Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others (Civil Appeal 11 of 2018) [2018] KECA 332 (KLR) (4 May 2018) (Judgment)

Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others [2018] eKLR

Neutral citation: [2018] KECA 332 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 11 OF 2018

PN WAKI, K M'INOTI & AK MURGOR, JJA

MAY 4, 2018

BETWEEN

PEVANS EAST AFRICA LIMITED ..... 1ST APPELLANT

BRADLEY LIMITED T/A PAMBAZUKA NATIONAL LOTTERY .... 2ND APPELLANT

AND

CHAIRMAN, BETTING CONTROL & LICENSING BOARD .... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT ..... 2ND RESPONDENT

COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY .... 3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF FINANCE ..... 4TH RESPONDENT

THE SPEAKER, NATIONAL ASSEMMBLY ..... 5TH RESPONDENT

THE SPEAKER, SENATE ..... 6TH RESPONDENT

THE ATTORNEY GENERAL ..... 7TH RESPONDENT

THE NATIONAL SPORTS FUND ..... 8TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 28th December 2017 in HC Const. Pet. No. 353 of 2017)

JUDGMENT

1. On 21st June 2017 the National Assembly, in exercise of the powers vested in it by Article 95 of *the Constitution*, passed the Finance Act, No. 15 of 2017, which amended the Betting, Lotteries and Gaming Act (the BLG Act) by introducing new sections 29A, 44A, 55A and 59. As far as this appeal is concerned, the effect of those legislative changes was to impose tax on revenue from the betting, gaming, lotteries and prize competition industry at the rate of 35% on gross turnover. The 1st appellant, Pevans East Africa Limited, and the 2nd respondent, Bradley Limited, who are sister companies duly licensed and active players in that industry in Kenya, were not amused by the new legislation because in the run up to its enactment, they had successfully campaigned and lobbied the National Assembly against an initial proposal to impose tax at the rate of 50%. They accordingly filed two separate constitutional petitions in the High Court, namely HC Const. Petition Nos. 353 of 2017 and 505 of 2017, challenging sections 29, 30, 31 and 32 of the Finance Act and the amendments to the BLG Act on a host of grounds, among them the alleged: - failure by the National Assembly to comply with *the Constitution* and prescribed legislative process; usurpation by the President of the powers of the National Assembly; failure to involve the Senate in the enactment of legislation that concerns counties; lack of public participation; violation of their right to property; and disregard of their legitimate expectation. The appellants also challenged the rate of taxation imposed by the new legislation as excessive, unfair, unreasonable and discriminatory.

2. The respondents opposed the petitions, contending among other things, that the impugned legislation was enacted in strict compliance with *the Constitution* and the law; that it was preceded by adequate public participation; that the Senate had no role in the enactment of the particular legislation; and that the rate of taxation was a policy matter reserved for the National Assembly, which the courts should not interfere with absent clear and compelling reasons.

3. Mativo J. consolidated and heard the two petitions together. By a judgment dated 28th December 2017, the learned judge found the petitions bereft of merit and an abuse of the court process. Accordingly he dismissed them, but made no orders on costs. The appellants were aggrieved and filed a notice of appeal on 9th January 2018, and ultimately this appeal.

4. For completeness of the background to this appeal, it is necessary to advert briefly to the antecedents of the amendments introduced by the Finance Act 2017. Before the changes introduced by the Finance Act, 2017, the tax regime for the industry, as set out in sections 29A, 44A, 55A and 59B of the BLG Act was as follows:

   (i) betting tax-7.5% of the gaming revenue

   (ii) lottery tax-5% of the lottery turnover

   iii) gaming tax-12% of the gaming revenue

   iv) prize competition tax -15% of the total gross turnover

5. On 3rd April 2017 the Government published the Finance Bill, 2017 and proposed to replace the above rates with a uniform rate of 50% on the revenue and turnover generated by the four undertakings. That proposal was predicated on the Government's desire to discourage gambling, particularly among the youth. However, after public participation, which entailed among others, hearing representations from the industry stakeholders, the National Assembly passed the Finance Bill 2017 on 30th May 2017 without the new tax proposal.

6. The Bill was subsequently submitted to the President for presidential assent as required by Article 115 of *the Constitution*. After considering the Bill, on 14th June 2017, the President remitted it back to the National Assembly for reconsideration with a memorandum that the Assembly considers introducing a uniform rate of 35% tax on the four activities mentioned above. The National Assembly considered the President's memorandum, introduced the 35% tax as proposed by the President, and submitted the Bill back to him, which he duly assented to on 21st June 2017.

7. Although the appellants set forth 15 grounds of appeal to challenge the judgment of the High Court, their learned counsel, Mr. Fred Ngatia and Mr. Kiragu Kimani, compressed all those grounds into four main grounds, impugning the judgment for failing to hold: that the amendments to the BLG Act were in violation of *the Constitution* for failure to involve the Senate; that the process of enacting the said amendments was in violation of *the Constitution* and parliamentary procedure; that the imposition of tax of 35% based on gross turnover was unfair, punitive and discriminatory; and by holding that the petitions were an abuse of the process of the court.

