

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO E181 OF 2023

AS CONSOLIDATED WITH PETITION NUMBERS E211 OF 2023, E217 OF 2023, E219 OF 2023, E221 OF 2023, E227 OF 2023, E228 OF 2023, E232 OF 2023, E234 OF 2023, E237 OF 2023 AND E254 OF 2023

IN THE MATTER OF: ARTICLES 22(1) & 2(C), 23, 48, 50(1), 159, 163(3)(d), AND 258(1) & (2)(c) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: ALLEGED THREATS POSED BY SECTIONS 28, 30, 33(XXX), 34(a)(iii), (v), (vii) & (viii), 36, 52, 56, 59, 73, 74, 76, 78 AND 79 OF THE FINANCE ACT, 2023 TO ARTICLES 1, 2, 3(1), 1019, , 20, 21, 24, 25(a) & (c), 27(1) & 2, 36, 40, 43, 46(1)(c), 47(1), 48, 50(1) & (2), 93(2), 94(1), (4), (5) & (6), 109(3) & (5), 114, 129, 131(2)(a), 153(4)(a), 159(1), 160(1), (2) & (4), 250 (8) AND 259(1) OF THE CONSTITUTION

IN THE MATTER OF: ALLEGED FAILURES OF THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND PLANNING AND OF THE NATIONAL ASSEMBLY TO UPHOLD THE CONSTITUTION AS EXPRESSLY REQUIRED OF THEM, RESPECTIVELY, AT ARTICLES 153(4)(a) AND 93(2) AND 94 (4) OF THE CONSTITUTION

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE FINANCE BILL 2023 WHICH WAS NOT SUBJECTED TO THE CONCURRENCE OF THE SPEAKERS OF THE NATIONAL ASSEMBLY AND THE SENATE, AND THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE RESULTANT FINANCE ACT, 2023

IN THE MATTER OF: INHERENT NATURAL LAW AND CONSTITUTIONAL LIMITATIONS ON THE TAXING POWER OF THE NATIONAL GOVERNMENT

IN THE MATTER OF: UPHOLDING CONSTITUTIONAL EDICTS ON MONEY BILLS AND PROTECTING TAXPAYERS FROM UNCONSTITUTIONAL TAX

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF USING TAX PROCEEDS TO PAY UNAUDITED PUBLIC DEBTS

IN THE MATTER OF: THE DOCTRINES OF NATURAL JUSTICE, CONSTITUTIONALISM, RULE OF LAW, VOID FOR VAGUENESS AND LEGITIMATE EXPECTATIONS

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER
ELIUD KARANJA MATINDI.....2ND PETITIONER
MICHAEL KOJO OTIENO.....3RD PETITIONER
BENSON ODIWOUR OTIENO.....4TH PETITIONER
BLAIR ANGIMA OIGORO.....5TH PETITIONER
VICTOR OKUNA.....6TH PETITIONER
FLORENCE KANYUA LICHORO.....7TH PETITIONER

-VERSUS-

THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND PLANNING.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT
THE NATIONAL ASSEMBLY.....3RD RESPONDENT
THE SPEAKER NATIONAL ASSEMBLY.....4TH RESPONDENT

AND

COMMISSIONER-GENERAL, KENYA REVENUE AUTHORITY...1ST INTERESTED PARTY
THE SENATE.....2ND INTERESTED PARTY
CONSUMERS FEDERATION OF KENYA.....3RD INTERESTED PARTY
KENYA EXPORT FLORICULTURE, HORTICULTURE AND ALLIED WORKES UNION.....4TH INTERESTED PARTY

J U D G M E N T

INTRODUCTION

1. The Finance Bill, 2023 precipitated the filing of Constitutional Petitions challenging the constitutionality of legislative process leading to the

enactment of the Finance Act, 2023. They also faulted several provisions contained in the said Act on grounds that they were in violation of the Constitution.

2. On 7th August, 2023 all the eleven Constitutional Petitions were consolidated by this Court. Constitutional Petition No. E181 of 2023 became the lead file.
3. The profile of the judgment is as follows: a brief background, a summary of the parties' pleadings and their respective submissions, main issues for consideration by the court, analysis and determination, conclusion and disposition.

BRIEF BACKGROUND

4. The **Finance Bill, 2023** (the **Finance Bill**) was published on 28th April, 2023 in the Kenya Gazette no. 56 (National Assembly Bill No. 14 of 2023). It was tabled before the National Assembly on 4th May, 2023 for the first reading. A public notice inviting members of public and relevant stakeholders for public participation was put in the print media on **7th** and **8th May, 2023**. It called for comments on the Bill to be presented to the Departmental Committee on Finance and National Planning. Upon completion of the public participation exercise, the Departmental Committee on Finance and National Planning presented its report on the Bill to the National Assembly on **13th June, 2023**. The Bill was presented to the House on 14th June, 2023 for the Second Reading. On 20th June, 2023 it came up for the Third Reading.

The National Assembly passed the Bill on 23rd June, 2023 with some amendments. The President assented to the Bill on **26th June, 2023**. It became the **Finance Act, 2023** (the Finance Act) the subject of the Consolidated Constitutional Petitions.

5. The eleven petitions before this court are: **Petition No. E181 of 2023, Petition No. E211 of 2023, Petition No. E217 of 2023, Petition No. E219 of 2023, Petition No. E221 of 2023, Petition No. E227 of 2023, Petition No. E228 of 2023, Petition No. E232 of 2023, Petition No. E234 of 2023, Petition No. E237 of 2023 and Petition No. E254 of 2023.**

6. The names of the Petitioners are: **Okiya Omtatah Okoiti, Eliud Karanja Matindi, Michael Kojo Otieno, Benson Odiwuor Otieno, Blair Angima Oigoro, Victor Okuna, Florence Kanyua Lichoro, Rone Achoki Hussein, Daniel Otieno Ila, Hon. Senator Eddy Gicheru Oketch, Peter Odhiambo Agoro, Clement Edward Onyango, Paul Saoke, Law Society of Kenya, Azimio la Umoja One Kenya Coalition Party, Rrobert Gathogo Kamwara, Trade Unions Congress of Kenya, Kenya Medical Pharmacists and Dentists Union, Kenya National Union of Nurses, Kenya Union of Clinical Officers, Dr. Fredrick Onyango Ogola, Nicholas Kombe, Whitney Gacheri Micheni, Stanslous Alusiola, Herima Chao Mwashigadi, Dennis Wendo, Mercy Nabwire, Benard Okello, Nancy Otieno, Mohamed B Dub, Universal Corporation Limited, Cosmos Limited, Elys Chemical Industries, Regal Pharmaceuticals, Beta Healthcare**

Limited, Dawa Limited, Medisel Kenya Limited, Medivet Products Limited, Lab and Allied Limited, Tasa Pharma Limited, Comet Healthcare Limited, Biopharm Limited, Biodeal Laboratories Limited and Zain Pharma Limited (referred to as the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st & 52nd Petitioner/Petitioners).

7. The Respondents in all the consolidated Petitions are as follows: **The Cabinet Secretary, The National Treasury & Planning; The Honourable Attorney General; The National Assembly; The Speaker of the National Assembly; The Speaker of the Senate; Kenya Revenue Authority; and The Cabinet Secretary, Ministry of Lands, Public Works, Housing & Urban Development** (the 1st 2nd 3rd 4th 5th 6th & 7th Respondent/Respondents).
8. **Kenya Export Floriculture, Horticulture & Allied Workers Union** and **Kenya Airlines Pilots Association (KALPA)** joined as Interested Parties (1st, 2nd and 3rd Interested Party/Interested Parties) while **Dr. Maxwel Miyawa** was allowed to participate as the *Amicus Curiae*.
9. The consolidated Petitions were heard by way of affidavit evidence and written submissions. Parties were given an opportunity to highlight their written submissions on 13th September, 2023.

10. Before we outline the issues raised in the petition we shall give reasons for dismissing the 1st Petitioner's notice of motion application dated 4th July, 2023 seeking to cross-examine the Speaker of the Senate **Hon. Amason Jeffah Kingi** on his replying affidavit dated 1st July, 2023. The 1st Petitioner contended that the affidavit was contradictory and untruthful.

11. It is trite law that court has discretion to allow cross-examination. **Order 19 Rule 2(1)** of the **Civil Procedure Rules** states:

Upon any application, evidence may be given by affidavit, but the court may, in the instance of either party, order the attendance for cross-examination of the deponent.

12. Regarding this discretion, the Supreme Court in Nicholas **Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others [2013] eKLR** held as follows:

" ...In my view then, the provisions of Order 19 rule 2(1) of the Civil Procedure Rules... should be interpreted to mean that the cross-examination of a deponent is not mandatory, but the court may, in the exercise of its discretion and on application by either party, order that a deponent be cross-examined. In the exercise of such discretion, the court should seek the demonstration by the applicant that there are sufficient grounds for making an order for cross-examination. Such demonstration should be by reference to the material contained in the affidavit whose deponent is sought to be cross-examined to show that the affidavit contains disputed matters when examined against the affidavit by the respondent. Where no sufficient basis has been laid the request to cross-examine should be declined..."

See also **Kibaki v Moi & Another; Election Petition No. 1 of 1998(UR), Hudson Enterprises Ltd v Kenya Cold Storage (Foods) Ltd & 14 Others (2006) eKLR.**

13. We rejected the motion on the ground that the issue of concurrence is by and large a matter of law as provided for in **Article 110(3)** of the Constitution, the **Senate Standing Order Number 133** and the **National Assembly Standing Order Number 143**.
14. In our view the issue of concurrence could be discerned from reading correspondence that was exchanged between the two Speakers that was exhibited in their respective affidavits. Therefore, the attendance of the Speaker for cross-examination was not necessary.

PETITIONERS' CASE

The 1st to 10th Petitioners' Case (Petition E181/2023)

15. The Petitioners alleged that the introduction of the Affordable Housing Levy (**housing levy**) imposed on the gross salaries of employees reduced their net income. Petitioners contended that the Finance Act 2023 interferes with the net salaries of judges, members of constitutional commissions, and holders of independent offices, and hence in contravention of **Articles 160(4)** and **250(8)** of the Constitution.
16. Further that the effect of impugned **Section 84** of the **Finance Act**, is to take money from taxpayers without clear guarantees and a legal framework as to how they will benefit. That it is cruel, unreasonable,

inhuman and degrading to levy a blanket tax on employee salaries based on deductible percentage without consideration of their existing contractual obligations.

17. The Petitioners contend that although the **Finance Act** contains provisions directly affecting county government, it was introduced in the National Assembly without the concurrence of the Speaker of the Senate in violation of **Article 110(3)** of Constitution.
18. The 1st Petitioner submitted that the requirement of the law is that revenue should be equal to the expenditure within a financial year in accordance with **Article 220(1)(a)** and **221** of the Constitution. He submitted that the estimates presented before the National Assembly were incomplete and did not contain the estimates of revenue contrary to **Section 38** of the **Public Finance Management Act (PFMA)**.
19. The 1st Petitioner submitted that **Article 96(1)** and **(2)** of the Constitution requires the participation of the senate in the enactment of the Finance and Appropriation Bills in order to protect devolution. That the Senate cannot be a bystander in the budget making process and that the Finance and Appropriation Bills should have been subjected to debate in the Senate and failure to do so renders both Acts void *ab initio*.
20. The 1st Petitioner submitted that concealment of estimates of revenue from the **Appropriation Act** amounted to budgeted corruption and results in punitive tax regime in the **Finance Act**. He submitted that

it was not possible to hold effective public participation based on the incomplete budget estimates. These arguments were supported by the 4th Petitioner who added that any legislation passed by Parliament without legislative competence or violating fundamental rights is inherently void.

21. Mr. Otiende Amollo S.C., cited several instances of unconstitutionality of Section 84 of the **Finance Act**. He argued that the provision purports to amend **Part 2(8)(d)** of the **Fourth Schedule** of the Constitution. That the description of the imposition of the housing levy as a tax was intended to defeat the provisions of **Part 2(8) (d)** of the **Fourth Schedule**. That the category of taxes is spelt out in Article **209** of the Constitution and it was unconstitutional to collect the housing levy without an enabling statute. That the levy is discriminatory because it targets formal employees only contrary to **Articles 27** and **30** of the Constitution.
22. Counsel further pointed out that the **Finance Act** includes twenty-two new provisions that were not considered by the National Assembly at the First and/or Second Readings, or subjected to public participation contrary to **Article 201(a)** of the Constitution which requires public participation in financial matters.
23. Counsel further submitted the Finance Bill included matters that were outside the ambit of a money bill under **Article 114(3)** of the Constitution. In this regard he cited amendments to **Section 21** of

Statutory Instruments Act in the **Finance Bill**. He supported the position that the Senate should have been involved in the deliberations concerning the **Finance Bill**.

24. Mr. Amollo S.C., impressed upon this Court to find the **Finance Act** null and void or nullify all those parts that are clearly unconstitutional and an infringement of fundamental rights and freedoms. He cited several authorities including **Independent Electoral and Boundaries Commission & 4 Others v Ndi & 312 others; Ojwang & 4 others (Amicus Curiae) [2021] KECA 363 (KLR)** and **Wangari Mary Josephine Mathai v Andrew Stephen Mwangi Mathai [1980] eKLR** which held that the priorities of whatever regime must be within the law.
25. The 5th Petitioner's focused on whether concurrence between the Speakers of the National Assembly and the Senate was necessary and whether the **Finance Bill** concerned county governments in terms of **Article 110(3)** of the Constitution. Before deliberating on the **Finance Bill**, it was necessary for the Speaker of the National Assembly and the Senate to concur on the nature of the bill. This was a mandatory step that was skipped and a violation of the Constitution. He cited **In the Matter of the Speaker of the Senate & Another (2013) eKLR** to support his argument and urged that enactment of the **Finance Act** was in violation of the Constitution and therefore null and void.

26. Mr. Okong’o Omogeni S.C., on behalf of the 6th Petitioner submitted that the **Finance Act** was enacted in contravention of the mandatory provision of **Article 94** which provides for a bi-cameral Parliament where legislative authority is donated to the two houses; National Assembly and the Senate. Counsel contended that the Senate was bypassed when the National Assembly considered the Finance Bill which contained provisions affecting the powers and functions of county government contrary to **Article 109** and **110** of the Constitution. That the **Finance Bill** ought to have been deliberated by the Senate as it included several provisions affecting county government. Among them are **Section 84** of the **Finance Act** which amended **Section 31** of the **Employment Act** by imposing the housing levy while the function of housing is assigned to the county government pursuant to **Part 2** of **Fourth Schedule** of the Constitution. Further that since the **Finance Act** sought to amend several legislations, affecting county governments namely, the **Income Tax Act, Value Added Tax Act, Excise Duty Act, Betting, Gaming and Lotteries Act, Employment Act, Kenya Revenue Authority Act (KRA Act), Miscellaneous Fees and Levies Act, Tax Procedures Act, Kenya Roads Board Act, Unclaimed Financial Assets Act**, which statutes impact counties, then it was necessary that the same be considered by the Senate.

