**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 39 OF 2017**

**IN THE MATTER OF ARTICLES 10, 27, 40 & 201 OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLE 27, 40, AND 201 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE INCOME TAX ACT**

**IN THE MATTER OF THE FINANCE ACT 2015**

**AND**

**BETWEEN**

**THE LAW SOCIETY OF KENYA.....PETITIONER**

**VERSUS**

**THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT**

**HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT**

**JUDGEMENT**

## Introduction

Our Constitution is highly valued for its articulation. One such astute drafting is the fact that the Constitution of Kenya gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law.[1]

The Constitution of Kenya, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of Kenya have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All sovereign power belongs to the people, and it is entrusted by them to specified institutions and functionaries, namely, Parliament and the

legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the judiciary and independent tribunals[2] with the intention of working out, maintaining and operating a constitutional order.

The constitution is an effective document that is the basis of our laws. Every law enacted by Parliament must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. This court cannot deviate from its own duty of determining the constitutionality of an impugned legislation. The foundation of this power, as explained by Indian nine-judge bench[3]is the theory that the Constitution which is the fundamental law of the land, is the **'will'** of the **'people'**, while a statute is only the creation of the elected representatives of the people entrusted to perform their duties inconformity with the law; when, therefore, the **"will"** of the legislature as declared in the statute, stands in opposition to that of the people as declared in the constitution-the **"will"** of the people must prevail.

Courts have at one time or the other have felt the need to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good.

> *As Dr. Willy Mutunga, former Chief Justice of the Republic of Kenya and President of the Supreme Court once observed, the Constitution must be a frame of reference for every lawyer and every judge. Not just those who find themselves sitting in the Constitutional and Human Rights Division, or in criminal trials but those who deal with company law, land, commercial transactions, negligence, labour law etc*[4] *and to this list I must add Tax law.*

Indisputably, there exists a presumption as regard constitutionality of a statute. The Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles.[5] But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits. As Lord Russel of Killowen in *Inland Revenue Commissioner vs. Duke of Westminister* [6] stated that:-*"…..The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case"*

I also quote with approval a passage from *Partington vs. Attorney General**[7]*** where the House of Lords that:-*"As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."*

**The petitioners case**

The petitioners challenge the constitutionality of paragraph 11A of the Eighth Schedule of the Income Tax Act[8] (hereinafter referred to as "the schedule" ) on grounds that it is inconsistent with the provisions of paragraph 2 of the Schedule as read with Paragraph 6 (1) (a) of the schedule. It is also pleaded that paragraph 11A violates provisions of the constitution, namely; Articles 10 (1) (2), 40 (2) (a) and 201 (b) (i), hence the same is unconstitutional.

The category of tax payable in respect of property under the provisions of the Schedule is Capital Gains Tax (hereinafter referred to as the Tax). It is important to clarify that the petitioner is not opposed to payment of the tax, but the petitioner challenges paragraph 11A which makes the said tax payable "**upon presentation of the transfer instrument**" as opposed to upon successful transfer of the property.

The petitioner avers that real property in Kenya, in accordance with the provisions of Section 37 of the Land Registration Act,[9] is only deemed to have passed once the following conditions are met, namely; Filing the instrument (transfer forms) and Registration of the Transferee as proprietor of the land and that Paragraph 2 of the Schedule clearly provides that "the Tax" can only accrue once the transferee has been registered as the proprietor of the land and not earlier as provided in the challenged provision.

The petitioner maintains that in stark contradiction to the provisions of Paragraph 2, Paragraph **11A** imposes a requirement that "the Tax" be paid before property is transferred in that it provides that **"the Tax"** may be payable before the date of application for transfer which is evidently a period prior to transfer; or on the date of application for transfer which presupposes that the application has not been accepted and as such transfer has not occurred and that enforcement and application of any statute must be in accordance with the rule of law which militates against contradictions in statutes hence paragraph 11A is unconstitutional and that it offends the provisions of Article 40 (2) (a) of the Constitution by limiting the enjoyment of the right to property in that it restricts the right of a vendor to freely alienate his property and would prevent vendors who do not have the money to pay the Tax upfront from selling their property and also restricts a purchasers' right to freely acquire property and that it also offends Article 201 (b) (i) of the Constitution in that it creates an unfair tax burden.