8. Arguing the first ground, learned counsel submitted that the amendments that the Finance Acts, 2016 and 2017 effected as sections 29A, 44A, 55A and 59B of the BLG Act were matters "concerning counties" within the meaning of Articles 109 and 110 of *the Constitution* and therefore required the participation of the Senate in their enactment. It was the appellants' submission that the two Finance Acts affected the regulation of betting, casinos and other forms of gambling, which by dint of the Fourth Schedule of *the Constitution* is a concurrent function of the national and county governments. Relying on the decision of the Supreme Court in In re the Matter of the Interim Independent Electoral Commission [2011] eKLR, they submitted that the phrase "concerning counties" in Articles 109 and 110 of *the Constitution* means among others, any national level process with a significant impact on the conduct of county government. In their view, the amendments introduced by the two Acts to the BLG Act impacted significantly on the power of county governments to regulate gambling and therefore required the participation of the Senate. To the extent that it was the National Assembly alone that effected the amendments, the appellants submitted that the same were unconstitutional, null and void. They relied on the final judgment of the High Court in Africa Rafiki Ltd & 2 Others v Nairobi City County Government & 3 Others [2017] eKLR to support the contention that betting, lotteries and gaming activities were shared functions between the national and county governments.

9. Turning to their contention that the amendments to the BLG Act were effected in violation of *the Constitution* and parliamentary procedure, the appellants submitted that upon receipt of the memorandum from the President, the National Assembly was obliged by Articles 10, 114, and 118 of *the Constitution* to commit the proposal to introduce 35% uniform tax to the departmental committee on Finance, Planning and Trade, which it failed to do. They further contended that the Speaker had in fact started off on the right footing by committing the President's proposal to the said committee, but instead the National Assembly went off the rails and dealt with the memorandum on the floor of the House in violation Article 114 of *the Constitution*. We were therefore urged to find that the whole House is not a departmental committee and that the Act was passed without the benefit of the input of the committee, or informed by the views of the Cabinet Secretary for the Treasury, or stakeholders.

10. It was the appellants' further contention that when the House voted on 15th June 2017 on the amendments proposed by the President, it did not consider clause 29 thereof, which amended section 59B of the BLG Act. In their view, section 59B was null and void and of no effect because it was irregularly and illegally introduced as a provision of the law without any legislation from the National Assembly and in violation of Article 109 of *the Constitution*. On the authority of the judgment of the Constitutional Court of Uganda in Oloka-Onyango & 9 Others v. The Attorney General, Const. Pet.

No. 8 of 2014, the appellants submitted that any Act of Parliament passed in violation of the prescribed law and procedure is null and void.

11. Still on the second ground of appeal, the appellants submitted that the introduction of 35% uniform tax was without public participation and therefore in violation of Articles 10 and 118 of *the Constitution*. They conceded that the Finance Bill 2017 as initially passed by the National Assembly was preceded by public participation, but argued that once the President returned the Bill back to the National Assembly to consider inclusion of the 35% uniform tax, the National Assembly was obliged to undertake further public consultations, which it failed to do. They relied on the judgments of the South African Constitutional Court in Doctors for Life International v. Speaker of the National Assembly & Others [2006] ZACC 11 and Matatiele Municipality & Others v. President of the Republic of South Africa & Others (2) [2006] ZACC 12 and that of the High Court in Robert N. Gakuru & Others v. Governor, Kiambu County & 3 Others [2014] eKLR regarding what public participation entails and submitted that it is a constitutional obligation and must be meaningful and reasonable, which was not the case as regards the Finance Act, 2017.

12. On the third ground of appeal, it was the appellants' contention that the introduction of the 35% uniform tax was unfair, punitive, discriminatory, and in violation of Article 201 (b) of *the Constitution* which demands that the burden of taxation be shared fairly and equitably. In their view, and on the authority of the High Court's decision in County Government of Mandera & 2 Others v. Commission on Revenue Allocation & 4 Others [2017] eKLR, equitable sharing entails what is just, fair and right in the circumstances.

13. In the case at hand, it was further contended, the learned judge had, in upholding the 35% uniform tax, failed to consider other taxes imposed on the appellants such as the 30% corporate tax, the high cost of annual licenses which ultimately amounted to double taxation, and the fact that no other industry in Kenya has such high tax burden. The appellant's further urged that the 35% tax was not a deterrent tax as claimed by the respondents, because it only affected their revenues without discouraging the public and in particular, the youth, from gambling. Accordingly and on the authority of the decisions in Federation of Women Lawyers of Kenya & 5 Others v. Attorney General & Another [2011] eKLR and Prinsloo v. Van Der Linde [1998] 1 LRC 173, they submitted, their treatment was irrational, bereft of any legitimate aim, solely intended to punish them, and therefore amounted to unconstitutional discrimination.

14. Lastly the appellants criticised the learned judge for holding that their petitions were an abuse of the court process. They contended that on the contrary, the petitions were merited and properly before the court. In their view failure to disclose both the filing of the first petition and denial of conservatory orders in it, of itself, did not constitute abuse of the court process. They added that the businesses ran by each of them were different, one being betting business, and the other lottery business, and regulated by different taxation and licensing regimes.

15. Not surprising, the submissions by the respondents in opposition to the appeal were founded on common arguments and lists of authorities. To reproduce separately the contentions by each of the respondents will result in valueless and tedious repetition. Accordingly we propose to consider together, for each of the four grounds upon which the appeal is based, all the respondent's submissions in opposition thereto. For the record, the 1st, 2nd, 4th and 7th respondents (respectively the Chairman, Betting Control & Licensing Board, the Cabinet Secretary, Ministry of Interior & Co-ordination of National Government, the Cabinet Secretary, Ministry of Finance and the Attorney General), were represented by Mr. Kuria, learned counsel, the 3rd respondent, the Commissioner General, Kenya Revenue Authority, by Mr. Nyaga, learned counsel, the 5th respondent, the National Assembly by Mr.

