REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 426 OF 2018

ISAAC GACHOMO.....1ST PETITIONER

JUMA HEMEDI MWANIKI.....2ND PETITIONER

LUCY W. KAHENYA.....3RD PETITIONER

JACKSON KAMAU.....4TH PETITIONER

(SUING AS THE CHAIRMAN, SECRETARY GENERAL, TREASURER AND MEMBER RESPECTIVELY OF AJIBIKA SOCIETY)

VERSUS

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

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

AND

CENTRAL BANK OF KENYA.....1ST INTERESTED PARTY

KENYA BANKERS ASSOCIATION.....2ND INTERESTED PARTY

JUDGEMENT

1.The petitioners, Isaac Gachomo, Juma Hemedi Mwaniki, Lucy Kahenya and Jackson Kamau (suing as the chairman, secretary general, treasurer and member respectively of Ajibika Society) are seeking an interpretation of the exercise of the 2nd Respondent's legislative mandate under Article 94 of the Constitution with respect to the enactment of Section 65 of the Finance Act, 2018 that amended the Banking Act by introducing Section 33C thereto. The petitioners also seek an interpretation on whether in introducing Section 33C to the Banking Act, the 2nd Respondent (the National Assembly) interfered with the mandate, responsibility and independence of the 1st Interested Party, Central Bank of Kenya (CBK).

2. A brief background of the case is that on 9th June, 2018, the 2nd Respondent published the Finance Bill, 2018 in the Kenya Gazette Supplement No. 76. Among other things, the Bill sought to amend the Banking Act, Cap. 488 to review the capping of the interest rate to ensure access to credit facilities across the economy and the Central Bank of Kenya Act, Cap. 491 to provide powers to the CBK to regulate mortgage refinance business and to bring mortgage refinance companies within the CBK's reporting framework.

3. This Bill was later published in the Kenya Gazette on 19th June, 2018 and first read in the National Assembly on 3rd July, 2018 and committed to the Departmental Committee on Finance and National Planning (the Committee). At the time of the first reading, sections 58, 60, 61, 62, 63 and 64 of the Bill were in accordance with the objects and reasons of the Bill and the Committee carried out public participation on the Bill and received memorandum from 43 stakeholders on the clauses of the Bill as drafted and published. Thereafter, the Committee prepared a report which was laid before the House and debated upon during the 3rd Reading on 23rd, 28th and 29th August, 2018. It is contended by the petitioners that new clauses were introduced to the Bill at this stage by the Committee and members of the 2nd Respondent.

4. The petitioners averred that contrary to the objects of the Bill and without following due process, the Bill was passed on 30th August, 2018

and forwarded to the President who declined to assent to it and referred it back to the 2nd Respondent making several recommendations on his refusal to assent. The 2nd Respondent thereafter voted on the President's reservations and a revised Bill was passed on 20th September, 2018 and assented to by the President on 21st September, 2018 and is now the Finance Act, 2018.

5. It is the petitioners' contention that the 2nd Respondent acted *ultra vires* its constitutional mandate to make laws under Articles 94(1) and 109(1) of the Constitution and contrary to Articles 10, 231(3) and 259(1) of the Constitution by introducing substantive amendments to the Banking Act on the floor of the House during the 3rd Reading and enacting a legislation without public participation. The petitioners therefore seek the following orders:-

> **"a) The Honourable Court be pleased to interpret the Constitution and determine whether the introduction of Clause 58A and the Amendment to the Banking Act by introducing Clause 33C during the Committee of the Whole Stage of the National Assembly on 30th August, 2018 was in contravention of Articles 10, 93(2), 94, 109(1) and 118 of the Constitution of Kenya, 2010.**
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> **b) The Honourable Court be pleased to interpret the Constitution and determine whether Section 65 of the Finance Act, 2018 and Section 33C of the Banking Act are in conflict with Article 231(1) of the Constitution of Kenya, 2010.**
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> **c) The Honourable Court be pleased to issue an interpretation and make determination on whether, by enacting Section 65 of the Finance Act, 2018 and Section 33(C) of the Banking Act, the 2nd Respondent herein has interfered with the independence, mandate and responsibility of the Central Bank of Kenya under Article 231(2) of the Constitution as having the sole prerogative, responsibility and obligation of formulating monetary policy and performing other functions conferred on it by the Central Bank of Kenya Act in regulating banks and other financial institutions on the issues of deposits and withdrawals by their customers.**
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> **d) The Honourable Court be pleased to issue a declaration that Section 65 of the Finance Act, 2018 and Section 33C of the Banking Act are null and void and of no legal effect.**
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> **e) The Honourable Court be pleased to issue a declaration that the act or deed of the National Assembly, the 2nd Respondent herein, in passing Section 65 of the Finance Act, 2018 and amending the Banking Act introducing Section 33C of the Banking Act as being done *mala fides* in breach of the principles of public participation and good governance under Article 10(2), *ultra vires* its mandate under Article 94(1) as read with Article 109, without public participation and in breach of Article 231(3) of the Constitution.**
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> **f) The costs of and relating to this petition be borne by the Respondents in any event.**
>
> **g) Such other or further orders as this Honourable Court may deem just and expedient in the circumstances in protection of the Constitution and protection against violation of fundamental rights."**

6. The Attorney General, the 1st Respondent, did not file any pleadings. On its part, the 2nd Respondent filed a replying affidavit sworn on 31st January, 2019 by Michael Sialai EBS, the Clerk of the National Assembly. He averred that pursuant to Article 118 of the Constitution as read with Standing Order 127 of the National Assembly Standing Orders, the Committee conducted extensive public participation on the Finance Bill and prepared a report thereto. The same was thereafter tabled before the House and underwent debate on 23rd, 28th, 29th and 30th August, 2018 where amendments to the Bill were proposed, one of the clauses being Clause 58A which was moved by the Chair of the Committee.

7. The 2nd Respondent considered and passed Section 65 of the Finance Act on 30th August, 2018. The Bill was subsequently forwarded to the President for his assent in accordance with Article 115 of the Constitution but he declined and referred it back to the National Assembly on 13th September, 2018. However, on 21st September, 2018, the President in exercise of powers conferred upon him by Article 115(1)(b) of the Constitution assented to the revised Finance Bill and Section 65 of the Finance Act now has the full force of law.