The petitioner also avers that Section 3 (2) (f) of the Income Tax Act, provides that such a tax is **chargeable on gains** accruing in the circumstances set out under the Schedule while Paragraph 4 (3) of the Schedule provides that a gain or loss realized by a person on the transfer of property shall be deemed to be realized at the time of transfer.

It is the petitioners case that above provisions presuppose that "the tax" can ONLY be charged on gains that have accrued in favor of a vendor of property and which gain accrues at the time of transfer and as such imposing a requirement that "the tax" be paid on an anticipated gain which has not accrued amounts to unfairly imposing a burden of taxation upon a vendor of property in breach of Article 201 (b) (i) and that, Paragraph 4 (1) of the Schedule provides that the computation of a gain shall be based on the difference between the transfer value of the property and adjusted costs. The adjusted costs to be taken into account are set out under Paragraph 8 of the Schedule and include the cost of preserving the property as well as the cost of defending the title, which are all costs that can be incurred by the transferor even after an application for transfer has been presented. Thus, if "the tax" is charged without taking into account the adjusted costs incurred after the application for transfer is made but before transfer is effected, the vendor is likely to be saddled with a higher Tax assessment than he is rightly required to pay which would amount to an imposition of an unfair tax burden contrary to Article 201 (b) (i) of the Constitution.

**The Respondents case**

In a Replying affidavit filed on 24th February 2017, the Respondent avers that the Kenya Revenue Authority Act,[10] mandates it to enforce the provisions of the Act[11] and to enforce the provisions of the Stamp Duty Act[12] and that the Finance Act, 2014[13] reintroduced the Capital Gains Tax, a tax that had been suspended in Kenya since 1985 in order to widen the tax base and to cater for the increased financial budget of the Government and that the Capital Gains Tax is levied pursuant to the provisions of Section 3 (2) (f) of the Act which provides that income in respect of gains accruing in the circumstances prescribed in, and computed in accordance with, the Schedule shall be chargeable to tax and that it is levied on the gains accruing to companies and individuals, on the transfer of property situated in Kenya on or after 1st January 2015, at a general tax rate of five (5%) per centum.

It is also averred that in order to improve the implementation of the Tax provisions, the schedule was amended by inserting the challenged provision in Finance Act 2015[14]which provides that the due date for "the Tax" shall be on or before the date when the application for transfer of the property is made at the relevant Lands Office which was meant to determine when "the Tax" is payable to the Government by prescribing the due date when "the tax" should be remitted, hence the said provision does not contradict paragraph 2 and 6 (1) of the Schedule.

It is denied that Paragraph 11A contradicts the provisions of Paragraph 2 and 6 (1) of the Schedule because Paragraph 2 is a "**charging section"** that only answers what is taxable and provides that it is the gains "***on the transfer of property situated in Kenya"*** and that paragraph 6 is a "**definition section"** that answers what amounts to a transfer under the Act[15] for the purposes of the Tax while paragraph 11A is a "**tax point section"** that answers at what point the tax is due and payable to the Government, hence section 11 A was added to give clarity as to when "the Tax" accrues because the hitherto existing system created complexities, uncertainties and inefficiencies and that the provision complained of is in tandem with the International Accounting System which recognizes revenue when earned as opposed to when received and that it infuses harmony with similar provisions of the Act[16]especially section 3 of the act which recognizes revenue when earned and not when received, and that it creates certainty, simplicity, effectiveness and fairness and seeks to reduce the compliance cost. It was also averred that the said provision is in agreement with the cited provisions of the constitution, and that excess refund of taxes is provided for under Section 105 of the Act.

The Respondent also pleaded that public interest tilts in favour of the Respondents and that every statute is presumed to be constitutional and that article 209 of the constitution empowers the National Government to impose taxes.

In their grounds of opposition, the second Respondent stated that in determining the constitutionality of the statute, the court must be guided by the object and purposes of the impugned statute and that the petition does not disclose any violation of the petitioners Fundamental Rights and Freedoms by the second Respondent.

**Advocates submissions**

All the advocates filed lengthy written submissions which they also highlighted orally in court.

