitration Act* obliges a Court to refer such a dispute to Arbitration before entertaining the matter. This mechanism is also envisaged under Article 159(1) (c) of *the Constitution*.
61. To buttress this point, reliance was placed on the case of *Kimani Ngunjiri v David Manyara* (2005) eKLR where the Court held that the suit was unsustainable as it contravened the KANU Constitution which provided for the dispute resolution mechanism as being arbitration. Other cases relied on are: *Hon. Justice John Musakali V County Assembly of Bungoma* (Petition No.11 of 2015); *Born Bob Marren v the Speaker of County Assembly, Narok* (Petition No.1 of 2014) and *Safmarin Container NV of Antwerp v KPA Mombasa* (H.C.C.C 263 of 2010). Accordingly Counsel submitted that the petition was premature and lacking in merit.

The Interested Parties' submissions

62. The interested parties filed joint written submissions and a list and bundle of authorities dated 25th October 2019 through the firm of Prof. Albert Mumma and Company Advocates. Prof. Mumma and Mr. Agwara highlighted these submissions in Court on 10th May 2023. They identified the issues for determination as:
- i. Whether this Court has jurisdiction to entertain the petition.
 - ii. Whether this Court can lawfully vary and/or vitiate the negotiated terms of the Concession Agreement that was agreed to by the parties.
 - iii. Whether the petitioner was discriminated against through the application of the *Road Maintenance Levy Fund Act*, 1993.
 - iv. Whether the petitioner's rights under Article 10, 27, 40 and 201 of *the Constitution* were violated.
 - v. Whether the petitioner is entitled to the sum of Ksh.1,349,357,042.00 as well as the additional Ksh.270,692,256.00 under the circumstances of this case.
63. Counsel relying on the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989) KLR 1 on the first issue submitted that this Court does not have the requisite jurisdiction to entertain this petition. Comparable reliance was placed on the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* (Application No.2 of 2011). Counsel grounded this argument on the fact that the Concession Agreement under Section N provides for the resolution of disputes between the parties to be through arbitration. He stressed that the Terms and Conditions of the Concession Agreement could not be overlooked and disregarded simply because the petitioner had dubbed the dispute constitutional in nature while flouting the owed obligations under the Agreement. Counsel further contended that it was not within this Court's mandate to determine disputes arising from private contracts which the parties negotiated and agreed on in their engagement.
64. Counsel argued that the dispute herein constitutes a commercial transaction governed by private commercial law. Considering this, he submitted that public law remedies were not applicable in the circumstances of this case. He pointed out that the petitioner aggrieved by the application of Section 3 of the *Road Maintenance Levy Fund Act*, was obligated under Section L.1 of the Concession Agreement to issue a Notice of the same to the Government for the matter to be determined, which