8. It was his disposition that the amendment was informed by the regulatory confusion in respect to deposits and withdrawals in banks and financial institutions. Further, that State organs including the CBK are subject to oversight by the National Assembly pursuant to Article 95(5)(b) of the Constitution. He further contended that to hold, that every amendment moved must undergo the process of public participation would negate and undermine the legislative process as provided under Article 94(5) of the Constitution. That contrary to the petitioners' assertions, the purpose and effect of the impugned Section is to give the regulations and circulars made by the CBK on deposits and withdrawals by customers in banks and financial institutions the full force of the law in accordance with Section 11(2) of the Statutory Instruments Act No. 23 of 2013.

9. Mr. Sialai deposed that Section 65 of the Finance Act, 2018 does not in any way interfere with the mandate, responsibility and independence of the CBK in terms of Article 231(3) of the Constitution but merely restates its mandate and powers to make regulations. In any event, the CBK being a regulatory authority is also required to submit the regulations it makes to the National Assembly in accordance with the Statutory Instruments Act, 2013.

10. In conclusion, the Clerk of the National Assembly deposed that the petition contravenes the principles of constitutionality of legislations and is a threat to the doctrine of separation of powers as it encroaches on the legislative mandate of Parliament. He urged the court to dismiss the petition.

11. The 1st Interested Party in response filed a replying affidavit sworn on 6th December, 2018 by Kennedy Kaunda Abuga, a director in the Governor's Office. He declared that the CBK is mandated under the Banking Act to license and regulate banks, financial institutions and mortgage finance companies and mortgage refinancing in Kenya. Among the powers expressly vested in the CBK by statute include the power under Section 33(4) of the Banking Act to issue guidelines to institutions especially on standards in conduct of business and the maintenance of stability, efficiency of the banking and the financial system including conditions of withdrawal and deposit of cash, the subject of Clause 58A and 65 of the Finance Act, 2018.

12. It is their contention that the conditions for deposits and withdrawals of cash was adequately regulated under the Proceeds of Crime and Anti-Money Laundering Act, 2009, the Proceeds of Crime and Anti-Money Laundering Regulations, 2013, the Prevention of Terrorism Act, 2012 as well as under international conventions and best practices. That in enacting Section 65 of the Finance Act, 2018 and directing the CBK to make regulations on conditions of withdrawals and deposits, the 2nd Respondent was oblivious of the foregoing laws and regulations and assumed that banks were the originators of the said requirements.

13. Further, that the amendments particularly Section 33C(3) of the Banking Act would create confusion, chaos and negatively affect the banking sector, Kenya's international reputation and compliance with international law and best practices. His averment is that had the 2nd Respondent put the proposed amendment to public participation or invited the CBK to appear before its Committee and address it on this issue, then they would have enacted a legally sound statutory provision that is in harmony with the Constitution and the law.

14. The deponent urged the court to allow the petition and additionally asked the court to make a determination on whether:-

> **"(a) The regulations, prudential guidelines, directions and orders issued under the Banking Act, the POCAMLA and the regulations made thereunder are statutory instruments;**
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> **(b) The regulations, prudential guidelines, directions and orders issued under the Banking Act or the POCAMLA are operational and administrative powers of the CBK thus not subject to approval by the 2nd Respondent herein;**
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> **(c) The 2nd Respondent was entitled to impliedly repeal the extant laws and regulations on deposits and withdrawals through the provisions of Section 33C(3) of the Banking Act; and**
>
> **(d) The 2nd Respondent can be permitted to nullify extant international conventions and treaties ratified by Kenya and forming part of the Laws of Kenya under Article 2(5) & (6) of the Constitution."**

15. The Attorney General (the 1st Respondent) and the Kenya Bankers Association (the 2nd Interested Party) did not file any replies to the petition.

16. Mr. Maina who appeared for the petitioners highlighted his written submissions dated 30th January, 2019. He submitted that by introducing Clause 58A into the Finance Bill during the 3rd Reading of the Committee of the Whole House, the 2nd Respondent breached the provisions of Article 10(2)(c) of the Constitution requiring transparency and Article 118 of the Constitution requiring public participation. It is their contention that the constitutional provisions were complied with after the first reading of the Finance Bill when the Committee carried out public participation. However, no such opportunity was accorded to members of the public or stakeholders with respect to amendments, which included the impugned Clause 58A, presented on the floor of the House during the 3rd Reading.

17. To buttress this argument, counsel relied on the case of **Republic v National Assembly, Speaker of National Assembly & 6 others Ex-parte George Wang'ang'a [2018] eKLR** which cited with approval Ngcobo J in **Doctors for Life International v Speaker of the National Assembly & others (cct12/05(2006) ZACC 11; 2006(12) BCLR 1339 (CC); 2006(6) 5A 416 (CC)** for the proposition that courts have to consider whether in enacting the law in question, parliament has given effect to the constitutional obligations. Similarly, counsel relied on the case of **Law Society of Kenya v Attorney General & another [2016] eKLR** where a panel of five judges held that by introducing totally new and substantial amendments to the Judicial Service Act, 2011 on the floor of the house, the legislature violated Articles 10 and 118 of the Constitution.

18. It was further submitted that Section 65 of the Finance Act, 2018 amending the Banking Act offends the provisions of Article 231(3) of the Constitution by attempting to control the CBK in the exercise of its powers to the extent that any regulations passed by it in the exercise of its constitutional mandate can be voided by a statute and will be subjected to scrutiny by Parliament. Secondly, in enacting those legislations, the 2nd Respondent took into consideration improper matters and facts. Further, counsel submitted that the Bill was presented as the Finance Bill but was in the nature of an omnibus Bill in that it sought to amend numerous acts and relied on the case of **Okiya Omtatah Okoiti v Communications Authority of Kenya & 21 others [2017] eKLR** for the proposition that omnibus amendments ought to be confined only to minor non-controversial and generally housekeeping amendments. Counsel therefore urged the court to allow the petition.

19. Mr. Bitta who appeared together with Ms. Ndirangu for the Attorney General highlighted his written submissions dated 27th February, 2019. Relying on the case of **Commission for the Implementation of the Constitution v Speaker of the National Assembly [2016] eKLR,** counsel submitted that nothing alleged to be in conflict with the Constitution is immune from the court's scrutiny. Similarly, he adopted the decision in the South African case of **De Lille v Speaker National Assembly (1998) 3 SA 430** for the proposition that courts may determine whether the internal procedures adopted by the National Assembly are consistent with the provisions of the Constitution.