The petitioners counsel submitted that paragraph 11A contradicts the other provisions of the Act and does not meet the test of the Rule of Law prescribed under article 10 of the constitution which militates against contradiction and inconsistency in any statute and as such, any such inconsistency ought to be declared unconstitutional and cited the High court decision in *Kenya Association of Stock Brokers and Investments Banks vs AG & Another*[17] where the court upheld its jurisdiction to declare as unconstitutional a legislation that is vague and contradictory and infringing or threatening to infringe constitutional rights.

Counsel submitted that said provision was inserted in blatant disregard of numerous provisions of the Schedule and contradicts paragraph 2 which provides that the income in respect of which tax is chargeable under section 3 (2) (f) is the whole of a gain which accrues on the transfer and cited the statutory definition of "on transfer of property" under paragraph 6 of the Schedule which is defined as 'Subject to this schedule there is a transfer of property for the purposes of this schedule **(a)** where property is sold, exchanged, conveyed or otherwise disposed of in any manner whatever (including by way of gift), whether or not for consideration.'

Counsel quoted the dictionary meaning of the words transfer, alienate and convey in the Black's Law Dictionary and relied on the above cited case[18] where it was held that where transfer of a property has not taken place, then one cannot be said to have made a gain that is capable of being taxed. Conversely, if a loss is made, then there would be no expectation that any tax would be payable by the owner of the property upon its transfer. Counsel reiterated that paragraph 2 provides that "the Tax" can only be charged on transfer of property while paragraph 11A talks of the same tax being payable before transfer of property can occur.

Counsel submitted that statutory provisions cannot be read in isolation but must be read as a whole[19]and pointed out that the Respondent admits the contradictions in paragraphs 16 and 17 of the first Respondents affidavit.

Counsel reiterated that the provision complained of infringes on right to dispose property under article 40

of the constitution since it will prevent persons from disposing their properties if they cannot pay the tax affront and it also inhibits a purchasers right to buy property and that it imposes an unfair tax burden contrary to Article 201 (b) (i) of the constitution because there must be a gain before the tax can be claimed under this tax head. Counsel cited *Halsbury's Laws of England**[20]* which stipulates three prerequisites of Capital Gains tax before the tax can be claimed, namely; **(a)** *The disposal of an asset;**(b)** The accrual from that disposal of a chargeable gain; and **(c)**The accrual of that gain to a person chargeable to Capital gains tax.*

Counsel submitted that contracts for the sale of land are, by their very nature, conditional upon the transfer of title and cited the Law Society Conditions of Sale, which require, as a condition of completion, the registration of the transfer. As such, before such a condition is met, there cannot be said to be a transfer and emphasised that the centrality of disposal as a prerequisite to Capital Gains Tax was acknowledged and dealt with by the United Kingdom Court of Appeal in the case of *Underwood vs. Revenue and Customs Commissioners**[21]* where the court held that the accrual is only "deemed" to have occurred on the contract date where there is actual disposal i.e transfer of property.

Counsel cited the Supreme Court of India in *Commissioner of Income Tax v. Shoorji Vallabhdas and Co**[22]* where the concept of accrual was elucidated citing the case of *C.I.T Central-Iii vs M/S Excel Industries Ltd on 8 October, 2013* where it was stated as follows:-

> *"No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income, which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account"*

The Indian Supreme Court in the above case identified three principles for determining accrual of a tax as follows[23]namely; (a) *Whether the income accrued is real or hypothetical;(b) Corresponding duty of the other party to pass on some benefit to the transferor; and (c) Probability or improbability of realization of the benefits by the assessee from a realistic and practical point of view.*

The first Respondents counsel addressed the mischief paragraph 11A was meant to cure which are complexities, inconsistencies and inefficiencies and to widen the tax base. Counsel submitted that Section 3 of the Act is the charging section that brings to tax all income accrued in or derived in Kenya. Section 3 (2) (f) brings to charge gains accruing or derived from the sale of capital assets. He also submitted that the accrual concept as per the *International Accounting Standards (IAS1)* is favoured when assessing income and the concept recognizes revenue when **earned** and **NOT** when received. In his view, this can be discerned from a plain reading of Section 3 (2) (f), hence, the provisions of Paragraph 11A are in line with the provisions of Section 3 (2) (f) and the accrual concept adopted in taxation as well as in accounting for income and that the provisions of Section 11A are also in harmony with the provisions of Paragraph 2 and 6 (1) (a) of the Schedule.