27. Counsel added that concurrence between the Speakers of the two Houses was necessary and the Speaker of the Senate had raised the issue through a letter dated 15th June, 2023 where he categorically

stated that the **Finance Bill** was not submitted to the Senate for consideration yet the Committee of the Senate had on the 8th June, 2023 noted that the **Finance Bill** contained provisions that proposed to amend not only the **Statutory Instruments Act** but also other laws affecting counties.

28. Mr. Daniel Maanzo on behalf of the 7th Petitioner supported the position taken by counsel for 6th Petitioner on the issue of concurrence of the Speaker of both Houses in respect of matters concerning county government. He focused on **Articles 10(2)** and **118** and argued that public participation did not meet the requirements of the Constitution. Citing **Article 25(a)** of the **International Covenant on Civil and Political Rights (ICCPR)** which recognizes the right of every citizen's right to participate in public affairs, directly or indirectly, he conceded that some public participation took place. However, some amendments introduced and passed in the National Assembly had not been subjected to public participation. The 7th Petitioner's advocate submitted that the original **Finance Bill** submitted for public had 84 clauses but the final Bill assented to by the President had 102 clauses and that 18 clauses were never subjected to public participation. To support his case, he cited the case of **Poverty Alleviation Network & Others vs President of The Republic of South Africa & 19 Others (CCT86/08) [2010] ZACC 5** and urged the Court to find that Kenyans did not get an opportunity to express their fears, concerns and demands regarding the 18 sections.

11th Petitioner's Case (Petition E211/2023)

29. The 11th Petitioner complained that the **Finance Act** introduced new provisions after the public participation exercise. He contended that the amendment of various laws relating to taxes in order to increase government revenue violates the Constitution in different ways. He cited **Section 52** which he submitted violates property rights under **Article 40** by giving the Commissioner powers to register security against tax defaulter's property without notifying the taxpayer. He asserted that **Section 30** amending **Section 17** of **Value Added Tax Act**, which imposes 16% VAT against the owner of a taxable supplies compensated for the loss of goods is a threat to right to property. He contended that **Section 28** which increases VAT on petroleum products from 8% to 16% will lead to high prices of goods. That **Section 33** reclassifies agricultural pest control products, inputs and raw materials for fertilizer from zero rated to exempt and will negatively affect the agricultural sector. It was his contention that **Section 78** which repealed **Section 21** of the **Statutory Instruments Act** to delete automatic revocation of Statutory Instruments after 10 years undermines the mandate of Parliament to review statutory instruments.
30. Further that, the **Finance Act** is discriminatory and punitive. It increased gross sales tax from **1%** to **3%**, lowered the entry point to cover businesses with a turnover of **Kshs. 500,000/-** annually from the previous **Kshs. 1,000,000/-**; introduced digital assets tax on

transfer charges applied during the exchange of digital assets including cryptocurrencies; introduced a new pay-as-you earn tax band at 35% for persons earning gross monthly income of above Kshs. 500,000.00; the introduced the housing levy; increased VAT on petroleum products from 8% to 16% and excise duty on human hair, wigs, false beards, eyebrows, eyelashes and artificial nails.

31. The 11th Petitioner contended that under **Article 206** of the Constitution the national government is required to deposit all revenue into the consolidated fund except money that has been set aside for a specific fund established by an Act of Parliament. The housing levy violates **Article 206** of the Constitution as no special fund has been created and there no provision for receiving the levy under the **Housing Act**.

32. In addition, Mr. Nyakiriga for the 11th Petitioner submitted that the **Finance Act** was not subjected to public participation as most of the public views were outrightly rejected. He also faulted the Respondents for the failure to protect the Constitution by passing the **Finance Act** which overburdens the public terming it a danger to the Constitution.

12th Petitioner's Case (Petition E217/2023)

33. The 12th Petitioner complained that **Section 38** of the **Finance Act** which amended the **Second Schedule, Part A** of the **Value Added Tax Act** by deleting paragraph (20) zero-rated **'The supply of Maize (Corn) flour, cassava flour, wheat or meslin flour and maize**

flour containing cassava flour by more than ten per cent in weight' will increase prices of staple foods hence is a threat to food security and threatens **Article 43(1)(c)** which protects every person from hunger. These amendments also affect the unfair tax burden principle under **Article 201(1)(b)** of the Constitution by imposing VAT on local staple foods while zero rating international exports thus adversely affecting small business which deal with local products.

34. As for the housing levy, the 12th Petitioner's position was that, it violates **Articles 33** and **40** of the Constitution which protect freedom of expression and right to property respectively. That **Section 52, 63** and **66** of **Finance Act** threatens consumer rights under **Articles 46(1)(c)** of the Constitution through amendment of **Tax Procedures Act** to introduce **Section 23A** which mandates the Commissioner to establish an electronic tax system for purposes of the Act by which all business including small business are required to issue invoices through the system and maintain record of stocks. The Petitioner contended that the requirement threatens economic interests of small businesses and is a threat to consumer economic rights under **Article 46(1)(c)** of the Constitution and **Section 3** of **Consumer Protection Act**. The Petitioner complained that their views on this issue were ignored during the public participation process in violation of **Articles 1, 10** and **118** of the Constitution.

13th Petitioner's Case (Petition E219/2023)

35. The Petitioner in this petition raised the same issues as those in Petition No. E181 of 2023. He was represented by Mr. Otiende Amollo S.C., who adopted his submissions in the latter petition.

14th Petitioner's Case (Petition E221/2023)

36. The 14th Petitioner (LSK) challenged **Section 84** of the **Finance Act** on the ground that it violated **Article 40(2)** of the Constitution. It argued that there was no rationale for the government to force its citizens to contribute to a mandatory housing scheme when they are already grappling with harsh economic times. Further, that Section **84** violates **Article 201** of the Constitution as **Section 31** of the **Employment Act** already places an obligation on an employer to provide adequate housing to its employees hence the impugned law will amount to double taxation.

37. The 14th Petitioner complained that **Section 84** of the **Finance Act** does not provide for the manner in which the housing levy will be collected and who is responsible for the administration of the money and this ought to have been stated in the legislation. In addition, the appointment of the KRA as the collection agency of the housing levy violates **Articles 47, 48, 50** and **94** of the Constitution. This amounts to usurpation of the role of the National Assembly as the **KRA Act** does not provide for collection of the housing levy, hence its appointment is *ultravires* the Act. The 14th Petitioner contended that

as a result a taxpayer cannot seek redress under the **Tax Procedures Act** as the **KRA Act** does it as the collecting agency for the housing levy which violates the right to fair administrative action as well as access to justice.

38. The 14th Petitioner challenged **Section 7** of the **Finance Act** which amends **Section 10** of the **Income Tax Act** on the ground that it infringes on the economic rights of non-resident Kenyans as the import of the provision is that (a) where a tax audit leads to a transfer pricing adjustment, resident companies that are found by the KRA to have made excessive payments to non-residents parties will be unable to utilize the withholding tax deducted on those excess payments as a credit or claim a refund; (b) the said amendment will see to it that taxpayers forfeit the withholding tax already remitted to KRA despite KRA disallowing the corresponding expense and getting additional corporate tax which will lead to double taxation contrary to the provisions of **Article 201** of the Constitution; and (c) that the amendment was not subjected to public participation as those affected by the section were not accorded an opportunity to make any representation to the National Assembly's committee on the proposed amendments.
39. Counsel for the 14th Petitioner, **Mr E. Theuri**, submitted that **Sections 7** and **84** of the **Finance Act** did not meet the constitutional test of purpose and effect because it was unclear who is eligible to benefit from the scheme. He also submitted that imposition of the housing

levy violated **Part 2** of the **Fourth Schedule** which assigns the housing function to county governments.

40. **Mr. Ngoloma** submitted that although there was public participation during the early stages of deliberations concerning the **Finance Bill, Sections 24(c), 44, 47(5), 72, 73, 100 and 101** of the **Finance Act** were not subjected to public participation. He submitted that although the **National Assembly Standing Order Number 133** allowed a member of the National Assembly to introduce amendments at any stage of the legislative process, it could not override the statutory and Constitutional provisions. He cited **Kenya Bankers Association vs. The Attorney General & Another; Central Bank of Kenya (Interested Party) (2019) eKLR, Attorney General & Two Others vs David Ndi & 79 Others; Prof. Rosalind Dixon & 7 Others (Amicus Curiae) (2022) KESC 8 KLR** and urged that the court should hold that substantive additions cannot be made in the guise of minor amendments.
41. **Mr Ngoloma** further submitted that under **Section 31(c)** of the **Finance Act**, the collection period of the levy was nine days after its the implementation hence the levy should not have been backdated to incorporate the period when there was a conservatory order issued by this court stopping the implementation of the **Finance Act**.

The 15th Petitioner's Case (Petition 227/2023)

42. The 15th Petitioner raised three challenges to the **Finance Act**. First, that **Section 84** of the **Finance Act** which enacts the housing levy is unconstitutional on the ground that the National Government is seeking to implement and develop housing which is a function of county government under **Part 2** of the **Fourth Schedule**. Second, that by introducing the tax on digital content monetization under **Section 2** of the **Finance Act**, the national government imposes tax on entertainment which is a function of the county government. Third, **Section 33** of the **Finance Act** which amends **Section 17** of the **Value Added Tax Act** by introducing 16% VAT on insurance compensation amounts to expropriation and violated the right to property in **Article 40**.
43. In their submissions **Mr Ochieng Oginga** and **Ms Wambui Njoroge** reiterated these grounds and added that housing, planning and development are key functions of the counties as held in **The Law Society of Kenya vs Cabinet Secretary Ministry of Lands & 3 others [2017] eKLR**. Mr. oginga submitted that whereas **Section 2** of the **Finance Act** introduces income tax on income generated from digital platforms, **Article 209** of the Constitution restricts the taxes that can be imposed by the national and county governments and that the digital content monetization tax is ambiguous and contravenes **Article 186(2)** of the Constitution. Related to the issue of the county government functions, he submitted that the court reserves the

jurisdiction to determine whether a bill concerns county government as this is not an exclusive mandate of the Speakers.

16th to 23rd Petitioners Case (Petition E228/2023)

44. The 16th to 23rd Petitioners represented by **Mr Ochiel Dudley** and **Ms Caroline Muneni** contended that liquor control is a function of the county government. That the amendment introduced by **Section 86** of the **Finance Act** to **Section 31** of the **Alcoholic Drinks Control Act** to the effect that a person shall not sell alcohol below the minimum input cost is unconstitutional being a matter concerning county government functions under **Part 2(4)(c)** of the **Fourth Schedule**. Further, the amendment was made without the involvement of the Senate.
45. The 16th to 23rd Petitioners contended that **Section 84** of the **Finance Act** was unconstitutional on several grounds. That the retroactive effect of the housing levy and the appointment of KRA as collector through a newspaper notice violated the rule of law under **Article 10** of the Constitution. That the housing levy violates **Article 206(1)(a)** by establishing a fund without the statutory authority of Parliament besides designating a housing levy fund without that express authority. That imposing a blanket housing levy of 1.5 percent against an employee's income is directly discriminatory and violates **Articles 27** and **201** of the Constitution. That non-employment income is left untouched hence the tax burden is not shared fairly. Contrary to

Article 27 the imposition of a mandatory uniform deduction indirectly discriminates against those already owning homes, paying mortgages, the uninterested and low-income earners. That the mandatory contribution to a housing scheme violates the right to property under **Article 40** of the Constitution. That the definition of an employee in the amendment is vague as it would compel remote or foreign employees with no interest in housing in Kenya to contribute to the scheme.

46. The Petitioners contended the Parliament approved a tax in stealth by allowing it to be expended outside the Consolidated Fund Services (CFS); that the housing levy, violates **Article 201(b)(ii)** of the Constitution because it is revenue raised nationally but cannot be shared equitably among national and county governments, instead, **Section 84** of the **Finance Act** earmarks the housing levy by stating that it shall not be used for any other purpose other than the development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans. That the housing levy distorts **Articles 10, 21(1)** and **43** of the Constitution by earmarking a levy for the realization of a specific right to neglect other rights when the state must promote and fulfil all rights in the Constitution.

47. It was further contended that changes introduced by the **Finance Act** are regressive and a disproportionate burden to the poor and vulnerable. That the effect of **Section 30(b)** of the **Finance Act**

which amends **Sections 5(2)(ab) and 5(2)(aa)** of the **Value Added Tax Act** is to double the VAT on liquefied petroleum gas and other fuels violates **Articles 24 and 47** of the Constitution . That the National Assembly disregarded concerns on the cost of living in the Budget Policy Statement and the requirement in the **Standing Orders 245(2)** to consider equity and impact of the proposed changes on the composition of the tax revenue based on the direct and indirect taxes. The Petitioners contend that doubling VAT on natural gas threatens the right to a clean and healthy environment under **Article 70** because recourse will be non-renewable energy as an alternative.

48. The Petitioners assailed **Section 37** of the **Finance Act** for amending **Section A Part I & Paragraph 66A** of the **First Schedule** to the **Value Added Tax Act** whose effect is to reverse zero rating of several goods including malaria diagnostic testing kits, infant milk, antisera, blood fractions, and immunological products, vaccines for human medicine and veterinary medicine and moving some goods from exempt to zero-rated including liquefied petroleum gas, Bioethanol vapour (BEV) Stoves. They contended that these changes are not only unconstitutional and violate the right to health, life of women and children under **Articles 26 and 43** of the Constitution but also violates the state's obligation under **Article 21(2) and (3)** of the Constitution to take legislative, policy and other measures, including setting standards, to achieve the progressive realisation of the right to health and to address the needs of vulnerable groups within society.