- was not done. He therefore urged the Court to reject the invitation by the petitioner to cunningly evade its obligations under the Terms and Conditions of the Concession Agreement.
65. To buttress this point, counsel cited the case of Revital Healthcare (EPZ) Limited (*supra*) where it was held that where there is a parallel remedy, constitutional relief should not be sought unless the circumstances include a feature which makes it appropriate to take that course. In absence of such a feature the same would be a misuse and an abuse of the Court's process. Also cited are the cases of John Harun Mwau v Peter Gatrow and 3 others (2014) eKLR, Simon Sambigi Mukuria and another v Governor County of Nyandarua and 3 others (2016) eKLR, Abdalla Abubakar Miraj and another v Kneya Ferry Services Limited (2015) eKLR and Stephen Nyarangi Onsomu and another v George Magoha and 7 others (2014) eKLR, Safepak Limited v Henry Wimbega and 11 others (2019) eKLR. Bearing this in mind, Counsel submitted that this Court ought to exercise restraint and first give opportunity to the relevant constitutional bodies or organs to deal with the dispute.
 66. On the second issue it was submitted that the petitioner with reference to the Concession Agreement contractually obligated itself to be bound by the [Road Maintenance Levy Fund Act](#), 1993 making it clear that the applicable laws and taxes were negotiated and agreed upon by the parties. Further that the Concession Agreement was based on all the existing laws save for the future 'Change in Laws' under Section L of the Agreement.
 67. Counsel pointed out that the petitioner in bringing the instant petition was challenging its obligations under the Concession Agreement while disguising it as a constitutional issue. He thus stated that the petitioner having agreed to be bound by the terms of the impugned Act was estopped from now alleging the same to be unconstitutional. It was further observed that had it been the intention of the parties to exclude application of the impugned Act the same could have been clearly stipulated in the Concession Agreement.
 68. To buttress this point, reliance was placed on the case of Fina Bank Limited v Spares and Industries Limited (2000) 1 EA 52 where it was held that commercial transactions are entered into with full knowledge of the probable consequences. It was submitted that a court of law cannot rewrite a contract between parties to which they are bound. This is unless coercion, fraud or undue influence are proved as held in the case of National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Limited and another (2002) EA 503.
 69. Turning to the next issue, Counsel stated that the petitioner had misunderstood the nature and purpose of the road maintenance levy and misinterpreted the provisions of the [Road Maintenance Levy Fund Act](#). This is because the petitioner considers the road maintenance levy as a road user's tax whereas the Act provides that the levy is imposed on any or all petroleum fuels imported in Kenya for home use. Counsel noted that it is apparent that the tax is a general one.
 70. It was further restated that the government is constitutionally empowered to impose taxes under Article 209 of [the Constitution](#) and a levy under Article 206 of [the Constitution](#). It was likewise argued that the petitioner's allegation on exemption of KenGen was unsubstantiated. This is because the respondents in reply justified the exemption which was contrary to the petitioner's assertion. In light of this counsel, argued that the petitioner's allegation of discrimination had no legal foundation. He added that the petitioner's claims of discrimination did not constitute the grounds outlined under Article 27(4) of [the Constitution](#). He also stated that the petitioner had not discharged its burden of proof as seen in the case of Mohamed Abduba Dida v Debate Media Limited and another (2018) eKLR, and Centre for Rights Education and Awareness (CREAW) and 7 others v Attorney General (2011) eKLR, among many others.



71. Counsel further submitted that the relationship between the petitioner and the government together with the interested parties was governed by the Concession Agreement whose legality had not been challenged. It was argued therefore that the petitioner had not met the required threshold under the Anarita Karimi karimi Njeru (supra) to warrant grant of the orders sought.
72. On the final issue, Counsel submitted that even if the petitioner would have succeeded to prove the alleged violation of discrimination, this Court would not be in a position to grant the sought amount. This is because the petitioner has failed to adduce sufficient evidence that it made the alleged payment to justify a refund. It was nevertheless stated that the petitioner owes the government through the 2nd interested party a sum in excess of Ksh.1.4 billion in view of the pending Commercial case.
73. Counsel also challenged the claim for the sum of Kshs.270,692,256.00 since it was introduced through the petitioner's supplementary affidavit and not the pleadings. He stressed that parties are bound by their pleadings as held in the case of Independent Electoral and Boundaries Commission and another V Stephen Mutinda Mule and 3 others (2014) eKLR.
74. Counsel urged the Court to find that the public interest in the maintenance of the roads in Kenya outweighs a private individual's interest. In support reliance was placed on the case of R v Kenya National Commission on Human Rights Ex parte Uhuru Kenyatta (2010) eKLR where it was held that the court has an onerous responsibility of maintaining the delicate balance between an individual's right and those of the public and that sometimes private rights have to bow to public interest. Akin sentiments were held in the Court of Appeal case of Kenya Pipeline Company v Stanley Munga Githunguri (2011) eKLR which was also cited in support.
75. Finally counsel submitted that the factual and legal effect of the lawful termination of the Concession Agreement due to the petitioner's breach of the said Agreement renders the petition baseless and lacking in merit. He contended that the costs ought to be awarded to the interested parties. Reference was made to the case of Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya and another (2012) eKLR where it was held that exemplary costs as deterrent against frivolous and vexatious public interest litigations must be a mechanism which can be employed in such circumstances.