Counsel maintained that Paragraph 2 of the Schedule is a ***Charging Provision*** that only answers what is taxable and provides that it is the gains ***on the transfer of property situated in Kenya*** and that it does not state when the taxes are to be remitted to the taxman or the Government but creates a burden on a person to remit the gains that accrue on the transfer of property situated in Kenya while Paragraph 6 of the Schedule is a further definition provision as per Paragraph 1 (1) of the Schedule, hence the definition of "***transfer***" in the Schedule can only take the meaning ascribed to it by Paragraph 6 of the Schedule and that Paragraph 6 being a definition provision does not state when taxes are due and payable to the Commissioner rather it specifies what constitutes a "***transfer***" for Capital Gains Tax purposes.

Counsel also submitted that Paragraph 11A is a tax point provision that answers at what point the tax is due and payable to the taxman or the Government and it is clear tax is payable on or before the date of

application for transfer of the property at the relevant Lands Office. In counsels view, the three provisions are distinct in nature and serve three different functions but they are all in harmony and communicate one message.

Counsel cited the case *Republic vs. Commissioner of Domestic Taxes Large Taxpayer's Office ex-parte Barclays Bank of Kenya Ltd*,[24] where the Court held *inter alia* that *if a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be*." Counsel insisted that Paragraph 11A does not violate the provisions of the constitution.[25]

Counsel for the second Respondent submitted no violation or contravention of the petitioner's fundamental rights and freedoms has been proved[26] and that there is a general presumption that every Act is constitutional and the burden of proof lies on any person who alleges otherwise[27] and further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.[28]

**Issues for determination**

The key issues for determination are:- **(a)** whether or not paragraph 11A of the schedule is vague, contradicts the other provisions of the same schedule and whether it is unconstitutional; **(b)** When does liability to pay Capital Gains Tax accrue?

**Principles governing statutory interpretation.**

The principles governing the interpretation of statutes are summarized as follows:-[29]

> *i. Under Article **259** of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution.*
>
> *ii. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.**[30]** (The court should start by assuming that the Act in question is constitutional).*
>
> *iii. In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.*
>
> *iv. The constitution should be given a purposive, liberal interpretation.*
>
> *v. 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.**[31]***
>
> *vi. The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion.**[32]***

I have in previous decisions rendered in this court argued that the disposition of issues relating to interpretation of statutes and determining constitutional questions must be formidable in terms of some statutory and constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand.[33]The

privy council[34] while interpreting the Constitution of Bermuda stated that a constitutional order is a document *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.

My discernment from the foregoing principles is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

Statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

> *a. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.*
>
> *b. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.*
>
> *c. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.*

Words spoken or written are the means of communication. Where they are possible of giving one and only one meaning there is no problem. But where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, *after* enacting statutes becomes *functus officio* so far as those statutes are concerned. It is not their function to interpret the statutes. Thus two functions are clearly demarcated. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. *Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete*.

In my view, it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? The Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning, the Court is precluded from speculating. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts

would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

Where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external aid is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question. The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others**[35]* observed that:-

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[36]To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.[37] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[38] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.

These principles are not new. There are important principles which apply to the construction of statues such as **(a)** presumption against "*absurdity"* – *meaning that a court should avoid a construction that produces an absurd result;* **(b)** the presumption against unworkable or impracticable result - *meaning that a court should find against a construction which produces "unworkable or impracticable" result*; **(c)** 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 **(d)** the presumption against artificial result – *meaning that a court should find against a construction that produces "artificial" result* and, lastly**,(e)** 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*." 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. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

The absurd result principle is extraordinarily powerful. It authorizes a judge to ignore a statute's plain words in order to avoid the outcome those words would require in a particular situation.[39] This is a radical thing; judges are not supposed to rewrite laws. Ordinarily, such actions would be condemned as a usurpation of the legislative role, an unconstitutional violation of the separation of powers. The absurd result principle apparently gives just that power and authority to a judge. This principle enjoys almost universal endorsement. The rationale behind this rule is that Parliament could not have indented an absurd result.