49. The Petitioners impugn the constitutionality of the following provisions on the ground that they violate **Articles 10, 21(3), 27, 201(b)(i)** of the Constitution and the National Tax Policy. These are amendments to **Section 5** of the **Income Tax Act** by **Section 5** of the **Finance Act** exempting mileage from taxation, amendment to **Paragraph 10** of the **Third Schedule** to the **Income Tax Act** by **Section 26(b)(x)** of the **Finance Act** reducing tax on rental income from 10% to 7.5%, repeal of **Section 10** of the **Excise Duty Act** by **Section 41** of the **Finance Act** eliminating the allowance for inflation adjustment, **Section 47(a)(v)** of the **Finance Act** amending **Part I** of the **First Schedule** to the **Excise Duty Act** increasing the excise duty from 25% to 35% on imported glass bottles excluding imported glass bottles for packaging of pharmaceutical products, amendment by **Section 47** of the **Finance Act** to the **First Schedule** to the **Excise Duty Act** to impose excise duty of 25% on imported cartons, boxes and cases of corrugated paper or paper board and imported folding cartons, boxes and case of non-corrugated paper or paper board and imported skillets, free hinge lid packets, amendment of the **First Schedule** to the **Excise Duty Act** by **Section 47** of the **Finance Act** to increase excise duty on imported fish, powdered juice and sugar.
50. Counsel for the Petitioners emphasised that regressive taxes violate **Articles 10, 21(3)** and **201** of the Constitution and submitted that taxation must be fair as Kenya is in an economic crisis. They further submitted that some taxes violate **Article 42** of the Constitution which

protects the right to a clean and healthy environment by exerting pressure on forests a matter that would impact on the climate change. The Petitioners also complained that the **Finance Act**, being a money Bill under **Article 114** of the Constitution contained non-money Bill matters such the repeal of **Section 21** of the **Statutory Instruments Act**. Counsel reiterated and supported the other petitioners' position on public participation.

51. Mr. Ogada for the 6th and 7th Petitioners emphasised that the principle of legality should be the foundation for the Court's determination of the petitions. On the issue of public participation, counsel relied on the decision of the Supreme Court in **British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs 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** and urged the court to consider the qualitative and quantitative elements of public participation outlined in the decision in evaluating the **Finance Act**.

52. Mr. Ogada also submitted that the notice regarding the deduction of housing levy was unlawful as it was signed by the Cabinet Secretary for Housing yet it should have been done by the Cabinet Secretary for Labour. That the notice was retrospective and in contravention of **Section 28** of the **Statutory Instruments Act** as read with **Interpretation and General Provisions Act**.

24th Petitioner's Case (Petition E232/2023)

53. The 24th Petitioner impugned **Section 84** of the **Finance Act** on grounds that it poses a grave threat to the express provisions of **Articles 1, 2, 3(1), 10, 19, 21, 24, 25(a) & (c), 27(1) & (2), 36, 40, 132, 209** and **201** of the Constitution. He contended that the housing levy was alien and not contemplated under **Article 209** as read together with **Article 210** of the Constitution. He argued that the housing levy cannot be imposed on employees or employers unless specifically provided for in tax legislation. He added that there is no accountable and transparent governance framework established by the Respondents to ensure that the housing levy is properly utilized for benefit employers and employees.

25th to 28th Petitioners Case (Petition E234/2023)

54. The 25th to 28th Petitioner's case revolved around **Sections 26** and **84** of the **Finance Act** which limits employees' rights under the **Employment Act** beyond what is reasonable and justifiable in an open and democratic society based on human rights and dignity. They asserted that the imposition of the housing levy results in the net pay of some employees falling below a third of their wages in violation of Article **24** of the Constitution. Further, that by increasing the individual income tax beyond 30%, **Section 26** of the **Finance Act** contravenes **Article 40** of the Constitution as it limits and **prevents** the employees from enjoying the right to their income to the greatest possible extent.

55. The Petitioners averred that by taking over the duty of providing housing through **Section 84** of the **Finance Act**, the State was likely to infringe on the right to accessible housing by providing houses far from their places of work or providing fixed place of abode to employees who are subject to transfers to different geographical areas and those that change jobs.
56. **Mr Elisha Ongoya** emphasised that **Article 19(3)(b)** and **(c)** of the Constitution discourages exclusion of other rights and freedoms not in the Bill of Rights and that any limitation of the right is subject to **Article 24** of the Constitution. That the rights of workers form an integral part of the Bill of Rights and any limitations brought about by the **Finance Act** should be in accordance with the provisions of the Constitution.

29th – 38th Petitioners Case (Petition E237/2023)

57. The 29th to 38th Petitioners supported by the submissions of the 1st Petitioner, **Dr Fredrick Onyango Ogolla**, impugned **Sections 75, 77, 84** and **89** of **Finance Act** on the ground that they contravened **Articles 2(4), 96, 109, 110, 112** and **113** of the Constitution by allowing the National Assembly to make unilateral amendments to Acts of Parliament enacted jointly by the National Assembly and the Senate. That **Section 84** of the **Finance Act** will interfere with the net salaries of judges, members of constitutional commissions, and holders of independent offices and other public servants' contrary to **Articles 160(4)** and **250(8)** of the Constitution.

58. They contended that imposition of the housing levy threatens socio-economic rights under **Article 43** as the fund will require a 1.5% reduction in basic salary for employees and a 1.5% housing levy from employers, thereby reducing worker's purchasing power as it increases business operating costs. That the amendment to **Section 5** of the **Value Added Tax Act** under **Section 30** of the **Finance Act** has the effect of raising VAT on petroleum products which will further increase the cost of living thus violating the right to human dignity and socio-economic rights protected under **Articles 28** and **43** of the Constitution, respectively.
59. The Petitioners complained that **Sections 44, 45** and **55** of the **Finance Act** which amends **Excise Duty Act** to require remittance of excise duty within twenty-four hours from the closure of the transaction of the day is a complicated and onerous.

39th to 52nd Petitioners' Case (Petition E254/2023)

60. The 39th to 52nd Petitioners, which are pharmaceutical companies, centered their case on the provisions of **Section 47(a)(xii)** of the **Finance Act** which amended provisions of the **Excise Duty Act** and which they contended violate **Articles 2(4), 10, 93(2), 109 118(1)(b), 124(1)** as read together with **Article 232(1)(d)** of the Constitution by enacting a new tax at the rate of 25% on imported cartons, boxes and cases of corrugated paper or paper board and imported folding cartons, boxes and case of non-corrugated paper or

paper on board and imported skillets, free hinge lid packets, imported plates of plastic and imported paper or paper board labels of all kinds whether or not printed without any form of public participation on the said provision. The Petitioners complained that this provision was not in the original bill and was only inserted during the third reading of the bill before the National Assembly. For this reason Mr. Arwa urged the Court to declare **Section 47(a)(xii)** of the **Finance Act** unconstitutional. He further argued that constitutional values under **Article 10(1)(b)** of the Constitution are binding on Parliament at every step of the legislative process.

THE RESPONDENTS' CASE

61. The Respondents, that is, **the Cabinet Secretary for National Treasury and Economic Planning** (the CS, Treasury), **the Attorney General, the National Assembly, the Speaker of the National Assembly,** and the **KRA** filed their respective responses to the petitions. The CS, Treasury and the Attorney General rely on three affidavits sworn by **Prof Njuguna S. Ndung'u**, the CS, Treasury. The National Assembly and the Speaker of the National Assembly relied on the replying affidavit of the **Rt. Hon. (Dr.) Moses M. Wetang'ula**, Speaker of the National Assembly and four affidavits of **Samuel Njoroge**, Clerk of the National Assembly. KRA filed two replying affidavits through its Officer, **Josephine Mugure**. These responses appear aligned on most of the key issues.

62. The Respondents inveigh the Petitioners' lack of appreciation of the principle that taxation is not only lawful, constitutional and legitimate, but is also a necessary mechanism for the national government to raise revenue to meet

recurrent expenditure including salaries, debt financing, capital expenditure for investment and infrastructure development as well as capitation of various independent commissions, agencies, and county governments.

63. Further, that the Ministry of National Treasury and Planning is responsible for the formulation of the national budget and for creating legislative proposals in the form of a finance act. Asserting that under **Article 1** of the Constitution, the people of Kenya delegate legislative authority to the National Assembly, the Respondents describe the chronology of pertinent events as follows. That in accordance with **Article 43(1)(b)** of the Constitution, the CS, National Treasury submitted the **Finance Bill** whose purpose was to propose an array of tax modifications primarily to increase revenues to meet the government's budget of Kshs.3.6 trillion for the financial year 2023/2024 to the National Assembly for discussion, consideration and enactment of the **Finance Act** pursuant to **Articles 94(1), 94(5), 95(3) and 109 (1)** of the Constitution and subsequently, the **Finance Bill** was presented to the National Assembly for consideration and was published vide **Kenya Gazette (Supplement No. 56 of 2023)**.
64. According to the Respondents, the passage of a bill through the National Assembly comprises several stages, including the First Reading, Second Reading, Committee Stage, Reporting Stage, and Third Reading. That the **First Reading** entails the Bill's introduction into the National Assembly by reading of its title, before commitment to the relevant select committee for consideration. At the **Second Reading**, the National Assembly thoroughly debates the Bill's principles and objectives before a vote is taken, and if

passed, the Bill proceeds to the Committee Stage during which the Bill is examined clause-by-clause by the Committee of the Whole House consisting of all Members of the Assembly, and chaired by the Deputy Speaker or a member of the Chairperson's Panel ending with a vote regarding proposed amendments.

65. Thereafter, the sponsor of the Bill moves a Motion for the Chairperson to report the Bill to the National Assembly. That during the Reporting Stage, the Chairperson of the Committee of the Whole House reports to the House on the Committee's deliberations on the Bill. At that stage, Members have the option to move a Motion to amend the Motion for Agreement, seeking re-committal of specific parts of the Bill for further deliberation by the Committee. **The Third Reading** is the final stage in the passage of a Bill after which a Bill is referred to the President for assent. **Hon. Murugara** underscored this process in his oral submissions on behalf of the National Assembly.
66. The Respondents asserted that a **Finance Bill** is an annual bill enacted to facilitate revenue collection by the National Government based on the approved annual **Budget Policy Statement (BPS)** and the Budget Estimates and that the operative provisions with regard passage of the **Finance Bill** are **Articles 95 (4) (c), 109 (3), 114, 209 (1), 221 (1)** and **Section 39A** of the **PFMA**. That the 2023 **BPS** was submitted to Parliament and tabled before the National Assembly on 15th February 2023 and approved by the Budget and Appropriations Committee following extensive public participation before approval by the National Assembly. That

the **2023 BPS** as approved by the National Assembly formed the basis of the 2023/2024 budget for the national government under **Section 25(8)** of the **PFMA**.

67. The Respondents contended that in accordance with the revenue ceilings approved through the **2023 BPS**, the **Estimates of Revenue and Expenditure for the Financial Year 2023/2024** for the Executive, Parliament, and the Judiciary were submitted to the National Assembly on 27th April, 2023 in accordance with **Article 221** of the Constitution. The Estimates were then submitted to the Budget and Appropriation Committee for consideration and public participation. That the Budget and Appropriation Committee facilitated extensive public participation on the Estimates before their approval, and that the National Assembly adopted the Budget and Appropriation Committee report and approved the Estimates of Revenue and Estimates of Expenditure of the Executive, the Judiciary and Parliament for the Financial Year 2023/2024. That the first phase of public participation in the revenue raising measures by the National Assembly was at the point of approval of the 2023 BPS and the Estimates of Revenue and Expenditure under **Article 221** of the Constitution.
68. The Respondents stated that it is through the foregoing process that the **Division of Revenue Act**, the **County Allocation of Revenue Act**, the **Appropriation Act** and the **Finance Act** were formulated, debated, and enacted in accordance with the Constitution.

69. While acknowledging the role and influence of public interest litigation as a means of advancing the common good for the country, the Respondents contended that public interest litigation should not to be abused. That the Court has the public duty to protect the noble objective of public interest litigation by filtering out cases filed for ulterior motives such as the present petitions.
70. The Respondents' were unanimous that the proposals in the Finance Bill were within the provisions of **Article 109 (1), (2) and (3)** of the Constitution and had no direct bearing on matters concerning counties. Consequently, the Senate had no role in the **Finance Bill**. Further, matters related to national tax as envisaged by **Article 209** of the Constitution are the preserve of the National Assembly and not the Senate, whose legislative role is limited to Bills that concern county governments.
71. The Respondents submitted that under **Article 114 (3) (e)** of the Constitution matters incidental to a money Bill may be included in money Bill. Prof. Githu Muigai S.C., described matters incidental to a money Bill as matters *ejusdem generis*.
72. The Respondents contended that the proposals contained in the **Finance Bill** were limited to matters pertaining to the National Government pursuant to **Articles 109, 110, 209 and 210** and **Part 1** of the **Fourth Schedule** of the Constitution and concerned imposition of income tax, VAT and Excise Duty. That none of the provisions in the **Finance Bill** amounted to or touched on the functions of the county government under **Article 110** or

Part 2 of the **Fourth Schedule**. As concerns the provisions repealed, amended, altered, or otherwise affected by the proposals, the Respondents contended that these were lawful and necessary under **Section 40** of the **PFMA**.

73. Mr. Kiragu S.C., and Mr Somane appearing for the CS, Treasury and the Attorney General, respectively dismissed the Petitioners assertion that there was inadequate public participation. As demonstrated by the evidence on record, they submitted that public participation resulted in several changes to the bill including changes to the percentage contribution to the housing levy by employees, percentage of tax levied against digital content creators which was indicative of meaningful public participation.
74. The Respondents submitted that public participation only calls for effective engagement and deliberation over proposals and that any outcome arising out of effective public participation cannot be impugned merely on grounds acceptance or rejection of any proposals made by the public. That in this instance, the public participation exercise was well publicised in the print media on 7th and 8th May, 2023 through invitations seeking comments on the **Finance Bill**, that resulted in the Committee receiving a total of 1080 memoranda.
75. Further, the Respondents contended that public participation was conducted directly through submission of memoranda by stakeholders and indirectly through the elected representatives. They therefore asserted that the

Petitioners have failed to discharge their legal and evidentiary burden of proof that the **Finance Bill** and **Act** were not subjected to public participation.

76. The Respondents disputed the Petitioners claim that the housing levy violated Part **2** of the **Fourth Schedule** of the Constitution since the national government was authorized to impose tax on income by **Article 209(1)(i)** of the Constitution to support the national housing policy, a function which is reserved for the National Government. That the tax was not intended to regulate the social economic activities in the county as this is within the power of county government under **Part 2** of the **Fourth Schedule** to the Constitution.
77. The Respondents urged the court to take judicial notice of the Housing Act and contended that it creates the National Housing Development Fund and the National Housing Corporation and therefore the specific statute on which the housing levy was anchored.
78. The Respondents contended that the **Finance Act** was procedurally enacted. That it dealt with the raising of revenue, and incidental matters and did not require prior concurrence by the Speakers of the National Assembly and the Senate as asserted by the Petitioners. Citing correspondence exhibited by the Speakers of both Houses in this matter, the Respondents asserted that the two Speakers had concurred that the **Finance Bill** was not a bill concerning county governments under **Article 109(3)** of the Constitution.