20. On the doctrine of separation of powers, counsel submitted that even though the doctrine is still recognized under our Constitution, a rigid and formalistic approach to it in present day Kenya is however no longer tenable in light of the new constitutional dispensation. To buttress this argument, he relied on the case of **Mwangi Wa Iria & 2 others v Speaker Muranga County & 3 others [2015] eKLR** where the Court held that judicial interference is not inappropriate and to insist otherwise would be to misunderstand what took place and what was

intended when our country adopted the current Constitution in 2010. Also relying on the case of **Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & others (CCT27/95) [1995] ZACC 8**, counsel submitted that good faith and well-meaning intentions are meaningless if the object and design are constitutionally objectionable.

21. On the nature and supremacy of our Constitution 2010, counsel relied on the words of Odunga, J in the case of **Republic v National Assembly & 6 others Ex-parte George Wang'ang'a [2018] eKLR** which extensively elaborated on our transformative Constitution which ingrains the national values and principles of governance as espoused in the Preamble and Article 10 and embodies an objective, normative value system. On public participation, he relied on the already cited case of **Ex-parte George Wang'ang'a,** for the proposition that enactment of a law is a process and if any of the stages therein are flawed that vitiates the entire process and the law that is enacted as a result is as well defective. It was therefore submitted that the enactment of Section 65 of the Finance Act, 2018 and Section 33C of the Banking Act was contrary to the Constitution and therefore null and void.

22. Mr. Mwenda who led Mr. Kuyioni appeared for the 2nd Respondent and highlighted their written submissions dated 22nd March, 2019. Counsel submitted that there were three issues for determination before this court. The first issue being, whether the National Assembly violated Article 10(2) and 118 of the Constitution in introducing Clause 58A during the Committee of the Whole House. Counsel submitted that Article 118 which is further embodied in Standing Order 127 required the Committee to conduct extensive public participation on the Finance Bill, 2018 which they contend, the petitioners acknowledged at paragraph 25 of the petition.

23. Counsel submitted that thereafter the Committee prepared a report which was laid before the House and underwent debate on 23rd, 28th, 29th, and 30th August, 2018 where amendments to the Bill were proposed thereby introducing Clause 58A that is Section 65 of the Finance Act, 2018. It is counsel's submission that to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process as was stated in the case of **Institute of Social Accountability & another v National Assembly & 4 others (2015) eKLR**. He asserted that the said principle was also enunciated by the Court of Appeal in the case of **Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board and 7 others [2018] eKLR; Civil Appeal No. 11 of 2018 (Nairobi)** (hereinafter simply referred to as the **Pevans case**) where the Court held that the National Assembly can effect amendments to a bill before passing it and those amendments do not have to agree with the views expressed by the people. Counsel therefore submitted that the impugned Section was passed in accordance with the Constitution and the National Assembly's Standing Orders.

24. It was further his submission that Article 94 of the Constitution vests legislative authority in Parliament to amend a legislative proposal as the bill goes through the various stages of enactment of legislation and hence the reason why Article 95(3) grants the National Assembly power to exercise their legislative will while Article 124 of the Constitution allows Parliament to make standing orders to provide for procedures for conducting its business. Counsel cited the case of **Pevans case** where the Court of Appeal held that the National Assembly is not precluded from effecting amendments to a bill after hearing views from the public and that Parliament is not required to adjourn its proceedings every time a member proposes an amendment to the bill so that further public participation can take place. Accordingly, he submitted that once a bill is published and read in the House, it goes through First Reading, Second Reading, Committee Stage and Third Reading and the purpose of all these stages of the reading of the bill is to allow members who represent different constituencies of the electorate to negotiate on their behalf and represent their varying interests.

25. On the second issue, whether Section 65 of the Finance Act, 2018 and Section 33C of the Banking Act are in conflict with Article 231(3) of the Constitution, counsel submitted that pursuant to Article 94(6) of the Constitution as read with Section 11 of the Statutory Instruments Act No. 23 of 2013, all regulation making authorities are required to submit copies of all statutory instruments for tabling before the National Assembly in accordance with the Statutory Instruments Act, 2013. Further that pursuant to sections 4 and 13 of the Statutory Instruments Act, 2013, the purpose of tabling draft regulations in the National Assembly is to ensure that the overall legal regime is in accord with the Constitution and that subsidiary legislation does not violate statute.

26. In view of the above, counsel submitted that the Central Bank of Kenya being a regulation making authority having been conferred with power to make regulations pursuant to Section 57 the Central Bank of Kenya Act, Cap. 491 is required to submit the regulations it makes in accordance with the Statutory Instruments Act, 2013. Further, that Article 231(2) provides that the CBK shall be responsible for formulating monetary policy, promoting price stability, issuing currency and performing functions conferred on it by an Act of Parliament. It was therefore their submission that the impugned Section does not in any way interfere with the mandate, responsibility and independence of the CBK but merely restates its mandates and powers to make regulations.

27. On the purpose and effect of the impugned Section, counsel cited the case of **Muranga Bar Operators and another v Minister of State For Provincial and Internal Security & 2 others [2011] eKLR** for the proposition that if either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional. He also cited the Canadian Supreme Court case of **R v Big M Drug Mart (1985) 1 S.C.R. 295** for the proposition that either an unconstitutional purpose or effect can invalidate legislation and the case of **Mugambi Imanyara & another v Attorney General & 5 others [2017] eKLR** for the proposition that when constitutionality of a law is challenged on grounds that it infringes the Constitution, the court will consider the direct and indirect effect of that law. Counsel therefore submitted that the purpose and effect of the impugned Section is to give the regulations and circulars made by CBK on deposits and withdrawals by customers in banks and financial institutions the full force of the law in accordance with Section 11(2) of the Statutory Instruments Act, 2013. He therefore submitted that the impugned Section is in line with Article 95(2) of the Constitution and the enactment is constitutional.

28. On the oversight role and independence of the CBK, counsel submitted that pursuant to Article 95(5)(b) of the Constitution, approval of regulations made by regulation making authorities, is one of the oversight and control mechanisms of the National Assembly over the CBK being a State organ. Accordingly, its independence is sustainable in the long term if accompanied by strong accountability and transparency in its operations.

