



**Gikenyi B v Cabinet Secretary, Interior & National Administration & 4 others;
 Law Society of Kenya & 4 others (Interested Parties) (Petition E116 of 2024)
 [2025] KEHC 15505 (KLR) (Constitutional and Human Rights) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15505 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E116 OF 2024

LN MUGAMBI, J

OCTOBER 30, 2025

BETWEEN

DR MAGARE-GIKENYI B PETITIONER

AND

**CABINET SECRETARY, INTERIOR & NATIONAL ADMINISTRATION 1ST
 RESPONDENT**

**CABINET SECRETARY NATIONAL TREASURY & ECONOMIC
 PLANNING 2ND RESPONDENT**

SAMUEL R LUKANU 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

NATIONAL ASSEMBLY 5TH RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

OPERATION LINDA JAMII INTERESTED PARTY

KITUO CHA SHERIA INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY

TUNZA MTOTO COALITION INTERESTED PARTY



JUDGMENT

Introduction

1. The Petition dated 5th March 2024 is supported by the Petitioner's affidavit in support sworn of even date.
2. The Petition challenges the Respondents revision of charges, fees and levies for various government services pursuant to Gazette Notices No 15493, 15494, 15495 and 15496 dated 14th November 2023 of 1st March 2024. The Petitioner contends that the review and increase thereof is anchored on repealed statutory instruments hence null and void ab initio. Further, the Respondents action violates Articles 1, 3, 10, 27, 43, 53, 73, 75, 94, 132(3)(c), 153(2), 201(b)(1), 209(4) and 232 of *the Constitution*.
3. Accordingly, the Petitioner seeks the following reliefs against the Respondents:
 - a. A declaration that the purported review/increase of charges/fees/levies of various services as depicted in Gazette Notices No Vol. CXXV No. 241 15493-15496 Dated 14th November 2023 No.15239-15242 and/or letter dated on/about 29th February 2024 written by Mr.Samuel Lukanu and/or any other person and/or any document written on any other date(whether preceding or after this date) purporting to give authority increase/review aforementioned charges/fees violates constitutional provisions and relevant statutes is unconstitutional, null and void ab initio.
 - b. A declaration that any actions done/omitted by Respondents or any other person without valid statutory instrument has no force of law and hence null and void
 - c. A declaration that at all times the Respondents or any other person must conduct meaningful (as opposed to cosmetic) public participation for purposes of Article 10(2) of *the Constitution* as held in many Supreme Court decisions inter alia Petition 5 of 2017 -British American Tobacco Kenya, Plc (Formerly British American Tobacco Kenya Limited) Vs And Cabinet Secretary For the Ministry Of Health & 5 others [2019] eKLR.
 - d. A declaration that the state/Respondent's actions of improperly exercising powers pursuant to Article 209(4) without due regard and conformity with Article 10(2) *the Constitution* and part 3 of the bill of rights is unconstitutional null and void.
 - e. A declaration that the 5th and 6th Respondents have failed the obligatory and constitutional duty of legislating and oversight and protecting Kenyans against excessive and illegal taxation/levying by the executive arm.
 - f. The Court is pleased to issue an order of judicial review by way of certiorari, quashing the Respondent's Gazette Notices No Vol. CXXV No. 241 15493-15496 Dated 14th November 2023 No.15239-15242 and/or letter dated on/about 29th February 2024 written by Mr.Samuel Lukanu and/or any other person and/or any document written on any other date(whether preceding or after this date) purporting to give authority increase/review aforementioned charges/fees/levies
 - g. An order of judicial review by way of prohibition, prohibiting the Respondents either by themselves, their agents and/or any other person(s) whatsoever from acting and/or giving effect to Gazette Notices No Vol. CXXV No. 241 15493-15496 Dated 14th November 2023 No.15239-15242 and/or letter dated on/about 29th February 2024 written by Mr.Samuel



Lukanu and/or any other person and/or any document written on any other date (whether preceding or after this date) purporting to give authority increase/review aforementioned charges/fees/levies unless lawful.

- h. An order of judicial review by way of mandamus, compelling the respondents/state to improperly exercise powers pursuant to Article 209(4) while considering and in conformity with Article 10(2) *the Constitution* and part 3 of the bill of rights.
- i. An order of judicial review by way of mandamus, compelling the Respondents to follow constitutional and statutory provisions when reviewing any fees/charges (if necessary).
- j. These orders do apply mutatis mutandi to any documents and/or actions touching on this issue done/made or omitted (now and during pendency of the case in court) for purposes of defeating wheels of justice before the conclusion of this matter in Court and be presumed to be part of the records of this Court.
- k. Any other order or/and modification of petitioner's prayer(s) which this Court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.
- l. Costs of this Petition to be borne by Respondents.

Petitioner's Case

4. For context, the 1st Respondent and 3rd Respondents through a letter circulating in the social media dubbed "Revised Charges Fees and Levies on Services offered by State Department for Immigration and Citizen Services (SDICS)" addressed all section heads, regional coordinators, national registry, county coordinators and sub-county registrars, directing them to implement the new charges for various government documents such as Identity Cards, passports and visas from 1st March 2024.
5. The letter stated as follows:

'You may recall that the effective date for implementation of these charges was 1st January 2024. However, the said charges were to be subjected to public participation before taking effect. The State department therefore conducted a comprehensive public participation from 14th November – 5th December 2023 which you were part of. The attached Kenya Gazette Vol. CXXV No. 241 dated 14th November 2023 shows the new fees, levies and charges that are supposed to be effected. The purpose of this circular is therefore to inform you that with effect from 1st March 2024, the revised fees, charges and levies takes effect and all our services will be charged accordingly. The Regional Coordinators are asked to ensure compliance of the same. Please acknowledge that you have read and understood contents of this circular and that you will implement accordingly. The copy of the Kenya Gazette is hereby enclosed',

Samuel Lukanu, For: Secretary – CRS'
6. The Petitioner states that the letter referenced Gazette Notices No Vol. CXXV No.241 15493-15496 Dated 14th November 2023 issued pursuant to various statutory instruments namely: the Public Finance Management (National Government) Regulations 2015, Kenya Citizen and Immigration Act, *Kenya citizens and Foreign Nationals Management Service Act* Regulations and Registrations of Persons Act and Births & Deaths Act.
7. The Petitioner asserts that prior to implementation of this directive, the 3rd Respondent insinuated that public participation had been done. He nevertheless described the same as a charade since it did not abide by the requirements of the exercise set out in British American Tobacco Kenya, Plc (Formerly



British American Tobacco Kenya Limited) Vs Cabinet Secretary For The Ministry Of Health & 5 others [2019] eKLR.

8. Furthermore, the Petitioner asserts that the manner in which the Respondents are utilizing their powers under Article 209(4) of *the Constitution* contravenes Article 10(2) of *the Constitution* and Part 3 of the Bill of Rights on children, persons with disabilities, children, youth, minorities, marginalized groups and older members of the society.
9. He claims that the statutory instruments relied upon by the Respondents in revising the charges and fees had expired having been revoked on 25th January 2024 by virtue of Section 21 of the *Statutory Instruments Act*. He avers that Legal Notice No. 11 of 2011 and L.N 31 of 2011 which created the said charges are among the revoked Statutory Instruments.
10. According to the Petitioner, the Respondent did not issue a Gazette Notice to notify the effective date of the new charges. He contended that they thus transformed the Gazette Notice of intent to charge to that of actual charging for these services through by means of that letter instead of the Gazette Notice.
11. Further, that the Respondents had increased the charges arbitrarily by over 20 times the original charge. Likewise, he states that the Respondents had also started charging for 'Not Previous Registered services'. In his view, the new charges were done without adhering to any formula or meaningful public participation.
12. The Petitioner further argues that although Regulation 60 of the Public Finance Management (National Government) Regulations 2015 and Section 205 of the *Public Finance Management Act*, 2012 grants a Cabinet Secretary power to make Regulations, the same does not grant him carte blanche to arbitrary increase or review fees without following the general constitutional provisions in this case, Article 10 (2) of *the Constitution*. Terming the increased charges illegal, the Petitioner contended that Article 201(d) of *the Constitution* mandates that public money be used in a prudent and responsible way.
13. In view of the foregoing, the Petitioner asserts that the Respondents did not adhere to the cited constitutional principles in light of the impugned fees. Equally, he contends that the fees will indirectly deny Kenyans citizenship contrary to Article 12, 13, 14 and 15 of *the Constitution*. The 5th and 6th Respondents are also accused of failing to protect the public against the rogue decisions of the Executive. Likewise, he contends that the Respondents actions are in breach of the public's legitimate expectation as they are expected to always act lawfully which they failed to do.

1st Respondent's Case

14. The 1st Respondent through the Principal Secretary, Amb. (Prof.) Julius K. Bitok filed a Replying Affidavit sworn on 4th April 2024.
15. He commences by stating that the Petition is incompetent, bad in law and an abuse of the Court process. He states that the issue of compliance with the provisions of the *Statutory Instruments Act* ought to have been raised in a different forum.
16. He depones that the impugned charges and fees are comply with Section 22 of the *Statutory Instruments Act* as they were published in Gazette Notices No. 15493, 15494, 15495 and 15496 of 2023 dated 14th November, 2023 in the Special Issue of the Kenya Gazette Vol. CXXV No. 241. For this reason, he states that there is no provision in law requiring for a superfluous Gazette Notice stating that the revised charges and fee were effective.



17. He avers that as to whether the cited Gazette Notices constitute statutory instruments made under the respective enactments, is a question that ought to be decided and certified by the 4th Respondent. He asserts that where *the Constitution* and law grants another body power to deal with disputes, the Court's jurisdiction is residuary and not primary. As such, he stresses that one must exhaust those mechanisms before invoking the Court's jurisdiction.
18. He states that Article 209(4) of *the Constitution* empowers the government to prescribe fees, levies and charges for the various services offered by the Government. He informs that the 1st Respondent set out to revise charges, fees and levies for various services in the *Public Finance Management Act* (National Government) Regulations 2015, *Kenya Citizenship And Immigration Act* (No. 12 of 2011), *Kenya Citizens And Foreign Nationals Management Service Act* (No. 31 of 2011), Regulations of *Births And Deaths Registration Act* (Cap. 149) and Regulations of *Registration of Persons Act* (Cap. 107). These were initially published in Gazette Notices No. 15239, 15240 and 15242 of 2023 dated 7th November 2023.
19. He depones that the 1st Respondent with the 2nd Respondent's authority issued communication to the public concerning the revisions vide these Gazette Notices. He notes that following this, the 1st Respondent received a number of concerns and proposals from the public. He states that despite these Notices having been issued lawfully, the 1st Respondent following these concerns revoked the Gazette Notices so as to allow for public participation. This call was made on 14th November 2023 by the 2nd Respondent and also shared in Daily newspapers.
20. Furthermore, the 1st Respondent vide Gazette Notices No.15493, 15494, 15495 and 15496 of 2023 dated 14th November 2023, notified the general public that the State Department for Immigration and Citizen Services intended to revise charges and fees on its various services issued under the *Kenya Citizenship and Immigration Act*, the *Kenya Citizens and Foreign Nationals Management Service Act*, the *Registration of Persons Act* and the *Births and Deaths Registration Act*. He points out that the Gazette Notices indicated the effective date of the revised charges and fees as being 1st January 2024.
21. He depones that through a Public Notice dated 20th November, 2023, the State Department for Immigration and Citizen Services also invited proposals and memoranda on the proposed revised charges and fees from the public to be submitted by 8th December 2023.
22. He avers that once the comments and memoranda were received the same were considered by the 1st Respondent. He however avers that the 1st Respondent was not persuaded to vary the revised charges and fees and thus the revised charges and fees came into effect on 1st January 2024. In light of this, he argues that the 1st Respondent did indeed conduct a meaningful public participation contrary to the Petitioner's allegations.
23. He depones that divergent to the Petitioner's allegation, the Statutory Instruments under which the impugned Gazette Notices were issued had not been revoked or expired by the time they were issued being 14th November 2023 or when took effect being 1st January 2024.
24. He informs that the *Statutory Instruments Act* which commenced on 25th January 2013 was to be revoked by operation of the law on 25th January 2023 however was granted an extension of 1 year vide Legal Notice No.217 of 2022. As such, the law was set to lapse on 25th January 2024. Considering this, he avers that the impugned notices were still valid when gazetted on 14th November 2023 and when they came in effect on 1st January 2024.



25. He in addition opposes that Petitioner's assertion that the 1st Respondent notified the public about the revised changes vide the Internal Memo dated 29th February 2024. Equally, he asserts that there is no discrimination of any group of persons as a result of the revised charges, fees and levies as published in the cited Gazette Notices. This is since the fees apply to all persons seeking the specific government services. He also points out that the Petitioner did not demonstrate the alleged discrimination neither assertion that Kenyans will be denied citizenship.
26. He depones as well that the revised charges are justified in that they are geared towards the need to ensure Kenya's self-reliance in financing its National budget and to wean it from unsustainable debts. What is more, these charges are utilized to cover the costs associated with the applications and other administrative services. On this premise, he urges the Court to recognize that the Petitioner wants it to usurp the 1st Respondent's mandate to prescribe these fees.

2nd, 3rd and 4th Respondents' Case

27. These Respondents in reply to the Petition filed Grounds of Opposition dated 8th April 2024 on the premise that:
- i. The Petition does not demonstrate or establish a cause of action against the 2nd, 3rd and 4th Respondents.
 - ii. The Government through the 1st Respondent is clothed with the power to prescribe the impugned fees, levies and charges under Article 209 (4) of *the Constitution* and pursuant to the *Kenya Citizenship and Immigration Act*, the *Kenya Citizens and Foreign Nationals Management Service Act*, the *Registration of Persons Act* and the *Births and Deaths Registration Act*, and the Regulations made thereunder.
 - iii. The revised charges and fees have complied with Section 22 of the *Statutory Instruments Act*, 2013 having been duly published in Gazette Notices No. 15493, 15494, 15495 and 15496 of 2023 dated 14th November, 2023 published in the Special Issue of the Kenya Gazette Vol. CXXV No. 241 pursuant to the *Kenya Citizenship and Immigration Act*, the *Kenya Citizens and Foreign Nationals Management Service Act*, the *Registration of Persons Act* and the *Births and Deaths Registration Act* and the effective date of the revised charges and fees on the said services stated to be 1st January, 2024.
 - iv. As demonstrated by the 1st Respondent in its Replying Affidavit sworn on 4th April, 2024, the conduct of public participation on the impugned fees, levies and charges met the threshold as defined by the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR.
 - v. The Statutory Instruments which anchored the fees, levies and charges prior to the impugned revision were still valid as at 14th November, 2023 when the proposed charges and fees were gazetted and 1st January, 2024 when they came into effect.
 - vi. The Petitioner has not demonstrated how the impugned fees, levies and charges infuse discrimination against a class of people as suggested in the Petition.
 - vii. The impugned fees, levies and charges are guided by and reflects the policy of the government at any one given point in time, and the applicable rate, timing and merit are matters of public



policy and do not fall within the jurisdictional remit of the High Court under Article 165 (4) of *the Constitution*.

- viii. The Petition is premised on issues dealing with the formulation of policy which, under the doctrine of separation of powers, is under the exclusive jurisdiction of the executive arm of Government. In the Petition, the Petitioner seeks to question government policy without providing a scientific basis to support the questioning.
- ix. The Petitioner has not demonstrated how the impugned fees, levies and charges amount to double taxation contrary to the principles of evidence and the doctrine of specificity as enunciated by the Court of Appeal in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

5th Respondent's Submissions

28. The 5th Respondent in response filed Grounds of Opposition dated 9th April 2024 on the basis that:
 - i. The Application fails to meet the test set out for the grant of conservatory orders by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* (2014) eKLR.
 - ii. By dint of the test in *Gatirau Munya* case, the orders sought are against public interest.
 - iii. The Applicants will not suffer any prejudice as the Petition will not be rendered nugatory if the application for conservatory orders is declined and the Court proceeds to hear the substantive Petition on its merits.
 - iv. Section 22 of the *Statutory Instruments Act*, 2013 provides for the Publication of Statutory Instruments. It further provides that any questions as to whether statutory instruments under any provisions of an enactment are statutory instruments, the Attorney General may by certificate in writing, decide the matter. The Petition herein is incompetent as the Petitioner has not exhausted the avenues provided hereinabove.
 - v. Public interest lies in upholding the presumption of constitutionality and regularity of government actions and this Court ought to decline to suspend giving effect to decisions of government flowing from a statutory power at an interlocutory stage.
 - vi. This Court ought to exercise judicial restraint and decline to grant the orders sought in the present Application as the same violates the doctrines of presumption of constitutionality of statutes, constitutional avoidance and separation of powers.
 - vii. The Court in *Law Society of Kenya vs the Hon. Attorney General & Others*; Petition No. 334 of 2018 held as follows on the role of Parliament in taxation:

“It is the policy makers and the Parliamentarians who are better placed to do the balancing act of determining whether taxes should be imposed on certain goods and services in order to fund the basic rights like food, medicine, shelter and education”.
 - viii. The Court will be overstepping its boundaries were it to direct Parliament on what goods or services to tax or not to tax. Most goods and services facilitate the enjoyment of fundamental rights and freedoms and it is upon the people's representatives to determine what is good for the electorate.
 - ix. One cannot say that *the Constitution* has been violated simply because a particular item or service has been taxed at a particular rate. Furthermore, since taxation is a policy decision solely



within the exclusive mandate of the Executive and the National Assembly, this Court lacks the necessary tools and jurisdiction to delve into policy decisions.

- x. The suit herein does not meet the test laid down by the Court of Appeal in *Anarita Karimi Njeru v Republic* [1979] eKLR as it has not been pleaded a violation of *the Constitution* with reasonable degree of precision. The Petitioners have not demonstrated with succinct precision and exactitude how the 5th Respondent has either violated the provisions of *the Constitution* or their rights and fundamental freedoms enshrined therein.
- xi. Article 94 (5) and (6) of *the Constitution* provide that-
 - (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.
 - (6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.
- xii. Therefore, a Cabinet Secretary or a body or a commission, or an authority or a board with power to make a delegated legislation, must ensure that they act within the power delegated under *the Constitution*. Further, Acts done under subsidiary legislation deemed done under Act which authorizes it being: the *Public Finance Management Act* (National Government) Regulations 2015, *Kenya Citizenship And Immigration Act* (No. 12 of 2011), *Kenya Citizens And Foreign Nationals Management Service Act* (No. 31 of 2011), Regulations of *Births And Deaths Registration Act* (Cap. 149) and Regulations of *Registration of Persons Act* (Cap. 107).
- xiii. The Acts authorizing the impugned Statutory instruments are constitutional, as such the actions taken pursuant to the parent Acts are still legal under the said Acts.
- xiv. There will be no prejudice suffered nor harm occasioned if this Court declines to grant the orders sought by the Petitioner herein.

6th Respondent and Interested Parties' Case

29. The 6th Respondent and the Interested Parties responses and submissions are not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

30. On 4th July 2024, the Petitioner filed his submissions and listed the issues for determination as: what are the settled guiding principles used by courts in interpreting and construing *the Constitution* especially when constitutional violations are alleged, whether the introduction of the charges followed constitutional and statutory procedures, whether effecting the charges using expired/revoked statutory instrument was legal and constitutional, whether the Respondents were properly exercising powers pursuant to Article 209(4) of *the Constitution* while at the same time conforming with Article 10(2) *the Constitution* and Part 3 of the Bill of Rights and whether the actions of Respondent was contrary to the legitimate expectation of Kenyans.



31. On the first issue, the Petitioner relying in *Institute of Social Accountability & Another v National Assembly & 4 Others* High Court, (2015) eKLR outlined the principles for constitutional interpretation as follows:

“This Court is enjoined under Article 259 of *the Constitution* 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 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 purpose and principles of *the Constitution*. In determining whether a statute is constitutional, 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 (see *Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others* Nairobi Petition No. 3 of 2011 [2011]eKLR, *Samuel G. Momanyi v Attorney General and Another* (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect... [59] Fourth, *the Constitution* should be given a purposive, liberal interpretation...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)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside *the Constitution*, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of *the Constitution*.”

32. Comparable reliance was placed in *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others* (Interested Parties) [2020] eKLR.
33. The Petitioner in the second issue submitted that the Respondents prior to revising the cited charges and fees failed to undertake a meaningful public participation exercise. Instead, the Petitioner the Respondents converted the impugned gazette notices of intent to charge to actually charging the cited fees and charges. He noted that this was contrary to the guidelines issued in *British American Tobacco Kenya PLC* (supra). The Petitioner underscored that the Respondents did not rebut this allegation as required under Section 109 of the *Evidence Act*.
34. Additionally, the Petitioner asserted that the Respondents’ in their actions violated various constitutional provisions being Article 1, 3, 10, 27, 43, 53, 73, 75, 94, 132(3)(c), 153(2), 201(b)(1), 209(4) and 232 of *the Constitution*. According to the Petitioner the Respondents actions of arbitrarily increasing and reviewing the fees without carrying out meaningful participation was illegal, irregular and irrational. For this reason, he argued that introduction of the charges did follow constitutional and statutory procedures.
35. Turning to the third issue, the Petitioner submitted that the new charges were introduced pursuant to statutory instruments which at the time had been revoked as at 25th January 2024 by operation of Section 21 of *Statutory Instruments Act*. On this premise, he argued that the charges and fees have no force of law and further the Respondents had no authority to purport to levy the said charges. Accordingly, these charges are argued to be illegal and unconstitutional.
36. The Petitioner further asserted in the next issue that Respondents actions did not conform to Article 10(2) of *the Constitution* and Part 3 of the Bill of Rights which provides for the vulnerable members



of the society. According to the Petitioner, introduction and review of the charges, negatively affected these people especially youths with regard to their right to procure identification and travel documents. Reliance was placed in Article 3, 4 and 5 of the African Charter on Human and Peoples' Rights which provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the charter without distinction of any kind...."It also provides for equality before the law, equal protection of the law(article 3), guarantees respect for life and the integrity of the person(article 4) and the right to the respect of the dignity inherent in a human being and prohibits all forms of degradation, torture, cruel, inhuman or degrading punishment and treatment.

37. Additional reliance was placed in *MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) [2017] KEHC 1496 (KLR)*.
38. In light of this, the Petitioner argued that although the Respondents mandate flows from Article 209(4) of *the Constitution*, the same is not a leeway to violate Article 10 of *the Constitution*.
39. On the fifth issue, the Petitioner argued that he and other Kenyans have a legitimate expectation that all state officers and state organs will follow the law and *the Constitution* when implementing policy decisions. In this matter, the Petitioner asserted that this expectation was violated as they did not expect the haphazard introduction and review of the said charges without adherence to the dictates in Article 10, 73, 75 and 232 of *the Constitution*.
40. To buttress this point reliance was placed in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others, Petition No. 14 of 2014* where the principles of legitimate expectation were set out as:
 - “(a) there must be an express, clear and unambiguous promise given by a public authority;
 - (b) the expectation itself must be reasonable;
 - (c) the representation must be one which was competent and lawful for the decision-maker to make; and
 - (d) there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.”
41. Like dependence was placed in *Oindi Zaippeline & 39 others v Karatina University & another [2015] eKLR*.

1st Respondent's Submissions

42. The 1st Respondent through Ngeri, Omiti and Bush Advocates LLP filed submissions dated 17th January 2025. The issues for determination were highlighted as: whether the instant Petition challenging the revised charges, fees and levies is proper before this Court, whether the revision of the impugned charges, fees and levies was preceded by public participation, whether the Statutory Instruments being relied on had expired and revoked on 25th January, 2024 by virtue of Section 21 of the *Statutory Instruments Act, 2023*, whether the revised charges, fees and levies for Citizen Services amount to denial of Citizenship to Kenyans and whether the revision of the charges, fees and levies was contrary to legitimate expectation of Kenyans.



43. Counsel on the first issue, submitted that Section 22 of the *Statutory Instruments Act*, 2013 provides for the publication of Statutory Instruments in the Kenya Gazette and where any question arises the same should be addressed to the 4th Respondent. Counsel stated that the 1st Respondent complied with the dictates of this Section and published the impugned Gazette Notices on 14th November 2023 and also indicated that the effective date would be on 1st January 2024. It was recapped that there is no requirement in the law for the 1st Respondent to issue a further gazette notice stating that the revised charges and fees were effective.
44. Counsel further argued that the Petitioner had failed to channel his concerns regarding the impugned Statutory Instruments to the 4th Respondent as required under Section 22 of the Act. As such, Counsel argued that the Petition was premature owing to the Petitioner's failure to comply with this provision, before approaching the Court. On this ground, Counsel submitted that this Court lacks jurisdiction to entertain this matter.
45. Reliance was placed in Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya)Ltd (1969)KLR where it was held that:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
46. Like dependence was placed in Speaker of the National Assembly vs Hon.James Njenga Karume(1992)KLR and Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others [2012]eKLR.
47. On the second issue, Counsel submitted that the Respondents in exercising their mandate under Article 209(4) of *the Constitution* are guided by Section 5(3) of the *Statutory Instruments Act*, which provides for the manner in which consultations can be undertaken to allow for public participation before any statutory instrument is made. Counsel submitted that the 1st Respondent had in its Replying Affidavit demonstrated that it gave the public an opportunity to give their comments and memoranda in line with the public participation principle. In the end, these views were considered although the 1st Respondent was not persuaded to vary the revised charges and fees as set out in the cited gazette notices.
48. Counsel relying in Cabinet Secretary for the National Treasury and Planning and 4 others v Okoit & 52 others; Bhatia (Amicus curiae) [2024]KESC 63(KLR) submitted that the Respondents are not required to take into account and implement every proposal and suggestion given during public participation.
49. On the next issue, Counsel emphasized as stated by the 1st Respondent that the gazette notices issued in respect of the revised charges were issued on 14th November 2023 and given the effective date of 1st January 2024, thus charges and fees were valid. The cited Memo is argued to have only been issued to inform and direct the relevant government officials to enforce the new charges.
50. On the fourth issue, Counsel submitted that the 1st Respondent justified the increase in the charges and fees in light of the inflated public debt. Thus the increase was aimed at widening the Country's income stream. Counsel argued that contrary to the Petitioner's assertion, collection of these charges and fees do not inherently deny one citizenship or immigration benefits but rather helps facilitate and sustain provision of these services.



51. Lastly, Counsel relying in the elements set out in Communications Commission of Kenya and 5 others (supra) stated that Article 209 of *the Constitution* gives both the National and County Governments power to raise revenue and levy taxes, rates or other charges. In light of this, Counsel submitted that legitimate expectation can only be established when there is a clear representation upon which it was reasonable for the Petitioner to rely on. Counsel noted that where there is a clear provision of the law giving the government authority to do something as in this case, there cannot be a legitimate expectation against such a legal provision.
52. Counsel additionally submitted that the Petitioner had failed to show the nexus between implementation of the impugned instruments and the alleged constitutional violations. Reliance was placed in *Base Titanium Limited v County Government of Mombasa & another* (2018)eKLR where the Court of Appeal held that:
- “ Article 209(4) of *the Constitution* empowers the County as well as the national governments power to impose charges for services they provide.”
53. Like dependence was placed in *Dullu Kora Elisha v Kenya School of Law and Director ,Kenya School of Lae* [2017]KEHC 2808 (KLR).

2nd, 3rd and 4th Respondents’ Submissions

54. Principal State Counsel, Kaumba S.O. filed submissions dated 26th November 2024 and highlighted the main issues as: the Petition does not demonstrate a cause of action against the 2nd, 3rd and 4th Respondents, the Government through the 1st Respondent is clothed with the power to prescribe the impugned fees, levies and charges, compliance with the *Statutory Instruments Act* and adherence to constitutional principle of public participation and the jurisdictional question.
55. On the first issue, Counsel submitted that the Petition does not disclose any allegation of constitutional or statutory infirmity on the part of the 2nd, 3rd and 4th Respondents. For this reason, Counsel submitted that the Petitioner had not met the threshold of mounting an action against them. Reliance was placed in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where it was held that:
- “We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”
56. Counsel took issue with the Petitioner’s reliance on the 1st Respondent’s Memo as it was confidential information. Moreover, the Petitioner is accused of failing to ascertain its veracity in line with Article 35 of *the Constitution*. Counsel noted that the Memo was meant to relay a decision reached and that the communication did not amount to taking a decision. Counsel asserted thus that the unprocedural obtaining of a document cannot form the basis for instigating a suit and thus urged that it be struck out. Reliance was placed in *Mue & another v Chairperson of Independent Electoral and Boundaries*



Commission & 3 others (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) where it was held that:

“Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.

The petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the petitioners’ case against the 1st and 2nd respondents, and to an extent, the 3rd respondent. No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information.”