The term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense.[40] Based on those values, courts reject certain outcomes as unacceptable, thereby rejecting the literal interpretations of statutes

when they would result in those outcomes. Those values represented by the term absurd accordingly act as a pervasive check on statutory law, and are rooted in the rule of law.[41] The absurd result principle is both a surrogate for, and a representative of, rule of law values.

The term rule of law has been used to mean a variety of things. Two common components, however, are:

**(1)** the predictability of the law, which enables people to rely on it in ordering their affairs, and to plan their conduct with some confidence and security;[42]and **(2)** the coherence of the legal system as a whole (that is, that one standard of law will not contradict another).

The common law principle of legality has hardened into a strong clear statement rule that is applied when legislation engages common law rights and freedoms. It has transformed a loose collection of rebuttable interpretive presumptions into a quasi-constitutional common law bill of rights.[43] If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality.

If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality. The Chief Justice French, for example, has said that the principle of legality 'can be regarded as "constitutional" in character' and 'that common law freedoms are more than merely residual.'[44]

> *"[These rights and freedoms] have in dependent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal."**[45]***

Gleeson CJ explained the justification for the principle of legality in the following terms:-

> *"The [principle] is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."**[46]***

Parliament may, of course, legislate to the contrary, but must use crystal-clear statutory language in order to do so. As Lord Hoffmann famously observed in *Ex parte Simms*:

> *"[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."**[47]***

Common law rights and freedoms are those principles and values chosen by the courts as especially worthy and capable of judicial protection in our legal system. J J Doyle QC said that this process 'has reflected the views of society and judges as to what rights should be accorded to individuals in a just society, or what rights are required to ensure our integrity as individuals.[48]The important point is that the principle of legality is no longer an 'interpretive fiction'[49]about likely parliamentary intent, but a clear and prior judicial statement to the elected arms of government as to the common law rights and freedoms that will be jealously guarded from legislative encroachment.

**Determination**

Article 2(5) of the Constitution expressly imports the general rules of international law and makes them part of the law of Kenya. Article 10 of the Constitution binds State organs, State officers, public officers and all persons to national values and principles of governance whenever they apply or interpret the Constitution; enact, apply or interpret any law; or make or implement public policy decisions. One of the said values and principles is the rule of law. It is now recognized as part of the rules of international law that the principle of legality is an integral part of the rule of law and as was appreciated by **Nyamu, J** (as he then was) in ***Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others***[50] **One of the**

**ingredients of the rule of law is certainty of law.**

In ***R vs. Demers***,[51] the Canadian Supreme Court adopted the view that if the state in pursuing a legitimate objective uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.

In ***Grayned vs. City of Rockford***,[52] the United States Supreme Court identified **a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important rules. A vague law impermissibly creates dangers of arbitrary and discriminatory application.**

On his part **Lord Diplock** in ***Black-Clawson International Ltd vs. Papierwerke Waldhof-Aschaffenberg AG[53]***commented that t**he acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.**

Therefore elementary justice or the need for legal certainty demands that rules by which the citizen is to be bound should be ascertainable by him by reference to identifiable sources that are publicly accessible, clear and not vague. It is important to have clarity and certainty. It is therefore clear under the principle of legality, two principles emerge:- **(a)** no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and **(b)** no one should be punished for any act which was not clearly ascertainably punishable when the act was done.

> **The principle [of legal certainty] enables each community to regulate itself; with reference to norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible –an individual must have an indication of the legal rules applicable in a given case – and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the law[54]or consequences.**

A statute is **void for vagueness** and unenforceable if it is too vague for the average citizen to understand. There are several reasons a statute may be considered vague; in general, a statute might be called void for vagueness reasons when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed. A statute is also void for vagueness if a legislature's delegation of authority to administrators is so extensive that it would lead to arbitrary prosecutions.[55]

To summarize the contents of the doctrine void for vagueness, it establishes specific criteria that all laws, or any legislation must meet, to qualify as ***constitutional***. Such criteria includes the following:- **(a)** Law must state explicitly what it mandates, and **(b)** what is enforceable, **(c)** Definitions of potentially vague terms are to be provided.