79. Prof. Githu Muigai, S.C., stressed that the taxation measures were an exercise of executive policy formulation by the national government in exercise of its exclusive powers and functions related to national economic policy and planning in **Part 1 of the Fourth Schedule** and that what was before the Court was a political dispute that ought to be resolved in Parliament and not by the Court. He added that the dispute is a policy matter relating to taxation hence is non-justiciable.
80. The Respondents defended the impugned provisions in the **Finance Act**. KRA in demonstrating their position asserted that the amendment of the definition of the term "**winnings**" was intended to clarify the nature of income to be taxed hence a matter reserved for the national government. Other amendments cited in this connection include insertion of new paragraphs in **Income Tax Act, Tax Procedures Act, the Betting, Gaming and Lotteries Act, the Kenya Roads Board Act, the Employment Act** and the **Statutory Instruments Act** which the Respondents contended that these fell within the ambit of public policy and therefore within the legislative remit of the National Government. The Respondents further contended that the **Employment Act** is the overarching legal and regulatory framework governing employment in Kenya and labour standards and therefore the preserve of the national government under **Part 1** of the **Fourth Schedule**.
81. The Respondents stated that the repeal of **Section 21** of the **Statutory Instruments Act**, did not affect the functions or powers of county governments as the statute is a regime for the making, scrutiny, publication

and operation of statutory instruments, which matters are reserved for the national government under **Article 109** of the Constitution. In addition, the Respondents submitted that the repeal of **Section 21** of the **Statutory Instruments Act**, was informed by the need to save the statutory instruments by extending the lifespan of subsidiary legislation to provide a stable, consistent and predictable regulatory framework for the financial sector and to avoid the tedious and complex, time consuming and expensive process of reviewing a host of regulations. They defended the amendment to the **Statutory Instruments Act** as falling within the objects of the **Finance Bill** whose object is to amend the laws relating to various taxes and duties, and for matters incidental thereto.

82. In conclusion, the Respondents stated the amendments to the **Income Tax Act**, **Value Added Tax Act** and **Excise Duty Act** solely related to the exercise of the national government's powers of taxation as reserved by **Article 209(1)** of the Constitution and did not entail any function or power vested in the county governments. Hence the amendments were lawfully and constitutionally enacted by the national government.

83. On the housing levy, the Respondents stated that taxation, imposition of levies and other government revenue raising measures are constitutional, legitimate and legal exercise of government power which is vested on national government as expressly provided under **Articles 209** and **210** of the Constitution and moreover, that any taxation measure enacted by Parliament enjoys the presumption of constitutionality, which the Petitioners have not rebutted while canvassing misapprehension of law, distortion of

facts or outright manifest misunderstanding of the factual matrix underpinning the **Finance Act**. Mr. Somane cited the case of **Pharmaceutical Manufacturing (K) Co. Ltd & 3 Others vs Commissioner General of Kenya Revenue Authority & 2 Others (2017) eKLR** for the proposition that legitimate imposition of taxes does not amount to expropriation of property. He reiterated that the housing levy is not discriminatory and that this is a case of differentiation, here citing the case of **Nubian Rights Forum & 2 others vs Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR**.

84. The Respondents asserted the cardinal principles of taxation as contained in the Constitution and as exercised in all democratic societies being the **Article 201** on the principles of fairness, equity, equality and prudence in taxation. They explained that the NHDF was first established in 2018 through the **Finance Act** and was managed by the National Housing Corporation (NHC) with the objective of raising funds in one of several initiatives undertaken in a bid to close the housing deficit and for the realisation of the right to housing in **Article 43(1)(b)** of the Constitution.
85. That according to the NHC statistics, despite a burgeoning urban population, only 50,000 new houses are delivered or constructed annually in the country, against the demand for affordable housing estimated at 250,000 units per year, hence the deficit. That affordable housing plays a central role in the social life of Kenyans through providing an enabling environment for nurturing families, the promotion of health, security for individuals and their

property, among other benefits. That despite launching of the Affordable Housing Program (AHP) by the government in December 2017, as part of the 'Big Four Agenda', the objectives of the AHP have not been fully met because of inadequate financing and lack of a proper financing model for the Project which is a capital-intensive venture, and that the proposed Housing Fund is a pooling of contributions from various workers in both public and Private sector as well the participants in the AHP, allowing the private developers to transact at an institutional level for the benefit of the individual citizen.

86. The Respondents averred that the AHP is intended to ensure access by its citizens to social economic rights and in particular the realisation of the **Article 43** ideal, as read together with **Article 40** and **Article 209**, to establish the NHDF, with a self-sufficient and cost-effective financial structure aimed at addressing the demand for affordable housing in Kenya. The Respondents emphasised the right to housing as embedded in **Article 43(1)(b)** of the Constitution as affirmed by the Supreme Court in **Mitu-Bell Welfare Society vs The Attorney General & 2 Others (2013) eKLR**. The Respondents defend the housing levy as a noble idea consistent with the Constitution and international human rights instruments

87. That the **Finance Bill** had various legislative proposals including the introduction of a 3.0% levy on the employee's gross monthly income, with a matching contribution from the employer that would be remitted to the NHDF. That the State has an obligation to put in place legislative, policy and programmatic framework in the context of a national strategic plan for the

realization of the entrenched affordable housing right and that these steps must be deliberate, concrete, targeted, adequately financed, and capable of realizing the entrenched rights.

88. Further, that the State is currently appropriating and accumulating resources for financing the affordable housing through the introduction of housing levy, a classic example of hypothecated tax that is earmarked to achieve a specific public purpose. That it aligns with **Section 7(3)(a)** of the **Housing Act** that recognizes, authorizes, and permits Parliament to appropriate or vote funds for payment into the NHDF.

89. Further, the Respondents state that such taxation is not novel in Kenya as several levies have been introduced by the government in the past to raise funds for various key priority areas. These include the **Sugar Development Levy (SDL), Railway Development Levy (RDL), Road Maintenance Levy Fund, the National Hospital Insurance Fund (NHIF), the National Social Security Fund (NSSF), Hotel and Catering Levy, Fuel Levy, Standards Levy** and **Export Levy**. Therefore, contrary to the Petitioners' allegations, the rationale for introducing a housing levy to address the issue of affordable housing deficit in the country pursuant to **Article 209** of the Constitution together with the rates of taxation, are a policy decision within the mandate of the National Assembly and the Executive, pursuant to **Article 209** of the Constitution as read together with **Section 7(3)(a)** of the **Housing Act**.

90. The Respondents denied that the housing levy violates **Article 40(1) (a)** and **(b)** of the Constitution and argued that the assertion by the Petitioners lacks factual basis and termed it selective interpretation of the Constitution without considering **Articles 43, 209, 94 (1), 94(5), 95(3)** and **109 (1)** of the Constitution.
91. The Respondents' aver that the introduction of the housing levy under **Article 201(b)** of the Constitution as read with **Section 7(3)(a)** of the **Housing Act** is progressive, equitable, and fairly borne through a progressive taxation regime that offers vertical equity. That the housing levy applies horizontally and vertically and does exempt any public and state officers from payment of the housing levy.
92. On the issue of ringfencing the housing levy, the Respondents cited the authority conferred on the national government by **Article 206(1)** of the Constitution to exclude specific monies from the Consolidated Fund into public funds meant for specific purposes. They point out there is adequate clarity on who shall contribute to the NHDF under the **Housing Regulations (2018)**. The Respondents accuse the Petitioners of preempting Parliament's authority to amend the said **Housing Act** through the **Housing (Amendment) Bill, 2023**, which proposes the establishment of a fund, its object and purpose as well as the administrative and management structure.
93. In response to the assertion that the proposed amendments to **Section 42(2)** of the **Tax Procedures Act** articulated in **Section 56** of the

Finance Act, threaten property rights, it is the Respondents' contention that these alterations seek to promote fiscal responsibility and optimize the usage of taxpayers' funds and that the amendments will not arbitrarily deprive taxpayers of their overpaid taxes but merely serve as a mechanism to offset future tax liabilities. That the Commissioner's power to withhold and use overpaid taxes is a measure to enhance tax management and not an infringement of taxpayers' rights.

94. The Respondents submitted that the amendments to the **Tax Procedures Act** are vital in promoting clarity, fairness, and efficiency in the dispute resolution process.
95. That the objective of the amendments of provisions of the Value Added Tax is to broaden the tax base and to generate additional revenue for the government, rather than to deny tax payers their property rights. Specifically and as regards VAT on compensation the Respondents' explained that where taxpayers claim and deduct input VAT on their property, it is only reasonable that KRA is entitled to tax compensation paid out by insurance companies and that this practice aligns with the broader principles of tax fairness and neutrality.
96. Regarding the reclassification of agricultural pest control products, transportation of sugarcane, inputs/raw materials for fertilizer manufacturing, and fertilizers from zero-rated to exempt under the Finance Act the Respondents stated that this was necessary to streamline the VAT

system and improve tax compliance and is not intended to burden the agriculture sector.

97. For the above reasons, the Respondents asserted that the impugned provisions of the **Finance Act** were properly and procedurally enacted and the rationale for every provision has been adequately explained. As such they urge the Court to find that the Petitioners have failed to demonstrate any violation of the Constitution.

THE INTERESTED PARTIES' CASE

98. The following parties were joined to Petition Nos. E181, E217 and E228 of 2023 as Interested Parties: The Commissioner-General KRA, the Senate, Consumer Federation of Kenya (COFEK), Kenya Export Floriculture, Horticulture and Allied Workers Union, Devki Steel Limited, Electrical Mobility Association of Kenya, Kenya Airlines Pilots Association (KALPA) and the Law Society of Kenya.

99. The Law Society of Kenya, the Senate and the Kenya Revenue Authority were Petitioners and Respondents respectively in some of the Petitions where they filed their responses and submissions which have already been set out.

The Consumer Federation of Kenya (COFEK)

100. COFEK opposed the petition and contended that the Constitution grants Parliament legislative power without limitation and that the Judiciary and the Executive only facilitate Parliament in carrying out its

functions. It urges the court not to overreach and appear to amend laws passed by Parliament.

101. It urged this Court consider that due to budgetary constraints, the implementation of socio-economic rights under **Article 43(1)** of the Constitution could not be realised without the State raising additional resources through reasonable taxation as proposed by **Section 84** of the **Finance Act**

Kenya Export Floriculture, Horticulture and Allied Workers Union (Kefhawu)-4th Interested Party

102. **Kefhawu** opposed the consolidated petitions and supported the submissions of the 1st, 2nd, 3rd and 4th Respondents that the **Finance Act** was procedurally enacted in accordance with **Article 114** of the Constitution.

103. The 4th Interested Party cited **Mitu-Bell Welfare Society vs The Attorney General & 2 others (supra)** to submit that the housing deficit in the country was acknowledged by the Supreme Court. The housing levy enacted by the **Finance Act** is geared towards fulfilment of the right to housing.

Kenya Airlines Pilots Association (Kalpa) -7th Interested Party

104. The 7th Interested Party supported the consolidated petitions in its capacity as a trade union and voiced the grievances of workers against the **Finance Act**. It supported the Petitioners on two fronts. That there was inadequate public participation in the process leading to

enactment of the **Finance Act** and the introduction of the housing levy was unconstitutional.

105. Regarding the increase in income tax through adjustment of PAYE, it contended that is unconstitutional. KALPA submitted that the principles of fairness in taxation obligates Government to expand the tax base to avoid inequality.

AMICUS CURIAE

Dr. Maxwell Miyawa

106. Dr. Maxwell confined his submissions to questions concerning the legality and constitutionality of the housing levy. He submitted on the Constitutional normativity of the tax and the International normativity of such a levy.
107. On the question of constitutional normativity, he referred to **Article 43(1)(b)** of the Constitution and stated that the Constitution should be interpreted holistically and its provisions given meaning to the ensure that each supports and does not destroy the other. That as such the right to adequate housing can only be deduced by reference to other constitutional provisions including **Articles 10(1) and (2), 19(1) and (2), 20(1) and 23(3)** of the Constitution. That in resolving the issues in this matter, the Court should consider social justice, inclusiveness, human rights and human dignity in asking itself whether the programme is justified on the basis of seeking to realise constitutional values.

108. He urged the court to consider the following factors in determining the constitutionality of the housing levy. That the Court should consider that government bears the burden to demonstrate that resources are not available; that the Court should not descend into the arena of distribution of resources which is the function of the legislature; that the court should determine whether the housing levy promotes and fulfils the right to housing or is excessive taxation bearing in mind the duty of the state to enact and implement laws in fulfilment of internationally recognized obligations.
109. The international normativity question, the Amicus relied on the case of **Mitu-Bell Welfare Society v The Attorney General & 2 Other (supra)** and stated that **Article 2(5)** and **(6)** incorporates general rules of international law and treaties and conventions ratified by Kenya into Kenyan law. That the question for the court is what norms and rules are relevant to the question of the housing levy and whether it can be justified. He cited Articles **2(1), 11.2** and **23 International Covenant Economic Social and Cultural Rights (ICESCR)**, and General Comment No. 4 of 1991, General Comment 7 under the **African Charter on Human and People's Rights**.

Dr. Maurice Juma Okumu

110. Dr Maurice Juma submissions concentrated mainly on the issue of public participation: what amounts to sufficient public participation,

whether the law addresses the question of public participation and what the place of public participation is in International Law.

111. He contended that the concepts of public participation are not generally well defined and that the same is not well formulated. Citing **National Super Alliance vs Independent Electoral Boundaries Commission & 2 Others (2017) eKLR**, he defined public participation as the practise of involving members of the public in the agenda-setting, decision-making, and policy-forming activities of organisations or institutions responsible for policy and law development.

112. As regards sufficient public participation, the Amicus cited several decisions to guide they included **R v Secretary of State for Social Service ex parte Association of Metropolitan Authorities [1986] 1 ALL ER 169**, **Robert Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR** and **Nairobi Metropolitan Psv Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others [2013] eKLR**.

113. On the place of public participation in International law, the Amicus referred to the following international instruments; Article **21** of the **Universal Declaration of Human Rights (UDHR)**, Article **25** of the **International Covenant on Civil and Political Rights (ICCPR)** as well as **Articles** in the **Convention on Elimination of**

All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD).

ANALYSIS AND DETERMINATION

114. From the pleadings, affidavits, and submissions of the parties, we find the following to be the issues emerging for consideration:

- 1) Were procedural requirements pertaining to the legislative process of the finance bill adhered to?**
 - a) Whether the Finance Bill is a money Bill in terms of Article 114 of the Constitution and whether it contained matters outside the scope of a 'money Bill.'**
 - b) Whether the Finance Bill required concurrence of the Speaker of the Senate.**
 - c) Whether estimates of revenue and expenditure were included in the Appropriation Act in accordance with the Constitution and the Public Finance Management Act?**
- 2) Whether the public participation conducted was sufficient.**
- 3) Whether certain taxes cited in the Petition and as enacted by the Finance Act are unconstitutional.**
- 4) Whether Section 84 of the Finance Act introducing the housing levy is unconstitutional.**
- 5) What reliefs, if any, should the court grant in the circumstances; and**

6) Who should bear the costs of the consolidated Petitions?