57. Furthermore, Counsel argued that the Petition is premised on a misconception of the tenor and scope of the communication, without considering the whole document. Counsel noted that the communication was issued in the context of the revised charges, fees and levies on services offered by state department for immigration and citizen services. As such, Counsel submitted that the communication was never meant to create a directive beyond the contemplation of the law but rather was to aid the roll out of these revisions.
58. On the second issue, Counsel submitted that Article 209 (4) of the Constitution empowers the government to impose charges for the services they provide. In this case, as operationalized by the Kenya Citizenship and Immigration Act, the Kenya Citizens and Foreign Nationals Management Service Act, the Registration of Persons Act and the Births and Deaths Registration Act, and the Regulations made thereunder, which define the rate of such charges and fees.
59. On the third issue, Counsel submitted that the revised charges and fees complied with Section 22 of the Statutory Instruments Act, 2013 having been duly published in Gazette Notices No. 15493, 15494, 15495 and 15496 of 2023 dated 14th November, 2023 and further that public participation was conducted. In Counsel’s view this exercise complied with the guidance issued in British American Tobacco Kenya, PLC (supra).
60. Counsel on the fourth issue submitted that the rate of the impugned fees, levies and charges is beyond the scope of this Court’s jurisdiction as is a policy issue which does not fall within Article 165(4) of the Constitution. Reliance was placed in State of MP v Rakesh Kohli & another AIR 2012 SCC 2351 (11 May,2012) where it was held that:

“While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:

- i. there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature
- ii. no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found.



- iii. the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,
- iv. hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law and,
- iv. in the field of taxation, the Legislature enjoys greater latitude for classification...”

61. Like dependence was placed in Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) [2021] KEHC 9748 (KLR).

5th Respondent’s Submissions

62. Counsel for the 5th Respondent, S. Omondi filed submissions dated 24th February 2025 and underscored the key issues for discussion as: whether the Petition has met the Anarita Karimi test, whether this suit is premature and bad in law under the doctrine of ripeness, the constitutionality of imposition of taxes, whether the National Assembly has discharged its legislation and oversight roles constitutionally and whether the doctrine of legitimate expectation is available to the Petitioner.

63. Counsel submitted that the Petition had failed the test of specificity owing to the Petitioner’s failure to particularize the violations claimed as outlined in the case of Anarita Karimi Njeru v Republic (1979) eKLR. Counsel emphasized that it is not enough for a litigant to claim that a right has been infringed, they are also required to plead the violations with exactitude to enable the Court apply its mind to real issues at hand.

64. In his view, the Petitioner presented hypothetical scenarios, speculative issues and premature matters for determination. Other than citing numerous constitutional provisions claimed to be violated Counsel noted that no explanation was given as to how the provisions have been violated neither a nexus between the cited provisions and how they have been violated. In like manner, Counsel submitted that the Petitioner had not demonstrated by use of evidence his case against the 5th Respondent.

65. Reliance was placed in Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) versus Habil Olaka- Executive Director (Secretary) of the Kenya Bankers Association (Being sued on behalf of Kenya Bankers Association) & Another (2018) eKLR where it was observed that:

“I have gone through the petition and the supporting affidavit. All that they allege are in general terms breaches or failure by members of the Kenya bankers Association to comply with Section 44 of the *Banking Act* by increasing charges without the minister’s approval. The petition does not allege breach or violation specific constitutional provisions or infringement of specific rights and fundamental freedoms and the manner of such breach, violation or infringement.”

66. Comparable dependence was placed in Judicial Service Commission versus Gladys Boss Shollei & Another (2014) eKLR.

67. On public participation, Counsel submitted that no evidence was adduced to show that it was not done meaningfully other than just alleging that the exercise was not. Additionally, no evidence of a specific



error of relevancy or purpose or reasoning illogically was adduced by the Petitioner to support his claims. To buttress this point reliance was placed in *Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya* [2019] eKLR where it was held that:

“Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.

65. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference, or where the decision maker failed to apply his mind to the matter.”

68. On the second issue, Counsel submitted that this Court lacks jurisdiction to hear and determine the Petition in light of the political question doctrine, the doctrine of ripeness and the doctrine of exhaustion. Reliance was placed in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR where it was held that:

“The Supreme Court, however, cautioned against undue interference with running processes in other arms of Government. The Court thus pronounced itself:

“This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another”

69. Comparable reliance was placed in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 Others* [2016] eKLR and *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties)* [2020] eKLR.

70. Counsel submitted that Section 22 of the *Statutory Instruments Act*, 2013 provides for the publication of Statutory Instruments. Further it provides that any questions as to whether statutory instruments under any provisions of an enactment are statutory instruments, the 4th Respondent may by certificate in writing, decide the matter. Considering this, Counsel submitted that the Petition is incompetent as the Petitioner had not exhausted the avenues provided.

71. On the next issue, Counsel submitted that Article 209 of *the Constitution* mandates the national government to levy taxes of various nature with the exclusion of those which are levied by County Governments. On this premise, Counsel submitted that there is nothing unconstitutional with the government levying charges.

72. On the fourth issue, Counsel submitted that it is within the mandate of the 5th Respondent to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced.



73. Accordingly, Counsel emphasized that the 5th Respondent had not breached its legislative role in enacting the taxation laws as alleged. Additionally, Counsel submitted that the Petitioner had not adduced any evidence that the 5th Respondent had breached its role insofar as the process of scrutinizing statutory instruments is concerned.
74. Reliance was placed in *Law Society of Kenya vs the Hon. Attorney General & Others*; Petition No. 334 of 2018 where it was held that:
- “It is the policy makers and the Parliamentarians who are better placed to do the balancing act of determining whether taxes should be imposed on certain goods and services in order to fund the basic rights like food, medicine, shelter and education.
- The Court will be overstepping its boundaries were it to direct Parliament on what goods or services to tax or not to tax. Most goods and services facilitate the enjoyment of fundamental rights and freedoms and it is upon the people’s representatives to determine what is good for the electorate.”
75. Comparable reliance was placed in *George Lesaloi Selelo & another v Commissioner General, KRA & 4 Others*; *Pevans EA Limited (t/a Sportpesa) & 3 Others* [2019] eKLR.
76. Counsel further submitted that the allegation that the instruments were made from a revoked instrument, are erroneous as the impugned Gazette Notices are separate instruments and are not based on the revoked instruments as alluded to by the Petitioner. To buttress this point reliance was placed in *Republic v National Hospital Insurance Fund Board of Management & another Ex parte Law Society of Kenya* [2019] eKLR where it was held that:
- “The most basic rules of administrative law are first that decision makers may exercise only those powers which are conferred on them by law, and, second, that they may exercise those powers only after compliance with such procedural prerequisites. So long as administrators comply with these two rules, their decisions are safe.”
77. On the final issue, Counsel submitted that the doctrine of legitimate expectation is not available to the Petitioner since no promise was made by the 1st Respondent that there was not going to be any variations in the impugned charges and levies and second, the impugned Legal Notices were published and brought to the attention of the public as required by law.
78. Reliance was placed in *Royal Media Services Limited & 2 Others v Attorney General & 8 Others* [2014]eKLR where it was held that:
- “Legitimate expectation, however strong it may be, cannot prevail against express provisions of *the Constitution*. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends *the Constitution*, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.”
79. Comparable reliance was placed in *R v Gaming Board of Great Britain, ex p Kingsley* [1996] COD 178 at 241, *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR, *Keroche Industries Limited v Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006* [2007] 2 KLR 240, and *CCSU v Minister for the Civil Service* [1984] 3 All ER, 935.



Analysis and determination

80. In my humble view, the main issues that arise for determination in this matter are as follows:
- i. Whether the Respondents relied on expired statutory instruments to review the charges.
 - ii. Whether the Respondents' adhered to the principle of public participation.
 - iii. Whether the Respondents' violated the Petitioner's rights under Articles Article 1, 3, 10, 27, 43, 53, 73, 75, 94, 132(3)(c), 153(2), 201(b)(1), 209(4) and 232 of *the Constitution*.
 - iv. Whether the Petitioner is entitled to the relief sought.