29. On the last and final issue, whether the orders sought should be granted, counsel submitted that this court ought to take into account public interest and cited the case of **East African Cables Limited v The Public Procurement Complainants, Review & Appeals Board & another [2007] eKLR** where the Court of Appeal set out the principle of public interest. It was submitted that one of the effects of the impugned Section is to end the regulatory confusion and ensure that persons to whom the regulations apply are involved in the process of

making the regulations. In conclusion therefore, counsel submitted that the basic principle of legal policy is that the law should serve the public interest and the petition herein is a threat to the doctrine of separation of powers, an encroachment into the legislative mandate of Parliament and ought to be dismissed.

30. Mr. Ochieng Oduol and Mr. Chege appearing for the 1st Interested Party highlighted their written submissions dated 31st January, 2019. On jurisdiction, counsel submitted that Article 165(3)(d) of the Constitution vests in this court the jurisdiction to hear and determine any question regarding interpretation of the Constitution. Further, that Article 259 (1) of the Constitution directs this court on how to interpret its provisions and the laws of Kenya.

31. On the principle of the presumption of constitutionality of statute, counsel relied on the case of **Geoffery Andare v Attorney General & 2 others [2016] eKLR** where Mumbi, J cited with approval the Tanzanian Court of Appeal case of **Ndyanabo v Attorney General of Tanzania [2001] EA 497** where the Court affirmed that every Act of Parliament is presumed as constitutional and the burden of proving the contrary rests upon the person who challenges such provision. It was submitted that this burden is only discharged where the petition clearly identifies the constitutional provisions contravened as well as the offending statutory provision as was emphasized in the case of **Aids Law Project v Attorney General & 3 others [2015] eKLR.**

32. Counsel therefore urged this court to be guided by the case of **Muranga Bar Operators & another v Minister of State for Provincial Administration and Internal Security & 2 others, Nairobi High Court Petition No. 3 of 2011,** for the proposition that if either the purpose or the effect of implementation of statute infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional. Also cited is the case of **Law Society of Kenya v Attorney General & another [2016] eKLR** for the proposition that either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. They therefore submitted that they had discharged their duty to prove that the impugned provision is unconstitutional.

33. On whether the national value of public participation was adhered to in enacting Section 65 of the Finance Act, 2018, counsel relied on the case of **Robert N. Gakuru & others v Governor Kiambu County & 3 others [2014] eKLR** for the proposition that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of the fulfillment of the constitutional dictates. He also relied on the case of **Law Society of Kenya v Attorney General & another [2016] eKLR** where it was held that the right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in Article 1 of the Constitution.

34. On whether the 2nd Respondent breached the principles of good governance, acted *ultra vires* and *mala fides* in enacting Section 65 of the Finance Act, 2018, it was submitted that the court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purpose, values and principles, advances the rules of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance as was emphasized in the case of **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR.**

35. Accordingly, counsel submitted that from the deliberations of the members of the 2nd Respondent, it is apparent that Clause 58A was introduced during the 3rd Reading and the members were not aware of any law, regulations, circular or guideline regulating cash deposits and withdrawals. In fact, members of the 2nd Respondent assumed that banks were the originators of the regulations and conditions for withdrawal or depositing of cash and that such regulations were not harmonized and issued by the CBK. It was counsel's submission that the 2nd Respondent surreptitiously introduced substantive amendments to the Banking Act on the floor of the House in a Finance Bill purely intended to deal with taxes and duties only as provided in the Memorandum and Objects of the Bill and contrary to the objectives and purposes of the Bill and acted *ultra vires* its constitutional mandate.

36. On whether the impugned Section of the Finance Act, 2018 claws back on the CBK's mandate, counsel submitted that Article 231(3) decrees that the CBK shall not be under the direction or control of any person or authority and relied on the case of **In the Matter of Interim Independent Electoral Commission [2011] eKLR; Constitutional Application No. 2 of 2011** where the Court interpreted the real purpose of the **"independence clause"** with regard to commissions and independent offices established in the Constitution. Further, that Articles 94 and 231(5) of the Constitution empowers Parliament to enact law providing for the composition, powers, functions and operations of the CBK and not to take away the exclusive mandate vested in the CBK by the Constitution itself.

37. It was further submitted that the independence of the CBK as provided in Article 231(3) of the Constitution is in line with international best practices whereby the Basel Core Principles for Effective Banking Supervision (Basel Core Principles) provide the *de facto* minimum standard for sound prudential regulation and supervision of banks and banking systems. Counsel submitted that Principle 1 of the Basel Core Principles require regulators like the CBK to have powers to set and enforce minimum prudential standards for banks and bank groups. Principle 2 requires regulators like the CBK to possess operational independence, transparent processes, sound governance, budgetary processes that do not undermine the autonomy of the regulator.

38. Accordingly, by enacting Section 65 of the Finance Act, 2018 and directing the CBK to make regulations on deposits and withdrawals but subjecting the said regulations to parliamentary approval under the Statutory Instruments Act, 2013 the amendment has the effect of subjecting the prudential guidelines, circulars, regulations, directives and orders of the CBK to the 2nd Respondent's control. Therefore, the enactment and limitation of the time for promulgation of the said regulations to 30 days under Section 33C of the Banking Act is an affront to the CBK's operational independence. They relied on the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** in support of that proposition. They therefore urged the court to be guided by the decision in the case of **Commission for the Implementation of the Constitution v Speaker of the National Assembly [2016] eKLR** and grant the orders sought in the petition.

39. Having considered the pleadings, the written submissions and the oral highlights of the pleadings and submissions, I find that this petition challenges the constitutionality of Section 65 of the Finance Act, 2018 which introduced Section 33C to the Banking Act, Cap. 488 both on the procedural and textual aspect. On the procedural aspect, it is stated that the amendment was not subjected to public participation as required by the Constitution. On the textual aspect, it is submitted that the provision offends Article 231 of the Constitution as it impinges on

the independence granted to the CBK by the Constitution.