Mwendwa and Mr. Kuyioni, learned counsel, whilst the 8th respondent, the National Sports Fund, was represented by Mr. Muchemi, learned counsel.

16. Regarding the first ground of appeal on whether the Senate had any role in the enactment of the Finance Act, 2017, the respondents submitted that unlike in the Division of Revenue Bill, the Senate had no role in the enactment of the Finance Act, which by dint of Article 221 of *the Constitution* and section 41 of the Public Finance Management Act is the exclusive responsibility of the National Assembly. They added that the Finance Bill was not a Bill concerning counties within the meaning of Article 109 and 110 of *the Constitution*. In their view, the Finance Bill, 2017 was a Money Bill, which by dint of Article 109(5) could only be introduced in the National Assembly. They contended that the appellants had failed to demonstrate how the said Bill concerned county governments to justify the involvement of the Senate.

17. It was the respondents' further submission that although the Senate was named as a respondent in the proceedings before the High Court, it did not raise any issue concerning its alleged exclusion in the enactment of the Finance Act, 2017. The respondent also argued that the Finance Act levied only the taxes reserved for the national government by Article 209 (1) of *the Constitution* and did not affect the taxes reserved for county governments by Article 209(3) and therefore there was no basis in the appellants' claim that the Act concerned county government.

18. Relying on the decision of the Supreme Court in Re the Matter of the Interim Independent Electoral Commission (supra) the respondents submitted that whether a matter concerns county government has to be determined cautiously and on case by case basis, and that the Finance Bill 2017 and the amendments it effected to the BLG Act did not, in the circumstances of this case, concern county government. They also invoked the pith and substance doctrine, which was adopted by the High Court, and submitted that the true nature of the impugned amendments to the BLG Act was to vary and impose a new rate of taxation on betting, gaming, lotteries and prize competition revenue and not to transgress into or affect the constitutional taxation competence of the county government. Further, it was contended that under the Fourth Schedule of *the Constitution*, the county government's mandate as regards betting and casinos and other forms of gambling does not extend to imposing taxation.

19. Accordingly the respondents urged us to find that the learned judge properly concluded that the Senate had no role in the enactment of the Finance Act, 2017 and to reject the first ground of appeal.

20. Turning to the second ground of appeal, the respondents submitted that the National Assembly did not violate *the Constitution* or any other law or procedure in enacting the Finance Act, 2017 because it was not necessary to submit the President's memorandum to the relevant departmental committee, that committee having previously considered the Bill before it was presented to the President for assent. When the President returns a Bill back to the National Assembly pursuant to Article 115 of *the Constitution*, it was contended, the Bill does not have to be subjected to the entire law making process afresh but rather consideration is limited only to the issues raised by the President. In this appeal therefore, it was submitted, the National Assembly neither violated *the Constitution*, nor its Standing Orders. The respondents added that under Article 115(2) and Standing Order No. 154, the President's reservations to a Bill are to be considered by the National Assembly and not by the relevant departmental committee. For its part, the 5th respondent was of the view that the President's memorandum was duly committed to the relevant departmental committee before it was tabled in the National Assembly.

21. In the same vein, the respondents contended that in recommending to the National Assembly to consider introducing the tax at 35%, the President neither directed the National Assembly on how to legislate nor usurped its powers. It was further urged that Article 115 of *the Constitution* empowered

the President to return the Bill to the National Assembly as he had done and that it was within the power of the National Assembly to consider and accept or reject the President's views, which were not binding on it. The mere fact that the National Assembly considered the President's memorandum and acceded to his views, it was urged, is not tantamount to usurpation of the powers of the National Assembly because *the Constitution* contemplates situations where the National Assembly may agree or differ with the President. The respondents relied on the decision of the High Court in Nation Media Group Ltd & 6 Others v. Attorney General & 9 Others [2016] eKLR, where the court found that a decision by the National Assembly to accommodate the views of the President did not violate *the Constitution*.

22. Turning to the question whether the Finance Act, 2017 was vitiated by lack of public participation, the respondents submitted that the President's memorandum did not require any further public participation because the Bill, which was sent to the President for assent, had already been subjected to adequate public participation. They contended that after first reading, the Bill was duly committed to the Departmental Committee on Finance, Planning and Trade. Thereafter, in advertisements carried in the Daily Nation and the Standard, the National Assembly invited members of the public and stakeholders to submit memoranda on the Bill. Upon receipt of memoranda, stakeholders' a workshop was held to discuss the issues that were raised as regards the Bill and the proposed taxation.

23. It was the respondent's contention that the National Assembly had the power to amend a Bill, which has been subjected to public participation without having to hold further public participation on the amendments. In support of those views the respondents relied on the judgments of the High Court in Law Society of Kenya v. Attorney General & 10 Others, Pet No. 3 of 2016 and Institute of Social Accountability & Another v. National Assembly & 4 Others [2015] eKLR. The respondents also cited the decisions in Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others (supra) and Association of Gaming Operators, Kenya & 41 Others v. Attorney General & 4 Others [2014] eKLR, and maintained that the National Assembly was obliged to afford members of the public a reasonable opportunity for public participation, which it did, and that public participation did not necessarily mean that the view of the appellants must prevail; what was require was to take those views into account. They therefore urged us to find that, in the circumstances of this appeal, members of the public were afforded reasonable opportunity for to participate and deliberate on the Finance Bill, 2017.