1(a) Whether the Finance Bill is a money Bill in terms of Article 114 of the Constitution and whether it contained matters outside the scope of a 'money Bill.'

115. The Petitioners' contention is that the **Finance Bill** contained matters that were outside the scope of a money Bill while the Respondents' position was that the matters the Petitioners complained of were incidental to a money Bill.

116. The Court is therefore called to consider the meaning and place of a money Bill in the legislative process. **Article 114** of the Constitution provides as follows:

Money Bills

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 mentioned in the definition of "a 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.

(3) In this Constitution, "a money Bill" means a Bill, other than a Bill specified in Article 218, that contains provisions dealing with—

- (a) taxes;
- (b) the imposition of charges on a public fund or the variation or repeal of any of those charges;
- (c) the appropriation, receipt, custody, investment or issue of public money;
- (d) the raising or guaranteeing of any loan or its repayment; or
- (e) matters incidental to any of those matters.

(4) In clause (3), "tax", "public money", and "loan" do not include any tax, public money or loan raised by a county.

117. The High Court in **Pevans East Africa Limited & Another Vs Chairman Betting Control and Licensing Board & 7 Others [2017] eKLR** considered the meaning of a money Bill. It observed as follows:

"... A further test is to examine the purpose of the Bill. The pith and substance of the impugned legislation can be discerned by examining the purpose of the Bill. The preamble to the Finance Bill 2017, reads "An act of Parliament to amend the law relating to various taxes and duties and for matters incidental thereto." Here lies the purpose, namely, to amend the law relating to various taxes and duties.... 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..."

118. This position was affirmed by the Court of Appeal in **Pevans East Africa Limited and Another vs. Chairman, Betting Control and Licensing Board and 7 Others (2018) eKLR.** We therefore adopt the pith and substance test which enjoins the court to examine the purpose and substance of the Act.

119. The object of the **Finance Act** as contained in the preamble states that it is an **“AN ACT of Parliament to amend the laws relating to various taxes and duties; and for matters incidental thereto”**. It contains 102 sections amending existing laws on taxation and related matters, creating new taxes, charges and levies as revenue raising measures. The Petitioners have challenged some of these provisions on the ground they do not fall within the purview of a money Bill. Whether they fall within the definition of a money Bill depends on whether they relate to taxes or are incidental to the proposed taxation measures in the **Finance Act**.

120. **Blacks Law Dictionary 9th edition** defines the term ‘**incidental:**’ as **“Subordinate to something of greater importance; having a minor role.”** Matters incidental to a money Bill must have a rational connection to the matters enumerated in Article **114(3)(a)(b)(c)** and **(d)**. For example, the imposition, raising, reduction, variation of taxes may necessitate the amendment of other statutes. Hence the legislature, is permitted to include such changes in a money Bill.

121. The question that we need to answer is whether the provisions complained of by the Petitioners relate to or are incidental to the Finance Bill. From our consideration it is not disputed that certain amendments contained in the **Finance Act** are with respect to laws relating to taxes and duties, hence falling within the purview of the **Finance Act**. These amendments are to : the **Tax Procedures Act, 2015** under **Part VI (Sections 49- 67)** of the **Finance Act**; the **Excise Duty Act, 2015** under Part IV (**Sections 40-48**) of the **Finance Act**; the **Income Tax Act** under Part II (**Sections 2-29**) of the **Finance Act**; the **Value Added Tax Act, 2013** under **Part III (Sections 30-38)** of the **Finance Act**; the **Tax Appeals Tribunals Act, 2013** under **Part III (Section 39)** of the **Finance Act**; the **Betting, Gaming and Lotteries Act** under **Section 75** of the **Finance Act**; **Kenya Revenue Authority Act, 1995** under **Section 79-81** of the **Finance Act** and; the **Miscellaneous Fees and Levies Act, 2015** under **Part VII (Sections 68-74)** of the **Finance Act**.
122. The Petitioners contest **Sections 76, 77, 78, 82, 83, 84, 85, 86, 87, 88, 89, 90-102** of the **Finance Act** which amend various legislations, on the ground that they water down the character of the **Finance Act** as a money Bill. An individual consideration of the provisions is necessary to determine whether they fall directly within the purview of a money Bill or are incidental thereto.

123. The Petitioners impugn the inclusion of **Section 84** of the **Finance Act** which amends the **Employment Act, 2007** by adding **Sections 31B** and **31C**. The effect of these sections is to impose a new levy known as housing Levy (levy) and provide method for its collection. A levy being a form of tax, its imposition would constitute a tax measure within the purview a money Bill.
124. The effect of **Section 85** and **86** of **Finance Act** is to amend **Section 2** of the **Alcoholic Drinks Control Act, 2010**, to provide for a minimum input tax cost and to prohibit the sale, manufacture, packaging, or distribution of alcoholic drinks at a price below the minimum input cost. This amendment involves imposition of excise duty that falls within the purview of a money Bill.
125. **Section 76 to 78** of the **Finance Act** amend **Section 7** of the Kenya Roads Board Act, 1999 by providing for the membership of Kenya Roads Board (**Section 76**). **Section 77** amends **Section 35** of **Kenya Roads Board Act** by inserting a new sub-section to the effect that annual estimates shall be submitted together with a collated annual roads programme as provided for in **Section 19**. **Section 76** and **78** mainly deal with the composition of the Kenya Roads Board which has no demonstrable connection to the **Finance Act**. However, **Section 77** of the Act provides for estimates of collated annual roads programme. This provision falls within the purview of Finance Act.

126. **Section 87** of the **Finance Act** amends **Section 28** of the **Unclaimed Financial Assets Act, 2011** by providing that a beneficiary may designate a proxy to whom the Authority may make payments in respect of any claim or asset. The effect being to permit payment to persons other than direct beneficiary of the asset. This matter is neither incidental nor directly connected to a money Bill.
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 expire 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.

129. The **Finance Act** at **Sections 90, 91, 92, 93, 94, 95, 96, 98** and **99** amends the **Retirement Benefits (Deputy President and Designated State Officers) Act, 2015** to provide for monthly and lumpsum payments for designated persons under the Act and to include additional beneficiaries. Matters relating to the pension due to a Deputy President and the designated State Officer relating as they do to charges to a public fund, affect the national budget and hence are within the purview of **Finance Act**.

130. **Section 100** and **101** of the **Finance Act** amend the **Special Economic Zones Act, 2015** while **Section 102** of the **Finance Act** amends the **Export Processing Zones Act, 1990**. **Sections 100 and 101** of the **Finance Act** provide that a special economic zone is a designated geographical area which may include both customs controlled and non-customs controlled areas where business enabling policies, integrated land uses and sector-appropriate onsite and off-site infrastructure and utilities shall be provided, or which has the potential to be developed, whether on a public, private or public-private partnership basis, where development of zone infrastructure and goods introduced in customs-controlled area are exempted from customs duties in accordance with customs laws.

131. **Section 102** of the **Finance Act** amends the **Export Processing Zones Act, 1990** to provide that goods whose content originates from the customs territory shall be exempt from payment of import duties; and goods whose content partially originates from the customs territory shall pay import duties on the non-originating component subject to customs procedures. These amendments primarily deal with tax measures are therefore within the realm of the **Finance Act**.

132. 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.

1(b) Whether estimates of revenue and estimates of expenditure were included in the Appropriation Act in accordance with the Constitution and the Public Finance Management Act.

133. The Petitioners in Petition E181 of 2023 contended that the **Appropriation Bill, 2023** that was tabled before the National Assembly did not contain estimates of revenue hence the budget was incomplete, and the resultant **Finance Act** is unconstitutional.

134. The budget making process is governed by **Article 220** and **221** of the Constitution as well as the **Public Finance Management Act**. Under **Article 220(1)** and **221** the Cabinet Secretary responsible for finance is required, at least two months before the end of the financial

year, to submit to the National Assembly, the estimates of revenue and estimates of expenditure of national government for the next financial year for tabling before the National Assembly.

135. These estimates together with the estimates of the Judiciary and National Assembly are considered by the appropriate committee of National Assembly which makes recommendations to the National Assembly. Under **Article 221 (6)** when the estimates of the national government and estimates of expenditure for the Judiciary and Parliament have been approved by National Assembly, they are then included in the Appropriation Bill for introduction in the National Assembly to authorise withdrawal and appropriation of money needed for expenditure.
136. Having considered the above provisions, our view is that estimates of revenue and estimates of expenditure are part of the budget making process.
137. Although the bill containing estimates of revenue was not tendered before the Court, we ascertained that as part of the budget making process, the estimates of revenue were included in the approved estimates contained in the **Appropriation Bill** and the **Appropriation Act 2023** as published in the Kenya Gazette Supplement Nos. 87 of 15th June, 2023 and 98 of 26th June, 2023 respectively.

138. The upshot of the foregoing is that the asserted procedural flaw allegedly arising from want of compliance with the requirement regarding estimates of revenue in the budget process is without foundation and is rejected.

1 (c) Whether the Finance Bill required concurrence of the Speaker of the Senate.

139. Many of the petitions were grounded on the alleged failure by the National Assembly to seek the concurrence of the Speaker of the Senate on the **Finance Bill**. They argued that the Bill concerned counties because it contained provisions affecting the functions and powers of county governments as envisioned in **Article 110(1)** of the Constitution making it imperative for the Senate to participate in the legislative process. The Petitioners stressed that **Section 84** of the **Finance Act** that imposing the housing levy violated the powers and functions relating to housing which belong to the county governments under **Part 2** of the **Fourth Schedule** of the Constitution. The Respondents' answer was that the **Finance Bill 2023** was firstly, a money Bill and secondly, not a Bill concerning county government as contemplated in **Article 110** of the Constitution. Hence the concurrence of the Speaker of the Senate was not required, and the participation of the Senate was precluded by **Article 114** of the Constitution.

140. We have already found that the **Finance Bill 2023** was a 'money Bill' within the meaning of **Article 114** of the Constitution. Thus, pursuant

to **Article 109(5)**, it could only be introduced and considered in the National Assembly in accordance with **Article 114** because it dealt with amendment of laws relating to and imposition taxes under **Article 209** of the Constitution, which is a function of the National Government.

141. The role of the Senate is expressly circumscribed by **Article 96 (2)** of the Constitution which limits its law-making function to considering, debating, and approving Bills concerning counties as provided in **Articles 109 to 113**, thereby expressly excluding money Bills envisaged in **Article 114**. Accordingly, and from a plain reading of **Article 96(2)** and **114** of the Constitution the concurrence of the Speaker of the Senate was not required in respect of a money Bill.

142. In this case, the issue of concurrence by the Speaker of the Senate arose when he addressed the Speaker of National Assembly through the letter dated 15th June 2023, reference number SSN/SNA/6/VOL.II/045. He asserted that the Senate had a role in the legislative process pertaining to Finance Bill, 2023 where he stated as follows:

"I note that despite clear constitutional provisions, the Finance Bill, 2023 was never submitted to the Senate for concurrence on whether it is a bill that concerns counties. Further, I have been advised that during a sitting of the Senate Select Committee on Delegated Legislation held on 8th June 2023, the Committee noted that the Finance Bill, 2023 contains provisions that propose to amend the Statutory Instruments Act, 2013. The Committee therefore resolved that the Finance Bill

should be considered by the Senate as it does not only propose to amend laws relating to taxes but also laws that affect the work of the Senate. Further, I note that the principal objective of the Finance Bill is to amend various Acts with a view to raising revenue which will ultimately be shared between the two levels of government in accordance with Article 218 of the Constitution. Additionally, clause 76 of the Finance Bill proposes to amend the employment Act, 2007 to require an employer and employee to each contribute 3% of the employee's basic salary to the National Housing Development Fund. County governments are employers and therefore will be required to contribute 3% of the employee's salary for each employee towards the Fund. This statutory contribution will inevitably affect the finances of county governments. I am therefore of the view that the Finance Bill, 2023 is a Bill that concerns county government. For these reasons, I am of the view that the Finance Bill, 2023 is not only a Bill that concerns county governments but also fundamentally affecting the operations of the Senate and therefore requiring the input of the Senate. Further, pursuant to Article 109 (3) of the Constitution, the Finance Bill, 2023 the two Speakers of Parliament ought to have jointly resolved the question whether the Finance Bill, 2023 is a Bill concerning counties before its consideration. Consequently, pursuant to the provisions of Article 110(3) of the Constitution the Finance Bill, 2023 ought to be submitted to the Senate for consideration in accordance with the Constitution."

143. Subsequently, the Speaker of the Senate resiled from the position earlier taken and affirmed that the matter did not require concurrence of the Speaker of the Senate vide his letter dated of 26th June, 2023 in which he restated as follows:

"I do acknowledge that you indeed wrote to me with regard to the consideration of the Finance Bill, 2023 vide your letter SNA/SSN/BILLS/14/01 dated 2nd May, 2023. My letter Ref SSN/SNA/ 6/VOL.11/045 dated 15th June, 2023 was therefore sent in error and I hereby withdraw it and repudiate its contents in entirety."

The position therefore remains as set out in my letter Ref SSN/SNA/6/VOL.11/034 dated 3rd May, 2023 in which I was in agreement that pursuant to the provisions of Articles 95(4)(c), 114, 109(3), 209(1) and 221(1) of the Constitution, the Finance Bill (National Assembly Bills No. 14 of 2023) is a Bill not concerning county governments and is considered only by the National Assembly.

Consequently, I concurred, as I still do, that the Finance Bill (National Assembly Bills No. 14 of 2023) does not concern county governments and does not affect the operations of the Senate. "

144. No explanation was tendered as to the cause of the alleged error on such an important question, resulting in two evidently contradictory letters issuing from the office of the Speaker of the Senate. Nonetheless, it appears that two Speakers of Parliament eventually resolved that the Finance Bill was a money Bill. This determination is not binding on this Court which has jurisdiction to interrogate the legality of the position taken by the Speakers.

145. A money Bill is distinct, being neither special nor ordinary Bill concerning counties. Thus, it is not subject to the procedure in **Articles 110 to 112** of the Constitution, requiring concurrence of the

two Speakers as a condition precedent and/or involvement of the Senate, as held in **Pevans East Africa (supra)**.