40. As has become the tradition in litigations of this nature, the 2nd Respondent submitted that the instant petition threatens its legislative role as conferred upon it by Articles 1(1), 94 and 95 of the Constitution. In my view this is a statement that no longer needs to be made in this time and age of our constitutional development. That Parliament has the solemn duty to debate and pass laws is not in doubt. When a matter like the one before me is brought to court, the only question that should exercise the brains of the parties and the court is whether the impugned statute or provision is unconstitutional and if so, in what manner.

41. Nevertheless, the 2nd Respondent having alluded to alleged lack of jurisdiction by this court, I will address the issue briefly. The constitutional underpinning of this court's jurisdiction and its limits is found in Article 165 of the Constitution. The petitioners herein are seeking an interpretation of the exercise of the 2nd Respondent's legislative mandate under Article 94 of the Constitution with respect to the enactment of Section 65 of the Finance Act, 2018 that amended the Banking Act by introducing Section 33C thereto. They also seek an interpretation on whether in introducing Section 33C to the Banking Act, the 2nd Respondent interfered with the mandate, responsibility and independence of the CBK as guaranteed by Article 231 of the Constitution.

42. This matter is one that clearly falls within the ambit of this court's jurisdiction under Article 165(3)(d)(i)&(ii) which vests specific authority in the High Court with regard to the interpretation of the Constitution by providing that the High Court has:-

> **"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;"**
>
> [Emphasis supplied]

43. The petitioners in this petition are asking two questions which squarely fall within the jurisdiction of this court namely whether a law (Section 33C of the Banking Act) is inconsistent with or in contravention of the Constitution and whether in passing the impugned law the National Assembly contravened the Constitution. The 2nd Respondent cannot therefore be heard to say that the petitioners are trying to limit its legislative powers or that this court has no jurisdiction to interrogate the issues raised.

44. It is important to remind the National Assembly that whenever the constitutionality of a statute or a provision of a statute is challenged the duty of this court is that stated by Ngcobo, J in the South African case of **Matatiele Municipality and others v President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**, as cited with approval, in **Law Society of Kenya v Attorney General & another [2016] eKLR; Nairobi Constitutional Petition No. 3 of 2016,** as follows:-

> **"When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And in so far as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court…must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme…; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid…"**

45. Nevertheless, in exercising the constitutional powers reposed in this court, I am mindful of the caution by Ndungu Njoki, SCJ in her dissenting opinion in **Speaker of the Senate & another v Attorney-General & 4 others [2014] eKLR; Advisory Opinion Reference No. 2 of 2013** that:-

> **"[248] It is true and I do agree with the majority opinion of my learned brothers and sister judges and their reference to the observations of the South African court in *Speaker of the National Assembly and others v De Lille MP& Another* (297/98) [1999] ZASCA that Parliament is subject to the supremacy of the Constitution. I am in no way suggesting that the Legislature can disregard constitutional provisions. The Constitution however does not oust the doctrine of separation of powers between the three arms of government.**
>
> **[249] Just as Parliament is expected to operate within its constitutional powers as an arm of government so must the Judiciary. The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of government is infallible and all are**

equally vulnerable to the dangers of acting *ultra vires* the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of government must be therefore clearly delineated, limits acknowledged and restraint fully exercised. It is only through practice of such cautionary measures that the remotest possibility of judicial tyranny can be avoided."

46. The summary of it all is that this court is clothed with constitutional power to determine whether any law passed by Parliament conforms to the constitutional parameters. The court is also empowered to interrogate whether any acts performed by the legislature in the execution of its constitutional duties meets the constitutional threshold. In other words, the court is empowered to check both the actions (exercise of power) and the outcomes (output of the exercise of power). Whereas the two houses of Parliament have the freedom to discuss anything under the sun, subject to their Standing Orders, whatever they do must pass muster of the constitutional provisions. It is also important to state that once this court has been called upon to pronounce itself on the constitutionality of a statute or a section thereof, it has the mandate and duty to rise to the challenge. Such an invitation is within the four corners of the Constitution and the court cannot shy away from the call of duty. As such, I find that the petitioners' case is properly before this court and the court has the authority to consider the issues raised by the petitioners.

47. The key question in this case is the constitutionality or otherwise of Section 33C of the Banking Act, 2018. Two issues arise: the first issue is the constitutionality of the process, and the second issue is the constitutionality of the enactment itself. I will start with the constitutionality of the enactment.

48. The legal landscape is now littered with a plethora of authorities on how a court determines whether a statute or a provision of a statute is offensive to the Constitution. I will cite a few of the authorities for the purpose of highlighting those principles. In **Geoffrey Andare v Attorney General & 2 others [2016] eKLR**, Mumbi Ngugi, J cited with approval the statement in the case of **U.S. v Butler, 297 U.S. 1 [1936].** The United States case highlights the duty of a court called upon to check the constitutionality of a statute or a provision thereof as follows:-

"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

49. The cited principle requires the court to read the questioned law alongside the constitutional provision said to be offended by the law and answer the question posed by the parties being whether or not the law is unconstitutional.

50. In **Law Society of Kenya v Attorney General & 2 others [2016] eKLR,** the panel of judges cited with approval the decision in **The Queen v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** where it was held that:-

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

51. This principle places a duty on the court to interrogate the intention of the lawmaker in enacting the legislation and the impact of that legislation hence the need to understand the purpose and effect of the impugned legislation. It is only after considering the purpose and the effect of the challenged legislation that the court can pronounce itself on the constitutionality or otherwise of the impugned legislation.

52. There are other principles that guide the courts in interpreting the constitutionality of a statute. Some of those principles were enunciated by the Supreme Court in the case of **In the Matter of the Interim Independent Electoral Commission [2011] eKLR; Constitutional Application No. 2 of 2011** when it stated as follows:-

"[86] ....The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a *human-rights* based, and *social-justice* oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from *the people.* That authority must be reflected in the decisions made by the Courts."