Whether the Respondents relied on expired statutory instruments to review the charges

81. A major contention relied on by the Petitioner in this Petition was that the Respondents had relied on expired statutory instruments to the review the said fees, levies and/or charges. On this issue, Petitioner contended that the new charges were introduced pursuant to statutory instruments which at the time had expired as they would have expired on 25th January 2024 by operation of Section 21 of *Statutory Instruments Act*. It was thus the Petitioners position that the said charges and fees had no force of law and the Respondents could not purport to base the review of the charges on expired and thus unlawful statutory instruments.
82. In response to this issue, the 1st Respondent argued that the gazette notices relating to the revised charges were published on 14th November 2023 and given an effective date of 1st January 2024 hence those charges and fees were valid. As for the Memo that the Petitioner was using to impugn the implementation by alleging that it was done beyond the date 25/1/2024, the 1st Respondent explained that the memo was an internal communication to its officers reminding them to enforce the new charges as published in the said gazette notices.
83. A reading of the *Statutory Instruments Act* Cap 2A indicates that Section 21 was Repealed by Act No. 4 of 2023, vide S. 89. (that is, Section 89 of the Finance Act 2023). The former section stated as follows:

Automatic revocation instrument of statutory instruments

- (1) Subject to subsection (3), a statutory instrument of statutory instruments is by virtue of this section revoked on the day which is ten years after the making of the statutory instrument unless-
 - (a) it is sooner repealed or expires; or
 - (b) a regulation is made exempting it from expiry.
- (2) The responsible Cabinet Secretary may in consultation with the Committee, make a regulation under this Act extending the operation of a statutory rule that would otherwise be revoked by virtue of this section for a period as is specified in the regulation not exceeding twelve months.
- (3) Only one extension of the operation of a statutory rule can be made under subsection (2).

84. The Statutory Instruments (Exemption from Expiry) Regulations (Legal Notice 218 of 2022) under Section 2 extended this period as follows:

Extension of operation of statutory instruments



The operation of the statutory instruments made under the Acts of Parliament set out in the Schedule that have a continuing purpose is extended for a period of twelve months with effect from the 25th January, 2023.

85. The affected Statutes 400 in number, included the following which are the subject of this suit:
- a. *Registration of Persons Act* (Cap. 107) - (No.58 in the list)
 - b. *Births And Deaths Registration Act* (Cap. 149) (No.71 in the list)
 - c. *Kenya Citizenship And Immigration Act* (No. 12 of 2011) - (No.316 in the list)
 - d. *Kenya Citizens And Foreign Nationals Management Service Act* (No. 31 of 2011) - (No.331 in the list)
 - e. *Public Finance Management Act* (No. 18 of 2012) – (No.351 in the list)
86. The Finance Act, 2023 under Section 89 provided as follows:
- The *Statutory Instruments Act* 2013, is amended by repealing section 21.
87. This Finance Act, 2023 was assented to on 26th June, 2023 and date of commencement set as follows under Section 1:
- This Act may be cited as the Finance Act, 2023, and shall come into operation or be deemed to have come into operation as follows —
- (a) on the 1st of September, 2023, sections 10, 26(b)(xiii), 52, 56, 63, 64 and 74;
 - (b) on the 1st January, 2024, sections 5(c), 6, 12, 14, 20, 25, 26(a), 26(b)(iii), 26(b)(v), 26(b)(vii), 26(b)(ix), 26(b)(x), 26(b)(xii), and 27; and
 - (c) all other sections, on the 1st July, 2023.
88. In the High Petition, *Okoiti & 6 other v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties)* [2023] KEHC 25872 (KLR), the Petitioners argued that Sections 76, 77, 78, 82, 83, 84, 85, 86, 87, 88, 89 and 90 to 102 of the Finance Act which amended various legislations, watered down the fundamental character of the Finance Act as a ‘money bill’ thus questioned the constitutionality of these provisions. The 3-Judge bench of the High Court in its judgment of 28th November 2023 held as follows in regard to section 89 of the said Finance Act which purported to repeal Section 21 of the Statutory Instruments:
- “127. Section 88 and 89 repeal Section 21 of the *Statutory Instruments Act*, the consequence being that unlike before, statutory instruments shall not expire automatically ten years after commencement. The result of this amendment is that all statutory instruments that were due to expire on their 10th anniversary are saved. The rationale behind the expiry period is the necessity for reviewing statutory instruments through public engagement to bring them into conformity with changing circumstances.
128. Section 21 is an omnibus provision that affects multiple pieces of legislation (the respondent’s stated count is over one thousand) that may or may not have any connection with the Finance Act. The respondent’s answer to this



question was essentially that the host of subsidiary legislation was included in the Finance Act to save them from imminent expiry. In the absence of specificity on the subsidiary legislation affected, it is difficult to determine whether this amendment properly belongs to the Finance Act. In addition, some of the affected instruments may well have an impact upon the powers and functions of county governments and therefore require the input of the Senate. The connection between the said instruments and the Finance Act appears tenuous at best....In view of all the foregoing we are satisfied applying the pith and substance test that the Finance Bill is a money Bill within the meaning of article 114 of *the Constitution*. However, it contains certain matters other than those listed in the definition of a money Bill in article 114(3). To the extent that those matters are extraneous to a money Bill they are unconstitutional.”

89. The High Court bench then concluded:

“220. Having considered, the matters placed before us for determination, we now conclude as follows:

I. That, the Finance Act, 2023 is a money Bill within the meaning of article 114 of *the Constitution*. However, it contains some matters that do not fall within the purview or incidental to a money Bill although this does not change its basic character and substance as a money Bill. The specific extraneous matters identified by the court pertain to amendment made to the *Kenya Roads Board Act*, 1999 through sections 76 and 78 of the Finance Act, 2023; amendments to the Unclaimed Assets Act by section 87 of the Finance Act, 2023 and the repeal of section 21 of the *Statutory Instruments Act* by section 88 and 89 of the Finance Act, 2023. These amendments are extraneous to a money Bill and are therefore unconstitutional.

....

Disposition

221. Flowing from these findings and conclusions, the disposition of the consolidated petitions is as follows:

1. Sections 76 and 78 of the Finance Act, 2023 amending Section 7 of the *Kenya Roads Act*, 1999; Section 87 of the Finance Act, 2023 amending Section 28 of the Unclaimed Assets Act, 2011 and 88 and 89 of the Finance Act, 2023 which repeals Section 21 of the *Statutory Instruments Act* are all unconstitutional, null and void.”

90. This decision was appealed in the Court of Appeal. The Court of Appeal was invited on appeal to address this particular question but took a different tangent and ruled that the matter was moot for reasons that already, a Bill, the Statutory Instruments (Amendment) Bill No. 17 of 2024 had been introduced in Parliament to deal with this concern hence the matter was now moot.