Vague laws aren't just a threat to individual freedom. They constrict economic growth and discourage legitimate enterprise. As Justice Thurgood Marshall once wrote, vague laws "lead citizens to steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked."[56]

Vagueness is an argument typically used in criminal cases. In *Giaccio v. Pennsylvania*,[57] the Supreme Court held the doctrine of vagueness also applies in civil cases. A close look at the relevant provisions in the schedule leaves no doubt that they are open to more than one possible interpretations. Key among the possible interpretations is the question "when does transfer of property take place and when is the tax payable?' A law that is open to more than one interpretations or causes evident contradiction of what the law intends is not only contradictory, but vague. An examination of the relevant provisions reproduced below and applying the plain meaning rule clearly shows that the provisions are open to more than one possible meanings.

Section 3 (2) (f) provides that,

"*Subject to this Act, income upon which tax is chargeable under this Act is income in respect of gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule*."

Paragraph 2 of the Schedule provides in part as follows:-

*"the income in respect of which tax is chargeable under- section 3(2)(f) is the whole of a gain which accrues "**on the transfer"** …of property situated in Kenya….*

The Land Registration Act defines a transfer as follows:- **"transfer"** means passing of an estate or interest in land or lease under this Act, whether for valuable consideration or otherwise. Section 37 (2) of the Land Registration Act[58] provides that:-

*(2) A transfer shall be completed by-*

*a) filing the instrument; and (b) registration of the transferee as proprietor of the land, lease or charge*

The above definition clarifies the meaning of the words **"on the transfer"** used in paragraph 2 reproduced above and paragraph 6 (1) (a) which provides that *"Subject to this schedule there is a transfer of property for the purpose of this schedule when property is **sold, exchanged, conveyed or otherwise disposed of in any manner whatever** (including by way of gift), whether or not for consideration."*

In a clear contradiction of the above provision, Rule 11A provides that:- *11A"The due date for tax payable in respect of property transferred under this Part shall be **on or before the date of application for transfer** of the property is made at the relevant Lands Office."*

On one hand in the same statute we have provisions providing that the due date for tax is **'on transfer"** and the other hand we have a provision in the same schedule providing due date is **"on or before transfer."** To me, the above provisions clearly contradict each other.

In my view, the interpretation offered by counsel for the petitioner on when transfer takes place is the correct legal interpretation. Counsel for the petitioner cited *Halsbury's Laws of England**[59]*** which stipulates three prerequisites namely; **(a)** *The disposal of an asset;**(b)** The accrual from that disposal of a chargeable gain; and **(c)** The accrual of that gain to a person chargeable to Capital gains tax-.* These three are the requisite prerequisites for payment of Capital Gains Tax. These prerequisites in my view clearly answer the question when liability to pay Capital Gains Tax accrues.

When judicially trained minds can reach different conclusions while going through the same content as in the present case, then how is it possible for law enforcement agency and the public to decide as to what is the correct interpretation. Paragraph 11A, though it is argued was introduced to create certainty, in my view, it created a vague and confusing situation in an area that was already clear by clearly contradicting the hitherto clear provisions. Though enacted with a good intention of enforcing enforcement, it ended up causing unacceptable confusion and ambiguity, hence it is void for want of legal certanity.

It is trite law that a statute may be called void for vagueness reasons when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited or what punishment may be imposed or when tax is legally due and payable. It is well-recognized rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. In my view, the interpretation preferred if adopted may lead to absurdity which could never have been intended by the legislature.

In *Seaford Court Estates Ltd. vs. Asker,**[60]***outlining the duty of the Court to iron out the creases, it was enunciated, that whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise and even if it were, it is not

possible to provide for them in terms free from all ambiguity, the caveat being that the English language is not an instrument of mathematical precision. It was held that in an eventuality where a Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that or have been guilty of some or other ambiguity, he ought to set to work on the constructive task of finding the intention of the Parliament and that he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give "force and life" to the intention of the legislature.

If the literal construction thereof results in anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature and in the said pursuit, can within permissible limits strain the language so as to avoid such unintended mischief. In my view, the construction suggested by the first Respondent, that is, Capital Gains Tax be paid upon presentation of the transfer, not only contradicts the earlier cited provision of the schedule but creates an ambiguity in that the two provisions in the same schedule contradict each other and it cannot have been the intention of parliament to introduce such a contradiction.