53. In **Advisory Opinion No. 1 of 2012, In the Matter of the Kenya National Human Rights Commission [2014] eKLR,** the Supreme Court held that the Constitution must be interpreted from a historical perspective. The Court stated thus:-

"…But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

54. Finally, it needs to go on record that the Constitution must be read as a whole. In interpreting the Constitution, the court does not simply pick one provision and read it in isolation of all the other provisions of the Constitution. The Constitution must be read as one document with each Article giving meaning to the document as a whole. This principle was summarized in the case of the **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR; Nairobi HC Constitutional & Human Rights Division Petition No. 71 of 2013** as follows:-

> **"Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No. 1 of 1997 (1997 UGCC 3)).**"

55. The principles applicable to the interpretation of the Constitution were summarised by Githinji, JA in the case of **Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others [2012] eKLR; Civil Appeal No. 74 & 82 (Nairobi)** as follows:-

> **"[21] ….Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus:-**
>
> **· that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.**
>
> **· that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.**
>
> **· that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism."**
>
> **· that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).**
>
> **These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution."**

56. The cited principles will be applied in answering the petitioners' case. The argument that the questioned amendment suffocates the independence of the CBK hence violating Article 231 of the Constitution was best brought out by the 1st Interested Party. The 1st Interested Party submitted that Article 231 which establishes the CBK tasks it at Clause 2 with formulation of monetary policy, promotion of price stability and issuance of currency. At Clause 3 it is decreed that the CBK shall not be under the direction of any person or authority. Citing the interpretation of the **"independence clause"** by the Supreme Court in **Advisory Opinion Reference No. 2 of 2014, In the Matter of the National Land Commission [2015] eKLR,** counsel submitted that the CBK should be independent in discharging its constitutional obligations to formulate and implement monetary policy. Further, that the CBK does not take directions and is not subject to control by the National Assembly hence the National Assembly should not put strictures on its operations.

57. It was also submitted that once Parliament had passed the law providing for the composition, powers, functions and operations of the CBK, it could not again take away those powers, functions and operations by enacting a statute that takes away the exclusive mandate vested upon the CBK by the Constitution itself. It is the Interested Party's position that the legislation contemplated by Article 231(5) of the Constitution can only provide additional functions and powers that conform to the constitutional provisions. Such legislation, it is submitted, cannot take away or interfere with the manner in which the core constitutional obligations of the CBK can be discharged.

58. Counsel for the 1st Interested Party emphasized that the independence of the CBK is in line with international best practices. It was urged that the Basel Core Principles provide the *de facto* minimum standards for prudential regulation and supervision of banks and banking systems. It was stated that the Basel Core Principles are used by states, International Monetary Fund (IMF) and the World Bank as a benchmark for supervision of banks and banking systems and for identifying future work to achieve a baseline level of sound supervisory practices.

59. According to the 1st Interested Party, Principle 1 of the Basel Core Principles require regulators like the CBK to have powers to set and enforce minimum prudential standards for banks and bank groups. In line with this principle, a regulator has the power to increase the prudential requirements for individuals and banking groups based on the risk profile and systemic importance. This, according to counsel, is the power vested in the CBK by Section 33(4) of the Banking Act, Cap. 488 as well as by other statutory provisions.

60. Still submitting on the place of international best practices in the local banking sector, counsel stated that Principle 2 of the Basel Core

Principles requires the regulators, in this case the CBK, to possess operational independence, transparent processes, sound governance and budgetary processes that do not undermine the autonomy of the regulator. It is the 1st Interested Party's position that the legal framework for bank supervision includes legal protection of the supervisor and ensures that there is no government or industry interference that compromises the operational independence of the supervisor. In addition, it is stated, that under this principle the supervisor has discretion to take any supervisory actions or decisions on banks under its supervision.

61. The 1st Interested Party's position is that by directing the CBK to make regulations on deposits and withdrawals to be subjected to parliamentary approval under the Statutory Instruments Act, 2013, it amounts to subjecting the prudential guidelines, circulars, regulations, directives and orders of the CBK issued under Section 33(4) and Section 33C of the Banking Act to the National Assembly's final review, say or control. This, the 1st Interested Party contends, contravenes Basel Core Principles 1 and 2 on the powers, responsibilities and independence of the CBK.

62. On behalf of the 2nd Respondent (the National Assembly) it was submitted that pursuant to Article 94(6) of the Constitution as read with Section 11 of the Statutory Instruments Act, 2013, all regulation making authorities are required to submit copies of all statutory instruments for tabling before the National Assembly in accordance with the Statutory Instruments Act, 2013, hence Section 65 of the Finance Act, 2018 and Section 33C of the Banking Act, Cap. 488 cannot be said to be in conflict with Article 231(3) of the Constitution. Further, that pursuant to sections 4 and 13 of the Statutory Instruments Act, 2013, the purpose of tabling draft regulations in the National Assembly is to ensure that the overall legal regime is in accord with the Constitution and that subsidiary legislation does not violate statute.

63. In view of the above, counsel submitted that the CBK being a regulation making authority having been conferred with power to make regulations pursuant to Section 57 the Central Bank of Kenya Act, Cap. 491 is also required to submit the regulations it makes to the National Assembly in accordance with the Statutory Instruments Act, 2013. Further, that Article 231(2) provides that the CBK shall be responsible for formulating monetary policy, promoting price stability, issuing currency and performing functions conferred on it by an Act of Parliament. It was therefore their submission that the impugned Section does not in any way interfere with the mandate, responsibility and independence of the CBK but merely restates the CBK's mandate and power to make regulations.

64. On the purpose and effect of the impugned Section, counsel cited the case of **Muranga Bar Operators and another v Minister of State For Provincial and Internal Security & 2 others [2011] eKLR** for the proposition that if either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional. He also cited the Canadian Supreme Court case of **R v Big M Drug Mart (1985) 1 S.C.R. 295** for the proposition that either an unconstitutional purpose or effect can invalidate legislation and the case of **Mugambi Imanyara & another v Attorney General & 5 others [2017] eKLR** for the proposition that when constitutionality of a law is challenged on grounds that it infringes the Constitution, the court will consider the direct and indirect effect of that law. Counsel therefore submitted that the purpose and effect of the impugned Section is to give the regulations and circulars made by the CBK on deposits and withdrawals by customers in banks and financial institutions the full force of the law in accordance with Section 11(2) of the Statutory Instruments Act, 2013. He therefore submitted that the impugned Section is in line with Article 95(2) of the Constitution and the enactment is therefore constitutional.

65. On the oversight role and independence of the CBK, counsel submitted that pursuant to Article 95(5)(b) of the Constitution approval of regulations by regulation making authorities is one of the oversight and control mechanisms of the National Assembly over the CBK which is a State organ. Accordingly, its independence is sustainable in the long term if accompanied by strong accountability and transparency in its operations.