24. On the third ground of appeal concerning whether the 35% tax was unfair, punitive and discriminatory, the respondents contended that under *the Constitution*, the power to levy taxes is vested in Parliament and that courts should not interfere with the exercise of that power merely because they perceive that they may have exercised it differently, if they were the Parliament. In support of that proposition they cited the decisions of High Court in KUDHEIHA v. Kenya Revenue Authority & 3 Others [2014] eKLR and Mark Obuya & Others v. Commissioner of Domestic Taxes & 2 Others [2014] eKLR.

25. The respondents submitted further that under Article 209, it was within the power of the National Government to levy the tax and to determine the rate of taxation. The decision of the Supreme Court of Scotland in Scotch Whisky Association & Others v. the Lord Advocate & Another [2017] UKSC 76 was cited to demonstrate reluctance of the court to interfere with the Government's policy decisions on taxes. It was urged that the National Government policy, which was rational and justifiable, was to levy the taxes and set up programmes for the youth to deter them from gambling. It was also contended that higher taxes would result in higher ticket prices, which would discourage gambling. The respondents denied that the appellants were subjected to double taxation or discriminated against, submitting that other industries like tobacco, alcohol and motor vehicles pay the same or similar forms of taxes. In their view, taxes do not have to be similar to be rational.

26. Lastly the respondents cited the decisions of the High Court in Timothy Njoya v. Attorney General & Another [2014] eKLR, and of the Court of Appeal of Tanzania in Ndyanabo v. Attorney General [2001] 2 EA 485 to support the contention that all enactments by Parliament are deemed to be constitutional unless the contrary is proved,which the appellants had failed to demonstrate. Taxation on the basis of turnover, it was urged, was not unique to the appellants' industry and that accordingly there was nothing unfair, punitive or discriminatory in the taxation.

27. On the last ground of appeal, the respondents submitted that the learned judge had not erred in holding that the two petitions before him were an abuse of court process because they were filed by companies with common directors and that the second petition was filed after the court had declined to grant conservatory order in the first petition, a fact which was material but was never disclosed to the court when the second petition was filed. The respondents relied on the decisions in Aviation & Airport Workers Union (K) v. Kenya Airports Authority & Another [2014] eKLR and Republic v. Kenya Power & Lighting Co Ltd ex parte Corner Electrical Contractors Ltd & 3 Others [2015] eKLR and submitted that such conduct and non-disclosure amounts to abuse of the court process.

28. We have carefully considered the record of appeal, the impugned judgment of the High Court, the grounds of appeal, the elaborate submissions by learned counsel, both oral and written, and the authorities that were cited. The grounds of appeal are fairly crisp and we propose to consider the same in the order in which the parties addressed them.

29. The first ground is whether the Finance Act is null and void for lack of involvement of the Senate. The appellants contend that under the Fourth Schedule to *the Constitution*, which provides for distribution of functions between the national and the county governments, the national government is responsible for betting, casinos and other forms of gambling whilst the county governments are responsible for cultural activities, public entrainment and public amenities, which include betting, casinos and other forms of gambling. In the appellant's view, this is a shared function and to the extent that the Finance Act 2017 amended the BLG Act and changed the rate of taxation relating to that function, it was "a Bill concerning county government" within the meaning of Article 110(1) of *the Constitution* and therefore required the participation of the Senate in its enactment.

30. The respondents on the other hand, submit that the Finance Act 2017, and the consequential amendment of the BLG Act, was a pure Money Bill within the meaning of Article 114 and therefore, by dint of Article 109(1) and sections 40, 41 and 42 of the *Public Finance Management Act*, required the involvement of the National Assembly only. In their view the Act did not concern county governments so as to warrant the involvement of the Senate.

31. *The Constitution* defines "a Money Bill" in Article 114 to mean a Bill, other than a Division of Revenue Bill, which contains provisions dealing with taxes; the imposition of charges on a public fund or the variation or repeal of any of those charges; the appropriation, receipt, custody, investment or issue of public money; the raising or guaranteeing of any loan or its payment; or matters incidental to the foregoing. The provision is explicitly clear that the terms "tax", "public money", and "loan" do not include any tax, public money or loan raised by a county. By dint of Article 109(5) such a bill as described above can only be introduced in the National Assembly.

32. The appellants further contend that the Finance Bill, 2017 is one that concerned counties under the Fourth Schedule to *the Constitution* because gambling is a shared function between the national and county governments. In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR, the Supreme Court considered the meaning of the phrase "any matter concerning County Governments" in Article 163(6) of *the Constitution* in respect of which that Court is empowered to

give an advisory opinion. After noting the close connectivity between the functioning of the national and county governmets, the Court stated thus:

> We consider that the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government."

33. The Court however cautioned that interpretation to determine whether a matter is one that concerns county governments must be undertaken cautiously and on a case-by-case basis. Clearly the Court's concern was advised by the need to avoid the obvious danger of undermining devolution, a key pillar of *the Constitution* of Kenya, 2010, by for example, declaring every national government function to be a matter concerning county government (which theoretically is possible) or by declaiming a core function of the county government and declaring the same to be a function of the national government.