Analysis and determination

76. I find it prudent to address some of the issues raised by the 2nd interested party in its affidavits before commencing the determination of the pertinent issues. As correctly pointed out by the petitioner in its responses, the 2nd interested party introduced new issues in this matter which were not the subject of the suit.
77. In particular I observe that the 2nd interested party in making its responses discussed issues of fraud and tax evasion on the part of the petitioner as covered by a World Bank Report and the Business Daily Newspaper. It was as well stated that the petitioner owed a significant amount of taxes and concession fees to the government. Likewise, the party mentioned the breach of the Concession Agreement by the fault of the petitioner which led to the termination of the Concession Agreement in the end.
78. I am inclined to reject an invitation by the 2nd interested party to delve into these issues. I say so because the matters with reference to breach of the Concession Agreement and all matters pertaining to it are already before the Commercial Court. I further do not find that the issues raised herein are the same as those before the Commercial Court as alleged. A perusal of the Commercial Court pleadings as attached in the 2nd interested party's affidavit dated 25th October 2018 divulges that the issues therein are specially based on the modalities and fulfillment of the obligations in the Concession Agreement



and do not involve a challenge to the constitutionality of the [Road Maintenance Levy Fund Act, 1993](#) which is the core issue in the instant matter.

79. That said, I have perused the pleadings and submissions of the parties herein and it is my considered view that the issues for determination are as follows:
- i. Whether this Court has jurisdiction to entertain this petition.
 - ii. Whether Section 3 of the [Road Maintenance Levy Fund Act, 1993](#) is constitutional with reference to the petitioner.
 - iii. Whether the respondents in view of (b) above violated the petitioner's constitutional rights under Articles 10, 27, 40, and 201 of [the Constitution](#).
 - iv. Whether the petitioner is entitled to the reliefs sought.

Issue No.(i) Whether this Court has jurisdiction to entertain this Petition

80. The jurisdiction of this Court was challenged by the respondents and the interested party in their various affidavits. The 2nd interested party additionally filed a preliminary objection dated 4th October 2016 on the issue. The objection to this Court's jurisdiction is based on the assertion that this petition was filed contrary to the subject Concession Agreement dated 23rd January 2006 which stipulates mandatory provisions for settlement of disputes under Section N. It was claimed that the petitioner failed to observe this Condition by filing the instant petition.

81. The petitioner strongly opposed this assertion stating that the issues raised in this petition were not related to the Concession Agreement which the respondents and interested parties relied on heavily. Instead the main issue was the constitutionality of the impugned Act and violation of its constitutional rights. In view of this it was argued that this Court is the right forum to address the issues owing to the constitutional component.

82. The Supreme Court addressing its mind on the issue of jurisdiction in the case of Samuel Kamau Macharia (supra) opined as follows:

“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... 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](#)....”

83. It is settled in law that jurisdiction is everything and without it a Court cannot exercise its power, so much so that the Court of Appeal in the case of Owners of the Motor Vessel “Lillian S”(supra) while granting guidance on the vitality of jurisdiction addressed its mind as follows:

“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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



84. The jurisdiction of this Court to entertain constitutional matters is spelt out under Article 165(3) (d) of *the Constitution* as follows:

- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
 - 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.
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government.
 - iv. a question relating to conflict of laws under Article 191.

85. In like manner this Court under Article 159(2) of *the Constitution* is required to observe the following principles while exercising its authority:

- a. justice shall be done to all, irrespective of status;
- b. justice shall not be delayed;
- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- d. justice shall be administered without undue regard to procedural technicalities; and
- e. the purpose and principles of this Constitution shall be protected and promoted.

86. The question to be answered therefore is whether Clause N of the Concession Agreement ousts this Court's jurisdiction. Section N.1.1. stipulates as follows:

The parties shall in good faith and using all reasonable efforts in the spirit of cooperation take all steps as may be necessary or desirable to settle any dispute through negotiation and other constructive discussions. The parties shall not in any event be required to continue with such negotiations for a period in excess of 30 days.

87. Section N.1.2 goes on to state that:

Upon expiry of the 30 days or on earlier agreement, any party may require that an attempt be made to resolve the dispute through mediation....

88. Additionally Section N.1. 4 provides that:

If notwithstanding the provisions of Section N.1.1, a party considers that a dispute still exists which it has not been possible to settle, it may refer the dispute to arbitration by serving a request in accordance with the UNICITRAL rules and giving a copy of the request to the other party. The dispute will then be referred to and finally resolved by arbitration.



89. The jurisdiction of the Arbitration Tribunal under Section N.1.8 is stated to be as follows:

The Arbitration Tribunal shall decide all questions strictly in accordance with the terms of this Agreement and shall give effect to the same. The arbitrators are not authorized to exceed a limit of liabilities established hereunder or expand a guarantee made herein...

90. To my understanding, the Dispute Settlement Clause covers all disputes in relation to the Terms and Conditions of the Concession Agreement. In that regard by virtue of Article 159(2)(c) this Court is required to refrain from making a determination over such a dispute until the modes of dispute resolution are fully utilized. The Supreme Court in the case of Modern Holdings (EA) Limited v Kenya Ports Authority [2020] eKLR addressing the essence of this bar pronounced as follows:

“ 49. ... It is trite that by requiring courts to promote “alternative forms of dispute resolution including ... arbitration”, Article 159(2)(c) of the 2010 Constitution entrenches arbitration in our legal system...It is a jurisdiction that has been given constitutional imprimatur....Therefore, short of an amendment that deletes Article 159(2)(c) of *the Constitution*, that jurisdiction is here to stay.”

91. With this in mind, I perceive by a perusal of the Concession Agreement that the Terms and Conditions of the existing laws were not exclusively enshrined therein as alleged by the interested parties as seen for the Change of Laws under Section L. According to them, the mere existence of the laws is to be presumed to have formed part of the Agreement. I find this interpretation problematic because one, the jurisdiction of the Arbitration Tribunal is strictly over the express provisions of the Concession Agreement and this cannot be expanded in the manner suggested by the interested parties as per Section N.1. 8.

92. Secondly, the Arbitrators other than for the Terms and Conditions expressly stated in the Concession Agreement are not granted authority to interpret the law such as the impugned Act or determine violation of constitutional rights. This mandate is only granted to the Court. While the Arbitration Tribunal has exclusive jurisdiction over the Terms and Conditions, the Concession Agreement makes clear under Section N.1.10 that with reference to the Arbitral Award that:

....The Parties shall not appeal an award to any court unless on a point of law.

93. The jurisdiction of the Arbitration Tribunal in this regard was observed in the case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) as follows:

“ 41. The principal purpose of an arbitration clause is to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties are at liberty to contract to allow to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect...”

94. Taking this into consideration, I am certain that the nature and issue raised in the instant petition does not raise a question within the jurisdiction of Section N of the Concession Agreement but one that falls within the meaning of Article 165 (3) (d) (i) of *the Constitution*. This therefore grants this Court the jurisdiction to make a determination on the issues and questions raised by the petitioner.



Whether Section 3 of the Road Maintenance Levy Fund Act, 1993 is constitutional with reference to the petitioner