146. That said, in this instance, the position taken by the Speaker of the Senate in his letter of 15th June 2023 is not idle, as the Supreme Court **in the Matter of the Speaker of the Senate & Another [2013] eKLR** while discussing the role of the Speakers of the respective Houses of Parliament observed as follows:

"...Is it in doubt, in view of the formal provisions of the law, when and how a question for the consideration of the two Speakers arises under Article 110(3) of the Constitution? We do not think so. As Mr. Nowrojee submitted, the requirement for a joint resolution of the question whether a Bill is one concerning counties, is a mandatory one; and the legislative path is well laid out: it starts with a determination of the question by either Speaker – depending on the origin of the Bill; such a determination is communicated to the other Speaker, with a view to obtaining concurrence; failing a concurrence, the two Speakers are to jointly resolve the question. Both sets of Standing Orders are crystal clear on this scenario, and both, on this point, as we find, faithfully reflect the terms of the Constitution itself... It is quite clear, though some of the counsel appearing before us appeared to overlook this, that the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: *What is the nature of the Bill in question?* The two Speakers, in answering that question, *must settle three* sub-questions – before a Bill that has been published, goes through

the motions of *debate, passage, and final assent* by the President. The sub-questions are:

- a. is this a Bill concerning county government?
And if it is, is it a special or an ordinary bill?**
- b. is this a bill not concerning county government?**
- c. is this a money Bill?**

[142] How do the two Speakers proceed, in answering those questions or sub-questions? They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.

[143] Neither Speaker may, to the exclusion of the other, "*determine the nature of a Bill*": for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions.

[144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)].

[145] It is clear to us, from a broad purposive view of the Constitution, that the intent of the drafters, as regards the exercise of legislative powers, was that any disagreement as to the nature of a Bill should be harmoniously settled through mediation. An obligation is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism. They would each be required each to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It is also possible for the two Chambers to establish a standing mediation committee, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter...”

147. Our understanding of the foregoing pronouncement of the Supreme Court is that prior to either House taking up any Bill it is desirable for both Speakers to determine the nature of the Bill and the path it should take. From the perspective of the Supreme Court the two Speakers ought to have concurred as to the nature of the Bill prior to its introduction in the National Assembly. In any event, as already stated, the concurrence of the two speakers of Parliament cannot oust the jurisdiction of this court under Article 165 of the Constitution to interrogate such concurrence.

148. This Court in **the Institute for Social Accountability & Another Vs. The National Assembly & 5 Others Petition no. 1 OF 2018 held that:**

“...Accordingly, it is clear that if the Speaker of the Senate signifies concurrence with a Bill that it falls within one category or another, it may well be said that would be the end of the matter. However, the issue whether the matter is one for county government is of constitutional importance and the decision of the respective speakers, while respected, cannot be conclusive and binding on the court whose jurisdiction it is to interpret the Constitution and as the final authority on what the Constitution means....In our view and we so hold, the fact that the legislation was passed without involving the Senate and by concurrence of the Speakers of both House of Parliament, is neither conclusive nor decisive as to whether the legislation affects county government. In other words, while concurrence of the Speakers is significant in terms of satisfaction of the requirements of Article 110(3) of the Constitution, it does not by itself oust the power of this Court vested under Article 165(3)(d) where a question is raised regarding the true nature of legislation in respect to Article 110(1). The court must interrogate the legislation as a whole and determine whether in fact the legislation meets the constitutional test of a matter, “concerning county government.” We shall revert to this issue when we review the substance of the CDF Act and the subsequent amendment to determine whether in fact the legislation is a matter concerning county government...”

149. Having held that the **Finance Act** is a money Bill, we are not persuaded that the failure by the Speaker of the National Assembly to seek concurrence from the Speaker of the Senate prior to the introduction of Finance Bill vitiates the resultant Act. Concurrence of the two Speakers is not a requirement under **Article 114** of the Constitution.

2. Whether the public participation conducted was sufficient.

150. The Petitioners assailed the **Finance Act** on the ground that there was inadequate public participation. We appreciate that public participation is the hallmark of constitutional democracy and manifestation of the peoples' sovereignty. **Article 10(2)(a)** of the Constitution affirms public participation as part of the national values and principles of governance that must guide all persons, state organs, state officers and public officers when making or implementing public policy decisions. Moreover, **Article 118** provides for participation by the people in the legislative process as follows:

"Public access and participation

(1) Parliament shall-

- (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and**
- (b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees".**

151. The principle of public participation in the law-making process has been considered courts in many judicial decisions. The Supreme Court, **In the Matter of the National Land Commission (supra)**, acknowledged the principle of public participation as a form of checks and balances on the various arms of government in the execution of their mandates. In **British American Tobacco PLC (supra)**, the Supreme Court set out the following principles governing 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 ‘fulfil’ 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:

- a. **clarity of the subject matter for the public to understand;**
- b. **structures and processes (medium of engagement) of participation that are clear and simple;**
- c. **opportunity for balanced influence from the public in general;**
- d. **commitment to the process;**
- e. **inclusive and effective representation;**
- f. **integrity and transparency of the process;**
- g. **capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter...**

152. Whether the public participation exercise was sufficient to meet the test in BAT case is a question of fact. There is ample evidence here that the National

Assembly invited citizens to submit and give comments on the **Bill** by way of letters to various stakeholders and newspaper advertisements. Secondly, the invitations indicated the venues of the public meetings and the manner of submission of written memoranda on the **Bill**. The National Assembly provided liaison officers for the meetings. We find that the manner in which the National Assembly proposed to conduct the public participation was not only facilitative but also reasonable in the circumstances.

153. Thirdly, we do find that the public participation exercise was real and not illusory or cosmetic because in response to the invitations, various members of the public and stakeholders gave their views and comments which were received by the Committee. From the matrix of the stakeholder comments and memoranda exhibited by the Respondents, the views of stakeholders and members of the public were considered as some proposals were adopted while others were rejected. The public participation exercise was thus real and gave diverse stakeholders an opportunity to present their views on the Bill.
154. The Petitioners also complained that some of the submissions by members of the public were rejected without giving reasons. The enactment of Finance Act is a legislative process and in discharge of its legislative mandate, the National Assembly passed it. There is no express obligation on Parliament to give written reasons for adopting or rejecting any proposals received from members of the public. Nonetheless, we think that in order to enhance accountability and transparency, it is desirable that the relevant committee,

after conducting public participation gives reasons for rejecting or adopting proposals received.

155. Apart from the sufficiency of public participation, the Petitioners complained that the National Assembly incorporated into the Bill 18 additional amendments whose proposals were not subjected to public participation. The proposed amendments were to the **Income tax Act, Value Added Tax Act, Excise Duty Act and Miscellaneous Fees and Levies Act, Kenya Revenue Authority Act, Retirement Benefits Act, Alcoholic Drinks Control Act of 2010, Special Economic Zones Act and Export Processing Zones Act.**
156. The **National Assembly Standing Orders, 132 and 133** permit amendments to be made to a bill during the Committee stage. The Court of Appeal in the case of **Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others [2018] eKLR** affirmed the position that Parliament has the power during the legislative process, to make changes to a Bill post public participation. The Court stated:

“...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. These 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...”

157. By its nature public participation is intended to explore new issues that may be raised, interrogate and understand existing ones which may lead to revision or refinement of the Bill through new proposals and amendments. We are bound by the holding in **Pevans case (supra)** that once the National Assembly has heard the views of members of the general public and stakeholders on the Bill, it is not precluded from effecting amendments to the Bill during debate before it is passed, as a contrary position would amount to curtailing the legislative mandate of the National Assembly. The National Assembly was not required to re-submit the amendments to public participation on narrow issues that were within what was contemplated within the Objects and Memorandum of the **Bill**.

158. Having considered the relevant facts and the record and bearing in mind that the Finance Bill is a time-bound legislation, we are satisfied that the public participation process conducted by the National Assembly was sufficient.

3. Whether certain taxes cited in the Petition as enacted by the Finance Act are unconstitutional?

159. The Petitioners challenge tax raising measures introduced by the Finance Act. We will resolve them in light of applicable constitutional provisions.

160. Under **Article 94(1)** of the Constitution, the legislative authority of the Republic is derived from the people and vested in Parliament. Correspondingly, **Article 210(1)** provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. The power to impose taxes by the national government is provided for in **Article 209** of the Constitution. It states as follows:

Power to impose taxes and charges

209(1) Only the national government may impose:

- (a) income tax;**
- (b) value-added tax;**
- (c) customs duties and other duties on import and export goods; and**
- (d) excise tax.**

(2) An Act of Parliament may authorize the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).

(3) A county may impose:

- (a) property rates;**

(b) entertainment taxes; and

(c) any other tax that it is authorised to impose by an Act of Parliament.

(4) The national and county governments may impose charges for the services they provide.

(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

161. The totality of the aforesaid provisions is that the legislature, in this case the National Assembly, has broad powers to levy tax as long as the power is not exercised in a manner that infringes or violates provisions of the Constitution, more particularly the process prescribed and the Bill of Rights.

162. Tax laws are not enacted in a vacuum. They are the product of a process which is recognized in the Constitution. After formulation of policies underpinning the revenue and expenditure by the government, the legal process commences with National Treasury preparing the budget policy statement and submitting it to the Cabinet for approval pursuant to **Public Finance Management Act**. This culminates in presentation of the estimates of revenue and expenditure and the budget to the National Assembly for consideration and enactment of the **Appropriations Act** under **Article 220** and **221**. Revenue raising

measures are provided for in the **Finance Act** which is a money bill recognized by **Article 114** of the Constitution.

163. In view of the merger of policy and legislation, as reflected in many judicial pronouncements, courts have been slow to interfere with tax legislation. In **State of MP v Rakesh Kohli and Another AIR 2012 SCC 2351 (11 May, 2012)**, the Supreme Court of India underscored the following principles:

"....29.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,**

(v) in the field of taxation, the Legislature enjoys greater latitude for classification...”

164. The respondents argued that the court should not intervene in tax issues because these are policy matters. This approach is correct to a certain extent as exemplified by Odunga J., in **Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) [2021] KEHC 9748 (KLR)**

“Tax law and any legislation for that matter is guided by and is a reflection of the policy of the government at any one given point in time ..._it is not for this court to determine whether in arriving at a particular policy decision, the policy maker’s decision was wise or merited. It therefore follows that the timing of a policy decision based on the prevailing circumstances do not justify the Court’s interference with the policy in question...”

165. On the other hand, the Court has the constitutional duty under **Article 165(3)(b)(d)(i) and (ii)** to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened, whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of the Constitution. By these

provisions neither laws nor policies are immune from scrutiny by the Court.

166. The Court in **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR** echoed this position by stating that:

"... Anything done by Parliament outside the confines of the Constitution and the law attracts the attention and action of this court. In conducting an inquiry into the constitutionality of the decisions and actions of the legislature the Court finds constitutional authority in Article 165(3)(d)..." (See also **Council of Governors & 6 others vs Senate [2015] eKLR**).

167. The thrust of the respondents' response to the Petitioners' case is that the legislature has the power and authority to impose taxes. This power is not unconstrained; it is constrained within the four corners of the Constitution. Parliament cannot exercise its power in an arbitrary fashion without any rational connection to a legitimate purpose. To permit the legislature to assert a contrary position would undermine the national values and principles of rule of law, good governance, accountability and transparency.

168. Turning to the taxes challenged, the Petitioners attacked **Section 2** as read with **Section 21** of the of the **Finance Act** for amending section 35 of the Income Tax act as unconstitutional for imposing taxes on entertainment, which is a function of county government under **Part 2(4)** of the **Fourth Schedule** of the Constitution. Digital monetization is introduced in **Section 2** as a tax on payments for entertainment,

social, literal, artistic, educational or any other material electronically through any medium or channel. Such payment is treated as income and a person paying a non-resident or a person not having a permanent establishment is required to pay withholding tax on the payment. The purpose of the amendment is to clarify the type of income to be taxed. It is a tax on income which the national government is authorized to impose under **Article 209(1)(a)** of the Constitution. This does not affect the powers and functions of the county government as contended by the Petitioners.

169. Similarly, digital asset tax introduced by **Section 2** is payable by a person on income derived from the transfer or exchange of digital assets for example, crypto-currency. This is a tax on income and the manner in which it is charged and collected is within the purview of **Article 209(1)(a)** of the Constitution.

170. The Petitioners also challenged the **Finance Act** on the ground that it includes tax on 'winnings' from betting, gaming and lotteries which they contend violates the **Fourth Schedule Part 2(4)** of the Constitution as betting, casinos and other forms of gambling falls within the powers and functions of the county governments. The **Finance Act** amends **Section 2** of the **Income Tax Act** to define 'winnings' as the payout from a betting, gaming, lottery, prize competition, gambling or similar transaction under the Betting, Lotteries and Gaming Act, excluding the amount staked or wagered in that transaction. This section is to be read with **Section 10** of the **Income Tax Act** which states that "winnings" constitute income

accrued in or derived from Kenya and are subject to income tax. The purpose of this amendment was to clarify the definition of the term “winnings”. This is plainly income within **Article 209(1)(a)** and does not affect the powers and functions of the county governments as was held by the Court of Appeal in **Pevans Case** (supra).

171. The Petitioner in E211 of 2023 challenged the proposal in the Finance Bill seeking to raise the entry point of eligibility of businesses for payment of gross turnover tax from Kshs. 1,000,000.00 to Kshs. 500,000.00. Upon our perusal of the Finance Act, we found that this proposed amendment was not enacted.
172. **Section 26** of the **Finance Act** amended the **Third Schedule** of the Income Tax Act to introduce new tax bands. In addition, **Section 7** of the Act amended **Section 10** of the **Income Tax Act** relating to withholding tax. The Petitioners have not demonstrated how these amendments affect specific provisions of the Constitution. In any event, we hold that these are matters related to tax policy and administration.
173. **Section 33** of the **Finance Act** amended **Section 17** of the VAT Act to introduce 16% VAT on insurance compensation. The Petitioners argued that insurance compensation is not income and is therefore not subject to taxation. They further argued that the provision amounts to expropriation of property in violation of **Article 40** of the Constitution. We hold that imposition and collection of tax by legislation of itself is

not a violation of the right to hold or own property. (see **George Lesaloi Selelo & Another v Commissioner General, KRA & 4 Others; Pevans EA Limited t/a Sportpesa and 3 Others [2019] eKLR** and **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 Others [2014] eKLR**).