34. Having carefully considered the issue, there is no doubt in our minds that the Finance Bill, 2017 was a Money Bill within the meaning of *the Constitution*. The long title described the Bill as:

> AN ACT of Parliament to amend the law relating to various taxes and for matters incidental thereto." (Emphasis added).

35. In the Memorandum of Objects and Reasons, it was provided as follows:

> The Bill formulates the proposals announced in the Budget for 2017/2018 relating to liability to, and collection of taxes and for matters incidental thereto. The Bill also seeks to amend the following laws-
>
> The Betting, Lotteries and Gambling Act (Cap. 131)
>
> The Bill seeks to amend the Betting, Lotteries and Gambling Act to increase the tax rates from current rates to 50%.
>
> ..
>
> Statement on how the Bill concerns county governments.
>
> The Bill does not concern county governments in terms of Article 109(4) of *the Constitution*, as it does not contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule of *the Constitution*.
>
> Statement as to whether the Bill is a money Bill within the meaning of Article 114 of *the Constitution*.
>
> The Bill is a money Bill within the meaning of Article 114 of *the Constitution*." [Emphasis added].

36. Apart from the above provisions of the Bill, which expressly negate the appellants' contention, it must be borne in mind that Article 110 (3) of *the Constitution* provides a specific mechanism for settling the issue whenever the question arises as to whether any particular bill is a Bill concerning counties. In this case, the Senate, which has the constitutional mandate of representing and protecting the interests of the counties and their governments, did not raise any issue that the Finance Bill, 2017 was anything other than what it described itself to be, namely a Money Bill that did not concern the counties. As the respondents aptly point out, even when the appellants made the Speaker of the Senate a respondent to their petitions in the High Court, he did not support their view that the Finance Bill, 2017 was a bill concerning counties.

37. In National Assembly of Kenya & Another v Institute for Social Accountability & 6 Others [2017] eKLR, where the Senate had not questioned a Bill as one concerning county governments, this Court held that the court should not engage itself in a theoretical exercise or purport to usurp the roles of competent institutions under *the Constitution*. This is how the Court expressed itself:

> Furthermore, the Speakers of the two Houses had resolved that the Bill did not concern county governments. It is a constitutional condition precedent in the legislative process that the Speakers of both Houses resolve the question whether a Bill concerns counties before it is considered. It is also a constitutional requirement that if a dispute arose, it should be resolved through mediation. *The Constitution* has assigned the role of resolving disputes of this nature in the legislative process to the Speakers and to Committees of both Houses...
>
> > In this case, there was, in fact no dispute between the two Houses. The Senate did not question the amendment Bill in the High Court. In the absence of any controversy pertaining to the amendment Bill between the stakeholders, the court not only engaged itself in a theoretical exercise but also usurped the constitutional role of competent institutions in the legislative process." [Emphasis added].

38. See also Speaker of Senate & Another v Attorney general & 4 Others [2013] eKLR, where the Supreme Court held that the intention of the drafters of *the Constitution* was that any disagreement as to the nature of a bill (whether or not is concerns county government) should be harmoniously settled by the Speakers of the two Houses of Parliament or through the mediation mechanism provided by *the Constitution*.

39. The appellants relied heavily on the final judgment of the High Court in Africa Rafiki Ltd & 2 Others v Nairobi City County Government & 3 Others (supra) in support of their contention that betting, lotteries and gaming activities are a shared function between the two levels of government and therefore the Finance Act, 2017, by amending the rate of taxation in the BLG Act, was a Bill concerning county governments, the enactment of which required the participation of the Senate.

40. In the Africa Rafiki case, the High Court was grappling with the delineation of the licensing of betting, lotteries and gaming activities between the two levels of government. After considering the views of the defunct Transition Authority, the court held that as regards those activities, the national government is responsible for policy formulation, legislation, development of standards and norms, licensing of public gaming, regulation of the industry, licensing of public gaming, cross-county prize competition, national lotteries, on-course and off-course totali-sators and bookmakers. As for the county governments the court held that they were responsible for implementation of the policy standards, monitoring and evaluation, licensing of gaming, betting and totali-sators premises, licensing of amusement machines, and licensing and supervising lotteries and pool tables confined within the county.

41. We have carefully considered the provisions and effect of the Finance Act, 2017, and with respect, we do not see how it can be contended that the Finance Act concerns the functions of the county governments as tabulated above, which primarily involve implementation of policy, monitoring and evaluation and licensing of premises in which betting, lotteries and gaming activities are carried out within the county. To qualify as a Bill "concerning county government", the bill must be one whose provisions affect the functions and powers of the county governments set out in the Fourth Schedule of *the Constitution*. We would add that a bill, which affects the functions and powers of the county governments, is one that constricts or limits those functions and powers, or otherwise interferes with

or inhibits the ability of the county government to discharge its functions or exercise its powers, in a manner that undermines the constitutional purpose of devolution.

42. To determine whether the Finance Act 2017 affected the functions and powers of county governments, the learned judge subjected the Act to the "pith and substance" test, in a quest to determine its true substance, purpose and effect. He concluded that the Act's true, pre-eminent or primary purpose was taxation, which is a function of the national government. The learned judge expressed himself thus:

> From the above provisions, a Bill dealing with taxes such as the impugned legislation is a Money Bill. Further, taxation is a function of the National Government. Thus, in my view, the Bill was correctly processed by the National Assembly because its pith and substance falls within the functions of the national government. It was not necessary for the Senate to be included in the legislative process. The National Assembly had the requisite legislative competence to legislate the Bill in question."