Also, as correctly pointed out by counsel for the petitioner, requiring payment of the tax before registration of the transfer essentially means the tax is payable before the prerequisites enunciated in Halsbury's laws of England cited earlier. The effect is that a citizen may be called to pay tax before it is legally due, thereby creating an unfair tax burden to the citizens.The term unfair burden must be defined taking specifically into account the degree and capacity of the citizens to shoulder the tax in question, bearing in mind what may be burdensome to one person may not be so to another.

Article 201 (b) (i) of the constitution provides that the burden of taxation shall be shared fairly. The impact of a possible unfair burden must also be taken into account while construing the statute in question. Paragraph 11A requires that Capital Gains Tax be paid upon presenting the transfer as opposed to upon registration of the transfer. The effect is that the tax will be payable prior to transfer. In practice this means that a vendor must pay the tax before the conclusion of the transaction, thus, payment will be required before property is transferred or ownership is legally passed to the purchaser. It is common knowledge that where the sale agreement provides that payment shall be made upon transfer, then a vendor who is not financially able will not be able to sale his property and a willing buyer may also not be able to proceed with the transaction.To me, this infringes on both the vendors and purchasers right to property, hence, it is unconstitutional.

Article 2 of the Constitution, is emphatic that the Constitution is supreme, and any law that is inconsistent with the Constitution is void to the extent of the inconsistency. Article 259 provides the manner in which the Constitution is to be interpreted. Article 159(2) (e) of the Constitution mandates the Court, in exercising its judicial authority, to protect and promote the purpose and principles of the Constitution.

Guided by the principles in the constitution and the principles of statutory interpretation discussed earlier, and the need to construe a statute in manner that does not lead to absurdity, contradiction, unworkable or illogical result and the need to adopt an interpretation that will best serve public interest, and guided by the letter and spirit of the Constitution, I find that Paragraph 11A of the Eight Schedule of the Income Tax Act[61]does not meet the constitutional test which is rationality and proportionality and consequently I allow this petition and grant the following orders:-

> ***1. That** a declaration be and is hereby issued declaring that Paragraph 11A of the Eight Schedule of the Income Tax Act**[62]**is inconsistent with the provisions of paragraph 2 of the Eight Schedule of the Income Tax Act**[63]** as read with paragraph 6 (1) (a) of the Eighth Schedule of the Income Tax Act**[64]** and is therefore unconstitutional, null and void.*
>
> ***2. That** a declaration be and is hereby issue that Paragraph 11A of the Eighth Schedule of the Income Tax Act**[65]** violates the provisions of Article 10 (1) (2) and also Article 40 (2) (a) of the constitution of Kenya 2010 by depriving the public of their right over property and is therefore unconstitutional.*

***3. That** a declaration be and is hereby issued that Paragraph 11A of the Eighth Schedule to the Income Tax Act**[66]** violates the provisions of Articles 201 (b) (i) of the constitution of Kenya 2010 in that it unfairly imposes a tax burden on the public to the extent that it purports to impose an obligation on a tax payer to pay Capital Gains Tax **on or before** presenting the transfer instrument for registration **instead of upon registration** of the transfer instrument in favour of the transferee.*

*4. No orders as to costs.*

Orders accordingly. Right of appeal 30 days

Dated at Nairobi this **14th** day of **March,** 2017

**John M. Mativo**

**Judge**

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[1] Article 10 (1) (a)-(e)

[2] Article 1 (1), (2), & (3) of the constitution of Kenya

[3] In the case of the Supreme Court *Advocates on Record Association & Others vs Union of India* {1993} 3SCC 441

***[4]** Speech entitled 'Elements of Progressive Jurisprudence In Kenya: A Reflection'delivered by Hon. Dr. Willy Mutunga, Chief Justice and President of the Supreme Court of Kenya, Nairobi, 31st May, 2012. (Available at http://www.kenyalaw.org/Forum/?p=498).*

[5] See Charanjit Lal Chowdhury Vs. the Union of India and others AIR 1951 SC 41 : 1950 SCR 869

[6] {1936} AC 1 24

[7] {1869}:- 4 HL 100, 122

[8] Cap 470, Laws of Kenya

[9] Act No. 3 of 2012

[10] Cap 469 Laws of Kenya

[11] Cap 470 Laws of Kenya

[12] Cap 480, Laws of Kenya

[13] Act No. 16 of 2014

[14] Act No. 14 of 2015

[15] Ibid

[16] Supra

[17] {2015}eKLR

[18] Ibid

[19] Counsel cited Dileep Manibhai Patel & 3 Others vs Municipal Council of Nakuru & Another{2014}eKLR

[20] 4th Edition Vol. 5 at para. 26

[21] {2008} ECWA Civ. 1423

[22] {1962} 46 ITR 144 (SC)

[23] Ibid at paragraph 27 of its Judgment

[24]{2012}eKLR

[25] Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union vs. Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013 {2014} eKLR

[26] Anarita Karimi Njeri vs R (1976-1980) KLR 1272

[27] Counsel cited Pearlberg v Varty [1972] 1 WLR 534, as cited in Re Application by Bahadur [1986] LRC 545 (Const.),

[28] Counsel cited the Canadian Supreme Court in *R vs Big M Drug Mart Ltd* (1985) 1SCR 295 and U.S v Butler, 297 U.S. 1[1936],

[29] E. M. Githinji, JA in the case of Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others, {2012} eKLR

[30] See Ndyanabo vs A. G of Tanzania {2001} E. A. 495

[31] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[32] These words expressed in the Namibian case of State vs Acheson{1991} 20 SA 805

[33] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[34] In the case of Minister for Home Affairs and Another vs Fischer{1979} 3 ALL ER 21

[35] {1987} 1 SCC 424

[36]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes"https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf

[37] Christopher G. Wren and Jill Robinson Wren, The Legal Research Manual: A game Plan for Legal Research and Analysis(2d. ed. 1986)

[38] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning. Supra note 1

[39]Veronica M. Dougherty, Absurdity and the Limits of Literalism: Defining the absurd result Principle in Statutory Interpretation, © 1994 Veronica M. Dougherty. Assistant Director, Law and Public Policy Program, Cleveland-Marshall College of Law Cleveland State University. J.D. 1987, Harvard Law School; M.P.P. 1987, Kennedy School of Government, Harvard University; B.A. 1977, Bethany College.

[40] Ibid

[41] Ibid

[42] See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Cm. L. REv. 1175 (1989) (explaining that predictability is important factor in rule of law)

[43] Dan Meagher, The Principle of Legality as Clear Statement Rule: Significance and Problems, Associate Professor, School of Law, Deakin University.

[44] Chief Justice Robert French, 'Human Rights Protection in Australia and the United Kingdom : Contrasts and Comparisons' (Speech delivered at the Anglo-Australasian Law Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012) http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf>.

[45] Ibid, citing T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), Courts of Final Jurisdiction: The Mason Court in Australia (Federation Press, 1996) 146, 148.

[46] Electrolux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

[47] R v Secretary of State for the Home Department; Ex parte Simms [2000] 2 AC 115, 131 ('Ex parte Simms').

[48] J J Doyle, 'Common Law Rights and Democratic Rights' in P D Finn (ed) Essays on Law and Government: Volume 1 Principles and Values (Law Book, 1995) 151.

[49] Malika Holdings Pty Ltd v Stretton (2001) 204 CLR 290, 299 (McHugh J).

[50] **{2007} 2 KLR 240**

[51] **{2004} 2 SCR 489, 2004 SCC 46**

[52] **{1972} 408 US 104**

[53] **{1975} AC 591, 638**

[54] **R vs. Rimmington [2006] 1 AC 459 at 481**

[55] *"Vagueness doctrine definition". Cornell University Law School Legal Information Institute*.

[56]https://www.forbes.com/2010/03/30/vague-laws-economy-government-opinions-contributors-timothy-sandefur.html

[57] 382 U.S. 399 (1966)

[58] Act No. 3 of 2012

[59] 4th Edition Vol. 5 at para. 26

[60] {1949} 2 All ER 155

[61] Supra

[62] Ibid

[63] Ibid

[64] Ibid

[65] Ibid

[66] Ibid