174. This amendment only applies to persons who had claimed input VAT on supplies and who subsequently receives compensation inclusive of VAT and is required to declare the VAT component. This is a tax administrative measure and does not violate **Article 40** of the Constitution.
175. The Petitioners challenged **Part II, Sections 30 to 38** of the Finance Act which amended **Section 5, 8, 12 17, 31 34, 43, First Schedule** and the **Second Schedule** of the VAT Act. These provisions impose, vary or remove VAT on specific goods and services. They also vary the VAT rates applicable and the manner VAT tax is administered. We hold that these are matters within the competence of the legislature and reflect the policy choices of the national government. The Petitioners have not shown how these provisions violate the Constitution.
176. **Part IV** of the **Finance Act, Sections 40 to 48** introduced amendments to **section 2, Sections 20, 28, 40**, the **First and Second Schedules** and added **Sections 36(1)(a) and 36A** of the Excise Duty Act. Excise duty is a tax on the sale and importation of

specific goods and services. The amendment introduces the requirement for remittance of excise duty on betting and gaming within 24 hours of closure of a transaction as well as remittance of excise duty on alcoholic beverages within 24 hours of removal of the goods from the stock room. The Petitioners complaint is that the requirement is unreasonable. We find that this is a tax administration measure designed to ensure that excise duty is collected and accounted for. We do not find any justification to intervene.

177. Other grounds upon which the respondents assailed the excise duty relate to changes in tariff headings and rates of taxation on various products. The Petitioners have not demonstrated how these provisions violate the Constitution. We therefore hold these changes are governed by policy and do not violate the Constitution.
178. The Petitioner in Petition No. E211 of 2023 challenged excise duty on human hair, wigs, false beards, eyebrows, eyelashes and artificial nails in respect to the Finance Bill. This provision was not enacted hence is a non-issue.

4. Whether Section 84 of the Finance Act, 2023 introducing the housing levy is unconstitutional.

179. The Petitioners' grievances against the introduction of the housing levy are varied and include the following: that the levy is an alien tax not contemplated in **Article 209(1)** of the Constitution; that gross salaries of employees will be impacted; that salaries of judges,

members of constitutional commissions, and holders of independent offices will be adversely affected in contravention of the Constitution; that there is lack of a legal framework to govern the imposition and administration of the levy contrary to **Article 210**; that the absence of a foundational statute results in uncertainty; that the Constitution places an obligation of national government to deposit all monies its raises in taxes in the Consolidated Fund; that no fund as envisaged in **Article 206 (1)** has been put in place and that the KRA's mandate does not include receipt of the funds arising from the levy; that it further violates that Housing Act; that the deduction is unconscionable and impractical; that Part 1 of the Fourth Schedule to the Constitution limits the national government's functions in relation to matters housing to development of a housing policy and no more; that public participation in respect of the levy was cosmetic and a mockery of the centrality of the people as the source of the authority exercised by the government; that the Employment Act already obligates employers to provide housing for employees and that the imposition of the levy amounts to double taxation and is a form of regressive discriminatory tax that imposes a disproportionate tax burden on one group of earners without justification and is therefore a violation of **Articles 10, 27(4) and 201** of the Constitution. That the imposition of the tax under the **Employment Act** whose object is to secure the rights of employees amounts to a limitation of labour rights among others, and must be justifiable under **Article 24** of the Constitution.

180. The Respondents' answer to the petitioner's grievances is that taxation is a prerogative of national government, that the national government is not seeking to regulate income as a social economic activity but the amendment is aimed at taxation on income which the National Government is empowered to impose and that the establishment of the housing fund is a policy decision aimed at enabling the government to provide adequate housing for all citizens towards fulfilling the dictates of **Article 43(1)(b)** of the Constitution.
181. The Respondents further argue that the impugned Section enjoys the presumption of constitutionality and that the introduction of the levy is not a novel issue as there are other levies imposed by the national government that are geared towards collecting funds for various key priority areas. These include the **Sugar Development Levy (SDL), Railway Development Levy (RDL), Road Maintenance Levy Fund, the National Hospital Insurance Fund (NHIF), the National Social Security Fund (NSSF), Hotel and Catering Levy, Fuel Levy, Standards Levy** and **Export Levy**. They submit that the introduction of a housing levy will assist the government provide affordable housing and alleviate the housing shortage in this country. Further, that taxation targets certain sectors of the economy and if sufficiently justified, differentiated treatment is not unconstitutional.
182. The Respondents further defend the appointment of KRA as the government agency mandated with collection of revenue to collect the

levy, citing **Section 5(1)** of **KRA Act** and **Section 75** of the **PFMA**. It was asserted that the levy is anchored in the **Housing Act** and amendments to the **Employment Act** had been conceived and were being introduced to create the housing levy fund pursuant to **Article 206(2)** of the Constitution. That the said fund would be distinct from the National Housing Development Fund (NHDF) created by **Section 7(3)** of the **Housing Act** and that these provisions satisfy the prescription in **Articles 10, 201, 206** and **209** regarding legality of the tax measure.

183. We now turn to consider the substantial issue raised by the Petitioners whether the amendment of the **Employment Act** by **Section 84** of the **Finance Act** to create the housing levy or tax was in accordance with the Constitutional requirements. The effect of the amendment was to add **Sections 31B** and **31C** to the **Employment Act**. The amendment is in three parts, the first part imposes a levy on the employer and employee, the second part states the purpose of, and ringfences it, while the third part imposes on the employer the obligation to deduct, collect, and remit the levy and provides a sanction for non-compliance. **Section 31** of the **Employment Act** as amended read as follows:

31. Housing

- (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such**

sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—

- a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
- b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

(2) The Cabinet Secretary may, on the recommendation of the Board by notice in the Gazette, exclude the application of this section to a category of employees and such category of employee shall be dealt with as shall be specified in the notice.

31B. Affordable Housing Levy

(1) Notwithstanding the provisions of section 3(2) (a), (b), (c) and (d) of the Act, each employee and employer shall pay a monthly levy to be known as the Affordable Housing Levy.

(2) The purpose of the Affordable Housing Levy shall be to provide funds for the development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans.

- (3) **The Affordable Housing Levy shall not be used for any other purpose other than the development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans.**
- (4) **The monthly levy payable by the employer and employee shall be –**
- (a) **one point five per centum of the employee’s gross monthly salary for the employee;**
- (b) **one point five per centum of the employee’s monthly gross salary for the employer.**

31C.Obligations of the employer

- (1) **An employer shall-**
- (a) **deduct an employee’s monthly payment from the employee’s gross monthly salary;**
- (b) **set aside the employer’s monthly payment for each employee; and**
- (c) **not later than nine working days after the end of the month in which the payments are due, remit an amount comprising the employee and the employer’s payment.**
- (2) **An employer who fails to comply with this section shall be liable to payment of a penalty**

equivalent to two per cent of the unpaid funds for every month the same remains unpaid.
[Emphasis ours]

184. The Petitioners argue that housing levy is not a tax contemplated under **Article 209** of the Constitution. The amendment does not contain a legal definition of the housing levy or even define the term “levy” as used in the amendment. The lack of certainty in a matter as important as the definition of the housing levy is a major defect in the impugned amendment. One of distinguishing features of the other existing levies that were cited by the Respondents in defending the housing levy is that they are anchored in comprehensive Acts of Parliament that include definitions of the subject levies. Other tax legislation such as the **Income Tax Act**, the **VAT Act**, and the **Excise Duty Act** contain definitions of the taxes imposed therein. The Petitioners also pointed out that the definition of employee contained in the amendment does not distinguish between local and foreign employees.

185. Although the Constitution does not use the term levy, a levy is for all intents and purposes a form of tax. **Black’s Law Dictionary**, 9th Ed. at Pg. 991 defines “**Levy**” as **(1) “The imposition of a fine or tax; the fine or tax imposed” (2) “To impose or assess (a fine or tax) by legal authority”** whereas the same defines “**Tax**” at Pg.1594 as “**A charge, usually, monetary, imposed by the government on persons, entities, transactions, or property to**

yield public revenue.” Broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, imposts, and excises.

186. The Petitioners argue that a levy is not one of the enumerated taxes in **Article 209(a), (b) and (d)** of the Constitution. That in the absence of a clear definition of the levy within a foundational statutory enactment, it is difficult to confidently associate the housing levy with the category of taxes envisaged in the foregoing provisions, although on the face of the amendments it is intended to be levied on the income of employees. The uncertainty surrounding the housing levy is compounded by the failure to state the nature of the tax percentage payable by the employer. Is it income tax or contribution paid by the employer for the benefit of the employee? Under **Article 209 (2)** an Act of Parliament may authorize the national government to impose any tax or duty other than the categories authorized by **Article 209(1)** of the Constitution except those that a county government may impose which include property rates, entertainment taxes and any other tax it is authorized to impose by an Act of Parliament.

187. Related to this issue is the question whether the imposition of the housing levy is a matter concerning county governments. The Petitioners argue that housing development and planning is a function of county governments under **Part 2** of the **Fourth Schedule** of the Constitution. The Respondents contend that the levy is part of housing

development policy under **Part 1** of the **Fourth Schedule** of the Constitution to support affordable housing.

188. The housing levy was introduced as a tax on income by the **Finance Act**, through amendment of the **Employment Act** to support the national government policy on affordable housing, and was authorized under **Article 209(2)** of the Constitution.

189. The **Fourth Schedule** provides for the distribution of functions between the National Government and the County Governments. **Part 1(2)** of the **Fourth Schedule** grants the national government authority over housing policy while **Part 2(8)** of the same **Schedule** provides for county planning and development including housing. **Lenaola J** (as he then was) explained the distinction in the housing function between the two levels of government in **Law Society of Kenya v Cabinet Secretary, Ministry of Lands Housing and Urban Development and 3 Others [2017] eKLR** as follows:

“54. The words ‘housing policy’ and ‘housing’ as used in the Fourth Schedule in respect of National and County Government functions respectively are capable of varied interpretation and application. Black’s Law Dictionary 9th Edition defines a house as a home, dwelling or residence while ‘policy’ is defined as the general principles by which a government is guided in its management of public affairs. The mandate of the National Government involves the accreditation, regulation and promotion of quality assurance and technical capacity assistance in the construction industry at large while the County Government is involved in housing to the extent of planning and development within a County only...”

See also **Ahmed Bashir Abdi v B. M. Mule, Garissa County Director of Housing, the Ministry of Transport, Infrastructure, Housing and Urban Development and Others [2022] eKLR.**

190. The distinction between the shared housing functions between the National and County Government was also considered by the Court of Appeal in the **Speaker of National Assembly and Others Vs. Senate and 12 others 2021 KECA 282 (KLR)**. The question in that case was whether contributions to the NHDF infringed county government functions. The court observed as follows:

“...An examination of the Act indicates that notwithstanding that the amendments are housing related, the central theme is the establish a National Housing Development Fund into which employer and employee contributions are to be paid, the sums of which would go towards financing the building of affordable housing units. In so far as the enactments concern the imposition of taxes under Article 209 of the Constitution, which are paid into the National Housing Development Fund, we find that the national perspective upon which the housing development policy is founded is not a county function to which article 110(3) of the Constitution required to be applied...”

191. We agree that housing is a shared responsibility between the national and county governments where each level of government has defined roles to play. In this case, the purpose of the levy as stated in the amendment to the **Employment Act** is to, ***“provide funds for the development of affordable housing and associated social and***

physical infrastructure as well as the provision of affordable home financing to Kenyans”.

192. In this case, the stated purpose of the levy is to support the national policy on affordable housing. The Petitioners have not demonstrated how this policy interferes with the functions of the county governments under **Part 2** of the **Fourth Schedule**.
193. Nonetheless, legal certainty is one of the hallmarks of the rule of law, good governance, transparency, and accountability under **Article 10(2)(a)** and **(c)** of the Constitution (See **Aids Law Project v Attorney General and 3 Others, 2015 eKLR**). The amendment in the **Employment Act** does not set out either on its face or by reference to other legislation how the stated purpose is to be achieved. It is not open to the Respondents to supply these details through responses as they have sought to do; the enactment ought to address these details and speak for itself.
194. **Article 210** contemplates a comprehensive taxation law without which it is virtually impossible to determine whether and how the imposition of the levy will impact upon the shared function of housing or whether it will restrict or limit the functions and powers of the county governments under **Part 2** of the **Fourth Schedule** of the Constitution. Which raises the further question whether the term **"parliament"** as used in **Article 209(2)** and **209 (3)(c)** refers to both houses of Parliament, and whether the Senate ought to have been

involved in deliberations relating to the amendment. This is yet another lacuna in the impugned amendment resulting in uncertainty.

195. The Petitioners assert that the imposition of the housing levy through an amendment to the **Employment Act**, and without a comprehensive legal framework to govern it is a violation of **Article 210** and the national values and principles of governance in **Article 10(2)(a)** and **(c)** of the Constitution, namely the rule of law, good governance and transparency and accountability. They faulted the appointment of KRA as an agency for the collection of the housing levy on the ground that it contravenes **Section 5 (1)** of the **KRA Act** and the **First Schedule** thereto hence is of no legal effect. They contended that without a comprehensive legal framework being put in place, the national government would threaten, undermine, or otherwise usurp the functions of the county government. That without such a comprehensive legal framework, there would be no guarantees that the functions of county governments specified in the Constitution will be respected.

196. The Respondents rebuttals were somewhat mixed. On one hand they stated that the housing levy is anchored in the Housing Act which established the NHDF and in the **Employment Act** as amended; that an amendment was in the pipeline to anchor the levy and create a fund separate from the NHDF in the **Housing Act** in compliance with **Article 206 (1)** of the Constitution. They further asserted that it is the prerogative of national government to impose taxes aimed at

enabling the government to provide adequate housing for all citizens towards fulfilling the right to accessible and adequate housing, and to reasonable standards of sanitation provide for under **Article 43(1)(b)** of the Constitution. They reiterate that the enactment of the housing levy is not novel as there are other levies by the national government that are geared towards collecting funds for various key priority areas. On the issue of collection of the housing levy, KRA pointed out that under **Section 5** of the **KRA Act**, it is an agent of government for purposes of receipt of national revenue and was duly appointed as such. That under **Section 75** of the **PFMA**, KRA is also mandated to collect such revenue for the national government.

197. **Article 210 (1)** of the Constitution provides that no tax or licensing fee may be imposed, waived, or varied except as provided by legislation. In addition, **Article 10(2) (b)** and **(c)** of the Constitution outlines national values and principles of governance that encompasses components of the rule of law, good governance, transparency and accountability among others. In our view the **Section 84** of the **Finance Act** has shortfalls that negate these principles.

198. Although **Section 84(3)** of the **Finance Act** states that the housing levy shall not be used for any other purpose other than development of affordable housing, associated social physical infrastructure as well as provision of affordable home financing to Kenyans, this pronouncement is not anchored by a corresponding legal mechanism

demonstrating how this objective will be actualized. This is unlike the other levies cited by the Respondents which are collected for a specific purpose and are anchored on legal frameworks that govern them.

