REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 353 OF 2018

KENYA BANKERS ASSOCIATION.....PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA REVENUE AUTHORITY.....2ND RESPONDENT

-AND-

THE NATIONAL ASSEMBLY.....INTERESTED PARTY

JUDGEMENT

The Petitioner's Case

1. The Petitioner, Kenya Bankers Association, is a trade union of commercial and microfinance banks licensed to carry on banking business in Kenya. It filed its petition dated 15th October, 2018 supported by the affidavit of its Chief Executive Officer, Habil Olaka, in which the following reliefs are sought:

> **a) A declaration that the retroactive imposition of increased excise duty on fees charged for money transfer services and other fees charged by banks, money transfer services and other financial service providers is unconstitutional.**
>
> **b) A conservatory order do issue suspending the retroactive imposition and collection of increased excise duty of 20% of the excisable value on fees charged for money transfer services and other fees charged by banks, money transfer services and other financial service providers under paragraphs 2 and 4 of Part II of the First Schedule to the Excise Duty Act as amended by section 32(b) of the Finance Act, 2018.**
>
> **c) A declaration that the commencement date for section 32(b) of the Finance Act, 2018 should be 29th September, 2018.**
>
> **d) Costs.**

2. The 1st Respondent (the Attorney General) and the 2nd Respondent (Kenya Revenue Authority) oppose the petition. The Interested Party (the National Assembly) which joined the proceedings in the course of the trial also objects to the grant of the orders sought in the petition.

3. The Petitioner brings this petition against the alleged retroactive operation of amendments carried out in 2018 to the Excise Duty Act, 2015 ('EDA'). It is claimed that under the amendments to Part II of the First Schedule to the EDA, banks are now deemed to have undercharged excise duty for the period of 1st July to 28th September, 2018; filed returns which only reflect excise duty at 10% instead of 20%; and have only paid excise duty at 10% instead of 20% thereby committing criminal offences under sections 94 and 95 of the Tax Procedures Act, 2015 ('TPA').

4. The Petitioner further asserts that the amendments to the EDA create retroactive criminal offences out of conduct which was legal and in accordance with the law at the material time. It is argued that this is contrary to the Constitution. The Petitioner argues that it is unconstitutional and confusing to retroactively impose excise duty when excise duty is to be charged at the point of supply of service or product and at the rate prevailing at the time of supply.

5. The Petitioner refers to Articles 201 and 210 of the Constitution and argues that the imposition of excise duty retroactively for the period

of 1st July, 2018 to 28th September, 2018 is an infringement of the constitutional right to taxation that is fair. The Petitioner claims that there was no public participation in the increase of the excise duty as required under Article 201 of the Constitution. Moreover, it is deposed that it is unconstitutional to impose excise duty from 1st July, 2018 when the legislation imposing that excise duty was not passed until 21st September, 2018 and not published until 28th September, 2018.

6. In reference to Article 47 of the Constitution, the Petitioner argues that the respondents have violated the banks' right to fair administrative action by imposing excise duty retroactively. It is argued that it would be difficult, if not impossible, for banks to recover additional excise duty for the period 1st July, 2018 to 28th September, 2018 from their customers.

7. According to the Petitioner, following the President's assent to the Finance Act, 2018 on 21st September, 2018 and its publication on 28th September, 2018 the banks took immediate action to inform their customers of the increased excise duty and to alter their system to charge excise duty at 20% on the excisable value of the fees for money transfer services and other services. It is the Petitioner's averment that between 1st July, 2018 and 28th September, 2018 the banks were charging excise duty at 10% and it would be extremely difficult to identify the transactions which occurred in that period so as to claim the additional tax from their customers who may have in any case closed their accounts or may not have sufficient funds in their accounts to cover the increased excise duty.

The 1st Respondent's Case

8. The 1st Respondent opposed the petition through grounds of opposition dated 18th October, 2018. The 1st Respondent argues that the petition should be struck out on grounds that it offends the doctrine of presumption of constitutionality enjoyed by the impugned Finance Act, 2018 and that the Petitioner has not demonstrated that the rights and fundamental freedoms of banks have been violated by the impugned Act in order for the principle of presumption of constitutionality not to apply to the Act.

9. It is further argued that the petition offends the doctrine of *sub judice* as the issues raised in the petition are substantially and directly in issue before this very Court in **Nairobi High Court Petition No. 327 of 2018, Okiya Okoiti Omtatah v The Hon. Attorney-General & another;** and **Nairobi High Court Petition No. 334 of 2018, Law Society of Kenya v The Hon. Attorney General & 2 others.**

10. The 1st Respondent contends that the legality of the manner in which the impugned Finance Act, 2018 was enacted into law has not been questioned by the Petitioner. Further, that there is a general presumption of legality of all actions taken by various State organs such as the National Assembly in the discharge of their respective constitutional mandates. It is also asserted that Parliament has the legislative power to give the application of a particular law a retrospective effect.