43. We are in full agreement with the above conclusion by the learned judge. We are satisfied that he did not err or otherwise misdirect himself. Accordingly, we do not find any merit in the appellant's first ground of appeal.

44. The next issue relates to whether the National Assembly failed to comply with the prescribed procedure when enacting the Finance Act, 2017. Under this limb of the appeal, the appellants contend that after the President referred the Bill back to the National Assembly with his reservations, the Bill should have been sent back to the relevant departmental committee for consideration, pursuant to Article 114 (2) of *the Constitution*, which was not done. They contend that indeed on 14th June 2017 the Speaker properly committed the President's Memorandum to the departmental committee on Finance, Planning and Trade, but instead of the committee reconsidering the Bill in light of the President's reservations, the Bill was considered the next day by a committee of the whole house, which was in blatant violation of Article 114(2) of *the Constitution*. They also contend that the House did not consider clause 29 upon which section 59B of the BLG Act was based and therefore the section is null and void.

45. The relevant part of Article 114 of *the Constitution* provides as follows:

114.

(1) A Money Bill may not deal with any matter other than those listed in the definition of "a Money Bill" in clause

(3) .....

(2) If in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter listed in the definition of "money Bill", the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance."

(Emphasis added).

46. There are few points worth noting as regards Article 114(2) and the manner in which the appellants have submitted it should be interpretation and applied. First and foremost, by invoking Article 114,which makes provision for money bills, the appellants are unwittingly conceding that, the Finance Bill was after all a money bill. If the Finance Bill was a money bill, it follows by dint of Article 114(1) of *the Constitution* that it could not deal with any other matters other than those set out in Article 114 (3), and further by dint of Article 109 (5), it could only be introduced in the National Assembly, with

the Senate having no role in it. Clearly the appellants cannot say in one breath that the Finance Act was a money bill and in the other insist that the Senate had a role in it.

47. Secondly, Article 114(2) speaks to a motion, which makes provision on a matter that should otherwise be addressed in a money bill. In that case, the Assembly is obliged to proceed only in line with the recommendations of the relevant departmental committee and upon taking into account the views of the Cabinet Secretary for finance. With due respect, we do not see the relevance of that provision when the Assembly is considering a bill that has been returned to it by the President for reconsideration. We say so because Article 115 makes specific provisions on how the Assembly is to deal with a bill that has been referred back to it by the President. The appellants are not at liberty to ignore the express and relevant provision on referred bills and opt for a provision that addresses an entirely different matter.

48. Article 115 of *the Constitution* makes specific provisions on assent to bills by the President and referral of the bills back to Parliament by the President. It is necessary to set out the full provision, which provides as follows:

115.

(1) Within fourteen days after receipt of a Bill, the President shall-

(a)) assent to the Bill; or

(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.

(2) If the President refers a Bill back for reconsideration, Parliament may, following appropriate procedure under this Part-

(a) amend the Bill in light of the President's reservations; or

(b) pass the Bill a second time without amendment.

(3) If Parliament amends the Bill fully accommodating the President's reservations, the appropriate Speaker shall re-submit it to the President for assent.

(4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported-

(a) by two-thirds of members of the National Assembly; and

(b) two-thirds of the delegation in the Senate, if it is a Bill that requires the approval of the Senate.

(5) If Parliament has passed a Bill under clause (4)-

(a) the appropriate Speaker shall within seven days re-submit it to the President; and

(b) the President shall within seven days assent to the Bill.

(6) If the President does not assent to a Bill or refer it back within the period prescribed in clause (1), or assent to it under (5)(b), the Bill shall be taken to have been assented to on the expiry of that period."

49. Article 115 does not specifically require the bill referred back by the President to be first committed to a departmental committee. Instead the provision provides for a re-consideration of the bill by the

relevant House of Parliament, which may amend the bill to accommodate the President's views, or pass the bill again without amendment and thereby signalling a rejection of the President's views.

50. We have perused the Standing Orders of the National Assembly (3rd Edition, 2013) and do not find any provision that requires a bill referred back by the President to be committed to a departmental committee before consideration by the Assembly. Standing Order No. 154 requires the speaker, upon receipt of the President's reservation in respect of a Bill that did not involve the Senate, to convey a message to the house within three days and thereafter the Assembly is required to consider the President's reservations within 21 days of the date when the Assembly next meets. The Standing Order leaves no doubt that the consideration of the president's reservation, the approval or rejection thereof and the voting on the final decision is to be done by the Assembly, which we take to mean either through the departmental committees or a committee of the whole House. As Mr. H. B. Ndoria Gicheru observes in Parliamentary Practice in Kenya, Transafrica, 1976, page144):

> Committees exist not to take the initiative and rule the House, but to carry out the task imposed on them; they are creatures of the House with no independent existence."

51. We therefore do not think much turns on the decision of the Speaker to commit the President's reservations to the departmental committee, which decision in any event was not actualized. The provision of Article 114(2) relied upon by the appellants has no application in a Bill that has been refereed back to the Assembly by the President.