91. In the ensuing judgment by the Court of Appeal delivered on 31st July, 2024 in Civil Appeal Number E003 of 2023 National Assembly & Anor v Okiya Omtatah & 55 Others (M’ Inoti, Murgor, Mativo JJ. A) reasoned thus:

“ 125. The other ground urged in support of the doctrine mootness is the question whether the issue relating to the declaration that sections 88 and 89 of the Act unconstitutional is also moot. These are the provisions which repealed section 21 of the Statutory Instruments Act, the consequence being that unlike before, statutory instruments shall not expire automatically ten years after their commencement. The result of the amendment was that all statutory instruments that were due to expire on their 10th anniversary were saved. The rationale behind the expiry period is the necessity for reviewing statutory instruments through public engagement to bring them into conformity with changing circumstances. 126. In opposition to the above argument, the appellants’ counsel faulted the trial court for failing to take a holistic view of what the amendments entailed, and made a blanket condemnation of the amendments to the Statutory Instruments Act. They argued that section 21 of the amendment included crucial regulations made pursuant to other Acts, the expiry of which would negatively impact on operations of other bodies and adversely affect revenue collection. 127. In finding section 88 and 89 of the Act to be unconstitutional, the High Court held: Page 54 of 120 “In the absence of specificity on the subsidiary legislation affected, it is difficult to determine whether this amendment properly belongs to the Finance Act. In addition, some of the affected instruments may well have an impact upon the powers and functions of county governments and therefore require the input of the Senate. The connection between the said instruments and the Finance Act appears tenuous at best.” 128. We take judicial notice of the fact that subsequent to the impugned judgment, (it is in the public domain), the Statutory Instruments (Amendment) Bill, 2024, was introduced in the National Assembly. It went through the First Reading on 14th February 2024. Notably, the principal object of the Bill is to amend the Statutory Instruments Act, Cap. 2A to provide the timelines for the making of regulations to ensure implementation of laws passed by Parliament. Its Memorandum of Objects and Reasons stipulate as follows: “Statement of objects and reasons for the Bill The principal object of this Bill is to amend the provisions of the Statutory Instruments Act, 2013 to streamline its provisions with the Constitution and ensure better application of its provisions. Clause 2 of the Bill seeks to amend section 11 of the Act, to enable the Committee on Delegated Legislation to require the regulation-making authority to submit to Parliament a copy of any regulation that ceases to have effect by operation of law. The amendment further obligates Parliament to notify the general public in two newspapers of wide circulation, that a statutory instrument which ceases to have effect by operation of law is a nullity. Page 55 of 120 Clause 3 of the Bill seeks to amend section 12 of the Act, to align the Act with the constitutional provision (on) delegated legislative authority as per Article 94 (5). Clause 4 of the Bill seeks to amend section 14 of the Act to provide that where the Committee recommends an exemption of any statutory instrument from scrutiny, then the exemption may only be done subject to approval by the House. Clause 5 of



the Bill seeks to amend section 19 of the Act, to harmonize the wording of the law, specifying the action taken by Parliament as an annulment and deleting the word revoke. Clause 6 of the Bill seeks to amend the Title of Part V of the Act, to align it with the revised provisions. Clause 7 of the Bill seeks to amend section 21 of the Act, to remove the mandatory requirement for the review of subsidiary legislation and the expiration of statutory instruments. Clause 8 of the Bill seeks to amend Section 24 of the Act, to increase the limit of fines and term of imprisonment in order for the law to act as an adequate deterrent for violation or breach of regulations. Clause 9 of the Bill seeks to amend Section 27 of the Act, to provide for savings provision, allowing the continuous operation of regulations that were in operation on or before the 24th of January, 2024. 129. As to whether the Bill concerns county governments, its Memorandum of Object and Reasons states: “Statutory Instrument are a form of delegated legislation, at the National and County Government. Statutory Instruments are crucial at both levels of Page 56 of 120 government as they give effect to a number of provisions usually contained in the Parent Act. The Bill is therefore a Bill concerning county governments as County Executives and County Assemblies are central in the processing of statutory instrument in order to actualize a number of functions and powers as contained in Part 2 of the Fourth Schedule to *the Constitution*.” 130. In compliance with Article 110 of *the Constitution*, the National Statutory Instruments (Amendment) Bill (National Assembly No. 3 of 2024) was introduced in the Senate by way of First Reading on 17th April 2024 and thereafter committed to the Standing Committee on Justice, Legal Affairs and Human Rights. A reading of the Statutory Instruments (Amendment) Bill, 2024 shows that it seeks to address all the issues raised in the impugned judgment. Therefore, there is no longer a live controversy to be determined and 89 are unconstitutional. by this Court regarding the trial court’s finding that sections 88 131. From the above findings, we are persuaded that the issues relating to the Affordable *Housing Act* (Section 84) and the *Statutory Instruments Act* (Sections 88 and 89) are now moot...”

92. The Supreme Court appears was also persuaded by the Court of Appeal position as in the subsequent appeal to the Supreme Court, in *Cabinet Secretary for the National Treasury and Planning & 4 others v Okioti & 52 others; Bhatia (Amicus Curiae)* [2024] KESC 63 (KLR), a decision delivered on 29th October 2024 the Supreme Court holding on this issue was as follows:

“243. Consequently, the order that commends itself is an order setting aside the Court of Appeal’s judgment save for the finding that the questions relating to sections 84 (Affordable Housing Levy) 88 and 89 (*Statutory Instruments Act*) of the Act were moot. Further, with regard to the impugned contents of the Act, we uphold the High Court judgment to the extent that Sections 76 and 78 of the Act amending section 7 of the *Kenya Roads Act*, 1999; section 87 of the Act amending section 28 of the Unclaimed Assets Act, 2011 are unconstitutional as they were neither incidental nor directly connected to a money Bill.”

93. Despite the findings by the Court of Appeal and the Supreme Court; reaching the finding that amendment effecting on Section 21 by Section 89 of Finance Act, 2023 was now moot in the light of



the ‘the Statutory Instruments (Amendment) Bill, 2024, that was introduced in the National Assembly and went through the First Reading on 14th February 2024’ which had a clause 7 which had proposed that:

“The Principal Act is amended by repealing Section 21”

94. The real “The Statutory Instruments (Amendment) Act, 2024, Act No. 17 of 2024; which was assented to on 11th December, 2024 and commenced on 27th December, 2024; only had only four clauses and none mentioned the repeal of Section 21 that had been indicated as clause 7 of the amendment bill, meaning it was dropped. It is no wonder therefore that the repeal of Section 21 of *Statutory Instruments Act* still references Section 89 of the Finance Act, 2023 yet the High Court had declared it unconstitutional.
95. With the two contrasting positions on the issue repeal of Section 21 of the *Statutory Instruments Act* in the light the High Court finding on Section 89 of the Finance Act, 2023 and the Court of Appeal and Supreme Court finding, it this Court’s position that there is a legal limbo over the fate of Section 21.
96. This notwithstanding however, the Petitioner’s contention that the letter or the memo in question is the one that determined the implementation date is untenable.
97. Section 23 (1) of the *Statutory Instruments Act* expressly provides that:
 - “(1) A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable.”
98. The legal position is thus clear commencement of statutory instrument is not subject to guesswork. The position on implementation could only be changed, by that would bring a subsequent gazette notice publication and not a letter or a memo.
99. The lull on the part of the Respondents to operative statutory instrument on the due date, if by design, could not invalidate a properly enacted delegated legislation by declaring them unconstitutional when the legal requirements of the instruments were actually met. It would in my view count as dereliction of duty in a manner inconsistent with *the Constitution* by the respondent contrary to the expectations of Public Service as that goes into their conduct as opposed to the substance of the statutory instrument in question.
100. Accordingly, I find the Petitioners argument that the statutory instruments commenced operations after the 25/1/2025 superfluous as the commencement date is very clearly stated in the instrument itself in line with the provisions of Section 23 (1) Of the *Statutory Instruments Act* and that remained unchanged as no other gazette notice was ever issued to revoke this date or to set to get it fresh. The laxity on the part of the Respondent to ensure actual commencement goes into their conduct and not the validity of the instrument in question.