199. **Section 84** of the **Finance Act** does not set out how the levy will be administered once it is collected. More importantly, the legislation does not state how it supports the housing policy function of the national government. This concern is not idle as the manner in which money is administered and spent may encroach on the powers and functions of the county government. Further, without a framework embedded in legislation, how would the members of the public know who are the beneficiaries of the housing levy? What criteria will be applied to identify or select beneficiaries? This opaqueness undermines transparency and accountability. In our view, **Section 84** of the **Finance Act** does not meet the good governance test required by **Article 10(2)(a)** and **(c)** of the Constitution in the absence of a clear-cut legal framework concerning the administration of these funds.

200. In their submissions the Respondents contend the money collected as the housing levy is ringfenced for the purpose stated **Section 84** of the **Finance Act** and that the legal framework supporting the housing levy is provided by the existing NHDF established under the **Housing Act**. An *ex-facie* examination of **Section 84** of the **Finance Act** does not show any connection between the housing levy and the NHDF. Our concern is that under **Article 206** of the Constitution all money raised or received by or on behalf of the national government must be paid

into the Consolidated Fund except money that is set out in **Article 206(1)(a)** and **(b)** which is money that:

- (a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or**
- (b) may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.**

201. Our understanding of **Article 206(1)(a)** is that money earmarked and collected for a purpose must be paid over into a public fund established for that purpose by legislation. The housing levy cannot be paid into a public fund unless there is a provision of the law connecting the levy to a public fund created under **Article 206(1)(a)** of the Constitution. No such provision exists in **Section 84** of the **Finance Act** or in any other law.

202. Section 7 of the **Housing Act** establishing the NHDF does not reference the housing levy as a source of funding. **Section 7(3)** of the **Housing Act**, provides in part, that there shall be paid to the Corporation and carried to the NHDF, **“(a) all such moneys as may from time to time be voted or appropriated by Parliament for payment into the National Housing Development Fund.”** There is no requirement in this section to the effect that the moneys collected as the housing levy are ringfenced for the NHDF or any other fund. Ringfencing of funds by stating their purpose is, of itself, insufficient

as a legal framework for the intended purpose is pertinent, and merely ringfencing is contrary to **Article 206 (1)** and to the principles of public finance in **Article 201** of the Constitution.

203. The Petitioners also fault the appointment of KRA to collect the housing levy. KRA issued a notice in the local newspaper stating, in part, as that, **“Kenya Revenue Authority (KRA) would like to inform members of the Public that the Cabinet Secretary, Ministry of Lands, Public Works, Housing and Urban Development through a Public Notice dated 3rd August 2023 has appointed Kenya Revenue Authority as the Agent of the Affordable Housing Levy (AHL)”**. The Petitioners’ case is that KRA lacks legal authority under the **KRA Act** or any other legislation to collect the levy.

204. **Section 5** of the **KRA Act** provides for the functions of the Authority as follows:

5(1) The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collections and receipt of all revenue.

(3) In performance of its functions under subsection (1), the Authority shall –

(a) administer and enforce –

(i) all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws.

(ii) the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws.

(b) Advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule.

(c) Perform such other functions in relation to revenue as the Minister may direct.

(2A) The Authority may establish an institution to provide capacity building and training the staff of the Authority, general public and other jurisdictions.

(3) The Minister may, by notice in the Gazette, amend the First Schedule.

205. The import of the aforesaid provisions is that KRA is empowered to collect taxes under specific legislation set out in **Part I and II** of the **First Schedule**. Under the Act, the '**Minister**' means, "**the Minister for the time being responsible for Finance.**" What is clear from reading these provisions is that the housing levy is not one of the taxes KRA is empowered to collect under **Part I and II** of the **First Schedule**. Further, it is the Minister or Cabinet Secretary for Finance who is permitted to amend the **Schedule** to authorize KRA to collect a specific tax. The notice issued by KRA informing the public that it had

been appointed by the Cabinet Secretary, Ministry of Lands, Public Works, Housing and Urban Development to collect the housing levy does not have any legal basis under the **KRA Act**.

206. We have also looked at the **PFMA** which permits the Cabinet Secretary, in this case the CS, Finance, to designate in writing persons as receivers of national government revenue. It is therefore not possible for the Cabinet Secretary for Ministry of Lands, Public Works, Housing and Urban Development to authorise collection of a levy which, as we have held, constitutes a tax under **Article 209** of the Constitution. We therefore reject the argument by KRA that it is entitled to collect the housing levy merely on the ground that it is entitled to charge commission on amounts collected in accordance with **Section 16(10)(ba)** of the **KRA Act**. The authority to collect must be issued by the Cabinet Secretary for Finance.

207. As we have shown, the framework for the housing levy legislated by **Section 84** of the **Finance Act** does not meet the requirements of **Articles 201, 206(1), 210** of the Constitution and the principles of good governance, transparency and accountability required by **Article 10 (2)(a)** and **(c)** of the Constitution.

208. We must point out that this court does not purport to prescribe the form of the legal framework to be adopted by the National government, this being a matter within its mandate. Our concern is that the impugned provision imposes the housing levy and states its

purpose, and no more. How does an objective observer determine whether the purpose has been met or that the monies have been applied for the intended purpose when the manner of achieving that purpose has not been defined? The national government is required to demonstrate a rational connection between the purpose of legislation and the means by which that purpose is achieved. We hold that **Section 84** of the **Finance Act** is not the kind of legal framework contemplated by **Articles 10, 201, 206 and 210** of the Constitution.

209. The Petitioners also complained that the housing levy applies only to one category of the population, namely salaried workers in formal employment. They contended that this violates **Article 27** of the Constitution which protects equality and prohibits discrimination and **Article 201 (b)(i)** of the Constitution which requires the tax burden be shared fairly. They also complained that the housing levy amounts to double taxation because employees pay it in addition to income tax through Pay As You Earn (PAYE) Tax. Further, it imposes an obligation on the employer to pay the levy despite the fact that the employer under **Section 30** of the **Employment Act** is required to provide housing for the employees.

210. The Respondents countered that the country faces a serious housing deficit which the government is required to address in line with its responsibility to progressively realise the right to housing under **Article 43(b)** of the Constitution.

211. **Article 201** of the Constitution set out the principles that guide all aspects of public finance in Kenya. In particular, **Article 201(b)** provides as follows:

201. The following principles shall guide all aspects of public finance in the Republic-

(a)

(b) The public finance system shall promote an equitable society, and in particular –

(i) the burden of taxation shall be shared fairly;

(ii) revenue raised nationally shall be shared equitably among national and county governments; and

(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas.

(c)

(d)

(e)

212. **Article 201(b)(i)** aforesaid embraces the principle of fairness in taxation. It is acknowledged that in imposing taxes there will be distinctions between classes of taxpayers but the principle of fairness in taxation requires that these distinctions must be justified as being rationally related to a legitimate government purpose. This

requirement prevents arbitrariness which undermines the rule of law. If distinctions are to be made, there must be a rational basis for them.

213. We have looked at the responses by the Respondents. Their key submission is that the national government enjoys the prerogative and latitude to impose taxes as a means of achieving the objective of realizing the right to housing. They did not answer why the tax falls upon workers in formal employment alone, as opposed to other taxpayers or non- taxpayers.

214. In **Okello & Another v National Assembly & 2 Others; Shop & Deliver Limited t/a Betika & 7 Others (Interested Parties); Kiragu and 2 others (Cross Petitioner) (suing on behalf of, and as Chairperson, Secretary and Treasurer respectively of the Associations of Gaming Operator of Kenya [2002] KEHC 3059 (KLR) Odunga J.**, stated that:

“...[T]axes need not look the same and selective taxes may be applied to different sectors for different reasons such as to address distribution and equity hence the tax need not be similar to another for it to be rational and not discriminatory...”

215. We add that for any legislation or tax to pass the rule of law test, it must have a rational connection to a legitimate government purpose otherwise the legislation or tax would be arbitrary and therefore unconstitutional. It is the duty of the State to provide the rational explanation for the manner in which the tax is imposed.

216. In the absence of a rational explanation for the manner in which the housing levy was enacted, we can only conclude that the Respondents took the easy path of least resistance because collecting taxes from employees in formal employment is easier. It is the Respondents' constitutional responsibility to create a broad-based, efficient, and fair tax system that complies with **Article 201 (b)(i)** of the Constitution. The taxation levied against persons in formal employment to the exclusion of all other non-formal income earners to support the national housing policy is without a clear justification is unfair, discriminatory, irrational and arbitrary, in violation of **Articles 27** and **201 (b)(i)** of the Constitution. We therefore find that **Section 84** of the **Finance Act** unconstitutional for these reasons.

217. The Court of Appeal in **Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others (Interested Parties) (Civil Appeal E591 of 2021) [2022] KECA 1306 (KLR)** explained the principle of unfair taxation under **Article 201(b)(i)** as follows:

"On the issue as to whether the imposition of the minimum tax results is unfair and contrary to section 201(b)...The threshold for fairness is "... ensuring that everyone bears their fair share of taxation and pays the correct amount and which is seen to be fair by vigorous pursuit of tax avoidance and evasion."

218. The Petitioners also assail the housing levy on the ground that it will result in lowering the salaries of judges hence is in violation of **Article 160(4)** of the Constitution, as well as salaries of commissioners and holders of independent offices, in contravention of **Article 250(8)** of the Constitution. These provisions protect the remuneration and benefits, and are intended to safeguard the independence of judges of the Superior Courts, Commissioners and Independent Offices by insulating them from attempts by the political branches to influence them by reducing or threatening to reduce their remuneration and benefits.
219. While the Petitioners have not demonstrated how the housing levy directly affects the salaries and benefits of protected State Officers and how it violates the intent of **Article 160(4)** and **250(8)** of the Constitution in that regard, our reading of **Article 210(3)** of the Constitution is clear. It provides that no law can exclude or authorize exclusion of a State Officer from payment of tax by reason of the office of that State Officer or the nature of the work of the State officer. The Petitioner's submission on this front fails on the ground that the housing levy is a general tax that applies generally to taxpayers in formal employment.

Conclusions

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.**
- II. That, under Article 220 and 221 of the Constitution, estimates of revenue and estimates of expenditure are part of the budget making process. The estimates of revenue were included in the approved estimates contained in the Appropriation Bill and the Appropriation Act 2023 as published in the Kenya Gazette Supplement Nos. 87 of 15th June, 2023 and 98 of 26th June, 2023 respectively.**
- III. That, the purport of Article 96 (2) as read together with Article 114 of the Constitution is that the Senate is precluded from considering a money Bill which is only introduced in the National Assembly. However, In the**

Matter of the Speaker of the Senate and another [2013] eKLR the Supreme Court held that it is necessary for the Speaker National Assembly to agree on the nature of any Bill prior to its introduction in any House. Consequently, the failure by the Speaker of the National Assembly to seek agreement with the Speaker of the Senate on the nature of the Finance Bill prior to its introduction in the National Assembly does not vitiate the resultant Act as such concurrence is not a requirement under Article 114 of the Constitution.

IV. That, there is ample evidence that the National Assembly conducted sufficient public participation in respect of the Finance Act, 2023. The National Assembly having heard the views of members of the public and industry stakeholders on a Bill is not precluded from effecting amendments to the Bill before passing it. There is no express obligation on Parliament to give written reasons for adopting or rejecting any proposals by members of the public. Nonetheless, we think that in enhancing accountability and transparency, it is desirable that the relevant committee, after conducting public participation gives reasons for rejecting or adopting proposals received.

a) That, Section 2 as read with Section 21 of the of the Finance Act that amended Section 35 of the Income Tax to introduce digital monetization as a tax on payments for entertainment, social, literal, artistic,

educational or any other material electronically through any medium or channel is a form of taxation on income which the national government is allowed to impose, hence is not unconstitutional. Similarly, digital asset tax introduced by Section 2 is payable by a person on income derived from the transfer or exchange of digital assets for example, crypto-currency hence a tax on income and may lawfully be imposed by the national government.

- b) That, tax on 'winnings' from betting, gaming and lotteries does not violate the Fourth Schedule Part II of the Constitution as pay out from winnings constitute income accrued in or derived from Kenya. This is income subject to tax which the national government is expressly empowered to impose under Article 209. The imposition does not affect powers and functions of the county governments.**
- c) That, Section 26 of the Finance Act,2023 which amends the Third Schedule of the Income Tax Act to introduce new tax bands and Section 7 of the Act that amends Section 10 of the Income Tax Act in regard to withholding tax are matters related to tax policy and administration and thus not unconstitutional.**

- d) That, Section 33 of the Act that amends Section 17 of the VAT Act to introduce 16% VAT on insurance compensation does not violate Article 40 of the Constitution as it only applies to a person who had claimed input VAT on supplies and who subsequently receives compensation inclusive of VAT.**
- e) That, Sections 30 to 38 of the Finance Act which amend Sections 5, 8, 12 17, 31 34, 43, First Schedule and the Second Schedule of the VAT Act to impose, vary or remove of VAT on specific goods and services and, to vary the rates applicable and the manner VAT tax is administered, do not violate the Constitution being matters within the competence of the legislature.**
- f) That, Sections 40 to 48 of the Finance Act that amend Sections 2, 20, 28, 40, First and Second Schedule of the Excise Duty Act and also introduces new sections namely Section 36(1)(a) and 36A on the requirement for remittance of excise duty on betting and gaming within 24 hours of closure of a transaction as well as remittance of excise duty on alcoholic beverages within 24 hours of removal of the goods from the stock room is a tax administration measure. It is not unconstitutional.**

g) That, changes in tariff headings and rates of taxation on various products in the Excise Duty Act are policy matters on taxation within the purview of the national government. The changes do not violate the constitution.

V. That, the introduction of the Housing levy through amendment of the Employment Act by Section 84 of the Finance Act, 2023 lacks a comprehensive legal framework in violation of Articles 10, 201, 206 and 210 of the Constitution. The imposition of the housing levy against persons in formal employment to the exclusion of other non-formal income earners to support the national housing policy is without justification is unfair, discriminatory, irrational, and arbitrary and in violation of Articles 27 and 201 (b)(i) of the Constitution.

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.**

2. **A declaratory order be and is hereby issued that the Section 84 of Finance Act, 2023 violates Article 10 (2) (b) and (c) and 201 of the Constitution and is therefore unconstitutional, null and void.**
3. **An order of prohibition is hereby issued prohibiting the Respondents from charging, levying or in any way collecting tax, otherwise known as the 'Affordable Housing Levy' on the basis of the aforesaid Section 84 of Finance Act, 2023.**
4. **All other prayers in the consolidated petition not specifically granted are hereby dismissed.**
5. **This being a public interest litigation, each party shall bear its own costs of the Petition.**

Dated, signed and delivered at Nairobi this 28th day of November, 2023

**MAJANJA
JUDGE**

**C MEOLI
JUDGE**

**L N MUGAMBI
JUDGE**