52. The other limb of this ground of appeal is the validity of section 59B of the BLG Act, which the appellants contend was never considered by the Assembly. They contend that clause 29A which amended section 59B of the BLG Act was not considered and approved by the Assembly and therefore section 59B as amended is illegal, null and void.

53. We have carefully considered the National Assembly Official Report for Thursday, 15th June 2017 when the committee of the whole House considered the President's memorandum and we do not think that it bears out the appellants' contention. In the session which commenced at 2.30 pm, the Assembly considered clause 26 which amended section 29A of the BLG Act, clause 27 amending section 44A, and clause 28 amending section 55A. Questions were put and agreed as regards those amendments. It was then reported that the committee of the whole House had considered the President's memorandum and approved it without amendment. However on a point of order, the leader of the Majority Party, Hon. A. B. Duale explained that there was a typographical error and clause 29 had been omitted. There then followed an adjournment at 6. 32 pm. The Assembly reconvened at 6.50 pm and dealt with the omission which the Temporary Deputy Chairman, Hon. Cheboi, explained was clause 28D rather than Clause 29. The question as regards the additional clause was subsequently put and agreed.

54. But even if that were not the case, we would, in the circumstances of this appeal be guided by the view of the Supreme Court in The Speaker of the Senate & Another v Attorney General & 4 Others [2013] eKLR where the Court stated:

> This Court will not question each and every procedural infraction that may occur in either 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."

55. The next question relates to public participation. There is no contestation that prior to the passing of the Finance Bill by the National Assembly on 30th May 2017, it was preceded by adequate public participation. The record teems with evidence to that effect, including newspaper advisements by the

Clerk of the National Assembly notifying members of the public of the publication of the Finance Bill and inviting memoranda thereon, copies of numerous memoranda submitted in response, by various stakeholders, civil society organizations and Government entities, and even evidence of a workshop held in Mombasa to discuss the Bill. The dispute is whether when the President referred the Bill back to the National Assembly with his observation, further public participation was required.

56. We have already referred to the terms of Article 115 of *the Constitution* which leaves no doubt that what the National Assembly was required to do was either effect amendments to the Bill to accommodate the President's reservations, or decline to effect the amendments. The real question therefore is whether the Finance Act was vitiated by lack of public participation on the President's reservations.

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

58. In Institute for Social Accountability & 6 Another v. National Assembly & 4 Others [2015] eKLR, the High Court considered the power of the National Assembly to amend Bills vis-à-vis the duty to ensure public participation and stated:

> We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation."
>
> With respect, we agree with the above reasoning of the High Court, which accords with the ruling of the Speaker of the National Assembly dated 28th July 2015 and headed "Consideration and Scope of Presidential Reservations". In the pertinent part, the Speaker stated:
>
> I will now focus on the second subject, which is the procedure for consideration of presidential reservations. In seeking to answer the question raised by Hon. Gumbo as to whether a reservation or recommendation by the President should be subjected to a process similar to that obtaining in the consideration of a Bill, one needs to be fully alive to the express provisions of *the Constitution*...

> Secondly, the provisions of Article 115 seem to be self-contained as regards the procedures to be adopted by Parliament in considering the President's reservations. To this extent, the provisions of Article 115(3) and (4) do not contemplate Parliament going back to the entire process of enactment, but only contemplates Parliament passing the Bill a second time. This second passage does not in any way negate the fact that the Bill was passed by the House a first time after going through the entire sequence that culminates in passage, namely publication, First Reading, Second Reading and Third reading. The resubmission of a Bill by the President under Article 115 does not in any way negate these stages, unless the President decided to submit a totally new Bill outside the scope of what the House has passed, which would be uncharacteristic of the conventional legislative limits."

59. We do not find any evidence either, that the President usurped the role of the National Assembly or that the Assembly abdicated its responsibility, in the enactment of the Finance Act, as contended by the appellants. Article 115 of *the Constitution* (1) requires the President, where he has not assented to a Bill, to return it to Parliament for reconsideration together with his comments or reservations. Article 153(2) empowers the Parliament to amend the Bill to accommodate the President's concern or to pass the Bill a second time without accommodating the President's concern. The Standing Orders of the National Assembly are to the same effect and in particular Standing Order No. 154(3) provides thus:

> The Assembly may, in considering the Bill a second time, propose amendments in light of the President's reservation either fully accommodating the President's reservations, or not fully accommodating the President reservations."

60. All the evidence on record shows is that, after considering the President's reservations, the National Assembly agreed with his view, which is one of the options open to it under *the Constitution* and the Standing Orders. The mere fact that it settled for one of the two options open to it in law is not ipso facto evidence of usurpation or abdication of the National Assembly's power. To arrive to such a conclusion, in our view, would require more cogent and convincing evidence than the mere fact that the Assembly opted for one of the options rather than the other, available in law. The High Court easily appreciated this fact in Nation Media Group Limited & 6 Others v. Attorney General & 9 Others [2016] eKLR.

61. The penultimate ground of appeal challenges the finding of the learned judge that the rate of taxation imposed by the Finance Act 2017 on the appellants' industry is not unfair, punitive, discriminatory or in violation of Article 201(b), which demands that the burden of taxation shall be shared equitably.