95. The petitioner’s central argument is that the impugned Section is unconstitutional, as it is discriminatory in light of Article 27 of *the Constitution*. Secondly, it is geared toward depriving the petitioner of its right contrary to Article 40 (2) of *the Constitution* and lastly it violates the principles of equity, equality and fairness as envisaged under Article 201(b)(i) of *the Constitution*. The key cause for its grievance is anchored on the fact that the road maintenance levy is a ‘road user’s tax’ which in essence should not be applicable to it as a rail operator.
96. This assertion was fervently opposed by the respondents and the interested parties. It was underscored that the road maintenance levy was rightly imposed as per the dictates of *the Constitution* under Article 209. The respondents argued further that grant of the sought prayers would be in violation of the doctrine of separation of powers. The parties as well criticized the petitioner’s erroneous interpretation of Section 3 of the Road Maintenance Levy Fund Act, 1993. They stated that the road maintenance levy is a tax imposed on all petroleum fuels imported in Kenya including the ones used in homes, agricultural implements and electricity generation. In and of itself therefore the levy could not be defined as a ‘road users tax’ due to its general application that requires everyone who uses the petroleum fuel to pay the levy.
97. In making a determination on the constitutionality of the impugned provision, this Court requires to bear in mind the relevant guiding principles in the interpretation of an Act of Parliament. At the forefront is that the spirit of *the Constitution* must preside and permeate the process of judicial interpretation which is this Court’s mandate as spelt out under Article 259 of *the Constitution*.
98. There are a number of set principles that guide the Court while interpreting a Statute or its provisions and making a declaration of its constitutionality or lack thereof. The first principle is the general presumption that Acts of Parliament are enacted in conformity with *the Constitution*. This position was affirmed by the Court of Appeal of Tanzania in the case of *Ndyanabo vs. Attorney General* [2001] EA 495 which was a restatement of the law in the English case of *Pearlberg vs. Varty* [1972] 1 WLR 534. In the former, the Court held that:
- “Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”
99. Secondly, this Court is required to examine the purpose and effect of the impugned Statute. This principle was indicated in the case of *R v Big M Drug Mart Ltd* 1985 CR 295, as cited with approval in the case of *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR. The Court at paragraph 66 held as follows:
- “It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself. The Supreme Court of Canada in *R vs Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 enunciated this principle as follows:
- “Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation...”



100. Additionally, this Court is beholden to interrogate the intention articulated while drafting the Statute. This was confirmed by the Court of Appeal in the case of *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR when it stated as follows:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

101. The impugned provision of the Road Maintenance Levy Fund, 1993 which is Section 3 provides as follows:

Imposition of levy

1. The Minister shall, in consultation with the Minister for the time being responsible for finance, by Order published in the Gazette, impose on any or all petroleum fuels entered for home use in Kenya a road maintenance levy (in this Act referred to as "the levy") which may be determined from time to time and in such manner as the Minister may specify in the Order.
2. Out of the levy collected under subsection (1) there shall be paid an amount of three shillings per litre of petroleum sold into the Road Annuity Fund established under the *Public Finance Management Act*, 2012 to fund the construction of roads under the Road Annuity Programme and similar roads approved by the National Assembly.

102. It is not in dispute that one of the constitutional functions of the National Government is its power to impose taxes and charges as envisaged under Article 209 of *the Constitution* which reads as follows:

- (1) Only the national government may impose --
 - i. income tax;
 - ii. value-added tax;
 - iii. customs duties and other duties on import and export goods; and
 - iv. excise tax.
- (2) 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).

103. A reading of the impugned provision and preamble divulges the purpose of the Statute as one intended by Parliament to impose a levy for road maintenance from petroleum fuels. To begin with as guided by the outlined principles, a tax cannot be imposed save through a Statute. Likewise, it is evident that *the Constitution* mandates imposition of such taxes hence the imposition of the levy was not unlawful. In essence it is reasonable to state that the provision does not present an unconstitutional purpose. Furthermore, as can be discerned from the preamble, the intention of Parliament was to have the law apply uniformly for all persons using petroleum products without any exception. If therefore the provision was to apply to specific persons without justification, this would have resulted in an unconstitutional effect making it unconstitutional.

104. Speaking to Parliament’s mandate to impose taxes and Court’s mandate to interfere, the Court in the case of *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of*



Kenya Insurers & 5 others vs. Commissioner of Domestic Taxes & 2 others [2014] eKLR pronounced as follows:

“ 32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of *the Constitution*, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional.”

105. The Court while quoting a citation from the case of Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013[2014]eKLR at Paragraph 33 took note that:

“(24) Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. Article 209 of *the Constitution* empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of *the Constitution*, the legislature retains wide authority to define the scope of the tax. (See Bidco Oil Refineries v Attorney General and Others Nairobi Petition No. 177 of 2012, paras. 53 – 56.)”

106. The Court then proceeded to hold as follows:

“ 34. The decision whether to impose a tax and to who is within legislative authority...This Court cannot therefore intervene and I therefore find nothing unconstitutional in regard to that aspect of the petition.”