66. It is important to cite Article 231 of the Constitution and the impugned amendment in order to determine whether the challenged amendment contravenes the Constitution by impinging on the CBK's independence. Article 231 of the Constitution states that:-

> **"231. (1) There is established the Central Bank of Kenya.**
>
> **(2) The Central Bank of Kenya shall be responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament.**
>
> **(3) The Central Bank of Kenya shall not be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions.**
>
> **(4) Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolise Kenya or an aspect of Kenya but shall not bear the portrait of any individual.**
>
> **(5) An Act of Parliament shall provide for the composition, powers, functions and operations of the Central Bank of Kenya."**

67. The impugned Section 33C of the Banking Act which was introduced by Section 65 of the Finance Act, 2018 provides that:-

> **"33C (1) The Central Bank shall prescribe, in regulations, conditions on deposits or withdrawals by customers in banks and financial institutions.**
>
> **(2) The Central Bank shall within thirty days of coming into force of this Act prescribe regulations setting out the conditions for deposits and withdrawals by customers in banks and financial institutions in accordance with the Statutory Instruments Act.**
>
> **(3) For avoidance of doubt no other person shall purport to make regulations required under this section and any existing guidelines or regulations prescribing conditions on deposits or withdrawals by customers shall cease to be operational within**

fourteen days of coming into force of the regulations made under this section."

68. It was pointed out to me that the questioned Section as worded takes away the CBK's power to make regulations on deposits and withdrawals thereby chipping at the independence granted to it by Article 231(3) of the Constitution. At the oral hearing it was submitted that the said law would make Kenya a pariah state as such a provision militates against international best practices.

69. The parties in support of the petition submitted at length on international best practices and went ahead to state that the lacuna the National Assembly was trying to fill in enacting the impugned provision had been taken care of by the Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA) and the regulations made thereunder. The petitioners did not, however, state in what manner the impugned amendment contravened the POCAMLA or the Basel Core Principles. Making legislation on a given issue when there is legislation in place does not in any way make the new laws unconstitutional. The petitioners and their supporters did not also show how the impugned amendment offends the Basel Core Principles.

70. Still on the encroachment of the independence of the CBK, I was told that the actions of the National Assembly takes away the independence of the CBK. In the case of **In the Matter of the National Land Commission [2015] eKLR; Advisory Opinion Reference No. 2 of 2014**, the Supreme Court carried out an extensive analysis of various decisions and went ahead to explain the meaning and objective of the **"independence clause"** as follows:-

> **"[184] It emerges that independence is a pivotal feature in the newly- established commissions and independent offices. This Court, in *In Re IIEC* and the *CCK* case, and the High Court in *JSC v. Speaker of the National Assembly and Others,* and in *Independent Policing Oversight Authority & Another,* have defined certain key features of the independence of commissions. From the precedent in the earlier decisions, we would set out such principles as are coming forth, in relation to the object of independence in a commission.**
>
> ***Functional independence*: this entails commissions exercising their autonomy through carrying out their functions, without receiving any instructions or orders from other State organs or bodies. This has also been referred to as *administrative independence* (See *JSC v. Speaker of the National Assembly and Others;* and the South African Constitutional Court decision in *New National Party of South Africa.)* Functional independence is in line with the general functions and powers of commissions, as provided under Articles 252 and 253 of the Constitution.**
>
> ***Operational independence:* this includes functional independence, and is a safeguard or shield for independence, manifested through the procedure of the appointments of commissioners; composition of the commission; and procedures of the commission. Article 255(1)(g)[11] provides an elaborate procedure for the amendment of the Constitution in matters dealing with the independence of the Judiciary, as well as commissions and independent offices to which Chapter 15 applies.**
>
> **Financial independence: it means that a commission has the autonomy to access funds which it reasonably requires for the conduct of its functions. However, according to Article 249(3) of the Constitution, Parliament is mandated to set for the commission the budget considered adequate for its functions.**
>
> ***Perception of independence*: this means the commissions *must be seen* to be carrying out their functions free from external interferences. In *CCK* and Independent Policing Oversight Authority & Another, this Court and the High Court respectively held that the *perception of independence* is crucial in showing proof of independence.**
>
> ***Collaboration and consultation with other State organs*: it emerges from precedent, that independence of commissions and independent offices does not, perforce, entail a splendid isolation from other State organs."**
>
> [Citations omitted]

71. Earlier, in its advisory opinion in the case of **In the Matter of Interim Independent Electoral Commission [2011] eKLR; Constitutional Application No. 2 of 2011,** the Supreme Court discussing the **"independence clause"** with regard to the commissions and independent offices established by the Constitution had stated that:-

> **"[59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".**
>
> **[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "*direction or control by any person or authority*", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the *execution of their mandate,* and**

performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences"."

72. The independence granted to the CBK by Article 231(3) of the Constitution does not mean that the National Assembly cannot legislate on anything touching on the responsibilities allocated to the CBK by Article 231(2) of the Constitution. The responsibilities given to the CBK can only be discharged within parameters of the law and the Constitution. There is therefore merit in the submission by the 2nd Respondent that the powers granted to the CBK by Section 57 of the Central Bank of Kenya Act, Cap., 491 to make regulations, issue guidelines, circulars and directives ought to be exercised in compliance with the Statutory Instruments Act, 2013. It is indeed the duty of Parliament to ensure that all statutory instruments comply with Section 13 of the Statutory Instruments Act, 2013. It is noted that the National Assembly does not make regulations for any regulatory authority but simply approves regulations already made. Independence of the regulatory body is therefore not taken away when it is asked to make regulations. The actions of regulatory bodies must be checked and it is the duty of Parliament to ensure that the **"independence clause"** is not abused by the regulators.

73. It needs to be remembered that Section 2 of the Statutory Instruments Act, 2013 gives a wide definition of a statutory instrument as follows:-

"any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."

74. The definition given to the term "statutory instrument" would, in my view, cover any directions issued by the CBK on the maximum and minimum deposits that can be made by bank customers. In the case of **Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties) [2019] eKLR,** an issue arose as to whether in legislating on interest rates, the National Assembly had intruded into the CBK's constitutional jurisdiction of making monetary policy hence violating Article 231(3) of the Constitution. The panel of three judges who heard the matter held that:-

"For that reason it is not in our place to second guess the wisdom of the National Assembly in reaching a policy decision that interest rates needed to be regulated. Whatever our views of the impact of interest rate regulation, the Court must recognize that the law was reached by the Country's democratically elected representatives and what was decided must be taken to reflect the conscience of a majority of Kenyans…

Emerging from the material before this Court is that, in respect to interest rates, the setting of Central Bank Rates (CBR) under the provisions of Section 36 of the Central Bank Act, is undoubtedly a function in formulation of monetary and therefore in the exclusive sphere of CBK. What is not apparent is whether the legal framework that regulates the manner in which banks or financial institutions charge interest for facilities granted to their customers is a function of monetary policy. In other words, the Petitioner has not clearly demonstrated that the provisions of Section 33B of the Act violate CBK's constitutional mandate of formulating monetary policy. For this reason some latitude must be given to the National Assembly that in enacting the challenged provisions, they did not act outside the Constitution."

75. I am in agreement with the judges in the said case that the courts should not question the motives of the National Assembly when it decides to legislate on certain matters. I therefore do not find merit in the submission that by asking the CBK to submit regulations on deposits and withdrawals, the National Assembly overstepped its boundaries. In light of the pleadings and submissions placed before this Court, I find that the National Assembly did not overstep its boundaries in directing the CBK to submit regulations on deposits and withdrawals for its scrutiny and approval. I therefore find and hold that the independence of the CBK as provided by Article 231 of the Constitution was not violated by the National Assembly.

76. The remaining issue is whether the process of enacting the impugned amendment failed to meet the requirements of the Constitution. The petitioners state that the National Assembly through the Chair of the Committee introduced Clause 58A to the Finance Bill during the 3rd Reading. It is their view that the amendment was faulty for having been passed without public participation. Accordingly, they contend that the 2nd Respondent acted *ultra vires* its constitutional mandate and contrary to Articles 10 and 118 of the Constitution.

77. The National Assembly concedes that Clause 58A was introduced by the Chair of the Committee at the Committee of the Whole House. There is therefore no dispute that the amendment was not subjected to public participation as specifically required by Article 118(1)(b) of the Constitution. The question is whether the failure to resubmit the amendment to the public for its views renders it unconstitutional in the circumstances of this case.

78. In urging the court to uphold the amendment, counsel for the National Assembly submitted that during the legislative process amendments to a bill can be moved during the committee stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. Reliance was placed on the decisions in **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR** and **Pevans case** in support of this proposition.

79. I did not hear the National Assembly say that public participation is not a cornerstone of the legislative process. I will therefore simply

state for avoidance of doubt that the place of public participation in the making of legislation is cemented in the Constitution and must be adhered to during the legislative process.

80. The statement by the National Assembly that amendment of bills can be effected during the committee stage, without further reference to public participation, is indeed a correct statement of law. In the **Pevans case**, the Court of Appeal held that:-

> **"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."**

81. I agree with the cited statement of the Court of Appeal but I must state that the said statement is subject to the caveat imposed in the case of **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR** as follows:-

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

82. It is therefore important to note that any amendments effected at the committee stage should be within the parameters of what was submitted to the public for their input. Otherwise allowing the legislature to pass legislation touching on new matters on the floor of the House will result in the negation of the constitutional principle that requires public participation in the enactment of laws. Any new provisions introduced at the committee stage, unless subjected to fresh public participation, will be rendered unconstitutional as was held in the case of **Law Society of Kenya v Attorney General & another [2016] eKLR** that:-

> **"245. Whereas it is true that what were introduced on the floor of the House were amendments as opposed to a fresh Bill, it is our view that for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input….**
>
> **250. Therefore by introducing totally new and substantial amendments to the *Judicial Service Act, 2011* on the floor of the House, Parliament not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution. Its action amounted to a violation of Articles 10 and 118 of the Constitution."**

83. The question then that needs to be answered is whether the amendment to the Bill at the committee stage completely altered the purpose for which the public input had been sought through public participation. There is again no dispute as to what was put to the public for consideration. The Memorandum and Objects and Reasons of the Bill stated that the Bill sought to amend various laws relating to tax and duties including the following:-

> **"The Banking Act (Cap 488)**
>
> **The Bill seeks to amend the Banking Act to review the capping of interest rate to ensure access to credit facilities across the economy especially among the lower income retail consumers and small and medium enterprises. This is aimed at minimizing the adverse impact on credit growth, financial access and monetary policy effectiveness…**
>
> **The Central Bank Act (Cap 491)**
>
> **The Bill seeks to amend the Central Bank of Kenya Act to provide powers to the Bank to regulate mortgage refinance business and to bring mortgage refinance companies within the Bank's reporting framework."**

84. It is therefore clear that the Bill placed in the public domain was meant to enhance the powers of the CBK. The impugned amendment dealt with other things altogether. The National Assembly therefore went off course and ended up taking an unconstitutional route. It is not farfetched to state that the impugned amendment came out of the blues. The facts of this case are indeed incomparable to the facts of the **Pevans case** since in that case it was only the percentage of the tax payable that had been tinkered with. In the case at hand an entirely new provision not contemplated in the Memorandum and Objects of the proposed Bill was introduced at the Committee Stage. The DNA of the

impugned amendment is, as submitted by the petitioners, therefore defective for want of compliance with the constitutional requirement for public participation.

85. In **Matatiele Municipality and others** (supra) Ngcobo, J prescribed the correct remedy when he held that:-

> **"The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected."**

86. On the issue as to whether the impugned amendment is defective for procedural lapses, I find in favour of the petitioners and hold that in passing Section 65 of the Finance Act, 2018 and Section 33C of the Banking Act, Cap. 488, the National Assembly (the 2nd Respondent) breached the principles of public participation and good governance as established in Articles 10(2) and 118(1)(b) of the Constitution.

87. In the circumstances, a declaration is issued that Section 65 of the Finance Act, 2018 and Section 33C of the Banking Act, Cap. 488 are unconstitutional and therefore null and void and of no legal effect.

88. The costs for the petition are awarded to the petitioners against the 2nd Respondent (the National Assembly). The other parties will meet their own costs for the litigation.

Dated, signed and delivered at Nairobi this 18th day of July, 2019

W. Korir,

Judge of the High Court