Whether the Respondents’ adhered to the principle of public participation.

101. Besides the provisions of Article 10 (2) of *the Constitution* that require public participation, the *Statutory Instruments Act* Cap 2 has also amplified this requirement when it comes to the development of the Statutory Instruments.
102. The entire Part II of the Act, that is, Section 5 is dedicated to consultations, it provides thus:



PART

II – 5 Consultation before making statutory instruments
CONSULTATIONS

- BEFORE MAKING STATUTORY INSTRUMENTS
1. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
 - a. have a direct, or a substantial indirect effect on business; or
 - b. restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.
 2. In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
 - a. drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
 - b. ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
 3. Without limiting by implication, the form that consultation referred to in subsection (1) might take, the consultation shall—
 - (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or (b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

103. The principle of public participation is constitutionally anchored and has received judicial boost from the Supreme Court. In the British American Tobacco case *Kenya, Plc v Cabinet Secretary for the Ministry of Health & 5 others* (2019) eKLR the Supreme Court held thus:

“96... we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

“Guiding Principles for public participation

- i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.



- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:
 - i. clarity of the subject matter for the public to understand;
 - ii. structures and processes (medium of engagement) of participation that are clear and simple;
 - iii. opportunity for balanced influence from the public in general;
 - iv. commitment to the process;
 - v. inclusive and effective representation;
 - vi. integrity and transparency of the process;
 - vii. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.”

104. It follows therefore that failure to comply with public participation by State Organs whether in formulating policy or legislation would have catastrophic effect on any non-compliant policy, regulation or legislation.

105. The Petitioner alleged that the Respondents carried out shoddy, cosmetic and hollow public participation. That it was the duty of the Respondents to demonstrate that they had conducted meaningful public participation which they had failed to demonstrate.

106. The Respondents opposed the Petitioner’s contention maintaining that meaningful public participation was conducted as the public was invited to submit views and memoranda through advertisement. The designated places for submission were stipulated to be Nyayo House, or the offices of Regional, County Commissioners or Deputy County Commissioners throughout Kenya. The



Respondent also explained the reasons that had necessitated the said reviews namely, to mitigate the increase in costs of the services over the years and thus the need to ensure the service is self-sustaining among others. That the public was also duly informed when the new charges would be implemented.

107. I have carefully examined the replying affidavit of the 1st Respondent and I am satisfied that indeed invitations were actually done by the State Department of Citizen Services seeking memoranda and proposals on revised charges to be submitted by 8th December, 2025 and that sufficient disclosure was made to the public to be able to participate from an informed perspective. Further, it was evident that some of the charges proposed in the earlier gazette notices Nos. 15239 -15242 of 7th November 2023 and the instant notices 15493-15496 reduced some of the fees thereby confirming that public proposals were given some measure of consideration by the Respondents.

108. Given the extent of the views or information collected countrywide, it would not have been practical to show how each and every view was dealt with by the Respondents. As was held by the Supreme Court in *Cabinet Secretary for National Treasury and Planning & 4 others v Okoiti & 52 others* (2024) KESC 63 (KLR);

“... when Parliament receives thousands of views during public participation, it may consider clustering them into themes to address the concerns raised by the people. Therefore, there is no justification for imposing an additional burden on Parliament to respond directly to each individual involved in the public participation process.

159. We therefore hold that there is no sufficient basis to invalidate a public participation exercise on the grounds that Parliament did not provide reasons to every individual participant on how their proposals, suggestions, and input was treated...”

109. From the evidence provided, I find no merit in the Petitioner’s description of the process of the public participation that was conducted as being cosmetic, shoddy and ineffectual.

Whether the Respondents’ violated the Petitioner’s rights under Articles Article 1, 3, 10, 27, 43, 53, 73, 75, 94, 132(3)(c), 153(2), 201(b)(1), 209(4) and 232 of *the Constitution*.

110. It is the responsibility of whoever alleges an allegation of fact to prove it. This is what Section 107 of the *Evidence Act* entails. It provides thus:

107. Burden of proof

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

111. The Supreme Court in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] KESC 66 (KLR) restated the principle as follows:

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

112. Likewise, the Supreme Court in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another* [2017] KESC 42 (KLR) held as follows:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.....”

113. Correspondingly, the Court in *Matendechele v Sunstar Hotel Nairobi* [2023] KEHC 1921 (KLR) observed as follows:

“33. There is also the evidential burden of proof. This legal principle was discussed in *Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga v IEBC & 2 Others* (2018) eKLR as under: -

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.”

114. The Petitioner contended that in reviewing charges for various documents, which included identity cards, passports the Respondents actions hindered the rights of youths under Article 55, children under 53, minority Article 56, disabled under Article 54 and the elderly under Article 57 by hindering access to government services insisting that the authority granted by Article 209 (4) is not an open



- cheque by the State to exercise power arbitrarily in violation of the rights of citizens particularly those contemplated in part 3 of *the Constitution* hence the action of the Respondent is unconstitutional.
115. The Respondents denied that the fees charged are meant to disadvantage any class of people but are informed by the need to facilitate and sustain the provision these services by off-setting the costs incurred and does not in any way amount to denial of those services.
116. In my view, the authority of the State to raise revenue through taxes, levies, rates or charges is constitutionally provided for under Article 209 (4) and unless it can be demonstrated that the imposition of tax is discriminatory or arbitrary or cements disparities, the Court must defer to the relevant organs of the State in fiscal policy matters. The Respondent justified the review of the charges due to increased costs over the years and the need to ensure these services are self-sustaining given the country's low revenue streams and the huge national debt that has made external financing to support the services not a viable option.
117. While it is appreciated is that Article 21 (3) requires consideration for vulnerable groups by the State by obligating:
- “All State organs and officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of particular ethnic, religious or cultural communities”
118. *The Constitution* on the other hand, under Article 209 (4) authorizes the to impose levies, taxes charges without specifically or automatically giving exemption on the basis of the cited vulnerabilities. This therefore means uniformity in application of those charges even to vulnerable groups does not inherently translate into a violation of their constitutional rights as Article 209 (4) gives room for making policy choices. The State can choose to address the needs of the vulnerable through other separate welfare programmes that are funded from taxation revenue instead. This Court takes judicial notice of existence of such initiatives that include direct cash transfer for the elderly, the women and youth funds, bursary programmes that are all aimed at progressive alleviation of their socio-economic burden.
119. The rationale behind the revision of these charges has been legitimately and objectively justified by the Respondents as it is intended to ensure there is a self-sustaining model in place for smooth and efficient provision of these services to the public without driving the State into seeking external funding that will aggravate the already huge public debt.
120. The application of these charges on vulnerable groups is a policy choice of which the wisdom or unwisdom, this Court is reluctant to intrude unless there is a clear Constitutional transgression which the Petitioner has failed to demonstrate.
121. As held in Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013[2014]eKLR
- “.... Article 209 of *the Constitution* empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of *the Constitution*, the legislature retains wide authority to define the scope of the tax...



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

122. In the overall analysis, I find no merits in the instant Petition which is hereby dismissed in its entirety.

123. Considering that this is a public interest litigation, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF OCTOBER, 2025.

.....

L N MUGAMBI

JUDGE