107. An analysis of the arguments put forth by the petitioner present a number of issues. First the rules of statutory interpretation and principles under Article 259 of *the Constitution* do not favour an individualistic interpretation of a law. This would produce an absurd outcome which would be an affront to *the Constitution* as its objective is universal in nature.

108. Furthermore, it is discernible that the wording of Section 3 of the *Road Maintenance Levy Fund Act*, 1993 indicates that the tax is to apply to all who use petroleum fuels hence the burden is shared fairly. Nothing in the Section indicates that the tax only applies to road users as alleged. Manifestly the petitioner’s interpretation as challenged by the respondents and interested parties is flawed.

109. The imposition of taxes and payment of taxes is an obligation that applies to both Parliament and tax payers. This portion of payment therefore is mandated by law and failure to pay the same amounts to an offense. In view of this as long as a tax is lawfully imposed a party cannot argue that their right to property has been violated.

110. An interrogation of the impugned Section against the petitioner’s arguments makes it clear that the respondents in enacting the *Road Maintenance Levy Fund Act*, 1993 did so within the constitutional



confines. The impugned provision as tested against the principles of constitutional and statutory interpretation discloses that the Section is lawful and hence constitutional.

111. I find that the circumstances of this case do not warrant an interference with the respondents' mandate under *the Constitution* to impose taxes. In the same breath, I am of the humble view that allowing the petitioner's argument in this issue is unsustainable as would go against the letter and spirit of *the Constitution*.
112. Be that as it may, I find it necessary to point out a number of issues. Indisputably the genesis of this petition is the petitioner's obligations as provided in the Concession Agreement. The creation of the Agreement as deposed by the respondents and 2nd interested party involved negotiation of terms and in the end the parties agreed to the contracted terms before adopting it. It is also plain that the impugned Act was in existence when the Agreement was entered into. I find myself in consonance with the respondents' argument that the petitioner had an opportunity at the time to negotiate the Terms of effect of the road maintenance levy with reference to the impugned Act. This was not done. While the petitioner submitted that it had tried to engage the respondents to discuss the issue this was not proved and in the end was a mere averment.
113. It is as well appreciated that the respondents' ability to exempt any person or body from paying taxes is not a matter of discretion but as guided by the law and *the Constitution*. This means thus that an exemption must meet the prerequisites set out in the Statute to be legally sound otherwise the exemption would be unlawful.
114. By the same token, the Concession Agreement under Section O.7 makes provision for amendments to the Agreement as long as they are in line with the prerequisites set therein. This is to say that the petitioner even after entering the Concession Agreement had an opportunity all the while to deliberate the issue with the contracting parties. This option as is evident was also not utilized.
115. The irrefutable deduction in this matter is that the petitioner in filing the instant petition was keen on having this Court re-write the Terms and Conditions of the Concession Agreement by introducing an exemption, to find that the road Maintenance levy does not and neither did it apply to the petitioner at the time of agreeing to the Terms of the Agreement. This is untenable and was not done in good faith. This Court frowns upon this call and must strongly reject it.
116. This component was underscored in the case of Euromec International Limited (supra) where it was stressed as follows:

“ 50. ...the ‘background’ to a contract includes ‘knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating.’ Other important points to note regarding the courts’ approach to contractual interpretation include: - (a) the courts will endeavor to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;(b) the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and (c) where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the contra proferentem rule). This last principle has limited applicability in cases involving sophisticated commercial agreements where a contract has been jointly drafted by the parties or where the parties are of comparable bargaining power. The applicant did not demonstrate misrepresentation or fraud nor was it suggested that there



were no prior negotiations culminating in the agreement. The applicant is simply inviting this court to either re-write a binding contract or to assist it to evade consequences of a legally binding agreement it voluntarily signed.”

117. The consequence of the stated conclusion is that the petitioner’s spirited argument that its constitutional rights under Articles 10, 27, 40 and 201 of *the Constitution* were violated by the respondents fails.
118. It follows that the petitioner is not entitled to the reliefs sought.
119. The upshot is that the amended petition dated 11th September 2015 lacks merit and is dismissed with costs.
120. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22ND DAY OF SEPTEMBER 2023 IN OPEN COURT.

H. I. ONG’UDI

Judge of the High Court