11. The 1st Respondent avers that the Petitioner has misconstrued and misapplied the provisions of Articles 47, 201 and 210 of the Constitution as the enactment of legislation is not an administrative action within the meaning of Article 47. Further, that the Finance Act, 2018 was enacted as the requisite legislation that has imposed the impugned taxes, and the Petitioner has not demonstrated how any of the principles of public finance under the Constitution were not complied with in the enactment of the law.

12. It is further contended that the Petitioner has failed to sufficiently demonstrate with concrete evidence any violation of the Constitution. The 1st Respondent additionally avers that the Petitioner has an alternative avenue for resolving the matter which is provided under Article 119 of the Constitution as read with the provisions of the Petition to Parliament (Procedures) Act, 2012 to petition Parliament to enact, amend or repeal any legislation.

13. Lastly, the 1st Respondent asserts that by dint of Article 116(2) of the Constitution, this Court lacks the requisite jurisdiction to provide for the commencement date of any particular legislation.

The 2nd Respondent's Case

14. The 2nd Respondent filed a replying affidavit sworn by Caxton Masudi on 19th October, 2018 deposing that there is no illegality emanating from the Finance Act, 2018 for providing an effective date earlier than the date of enactment, as this is allowed by Article 116(2) of the Constitution. It is asserted that there is no absolute constitutional bar on the retroactive application of tax laws.

15. The 2nd Respondent argues that the nature of the dispute is purely a legal problem of implementation and interpretation of Section 32(b)(iv) of the Finance Act, 2018 and not its constitutionality. The 2nd Respondent asserts that since the enactment of the Act, it has not issued any demands for the outstanding 10% excise duty for the period between 1st July, 2018 to 21st September, 2018 from any of the Petitioner's members, and it has therefore not violated the constitutional rights of the Petitioner's members.

16. Furthermore, it is asserted that a conservatory order can only be granted on a specified violation of a right and not on the apprehension that a right may be violated. The 2nd Respondent, nevertheless, concedes that the Court has jurisdiction under Article 165(1)(d)(i) to determine whether Section 32(b)(iv) of the Finance Act, 2018 is inconsistent with the Constitution.

17. On the allegation of lack of public participation, the 2nd Respondent asserts that public participation took place through the National Assembly which by dint of Articles 1(2), 94(1) and 95(1) & (2) represents the electorate and their special interests. It is deposed that when the National Assembly debated and accepted the recommendations from the President, it did so as the people's representatives.

18. The 2nd Respondent contends that if Prayer C of the petition is granted, it would amount to this Court exercising legislative powers which are reserved for the National Assembly.

19. Alternatively, the 2nd Respondent avers that if the Court is persuaded to declare Section 32(b)(iv) of the Finance Act, 2018 unconstitutional, the unconstitutionality should only be with regard to the period between 1st July, 2018 and 21st September, 2018 and the respondents should also be granted time to remedy the unconstitutionality.

The Interested Party's Case

20. The National Assembly filed a replying affidavit sworn by its Clerk, Michael Sialai, on 26th August, 2020 in which it is deposed that the President's reservations to the Bill were not new and they related to amendments already contained in the Bill as passed by the House and referred to the President for assent under Article 115 of the Constitution. It is averred that before the Finance Bill, 2018 was enacted, it was taken through public participation. This assertion is supported by the statement of the Court of Appeal in **Nairobi Civil Appeal No. 11 of 2018, Pevans East Africa Limited & others v Chairman Betting Control and Licensing Board & others** that where Parliament has conducted public participation on a Bill, the House is not precluded from making subsequent amendments to the Bill.

21. Reliance is placed on Article 116(2) of the Constitution in opposition to the Petitioner's allegation that the impugned law is unconstitutional for being retroactive. It is deposed that the Petitioner's assertion lacks any constitutional foundation and it would amount to an infraction of the legislative prerogative of Parliament to allow the petition. It is asserted that the Constitution only forbids *ex post facto* laws which have been construed to only apply to criminal and penal laws and not revenue laws.

22. The Interested Party avers that Section 32(b) of the Finance Act, 2018 does not create a retroactive criminal offence or any criminal offence but imposes a tax which is not a punishment. Further, that no evidence has been tendered before this Court to demonstrate that a demand has been made against a member of the Petitioner for undercharging excise duty as alleged. Additionally, reference is made to the decision of the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** for the assertion that it is not the role of the Court to dictate as to whether a law should or should not apply retrospectively as that mandate is within the province of the legislature.

23. On the Petitioner's assertion that the impugned law unfairly imposes a tax, it is contended that Article 209 of the Constitution empowers the National Assembly to impose taxes, and the Court cannot interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration. It is therefore urged that the imposition of tax by legislation that has been duly enacted, and the collection of such tax, cannot amount to infringement of the constitutional right to taxation that is fair, or any other constitutional right or freedom.

24. Lastly, on the matter of fair administrative action, it is averred that the National Assembly in enacting a law is not taking an administrative action but carrying out its legislative function. It is therefore urged that enacting a law does not fall within the purview of Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

The Analysis

25. I have carefully considered the pleadings and submissions of the parties and in my view the issues for determination are:

I. Whether Section 32(b) of the Finance Act, 2018 was subjected to public participation;

II. Whether the enactment of Section 32(b) of the Finance Act, 2018 violated the Petitioner's right to fair administrative action;

III. Whether the retroactive operation of Section 32(b) of the Finance Act, 2018 violates the Constitution; and

IV. Whether Section 32(b) of the Finance Act, 2018 creates unfair imposition of a tax.

Whether Section 32 (b) was subjected to public participation

26. The issue of public participation is raised by the Petitioner in brief in the petition.

27. The 1st Respondent filed submissions dated 27th August, 2020 and argues that, as demonstrated in its replying affidavit, there was adequate public participation in the process leading to the enactment of the impugned legislation. The Court is urged to be persuaded by the decision in **Law Society of Kenya v Attorney General, Nairobi High Court Petition No. 318 of 2012.**

28. The 2nd Respondent in its submissions dated 19th November, 2018 asserts that adequate public participation took place on the Finance Bill, 2018 prior to its enactment into law. It is submitted that by dint of Articles 1(2), 94(1) and 95(1) & (2) of the Constitution, when the National Assembly debated on the memorandum from the President in respect to the First Schedule of the EDA and accepted the President's recommendation, the people participated in the process through their elected representatives.

29. It is further submitted by the 2nd Respondent that the President's recommendation did not introduce a new tax but increased the rate of tax from 10% to 20% and therefore the provisions had already been subjected to public participation under the Finance Bill, 2018. The case of **Transparency International (TI Kenya) v Attorney General & 2 others [2018] eKLR** is relied on to buttress this point.

30. The Interested Party filed submissions dated 26th August, 2020 and argues that the National Assembly conducted extensive public participation for the Finance Bill, 2018. However, when the Bill was submitted to the President for assent, it was referred back to the National Assembly for reconsideration. In reliance on the decision of the Court of Appeal in **Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board & 7 others [2018] eKLR**, it is submitted that the increase of the tax rate from 10% to

20% was in substance within the parameters of what had been subjected to public participation when the Bill was committed to the Parliamentary Committee on Finance, Planning and Trade.

31. On the issue of public participation, I observe that besides the single broad statement in the petition, the Petitioner has failed to bring forward any evidence or raise concise arguments on the the alleged lack of public participation. I do not believe that the Petitioner has effectively discharged its burden of proof on this issue as required by Section 107 of the Evidence Act, Cap. 80. In saying so, I am, nevertheless, alive to the holding by the **Court of Appeal in Law Society of Kenya v Attorney General & 2 others [2019] eKLR** that:

> **"It was an error for the learned judge to require the appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was….**
>
> **Additionally, the onus is on the Parliament to take the initiative to make appropriate consultations with the affected people. It is therefore a misdirection for the learned judge to hold that the appellant had the responsibility to prove that the consultations did not happen."**

32. In the case at hand the Interested Party has placed evidence before the Court to show that the Finance Bill, 2018 was subjected to public participation. Paragraph 7 of Michael Sialai's replying affidavit discloses the evidence of public participation as publication in the Kenya Gazette; publication in the newspapers as well as the parliamentary website; engagement between the Budget and Appropriations Committee with various stakeholders; and receipt of memoranda from the stakeholders and members of the public. This averment was not disputed by the Petitioner.

33. However, the Petitioner is indeed correct that an increment of excise duty from 10% to 20% was not on the cards when the Finance Bill, 2018 was initially passed by the National Assembly and sent to the President for assent. Be that as it may, the situation is covered by the Court of Appeal holding in **Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others [2018] eKLR** that:

> **"The dispute is whether when the President referred the Bill back to the National Assembly with his observation, further public participation was required.**
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> **We have already referred to the terms of Article 115 of the Constitution which leaves no doubt that what the National Assembly was required to do was either effect amendments to the Bill to accommodate the President's reservations, or decline to effect the amendments. The real question therefore is whether the Finance Act was vitiated by lack of public participation on the President's reservations.**
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> **It is common ground that up to the point when the National Assembly passed the Bill on 30th May 2017, it was preceded by adequate public participation. As published, the Bill proposed a tax rate of 50%. Proposals were made, ranging from adopting a tax of 50%, 35% and retaining the tax as it was under the 2016 Finance Act. With respect, we agree with the learned judge that there was no need for further public participation on the narrow issue of the percentage of the tax. It must be appreciated that after the National Assembly has heard the views of members of the public and industry stakeholders on a Bill, it is not precluded from effecting amendments to the Bill, before finally passing it. Those amendments do not necessarily have to agree with the views expressed by the people who have been heard, so long as the views have been taken into account. (See *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others [2013] eKLR).* In our view, it would bring the legislative process to a complete halt and undermine Parliament's ability to discharge its constitutional mandate if, after having facilitated public participation on a Bill, Parliament is required to adjourn its proceedings every time a member proposes an amendment to the Bill, so that further public participation can take place on the particular proposed amendment."**

34. Based on the cited decision and considering that the Bill had been subjected to public participation before the President recommended an increment of the excise duty, I agree with the respondents and the Interested Party that the challenged provisions of the Finance Act, 2018 cannot be impeached on the ground of lack of public participation. In view of what I have stated, it is not necessary to discuss this issue any further. It is therefore my decision that the Petitioner has failed to convince the Court to find in its favour on this issue.

Whether the enactment of Sections 32(b) of the Finance Act, 2018 violated the Petitioner's right to fair administrative action

35. On the matter of fair administrative action, the Petitioner in its submissions argue that the impugned provisions amount to unfair taxation and unfair administration. Reliance is placed on the decisions in **Samura Engineering Limited & 10 others v Kenya Revenue Authority [2012] eKLR;** and **the Judicial Service Commission v Mutava and the Attorney General [2015] eKLR.**

36. The 1st Respondent submits that the enactment of legislation is a constitutional duty of the Parliament and therefore does not qualify as an administrative action for the same to be governed by the Fair Administrative Action Act, 2015.

37. The 2nd Respondent asserts that the Petitioner's right to fair administrative action has not been infringed as a tax demand has not been issued to the Petitioner's members on the collection of the excise duty on the remaining 10% for the period between 1st July, 2018 and 21st September, 2018 which would then lead to a tax dispute. The case of **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** is relied upon.

38. The Interested Party contends that in enacting the impugned provision, the National Assembly was carrying out its legislative function as opposed to administrative function and therefore the enactment of a law does not fall within the purview of Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

39. Under Section 2 of the Fair Administrative Action Act, 2015 "administrative action" includes:

> **"(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or**
>
> **(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates."**

40. According to Article 93 of the Constitution, the National Assembly forms an integral part of the legislative arm of government and is clothed with the constitutional authority to enact legislation under Article 95. 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.

41. Furthermore, the Petitioner has not provided any proof that the 2nd Respondent has taken any steps by way of notices to collect the impugned tax. I, therefore, concur with the respondents and the Interested Party that in the circumstances of this case the Petitioner has not demonstrated by way of evidence that the National Assembly violated the right to fair administrative action. The impugned law was enacted in accordance with the constitutional and statutory provisions for enactment of laws. Consequently I find and hold that the provisions of Article 47 of the Constitution and the Fair Administrative Action Act, 2015 cannot be invoked in this case.

Whether the retroactive operations of Sections 32 (b) of the Finance Act, 2018 violated the Constitution

42. On the issue of retrospective application of the impugned legislation, the Petitioner argues that there is a presumption that legislation operates prospectively even though Parliament can pass legislation with retrospective effect provided that the intention is clearly stated. This argument is supported by the decisions in **Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies [2013] eKLR; Ruturi and another v Minister of Finance & another [2001] 1 EA 253;** and **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR.** The Petitioner further submit that it is unconstitutional to criminalise something which was not a criminal offence at the time it was done.

43. The 1st Respondent submits that Article 116 of the Constitution permits an enacted law to apply retrospectively because it does not expressly outlaw retrospective application of the law. This is supported by the cases of **Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR; Golden Line International Limited v Bluesea Shopping Mall Limited & 3 others [2016] eKLR;** and **Nation Media Group Limited v Onesmus Kilonzo [2015] eKLR.** It is asserted that the Constitution permits the retrospective application of the law, and the Petitioner has failed to rebut the presumption of constitutionality of the challenged provision.

44. It is further submitted that the Court should be guided by Article 259 when interpreting the provisions of the Constitution. Also, that the Court should follow interpretation principles such as the presumption of constitutional validity of legislation as pronounced in the cases of **Ndyanabo v Attorney General [2001] EA 495; Mark Ngaywa v Minister of State for Internal Security and Provincial Administration & another, Petition No. 4 of 2011;** and **Susan Wambui Kaguru & others v Attorney General & another [2012] eKLR.**

45. The 1st Respondent asserts that the Court should also consider the objects, purposes, and effect of the legislation as was held in the cases of **Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security & others [2011] eKLR; Samuel G. Momanyi v Attorney General & another, High Court Petition No. 341 of 2011; R v Big M Drug Mart Ltd [1985] 1 S.C.R. 295; Re Kadhis' Court: The Very Right Rev Dr Jesse Kamau & others v The Hon Attorney-General & another, Nairobi HCMCA No. 890 of 2004;** and **U.S v Butler, 297 U.S 1 [1936].**

46. The 2nd Respondent submits that there is no dispute that Section 32(b) of the Finance Act, 2018 is retroactive in nature and therefore the question to be answered is whether the provision is invalid or contrary to the Constitution. It is stated that there is no express provision under the Constitution that bars the legislature from enacting a tax law with retroactive implication. Reliance is placed on the decisions in **United States v Carlton [1994] No. 92-1941;** and **Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service & Another (87760/2014) ZAGPPHC 231** which set out instances under which the legislature may enact tax laws that are retroactive in nature without the same being unconstitutional.

47. The 2nd Respondent submits that it is not the intention of Section 32(b)(ii) & (iv) of the Finance Act, 2018 to create criminal offences, and any resulting offence is purely incidental and can be dealt with by the 2nd Respondent on a case by case basis. It is submitted that the 2nd Respondent shall only carry out its mandate as provided for by the law, which should be strictly interpreted. The decisions in **Republic v Commissioner of Domestic Taxes (Large Tax Payers Office) & another Ex-Parte British American Tobacco Kenya Limited [2015] eKLR; Tanganyika Mine Workers Union v The Registrar of Trade Unions [1961] EA 629;** and **Vestey v Inland Revenue Commissioners [1979] 3 All ER** are relied upon in support the arguments.

48. On its part, the Interested Party submits that its interpretation of Article 116 of the Constitution is that retroactive tax legislation is not absolutely barred in the Constitution. This interpretation is supported by reference to the decision of the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** as to the test to be applied in determining whether a statutory provision is unconstitutional. Further reliance is placed on the decisions in **Municipality of Mombasa v Nyali [1963] E.A. 371; United States v Carlton (supra); Huitson v HMRC [2011] EWCA Civ 893;** and **Pienaar Brothers (Pty) Ltd (supra).**

49. It is consequently submitted that the Petitioner's allegation that retrospective application of Section 32(b) of the Finance Act, 2018 is unconstitutional lacks constitutional foundation and agreeing with the Petitioner would amount to an infraction of the legislative prerogative of Parliament. It is further asserted that the Court cannot dictate as to whether a law should or should not apply retrospectively as this is the province of the legislature.

50. The Interested Party further submits that Article 50(2)(n) only applies to criminal legislation and the impugned legislation is not criminal legislation, and the penalty in the Tax Procedures Act, 2015 is not in the nature of punishment of a crime. The case of **Welch v Henry, 305 U.S 134 [1938]** is relied on to support the contention that the impugned provision of the Finance Act, 2018 does not create a retroactive criminal offence or any criminal offence at all.

51. Firstly, it is clear to me that what the Petitioner is complaining about is not an action by the 2nd Respondent, but rather the amendment of a legislation by the National Assembly. This Court is being asked to determine whether the National Assembly by enacting the impugned amendment to the Finance Act, 2018 has infringed the Constitution.

52. According to Article 116(2) of the Constitution, an Act of Parliament shall come into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates that it shall come into force on a different date or time. The Supreme Court discussed the issue of the retrospectivity of constitutional provisions in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** as follows:

> **"(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (*Halsbury's Laws of England*, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:**
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> ***(i) is in the nature of a bill of attainder;***
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> ***(ii) impairs the obligation under contracts;***
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> ***(iii) divests vested rights; or***
>
> ***(iv) is constitutionally forbidden.***
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> **(62) Applying these legal principles to the matter before us, it is clear that what is in question is not the seeming retroactive elements (if any) of section 15(1) of the Supreme Court Act, but *whether Article 163 (4) (b) of the Constitution was intended to confer appellate jurisdiction upon the Supreme Court the exercise of which would have retrospective effect upon the vested rights* of individuals. At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution."**

53. The Court of Appeal gave its opinion on the matter of the retrospective application of legislation in **Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited [2018] eKLR** where it held that:

> **"18. From the above authorities it is clear that there are exceptions to the general rule that a statutory provision is not retrospective. The important consideration being the intention of the legislature in enacting the statute.**
>
> **We are guided by the case of *Amalgamated Society of Engineers vs. Adelaide Steamship (1920) 28 CLR 129 at 161-2* where Higgins J stated as follows:**
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> ***"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable.""***

54. My interpretation of Article 116(2) as read with the pronouncements of the Supreme Court and the Court of Appeal is that legislation which is passed by Parliament should be applied prospectively unless it is expressly stated within the document that the legislation should apply retrospectively.

55. I have perused the Act that introduced the impugned amendments, and in Section 1 the drafters of the impugned amendments have expressly stated the date at which each of the amendments is to apply. It is stated as follows:

> **"1. This Act may be cited as the Finance Act, 2018, and shall come into operation, or be deemed to have come into operation, as follows—**
>
> **(a) Sections 48, 49, 50, 54, 56, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 78, on the 1st October, 2018;**
>
> **(b) Sections 4, 6, 7, 11(a), and 11(c) on the 1st January, 2019;**

(c) All other sections on the 1st July, 2018."

56. The drafters of the document have made their intentions known concerning the date of operation of each of the sections of the Act, and the same went through the legislative process and were passed accordingly. In accordance with Section 23 of the Interpretation and General Provisions Act, Cap. 2, the legislature is free to enact laws which affect the previous operation of a written law, or anything duly done or suffered under a written law, or affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law, so long as this intention is clearly expressed in the new law.

57. The above statement finds support in the decision of the South African High Court in **Pienaar Brothers (Pty) Ltd (supra).** The Court upon extensive scrutiny of international laws and precedent held that:

> **"99. There is no authority for the proposition that retrospective tax legislation would survive constitutional scrutiny only if there were "good reasons" for it. It is not for a Court to say what a good "reason" is. Foreign law also does not support such an approach. The only question is whether a legitimate legislative purpose is indicated. In the present case, the Government's purpose was to remove the tax exemption in amalgamated transactions. To do so retrospectively was also justified, because there was loss of STC revenue rising from amalgamations which was previously intended to be deferred and not permanently lost. More importantly, there was a general announcement that the intended amendment would remove that loop-hole. That was sufficient. I agree with Mr Semenya SC's submission in this regard, and I have given my reasons….**
>
> **102. I agree with Mr Semenya SC's conclusion that the constitutional attack on the impugned provision must fail. There is nothing in our Constitution which prohibits parliament from passing retroactive or retrospective legislation. There is nothing in other jurisdictions of similar constitutional structure that prohibits such passing. Also, and more significantly, there is nothing internal in the Rule of Law which renders retrospective legislation per se unconstitutional."**

58. I am therefore fortified in my conclusion that the passing of the retrospective legislation, even tax legislation, is not unconstitutional as it is not prohibited under the Constitution. It is the retrospective application of laws, and moreso criminal laws that is frowned upon, and in our case, actually prohibited by Article 50(1)(n) of the Constitution.

59. Additionally, in response to the Petitioner's argument that the impugned provision creates a criminal sanction which did not exist before its enactment, I observe that the impugned provisions are in the Finance Act, 2018 which, as elaborated by the respondents and Interested Party, is not criminal legislation and does not provide for any criminal sanctions. Therefore it cannot be found to be retrospective or unconstitutional in this regard.

Whether Sections 32 (b) of the Finance Act, 2018 creates unfair imposition of tax

60. On the issue of unfair imposition of tax, the Petitioner relies on Articles 201 and 210(1) of the Constitution and the right to the certainty of the law, particularly in regard to taxation and criminal offences, which should not be altered retrospectively. The Petitioner also relies on the cases of **Aids Law Project v The Hon. Attorney General & 3 others [2015] eKLR;** and **Keroche Industries Ltd v Kenya Revenue Authority & 5 others [2007] 2 KLR.**

61. The Petitioner further argues that the imposition of the excise duty resulted in double taxation prior and after the enactment of the impugned law. This argument is supported by reference to the decisions in the cases of **IRC v Clifforia Investments Ltd [1963] 1 W.L.R. 396; IRC v FS Securities Ltd [1964] 1 WLR 742;** and **Okiya Omtatah Okoiti v the Cabinet Secretary National Treasury & 3 others, Constitutional and Human Rights Division Petition 235 of 2018.**

62. The 1st Respondent submits that no taxation has been imposed without the requisite legislation and what has been done is consistent with Article 210(1) of the Constitution as a finance bill is introduced every year in the National Assembly after the presentation of the budget to give effect to the financial proposals of the Government.

63. It is contended by the 2nd Respondent that the obligation to pay taxes is statutory and should be adhered to. This is supported by the decision of Leach JA in **New Adventure Shelf 122 (pty) Ltd v The Commissioner of the South African Revenue Service [2017] ZASCA 29 (28 March 2017).**

64. The Interested Party avers that it is within the authority of the National Assembly under Articles 95, 209 and 210 of the Constitution to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced. The case of **Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others [2018] eKLR** is relied upon for the statement that:

> **"Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have the expertise in their area of mandate, which the courts do not normally have."**

65. It is further asserted that the imposition of tax by legislation that has been duly enacted, and the collection of such tax, cannot amount to infringement of the constitutional right to taxation that is fair, or any other constitutional right or freedom.

66. In determining this issue, I note that under Article 209 of the Constitution the national government is empowered to impose taxes and charges including excise tax and the same is imposed through an Act of Parliament. Furthermore, according to Article 210 no tax may be imposed, waived or varied except as provided by legislation. The National Assembly is therefore acting within its mandate when it enacts legislation which varies or imposes taxes.

67. However, the Petitioner in the affidavit of Habil Olaka avers that between 1st July, 2018 and 28th September, 2018 banks were charging excise duty at 10%, and therefore it would be extremely difficult to identify the transactions which occurred in that period so as to claim the additional excise duty from their customers who may have closed their accounts or may not have sufficient funds in their accounts to cover the increased excise duty.

68. In the case of **Du Toit v Minister of Safety and Security and Another (467/07) [2008] ZASCA 125,** the Supreme Court of Appeal of South Africa in tackling the question of the retrospective application of statute stated that:

> **"[10] There is a presumption that a statute was intended to operate prospectively and not retrospectively. In Bellairs v Hodnett and another 1978 (1) SA 1109 (A) at 1148F-G the court formulated the rule as follows:**
>
> **'There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation...'**
>
> **The same principle is recognised by the law of England. In Sunshine Porcelain Potteries Pty Ltd v Nash [1961] AC 927 at 938 Lord Reid said:**
>
> **'Generally, there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that ...'**
>
> **The presumption 'may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration'."**

69. In the above case, the Court was called upon to determine the intention of the drafters on the application of the Act, and the possible consequences of the Act applying retrospectively. Although the Court did not determine that the Act was intended to apply retrospectively, a significant examination was provided on the effects of such application. It was stated that:

> **"[16] In my view the Amnesty Act contains no indication that the legislature intended s 20(10) to operate retrospectively so as to undo consequences that came into effect before the granting of amnesty. To interpret the section to be retroactive would have far reaching financial and other effects as is illustrated by the present case where the appellant had not rendered any service to the SAPS for years and where another person had been appointed in his post. Such an interpretation would probably affect many other contracts and statutory relationships to the potential detriment of people who had not committed any wrong. It seems to me highly unlikely that the legislature intended such a result in legislation aimed at improving future relationships."**

70. The above decision raises the issue of reasonableness and fairness in the retrospective application of laws. If an Act is to apply retrospectively, the drafters must ask themselves whether the application of that law would be to the detriment of people who had not committed any wrong before it was enacted. In the case of **Republic v National Assembly of the Republic of Kenya & 2 others; Director of Public Prosecutions & 3 others (Interested Parties) Ex parte IDEMIA Identity and Security France SAS [2020] eKLR** Mativo, J tackled the issue of fairness as follows:

> **"136. The position in English Law was aptly stated by the House of Lords in *L'Office Cherifien Des Phosphates and Another v Yamachita-Shinnihon Steamship Company Ltd: The Boucraa*. In that case the main opinion was delivered by Lord Mustill who referred with approval to the following statement by Staughton LJ in *Secretary of State for Social Security and Another v Tunnicliffe* :-**
>
> ***"In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make clear if that is intended."***
>
> **137. Lord Mustill continued:-**
>
> ***"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute effects, or the extent to which the value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, in the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."***

71. Mativo, J consequently determined that:

"142. Applying the above jurisprudence to the facts of this case, it is my finding that a proper construction of the impugned decision, the provisions of Constitution and the enabling legislations leave me with no doubt that the impugned decision to the extent that it invokes provisions of the law which were not in force as at the time the contracts in question were signed is illegal. It offends the principle that prohibits retrospective application of the law. It offends the principle of legality. For avoidance of doubt, the contracts in question were executed prior to the provisions of the Companies Act and the PPAD Act which were invoked in making the challenged recommendations. In the so doing, the National Assembly and PAC fell into an error of the law."

72. The difficulty that the Petitioner's members are faced with in trying to comply with the impugned law is that the transactions which are to be taxed had been completed by the time the law was passed. The unfairness therefore emanates in the taxation of customers who were not aware of this increase and who may either have closed their accounts or may not have enough funds. The Petitioner's members are therefore put in a precarious position as they must find a way to raise the required funds either through pursuing their customers or by submitting their own profits. The law does not provide any guidance as to how the additional 10% is to be recovered from the banks' customers.

73. It is important to note that in this case the banks are simply acting as collection agents for the 2nd Respondent. The excise duty is deducted from the funds of their customers. The **Pienaar Brothers (Pty) Ltd** case, where the retroactive tax was to be collected directly from the taxpayers, is therefore not an appropriate authority in the circumstances of this case. In my view, the guiding principles are those established in **R (On the Application of Huitson) v Revenue & Customs Commissioners [2010] EWHC 97 (Admin)** as follows:

i) In securing the payment of taxes, a national authority must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, including the right that a person enjoys to "the peaceful enjoyment of his possessions": see, for example, National & Provincial Building Society and Others v United Kingdom (1998) 25 EHRR 127 at [80].

ii) In framing and implementing policies in the area of taxation, the State will enjoy "a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation" (National & Provincial Building Society at [80]). The domestic analogue of the margin of appreciation is the discretionary area of judgment and is especially wide in the field of social and economic policy (see, for example, R v DPP, ex p Kebilene [1999] UKHL 43 [2000] 2 AC 326, at 380E - 381D (Lord Hope). It has been said that "greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility" (International Transport Roth GmbH v SSHD) [2002] EWCA Civ 158; [2003] QB 728, at [83] per Laws LJ. In Wilson v First County Trust Ltd (No 2) Lord Nicholls stated that the readiness of a court to depart from the views of the legislature depends upon the circumstances, "one of which is the subject matter of the legislation. The more this concerns matters of broad social policy, the less ready will be a court to intervene" [2003] UKHL 40; [2004] 1 AC 816, at [70].

iii) Nonetheless the court will carefully examine all the relevant circumstances, including the history of challenged provisions, to determine whether a fair balance has been struck: see, for example, the detailed analysis by the European Court in James v United Kingdom [1986] 8 EHRR 123, at pages 143-148 of the judgment.

iv) These principles apply to tax legislation that is retrospective.

v) As regards retrospective legislation in particular:

"Retrospective legislation is not as such prohibited by [Article 1 of Protocol No 1]. The question to be answered is whether, in the applicants' specific circumstances, the retrospective application of the law imposed an unreasonable burden on them and thereby failed to strike a fair balance between the various interests involved" (MA and 34 Others v Finland (2003) 37 EHRR CD210)."

vi) The imposition of a tax is not devoid of reasonable foundation by reason only that it may have some retrospective effect: see, for example, R (on the application of Federation of Tour Operators, TUI UK Limited, Kuoni Travel Limited v Her Majesty's Treasury [2007] EWHC 2062 (Admin) at 149; affirmed [2008] EWCA Civ 752, where Stanley Burnton J (as he then was) said in that context that "the hurdle for the Claimants on A1P1 is very high" [154].

vii) Depending upon the specific circumstances of the case, it may be relevant to enquire whether the purpose of the retrospective legislation was to restore and reassert the original intention of the amended legislation (National & Provincial, where the original Parliamentary intent was clear, but the subordinate legislation, through a mere technical flaw, failed to give effect to that intention)."

74. The 2nd Respondent evidently recognises the potential unfairness of the impugned provision and suggests that should the the Court determine Section 32(b)(iv) of the Finance Act, 2018 unconstitutional, it should be declared that the unconstitutionality only applies to the period between 1st July, 2018 and 27th September, 2018. The 2nd Respondent additionally urged that the respondents should be granted reasonable time to remedy the unconstitutionality.

75. I am very much inclined to find that Section 32(b)(iv) of the Finance Act, 2018 is unfair and unreasonable as it imposes an impossible task on the Petitioner's members which has detrimental implications for the banks and their customers. I, therefore, find the impugned Section of the Finance Act, 2018 created an unfair imposition of tax and is unconstitutional in so far as it is to apply retrospectively up to 1st July, 2018 from the date of its publication on 27th September, 2018.

Other Issues

76. There was the argument by the 1st Respondent that the petition offends the doctrine of *sub judice* as the issues raised in the petition are substantially and directly in issue before this very Court in **Nairobi High Court Petition No. 327 of 2018, Okiya Okoiti Omtatah v The Hon. Attorney-General & another;** and **Nairobi High Court Petition No. 334 of 2018, Law Society of Kenya v The Hon. Attorney General & 2 others.** I only need to point out that the 1st Respondent took up this issue through an application and I addressed the point in my ruling delivered on 25th July, 2019 by dismissing the 1st Respondent's arguments.

The Determination

77. Following what I have said in this judgement, it is my finding that Section 32(b)(iv) of the Finance Act, 2018 is unconstitutional in as far as it applies to the period of 1st July, 2018 to 28th September, 2018. The Petitioner's members had already taxed the transactions that had taken place during that period at 10% as per the law in force at that time. The National Assembly failed to take into account the potential detrimental effect that the imposition of an increased tax would have on these historical transactions, and the impracticality and unreasonableness in collecting the tax when the transactions were already completed.

78. In the circumstances, I enter judgment in favour of the Petitioner as follows:

a) A declaration is hereby issued that the retroactive imposition of increased excise duty charged on fees for money transfer services and other services by banks for the period 1st July, 2018 to 28th September, 2018 is unconstitutional.

b) A declaration is hereby issued that the commencement date for Section 32(b(iv) of the Finance Act, 2018 in so far as it relates to the members of the Petitioner is 29th September, 2018.

c) Costs of the suit shall be awarded to the Petitioner.

Dated, signed and delivered virtually at Nairobi this 5th day of November, 2020.

W. Korir,

Judge of the High Court