62. The power to levy taxes and to determine the rate thereof is vested by Article 95 in the National Assembly, which is specifically empowered to appropriate funds for expenditure by the national government and other State organs. It is the National Assembly alone that is empowered under Article 114 (3) to levy taxes by means of a Money Bill. In the exercise of that constitutional power, it was initially proposed in the Finance Bill, 2017 that the tax levied upon the appellants' industry should be increased to 50% of gross turnover. After public participation and taking into account the views of the President, the National Assembly determined the rate of taxation should be 35% of the gross turnover. The appellants now invite us to hold that the learned judge erred in not finding that rate of taxation to be unfair, punitive and discriminatory.

63. Where *the Constitution* had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*, the law or that their decisions are so perverse, so manifestly irrational that they cannot be

allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes,because those organs have expertise in their area of mandate, which the courts do not normally have. We must accordingly shun invitation to dabble in matters of national economic policy, when what is placed before us are the views of only two players in one industry.

64. We have already adverted to the view of the Supreme Court in The Speaker of the Senate & Another v Attorney General & 4 Others (supra) where it emphasised that the courts cannot supervise the working of Parliament and that the institutional comity between the three arms of Government should not be endangered by unwarranted intrusion by any arm into the mandate of other arms. Similar approach has been taken by the High Court, as regards matters of taxes, in Kenya Union of Domestic Hotels, Education & Allied Workers v. Salaries & Remuneration Commission [2014] eKLR; Kenya Union of Domestic Hotels, Education & Allied Workers v. Kenya Revenue Authority & 3 Others [2013] eKLR; Mark Obuya & Others v. Commissioner of Domestic Taxes & 2 Others [2014] eKLR and Bidco Oil Refineries Ltd v. Attorney General & 3 Others [2013] eKLR.

65. In this case, the respondent explained the policy considerations behind the rate of taxation that was imposed by the National Assembly and the quest to discourage gambling among the youth. The learned judge considered the rationale and correctly in our view, found that those considerations were legitimate rather than arbitrary. To determine, in the circumstances of this case, that the rate of taxation must be other than determined by the National Assembly would be an arbitrary or undue intrusion in its mandate because no compelling reasons were presented before the learned judge to justify such intervention, other than general assertions on unfairness, punishment and discrimination. We agree with the learned judge than from the evidence on record, no unfairness or discrimination, as understood in law was disclosed.

66. The last ground of appeal is whether the learned judge erred in holding that the appellants' petitions were an abuse of court process. It is common ground that the two appellants share directors and both are involved in industries regulated by the BLG Act. On or about 19th July 2017, the 1st appellant, Pevans East Africa Limited filed a petition in the High Court (No. 353 of 2017) challenging the validity of sections 29, 30, 31 and 32 of the Finance Act, 2017. On the same day, that appellant applied ex parte and under a certificate of urgency, for conservatory orders, whose effect would have been to suspend the operation of the Finance Act, 2017, pending the hearing and determination of the petition. Mwita, J. heard the application and declined to grant ex parte orders. He directed the 1st appellant to serve the application for inter partes hearing on 31st July 2017. After hearing the parties, the learned judge declined to grant any conservatory orders and directed the petition to be heard on merit.

67. Instead of the 1st appellant prosecuting the petition already filed, its sister company, the 2nd appellant (Bradley Limited t/a Pambazuka National Lottery) filed another petition (No. 505 of 2017) seeking essentially the same orders that were sought in the first petition. Again ex parte conservatory orders were applied for in the second petition, without disclosure that a sister company had already unsuccessfully applied for similar orders before Mwita, J. The second application fell before Mativo, J. who granted it, thus putting in abeyance the operation of the Finance Act until the hearing and determination of the petition. On the above factual basis, the learned judge found the appellants guilty of material nondisclosure. The judgment of the High Court dismissing the petitions was however not based on the appellants' non-disclosure; the petitions failed because the appellants did not establish their grievances to the court's satisfaction.

68. A party who approaches the court, particularly ex parte, is under a duty to make full and honest disclosure of all material facts. The fact that there was pending in the same court a petition by a sister

company challenging the same provisions of the Finance Act 2017 and where the court had declined to issue conservatory orders stopping the operation of the impugned Act, was material. We have not seen any basis for differing with the learned judge's conclusion that the 2nd appellant was well and truly aware of the first petition and application, filed as they were, by a sister company with which it shared common directors.

69. Balcombe, LJ. underlined the importance of full and frank disclosure in ex parte matters as follows, in Brink's Mart Ltd v. Elcombe [1988] 3 All ER 188:

> The Courts today are frequently asked to grant ex parte injunctions, either because the matter is too urgent to await hearing on notice or because the very fact of giving notice may precipitate the action which the application is designed to prevent. On any ex parte application, the fact that the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances."

70. And much earlier in R v. Kensington Income Tax Commissioner ex-parte Prince Edmond de Polignac [1917] 1 KB 486, Warington LJ explained the consequence of non disclosure as follows:

> It is perfectly well settled that a person who makes an ex-parte application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify."

(See also The MV Lilian S [1989] KLR 1, 38 and Aberdare Freight Services Ltd v, Kenya Revenue Authority, CA No. 263 of 2004).

71. On the facts of this appeal, we are satisfied that the learned judge did not err in holding that the non disclosure was material and deliberate and amounted to abuse of the court process. The nondisclosure resulted in the High Court making two different sets of orders on the same set of facts, which we believe it could not have done had the material facts been disclosed,

72. We have come to the conclusion that the learned judge did not err in dismissing the consolidated petitions. Accordingly, this appeal fails and is hereby dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY, 2018

N. WAKI

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR