IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: M'INOTI, MURGOR & MATIVO, JJ.A.)

CIVIL APPEAL NO. E003 OF 2023

BETWEEN

THE NATIONAL ASSEMBLY.....1ST APPELLANT

THE SPEAKER OF THE NATIONAL ASSEMBLY.... 2ND APPELLANT

AND

OKIYA OMTATAH OKOITI.....1ST RESPONDENT

ELIUD KARANJA MATINDI.....2ND RESPONDENT

MICHAEL KOJO OTIENO.....3RD RESPONDENT

BENSON ODIWUOR OTIENO.....4TH RESPONDENT

BLAIR ANGIMA OIGORO.....5TH RESPONDENT

VICTOR OKUNA.....6TH RESPONDENT

FLORENCE KANYUA LICHORO.....7TH RESPONDENT

DANIEL OTIENO ILA.....8TH RESPONDENT

RONE ACHOKI HUSSEIN.....9TH RESPONDENT

HON. SENATOR EDDY GICHERU OKETCH.....10TH RESPONDENT

CLEMENT EDWARD ONYANGO.....11TH RESPONDENT

PAUL SAOKE.....12TH RESPONDENT

LAW SOCIETY OF KENYA.....13TH RESPONDENT

AZIMIO LA UMOJA ONE KENYA
COALITION PARTY.....14TH RESPONDENT

KENYA HUMAN RIGHTS COMMISSION.....15TH RESPONDENT

KATIBA INSTITUTE.....16TH RESPONDENT

THE INSTITUTE FOR SOCIAL
ACCOUNTABILITY (TISA).....17TH RESPONDENT

TRANSPARENCY INTERNATIONAL KENYA.....18TH RESPONDENT

INTERNATIONAL COMMISSION OF
JURIST-KENYA (ICJ) KENYA ..... 19TH RESPONDENT

SIASA PLACE..... 20TH RESPONDENT

TRIBELESS YOUTH.....21ST RESPONDENT

AFRICA CENTRE FOR OPEN GOVERNANCE.....22ND RESPONDENT

ROBERT GATHOGO KAMWARA.....23RD RESPONDENT

TRADE UNIONS CONGRESS OF KENYA.....24TH RESPONDENT

KENYA MEDICAL PRACTITIONERS

PHARMACISTS AND DENTIST UNION.....25TH RESPONDENT

KENYA NATIONAL UNION OF NURSES..... 26TH RESPONDENT

KENYA UNION OF CLINICAL OFFICERS.....27TH RESPONDENT

FREDRICK ONYANGO OGOLA.....28TH RESPONDENT

NICHOLAS KOMBE.....29TH RESPONDENT

WHITNEY GACHERI MICHENI.....30TH RESPONDENT

STANSLOUS ALUSIOLA.....31ST RESPONDENT

HERIMA CHAO MWASHIGADI..... 32ND RESPONDENT

DENNIS WENDO..... 33RD RESPONDENT

MERCY NABWIRE.....34TH RESPONDENT

BENARD OKELO.....35TH RESPONDENT

NANCY OTIENO.....36TH RESPONDENT

MOHAMED B. DUB.....37TH RESPONDENT

UNIVERSAL CORPORATION LIMITED.....38TH RESPONDENT

COSMOS LIMITED.....39TH RESPONDENT

ELYS CHEMICAL INDUSTRIES .....40TH RESPONDENT

REGAL PHARMACEUTICALS.....41ST RESPONDENT

BETA HEALTHCARE LIMITED.....42ND RESPONDENT

DAWA LIMITED.....43RD RESPONDENT

MEDISEL KENYA LIMITED..... 44TH RESPONDENT

MEDIVET PRODUCTS LIMITED..... 45TH RESPONDENT

LAB AND ALLIED LIMITED..... 46TH RESPONDENT

BIOPHARM LIMITED.....47TH RESPONDENT

BIODEAL LABORATORIES LIMITED.....48TH RESPONDENT

ZAIN PHARMA LIMITED..... 49TH RESPONDENT

THE CABINET SECRETARY FOR THE

NATIONAL TREASURY AND PLANNING.....50TH RESPONDENT

THE HON. ATTORNEY GENERAL.....51ST RESPONDENT

THE SPEAKER OF THE SENATE.....52ND RESPONDENT

COMMISSIONER-GENERAL,

KENYA REVENUE AUTHORITY .....53RD RESPONDENT

CONSUMERS FEDERATION OF KENYA

(COFEK).....54TH RESPONDENT

KENYA EXPORT FLORICULTURE, HORTICULTURE,

AND ALLIED WORKERS UNION.....55TH RESPONDENT

DR. MAURICE JUMAH OKUMU.....56TH RESPONDENT

(CONSOLIDATED WITH CIVIL APPEAL NOS. E016, E021, E049 AND E064, E080 OF 2024.)

(Appeals and cross-appeals against part of the Judgment and decree of the High Court at Nairobi (Constitutional and Human Rights Division) (Majanja, Meoli and Mugambi, JJ.) delivered at Nairobi on 28th November, 2023

in

High Court Constitutional Petition No. E181 of 2023 (consolidated with Petition Nos. E211, E217, E219, E221, E227, E228, E232, E234, E237 and E254 all of 2023)

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JUDGMENT OF THE COURT

1. A concise account of the circumstances which triggered the litigation before the High Court which yielded the judgment dated 28th November 2023, the subject of these amalgamated appeals, is essential in order to suitably contextualize the divergent arguments urged by the parties in support of their respective positions.

2. Briefly, the Finance Bill, 2023 was published on 28th April 2023 in Kenya Gazette No. 56 (National Assembly Bill No. 14 of 2023).

The Bill was tabled before the National Assembly on 4th May 2023 for the First Reading. On 7th and 8th May 2023, a public notice inviting members of the public and relevant stakeholders for public participation was published in the print media requesting public comments on the Bill to be presented to the Departmental Committee on Finance and National Planning. On 13th June 2023, the Committee presented its report on the Bill to the National Assembly.

3. On 14th June 2023, the Bill was presented to the National Assembly for the Second Reading. On 20th June 2023, it came up for the Third Reading. On 23rd June 2023, the National Assembly passed the Bill with some amendments. The Bill received presidential assent on 26th June 2023, and, it became the Finance Act, 2023 (hereafter the Act). Under section 1, it was to come into operation or be deemed to have come into operation as follows-(a) on the 1st September, 2023, sections 10, 26 (b)(xiii), 52, 56, 63, 64 and 74; (b) on 1st January 2024, sections 5(c), 6, 12, 14, 20, 25, 26(a), 26(b), (iii), 26(b) (v), 26 (b) (vii), 26 (b) (ix), 26 (b) (x), 26 (b) (xii), and 27; and (c) all other sections, on the 1st July 2023.

4. The Act amended 12 legislations, namely; (a) the Income Tax Act, Cap 470; (b) the Value Added Tax Act, 2013; (c) the Excise Duty Act, 2015; (d) the Tax Procedures Act, 2015; (e) Miscellaneous Fees and Levies Act, 2026; (f) the Betting, Gaming and Lotteries Act, 1991; (g) the Kenya Roads Act, 1999; (h) the Kenya Revenue Authority Act, 1995; (i) the Employment Act, 2007; (j) the Unclaimed Financial Assets Act, 2011; (k) the Statutory Instruments Act, 2013; and (l) the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015.

5. However, the enactment of the Act elicited 11 constitutional petitions which were all filed at the High Court, Constitutional and

Human Rights Division, Nairobi, namely, petition numbers **E181, E211, E217, E219, E221, E227, E228, E232, E234, E237** and **E254** all of **2023.** Principally, the petitions challenged the legislative process leading to the enactment and the constitutionality of provisions of the Act. Subsequently, on 7th August 2013 the 11 petitions were consolidated. ***Petition number E181 of 2023, Okiya Omtata and Others vs the Cabinet Secretary for the National Treasury and Planning and Others*** was designated as the lead file.

6. The respondents in the petitions, namely, the National Assembly, the Speaker of the National Assembly, the Cabinet Secretary for the National Treasury and Economic Planning, and the Attorney General opposed the consolidated petitions maintaining that the challenged provisions and the legislative process leading to the enactment met the constitutional threshold.

7. On 13th September 2023, a three-Judge bench of the High Court comprising of ***Majanja, Meoli and Mugambi, JJ.,*** heard the petitions by way of the pleadings filed and written and oral submissions. On 28th November 2023, the learned justices delivered their verdict in which they held as follows:

    a) ***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 are 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 pertaining to amendments 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.

b) ***That, under Articles 220 and 221 of the Constitution, estimates of revenue and estimates of expenditures 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 15 June 2023 and 98 of 26 June 2023 respectively.***

c) ***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 of the National Assembly to agree on the nature of any Bill before 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 before 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.***

d) ***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.

e) ...

f) ...

g) ...

h) ***That, the introduction of the Housing Levy through amendment of the Employment Act by section 84 of the Finance Act, 2023 lacks 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 Article 27 and 201 (b) of the Constitution.***

8. In a nutshell, the trial Court declared sections 76, 77, 78, 84, 87, 88 and 89 of the Act unconstitutional. However, the Court held that sections 30 to 38 and 47 of the Act are constitutional. This decision elicited 7 appeals to this Court and 3 cross-appeals as detailed shortly. In all the appeals and cross-appeals, the

appellants and cross-appellants are only aggrieved by part(s) of the judgment as highlighted in the succeeding paragraphs.

9. The 7 appeals are: Civil Appeals ***Nos. E003, E016, E021, E049, E064, E080*** and ***E175* of 2024.** However, the appellant in ***Civil Appeal No. E175 of 2024, The Speaker of the Senate vs Okiya Omtatah Okoiti & 57 Others*** filed a Notice of withdrawal dated 17th April 2024 and during the virtual hearing on the same day, at the request of its learned counsel, Mr. Miller, the said appeal was marked as withdrawn with no orders as to costs. Therefore, this judgment determines the 6 appeals which proceeded to hearing.

10. In ***Civil Appeal No. E003 of 2024, National Assembly and the Speaker of the National Assembly vs Okiya Omtatah Okoiti & 55 Others,*** the appellants are aggrieved by the trial court's finding that sections 76, 78, 84, 87, 88 and 89 of the Finance Act, 2023 are unconstitutional. They are also challenging the finding that the Affordable Housing Levy introduced under section 84 of the said Act is unconstitutional for want of a comprehensive legal framework contrary to Articles 10 (2) and 201 of the Constitution and that the levy is discriminatory, arbitrary and contravenes Articles 27 and 201 of the Constitution. They also seek to overturn the finding that the impugned Act violates Articles 109 (5) and 114 of the Constitution for containing provisions that do not relate to money Bills.

11. They are also querying the finding that whereas there is no express obligation for the National Assembly to give reasons for adopting or rejecting proposals received during public participation, it is desirable that the relevant committees of Parliament provides reasons for adopting or rejecting proposals presented during public participation. Lastly, they fault the learned justices for

finding that it was necessary for the Speaker of the National Assembly to agree with the Speaker of the Senate on the nature of the Bills and the path the Bill should take once it is introduced in the National Assembly.

12. In their Memorandum of Appeal dated 18th December 2024, the appellants in **E003 of 2024** cited 6 grounds which can be reduced into four, namely: (i) whether the Act was a money Bill and whether it contained provisions beyond those explicitly stated under Article 114 (a) – (e) of the Constitution; (ii) whether the learned Judges erred by failing to correctly apply the pith and substance test; (iii) whether the Affordable Housing Levy, introduced under Section 84 of the Act is constitutional; and, (iv) whether the resolution under Article 110 (3) is a pre-condition to the introduction of every Bill in either House of Parliament. They urge this Court to allow the appeal and issue declarations/orders as follows: that the Act in its entirety was procedurally debated and passed by the National Assembly in accordance with the Constitution and is therefore constitutional; that Nairobi High Court Constitutional Petition No. **E181 of 2023** consolidated with Petition Nos**. 211 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** be dismissed; declare that sections 76, 77, 78, 84, 87, 88 and 89 of the Act are constitutional; that there is no requirement for joint concurrence of the Speaker of the National Assembly and the Speaker of the Senate on the nature of any Bill prior to its introduction in any House other than Bills concerning County Governments; that the Affordable Housing Levy as introduced by section 84 of the Act is a form of raising revenue and it is therefore constitutional; declare that there is no obligation on the relevant committees of the

National Assembly to give reasons for adopting or rejecting proposals presented during public participation, and, they be awarded costs of the appeal and the proceedings in the High Court.

13. Civil Appeal No. **E003 of 2023** attracted three cross-appeals. First, is the cross-appeal dated 23rd January 2024 filed by the Law Society of Kenya (LSK, i.e. the 13th respondent). It prays that its cross-appeal be allowed; that Civil Appeal No. **E003 of 2024** be dismissed; and a declaration that sections 24 (c), 44, 47 (a) (v), 100 and 101 of the Act are unconstitutional for want of meaningful public participation during their enactment. This cross-appeal is premised two grounds: (a) whether the Affordable Housing Levy, introduced by section 84 of the Act is unconstitutional; and, (b) whether there was sufficient public participation prior to the enactment of sections 24 (c) 44, 47(a) (v) 100 and 101 of the Act.

14. The second cross-appeal dated 5th January 2024 was filed by the 15th to 22nd respondents **(Kenya Human Rights Commission, Katiba Institute, The Institute of Social Accountability (Tisa), Transparency International Kenya, International Commission of Jurists-Kenya, Siasa Place, Tribeless Youth and Africa Center for Open Governance)** seeking orders that: (a) the cross-appeal be allowed and the main appeal to be dismissed; (b) a declaration that Article 109 (5) only restricts the introduction (and not debate, consideration, or passage) of money Bills to the National Assembly and does not prevent debate by the Senate if a money Bill concerns county governments; (c) a declaration that the Act is unconstitutional for failure to involve the Senate because the Bill contained matters concerning counties; (d) a declaration that Articles 10, 21(3) and 201 require tax measures to be socially just, adequate, equitable, and progressive and not to

be regressive by disproportionately shifting the tax burden to the poor and marginalized. That the Act violates the said principles by doubling VAT on food and fuel from 8% to 16% during an economic polycrisis; (e) a declaration that section 30 (a) of the Act (amending section 5(2) (aa) of Value Added Tax Act, 2013 (to double the VAT from 8% to 16% on the fuels in section B of Part I of the First Schedule) and section 30 (b) of the Act amending section 5(2) (ab) of the Value Added Tax Act, 2013 (to double the VAT on liquefied petroleum gas including propane) are disproportionate, regressive and hence unconstitutional under Articles 10, 27 and 201.

15. In summary, the grounds in support of this cross-appeal are: (a) the High Court ignored the pleadings, the evidence and submissions that regressive taxes are unfair and violate Articles 10, 27, 26, 43 and 201; (b) the High Court misinterpreted Article 10 and 165 (3) on its jurisdiction to test the constitutionality of anything including policy and erred in finding that the impugned Act was *"a policy"* and not *"a law"* over which the court had jurisdiction; (c) the trial court misinterpreted Articles 109 (5) and 114 (2) by holding that money Bills do not require the mandatory concurrence of the two Speakers as a pre-condition but could be exclusively *"introduced and considered"* in the National Assembly; (d) the High Court violated the doctrine of *stare decisis* laid down in precedent(s) determining the division of revenue by holding that concurrence is *"desirable"* and ought to occur as opposed to a *"mandatory condition precedent"* when a Bill is introduced in either House; (e) the High Court erred in law in excluding the Senate from the process despite finding that the Act contained matters concerning Counties such as the Affordable Housing Levy; (f) failing to strike down the entire Act after establishing that the

Act was a money Bill, which violated Article 114 (1) for unlawfully containing non-money Bill issues; (g) finding that public participation on the Act was adequate; and, (h) holding that under Article 10 and 118, Parliament was not required to provide reasons for rejecting views tendered during public participation, but it is desirable for the Committee to give reasons for rejecting or adopting proposals received.

16. Conspicuously, the 15th to 22nd respondents' cross-appeal is a replica of Civil Appeal No**. E064 of 2024** filed by the same parties against the same judgment. Both are founded on substantially similar grounds and both seek identical reliefs. In our view, it is undesirable for a party to mount a cross-appeal and at the same time institute a substantive appeal against the same judgment. This practice should be abhorred because it amounts to vexing the other party twice and unnecessary saddling the Court. Accordingly, it will add no value for us to rehash the grounds and prayers sought in E064 of 2024.

17. Lastly, the third cross-appeal dated 5th March 2024 against Civil Appeal No. E003 of 2023 was filed by the 38th to 49th respondents. They also pray that their cross–appeal be allowed and the appeal be dismissed; a declaration that the amendment to part 1 of the First Schedule to the Excise Duty Act by section 47(a) (xii) of the Act which introduced 25% excise duty on imported cartons, boxes, cases of corrugated paper or paper board, imported folding cartons, boxes and cases of non-corrugated paper or paper on board, imported skillets, free hinge lid packets, imported paper or paper board labels of all kinds are unconstitutional for violating Articles 10 (2) (b) (c), 43 (1) (2) and (3), 118 (1) (b), 201 and 232 (1) (d).

18. This cross-appeal is premised on 12 grounds which can be abridged to 5, namely: (a) whether the impugned Act was enacted in violation of Article 109 since it was not part of the Finance Bill, 2023 published on 23rd April 2023; (b) whether there was sufficient public participation in the enactment of section 47 (a) (xii) of the Act; (c) whether the impugned amendment violated the cross-appellants' economic and social rights and their right to the highest attainable standard of health under Article 43 of the Constitution (grounds 9 and 10); (d) whether the impugned amendment violates Article 10 (2) and (c); and, (e) whether the amendment violates Article 201.

19. Civil Appeal No. **E016 of 2024** was filed by **Dr. Fredrick Onyango Ogola & 8 others** against the **Cabinet Secretary, National Treasury & Planning & 51 others.** In this appeal, the appellants, aggrieved by part of the judgment, seek the following orders: (a) a declaration that the 3rd respondent did not carry out the required public participation prior to the passage of the Act; (b) a declaration that Sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Act are unconstitutional for want of public participation during their enactment; (c) a permanent injunction barring the 1st, 2nd , 3rd and 4th respondents or any other state officers and any other state agencies from implementing the above sections; (d) all taxes collected pursuant to the foregoing sections or under any other unconstitutional section of the Act be accounted for and refunded to the tax payers; (d) such further directions/orders as may be necessary to give effect to the foregoing orders if granted; and, (e) each party to bear its own costs.

20. In their endeavour to upset the judgment, the appellants have cited 8 grounds which can be condensed into two: (a) whether

there was public participation in the enactment of the new sections introduced in the National Assembly; and, (b) whether the High Court erred in failing to find that the public participation conducted on the Act was narrow and insufficient.

21. In ***Civil Appeal No. E021 of 2024, Okiya Omtatah Okoiti & 3 others vs Cabinet Secretary, National Treasury & Planning and 58 others***, the appellants are aggrieved by: (i) the trial court's failure to find that in the absence of a Bill or Act containing detailed revenue estimates for financing the 2023/24 budget means that the Finance Act, 2023 had no basis. (ii) upholding the exclusion of the Senate from the national budget making process yet the Finance Bill contained matters which concerned the counties; (iii) failing to find that under Article 114(1), a Finance Bill is prohibited from dealing with "any matter" other than those listed in Article 114(3); (iv) holding that the failure by the Speaker of the National Assembly to seek concurrence of the Speaker of the Senate as to whether the Finance Bill, 2023 concerned county governments was not fatal to the legislative process; (v) failing to cross-examine the Speaker of the Senate regarding recantation of his previous position on the Finance Bill, 2023; (v) ignoring the evidence of budgeted corruption; and, (vi) misinterpreting the nature and scope of public participation. The appellants are seeking the following reliefs: (a) the appeal be allowed in its entirety; (b) the impugned part of the judgment and decree be set aside and substituted with a decision of this Court allowing the consolidated petitions in their entirety as prayed; (c) each party bears the costs of litigating both in this appeal and in the High Court.

22. The appellants grounds of appeal can be reduced to four: (a) the High Court erred in failing to find that there was an exclusion of

revenue estimates in the 2023/2024 FY Budget and such exclusion made the Appropriation Act, 2023 void *ab initio;* (b) the High Court erred in failing to find that the Senate was excluded in the 2023/2024 FY national budget-making process, which rendered the Act void *ab initio*; (c) the High Court misinterpreted the nature and scope of money Bills and the relevance of Articles 96 (1) and 109 (5); (d) the Court misinterpreted the nature and scope of public participation; and, (d) the learned judges of the High Court were biased.

23. In ***Civil Appeal No. E049 of 2024, Mr. Clement Edward Onyango vs Cabinet Secretary, National Treasury & Planning & 60 Others***, the appellant is also aggrieved by part of the judgment. He seeks the following orders: (a) a declaration that sections 52 and 63 of the Act that amends sections 23 and 59 of the Tax Procedures Act to introduce a mandatory and expensive electronic tax system is a threat and violates the consumer economic rights of small businesses under Article 46 (1) (c); (b) a declaration that public participation in the enactment of the Act was insufficient and lacked accountability and transparency; (c) Parliament and other state agencies are obligated to give written reasons for adopting or rejecting any proposals received from members of the public during public participation; and (d) courts have jurisdiction to interfere with tax legislations and policies that violate principles of taxation and fairness contrary to Articles 10, 27 and 201.

24. Mr. Onyango faults the trial court for: (a) disregarding and failing to determine the question whether section 52 and 63 of the Act that introduces mandatory and expensive electronic tax system is a threat or violates the consumer economic rights of small businesses under Article 46 (1) (c); (b) finding that the public

participation in the Act was sufficient contrary to the established principles and evidence and holding that Parliament has no obligation to demonstrate how they have considered the views collected from the public or provide reasons for rejecting some views; (c) contradicting itself by holding on one hand that there is no express obligation on Parliament to give reasons for adopting or rejecting any proposals received from members of the public, and at the same time holding that it is desirable for the relevant Committee, after conducting public participation to give reasons for rejecting or adopting the proposals received; (d) holding that in view of the merger of policy and legislation, the court has no jurisdiction to interfere with tax legislation, contrary to the principles of public finance, equal protection of law, fairness and judicial authority under Articles 10, 27,159 165, 201 and 259; (e) adopting an economic policy which does not reflect the financial status of the majority; and, (f) misconstruing the facts and the law.

25. Next is ***Civil Appeal No. E080 of 2024, the Cabinet Secretary, National Treasury & Planning and The Hon. Attorney General against Okiya Omtatah Okoiti & 48 Others*** in which the appellants are aggrieved by part of the judgment. They pray that their appeal be allowed; part of the judgement declaring Sections 76, 77, 78, 84, 87, 88 and 89 of the Act unconstitutional be set aside and the costs of the appeal be borne by the respondents.

26. In summation, their grounds of appeal are: (a) whether the framework for the Affordable Housing Levy as set out in section 84 of the Act meets the requirements of Article 201, 206 (1), 210 and the principle of good governance, transparency and accountability under Article 10 (2) (a) and (c); (b) whether 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, unfair, discriminatory, irrational, arbitrary and in violation of Article 27 and 201 (b) (i); (c) whether section 87 of the Act which amends section 28 of the Unclaimed Financial Assets Act, 2011, is neither incidental nor directly connected to a money Bill; whether the amendment to the composition of the Kenya Roads Board, as outlined in sections 76 and 78 of the Act have no demonstrable connection to the Finance Act, 2023; and, (d) whether section 88 and 89 of the Act, which repeals section 21 of the Statutory Instrument Act do not fall within the purview of a money Bill.

27. During the virtual hearing of the appeals on 17th April 2024, we consolidated the 6 appeals. The parties highlighted their respective written submissions. However, the 3rd, 4th, 5th, 7th to 10th, 12th, 55th and 56th respondents, though duly served, did not attend the hearing nor did they file any submissions.

28. As mentioned earlier, these appeals and cross-appeals arise from the same judgment. The only difference is that the appellants and the cross-appellants are aggrieved by parts of the judgment which were not in their favour and *vice versa*. The foregoing being the position, inevitably, the issues arising from the appeals and cross-appeals are cross-cutting. Mainly, most of the parties only relied on one set of submissions in support of their respective appeals and in opposition to their opponents' appeals or cross-appeals. Accordingly, for the sake of brevity and in order to avoid repetition, we shall highlight each and every parties' submissions bearing in mind that where applicable, they were both in support of their respective cases and in opposition to their opponents' appeal or cross-appeals.

29. Learned counsel Mr. Murugara, Mr. Kuiyoni and Ms. Amollo appeared for the appellants in Civil Appeal No. **E003 of 2024**. We have read their detailed submissions drawn and filed by Mr. Kuiyoni. We will here below briefly highlight their submissions in support of their appeal and in opposition to the cross-appeals and the appeals filed against their clients.

30. Submitting on the question whether the Finance Bill, 2023 was a money Bill and whether it contained provisions beyond those explicitly stated under Article 114 (a) – (e), they argued that a reading of Article 114 (3) reveals that the impugned Act was a money Bill which is not limited to provisions directly related to taxes or incidental to taxation measures under the Act. Therefore, by failing to give due regard to the comprehensive nature of a money Bill, the learned Judges erred when they declared sections 76, 78, 88, and 89 of the Act unconstitutional.

31. Regarding sections 76 and 78 of the Act which amended section 7 of the Kenya Roads Act, 1999 thereby reducing the Board membership from 8 to 5, they argued that the Board Members are remunerated using public funds, therefore, reduction of the Board's membership alters the financial implications associated with the Board's operations and expenditures. Hence, these provisions have a direct connection to the appropriation and utilization of public funds, effectively falling within the ambit of a money Bill. Consequently, they submitted that the learned judges erred in declaring the two sections unconstitutional.

32. Concerning section 87 of the Act, which amended section 28 of the Unclaimed Assets Act, they maintained that the said amendment related to payment by the authority to a designated proxy out of the Unclaimed Assets Trust Fund which is a public fund by virtue of Article 206 (1) (a). Thus, by enabling beneficiaries

to designate proxies to receive payments, the provision alters the mechanism through which public funds are distributed and managed, so it falls within the definition of a money Bill under Article 114(3).

33. Regarding sections 88 and 89 of the Act which repealed section 21 of the Statutory Instruments Act, they submitted that given the direct nexus between statutory instruments and revenue collection, this amendment falls within the ambit of a money Bill as defined by the Constitution and the expiry of the Statutory Instruments directly impacts revenue collection. Thus, it was erroneous for the learned judges to find that "*in the absence of specificity on the subsidiary legislation affected, it is difficult to determine whether this amendment properly belongs to the Finance Act."* They contended that under section 60 of the Evidence Act, the Court ought to take judicial notice of "all written laws, and all laws, rules and principles, written or unwritten, having the force of law". Therefore, the foregoing applies to the Statutory Instruments which were to expire after ten years pursuant to section 21 of the Statutory Instruments Act.

34. The appellants faulted the learned judges for failing to correctly apply the pith and substance test propounded by this Court in ***Speaker of the National Assembly & Another vs Senate & 12 Others (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR).*** In their view, the learned judges erred by delving into individual provisions of the Act. They stressed that the said amendments were incidental to the main provisions and relied on the Indian Supreme Court decision in ***Justice K. S. Pettaway (Rtd.) vs Union of India IR 2018 SC (SUPP) 1841*** in support of their argument urging that the provisions complied with Article 114 (3).

35. Regarding the constitutionality of the Affordable Housing Levy introduced under section 84 of the Act, the appellants faulted the learned Judges for finding that section 84 of the Act, amending section 31 of the Employment Act, 2007 violates Article 10 (2) (b) and (c) and 201 and is therefore unconstitutional. They maintained that the Affordable Housing Levy is a critical mechanism for financing the government's initiatives aimed at addressing the housing crisis in our nation, and that it is designed to mobilize resources for the construction of affordable housing units to citizens as required by Article 43.

36. It was their case that the Affordable Housing Levy cannot be faulted for lack of legal framework because the Employment Act under which it was introduced provides a clear legal framework for its implementation, enforcement and mechanisms for the collection and administration of employment-related contributions, ensuring efficiency and transparency in the levy's operation.

37. They also submitted that the imposition of the Affordable Housing Levy only to individuals in employment is rooted in pragmatic considerations and policy objectives because employment status is a reliable indicator of income stability and capacity to contribute without imposing undue financial hardship on taxpayers. Therefore, where there is a legitimate reason, the differentiation cannot be discriminatory. They relied on ***Okello & Another vs 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)*** where ***Odunga, J.*** (as he was then) held that if the government has

satisfactory reasons for making an exemption, the question whether or not it was right in so doing must then be a matter of policy.

38. Regarding the concurrence process in Article 110 (3), it was contended that the said issue was conclusively determined by this Court in ***Speaker of the National Assembly & Another vs Senate & 12 Others [supra],*** where it faulted the High Court for finding that it is a condition precedent that any Bill published by either House be subjected to the concurrence process. They contended that the learned judges failed to give reasons for departing from a binding precedent of this Court.

39. In opposition to the Cross-Appeals the appellants maintained that the provisions which were introduced on the floor of the National Assembly were not completely new nor were they introduced in the House after the First and Second Reading as alleged. It was contented that the said provisions were either in the Bill or arose from public participation forums with some proposals being adopted and others being rejected. Therefore, amendments arising from public participation forums cannot be said not to have gone through public participation. Consequently, the amendments were within the parameters of what was submitted to the public for input and contemplated in the Memorandum of Objects and Reasons of the Finance Bill, 2023.

40. It was also argued that the Constitution recognizes that a House of Parliament can amend Bills. Further, Article 124 allows Parliament to make Standing Orders to provide for its procedures for conducting House business. They relied on ***Kenya Bankers Association vs Attorney General & Another; Central Bank of Kenya (Interested Party) [2019] eKLR*** in which the High Court

held that the National Assembly is allowed to amend a legislative proposal as the Bill goes through various stages of its enactment.

41. It was contended that the adequacy of public participation hinges on the specifics of each case and it is a factual determination. Further, before the trial court, the National Assembly (the Departmental Committee on Finance and National Planning) presented substantial evidence demonstrating invitations to citizens and stakeholders to provide feedback on the Bill which were duly acknowledged by the Committee and some were incorporated into the Act. The appellants relied on ***Mui Coal Basin Local Community & 15 others vs Permanent Secretary Ministry of Energy & 17 Others*** ***[2015] eKLR*** where it was held that public participation did not mean that everyone must give their views, which is impracticable nor does the public authority have a duty to accept every view presented to it.

42. In response to the submissions that Sections 52 and 63 introduces a mandatory and expensive electronic tax system and violates the consumer economic rights of small business under Article 46 (1) (c) because the introduction of electronic tax systems will require small businesses to procure computers and internet services, it was submitted that the underlying rationale behind the adoption of eTIMS is to address issues related to fictitious input claims by VAT-registered taxpayers, via a streamlined and more effective VAT return filing mechanism. The implementation of electronic tax invoices is therefore intended to bolster compliance efforts and mitigate revenue leakages. Further, its implementation does not entail additional expenses for small businesses. Conversely, it is readily available for download and accessible through a USSD code. This Court was referred to ***Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf***

***of Association of Kenya Insurers & 5 others vs Commissioner of Domestic Taxes & 2 Others* [2014] eKLR** in support of the holding that the fact that a particular provision of a statute may be difficult to implement or inconvenient is not a ground to challenge its validity. They maintained that the alleged burdensome consequences do not *ipso facto* render the sections unconstitutional, instead, the party alleging unconstitutionality must go beyond mere inconvenience and prove contravention of fundamental constitutional principles.

43. Regarding public participation, the appellants contended that the trial court correctly held that the public participation exercise was sufficient and relied on ***British Tobacco Kenya Plc vs Cabinet Secretary for the Ministry of Health and Others* [2019] eKLR** in support of the finding that public participation must be real and not illusory or cosmetic. Further, for public participation to be considered effective, it does not mean that all proposals and views presented during public participation must be accepted. The National Assembly is only required to afford members of the public a reasonable opportunity to present their views and as was held by ***Lenaola, J.*** (as he then was) in ***Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others vs. County of Nairobi Government & 3 Others* Petition No. 486 of 2013**, public participation is not the same as saying that public views must prevail.

44. Regarding the question whether Parliament and other state agencies are obligated to give written reasons for adopting or rejecting any proposals received from members of the public during public participation, it was submitted that while Article 118 (b) underscores Parliament's duty to facilitate public

participation, it does not impose a specific obligation to provide written reasons for decisions arising from such participation.

45. The appellants contended that courts lack jurisdiction to interfere with tax legislation based on the merger of policy and legislation of public finance principles because the rate of taxation is a policy decision that rests with the legislature. Further, the court is being asked to appraise the decision to levy tax on particular goods and services which falls outside the mandate of this Court. Reliance was placed on ***Ndora Stephen vs Minister for Education & 2 Others [2015] eKLR*** where the High Court held that formulation of policy and its implementation are within the province of the executive. They also relied on ***Scotch Whisky Association and others vs. the Lord Advocate and Another [2017] UKSC 76*** in support of the holding that it is the mandate of Parliament to determine the minimum pricing of alcohol.

46. The appellants in Civil Appeal No. **E080 of 2024** represented by learned counsel Prof. Muigai, SC, Kiragu Kimani, SC, Mahat Somane and Mr. Charles Mutinda, Chief State Counsel, highlighted their comprehensive written submission drawn and filed by Mr. Mutinda. The germane issues urged in support of the appeal are that preparation of the Budget Statement, and the preparation of the Finance Bill and the enactment of the Act complied with the law, including the principles governing public participation laid down by the Supreme Court in ***Mui Coal Basin Local Community & 15 others vs Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR.***

47. Responding to the submission that the Affordable Housing Levy was not backed by adequate legal framework, it was argued that Article 43 (1) (b), the Housing Act, National Housing Corporation

Act, and the Affordable Housing Fund Regulations, 2018 provide sufficient legal framework for the levy.

48. Conceding that there could be some aspects of public participation that were missed, it was argued that the digression was not of such a significant impact to cause an injustice. Further, the amendments alleged to have been introduced on the floor of the National Assembly were incidental to a money Bill. Therefore, requiring Parliament to engage in public participation any time an amendment is introduced to a statute during the legislative process is a recipe for chaos.

49. On the question of public participation, this Court was referred to the decision of the High Court in ***Commission for the Implementation of the Constitution vs Parliament of Kenya & 2 Others*** ***[2013] eKLR*** to the effect that it will suffice if it is demonstrated that a reasonable opportunity was offered to members of the public to present their views. Further, what amounts to a reasonable opportunity depends on the circumstances of each case. They maintained that the public views on the Bill were invited through newspaper adverts, letters to identified stakeholders, and receipt of memoranda in Parliament and through representatives of the people in Parliament which they argued was sufficient. Further, public views and proposals are not binding. They may be accepted or rejected, what is required is that the views are given due consideration and should not be treated as mere formality as was held by the High Court in ***Republic vs. County Government of Kiambu ex-parte Robert Gakuru & Another*** ***[2016] eKLR.***

50. On whether it was constitutional for the National Assembly to draft additional provisions when amending the Finance Bill, they maintained that it would be absurd for the National Assembly to

collect views from the public and fail to take their views into account or draft amendments to a Bill to reflect some of the views. Therefore, the argument that such a Bill should not be amended is legally and factually untenable.

51. It was also submitted that there is ample jurisprudence in support of the fact that even after a Bill has been submitted to the public, the National Assembly retains constitutional mandate to amend it as was held by this Court in ***Pevans East Africa Limited & another vs Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR***. It was asserted that Parliament is not required to undertake fresh public participation on new proposals, and that such a requirement would bring the legislative process to a complete halt and undermine Parliament's ability to discharge its constitutional mandate.

52. The trial court was faulted for finding that the housing levy was discriminatory. The appellants reasoned that almost all taxes in their nature are discriminatory to certain groups of people such as the PAYE which is paid by employed persons. Therefore, the trial court rightly refused to interfere with policy decisions, but it erred by failing to apply the same principle while determining the constitutionality of the housing levy. It also failed to apply the test in Articles 27 and 201.

53. The appellants also submitted that for a court to uphold a plea of discrimination in tax legislation, it must be demonstrated that persons or entity undertaking similar activities were taxed at different rates. It was contended that a reading of section 84 of the Finance Act shows that the differential treatment was justified.

54. In addition, it was argued that proposals received during public participation are not binding, but what is required is that the

comments are given due consideration and should not be treated as mere formality. (***Republic County Government of Kiambu ex-parte Robert Gakuru & Another [supra] was*** cited).

55. Addressing the question whether the taxes collected during the subsistence of the impugned provisions should be refunded to the taxpayers, it was stated that the said sections were valid and operated under a presumption of constitutionality until a finding to the contrary was made by the High Court which, in any event stayed its decision for 45 days to allow the filing of an application under Rule 5 (2) (b). The declaration of unconstitutionality was to apply from the time this Court declined to stay of the High Court decision.

56. The 53rd respondent (the KRA) supported Civil Appeal Nos. **E003 of 2024** and **E080 of 2024**. It argued that the exercise duty on alcoholic products was contained in the budget statement and it was discussed at the public participation forums. Furthermore, the Committee agreed with all the stakeholders and it adopted the amendments. KRA relied on ***Mjengo Limited & 3 Others vs Parliament of Kenya & Another [2022] KEHC 13517 (KLR)*** where the High Court upheld the adoption of comments by a Committee.

57. On the question whether the increase of exercise duty rate on imported glass and whether the amendment by section 24 (c) par. 72 and 73 were proper, KRA argued that the amendment was aimed at promoting local glass industry and enhance the country's response to environmental challenges posed by plastics through the availability of practical alternative.

58. Regarding the amendments to special economic zones, KRA referred to the 2nd respondent's replying affidavit filed in petition

No. **221 of 2023** in which it is averred that the rationale behind the amendments is to attract direct foreign investment.

59. Concerning the questioned public participation in the enactment of section 47 (a) (xii) and the provisions which were introduced at various stages, KRA maintained that once amendments were made to accommodate the proposals received during public participation, there was no requirement to refer the amended Bill for fresh public participation. Besides, public participation can be done directly by members of the public or indirectly through their democratically elected leaders. KRA relied on the High Court decision in ***Peter O. Ngoge vs Francis Ole Kaparo & Others [2007] eKLR*** in support of the proposition that it is not the function of the Court to interfere with the internal arrangements of Parliament unless it can be shown that it violated the Constitution.

60. KRA also submitted that the assertions that the National Assembly sneaked many provisions into the approved Bill on the floor of the House without subjecting them to public participation are unfounded since all amendments were introduced in accordance with the Standing Orders Nos. 127 and 133 which allow consideration and passage of amendments, informed by the submissions from public participation. Therefore, it cannot be said that the amendments were improperly enacted.

61. In opposing the respondents' cross-appeals, KRA submitted that the implementation of the eTIMS is to protect the economic interests of the consumer as enshrined under Article 46 (1) (c) and also the rationale behind the implementation of the eTIMS is to curb fictitious claims of input as a VAT through a flexible and more efficient system of filing VAT returns. It cited the Supreme

Court (High Court?) in ***Bidco Oil Refineries Limited vs Attorney General & 3Others*** ***[2013] eKLR*** where it held that it is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered, calculated and enforced.

62. On public participation, KRA maintained that the Committee report clearly provides the reasons for adoption or rejection of the proposals and cited ***Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others*** ***[2017] eKLR***, where this Court held that Parliament has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of the public and/or interested parties.

63. Learned counsel Mr. Morara and Dr. Ogola represented the 28th to 37th respondents. In opposition to Civil Appeal Nos. **E003 of 2024** and **E080 of 2024,** they submitted that the requirement for public participation was not put in the Constitution for a cosmetic purpose. Conversely, it is a fundamental principle under the Constitution. Therefore, allowing Parliament to introduce completely new sections after conclusion of public participation opens a door for mischief in the law-making process, because the legislature may withhold some sections and introduce them at a later stage effectively bypassing public participation. They contended that stakeholders' views were ignored, rendering the entire process a cosmetic exercise. Emphasizing the supremacy of the Constitution, they argued that the Standing Orders cannot allow the legislature to introduce new sections without subjecting them to public participation.

64. They maintained that the Finance Act was not subjected to a purposive and meaningful public participation, rather it was illusory and a cosmetic exercise. They faulted the High Court for failing to take into consideration that most of the stakeholders views were rejected, rendering the public participation a mere formality.

65. Mr. Omtatah and Mr. Otieno (the1st and 3rd respondents, respectively in Civil Appeal Nos. **E003 of 2024** and **E080 of 2024**) appeared in person. On his part, Mr. Omtatah contended that it is not disputed that the Senate did not consider, debate and approve the Financial Year (FY) 2023/2023 budget estimates which were introduced into the National Assembly under Article 221. Further, it is also not disputed that the Senate did not participate in the enactment of the Appropriation Act, 2023 (the national budget) and Finance Act, 2023 yet counties and county governments are affected by national tax regime and nowhere in the Constitution is the Senate expressly or implicitly excluded from considering Bills touching on national taxation. Therefore, the learned judges erred by failing to find that the Senate had a constitutional mandate to participate in the consideration of the budget estimates presented to the National Assembly under Article 221.

66. Mr. Omtatah also submitted that the learned judges erred in law and fact by failing to find that the Appropriation Act, 2023 was void *ab initio* for not containing estimates of revenue as required under Articles 220 (1) (a) and 221 as read with section 39 (1) & (2) of the Public Finance Management Act (PFMA), therefore, there was no basis for enacting the Finance Act, 2023.

67. Mr. Omtatah argued that the Finance Bill, 2023 fell under Article 114 (2) and not under Article 114 (1) and (3). Therefore, the

learned judges failed to acknowledge the fact that the annual Appropriation Act is the national budget from which counties and the Senate draw their funding. He contended that consideration and approval of the annual Appropriation Bill concerned counties and therefore the Senate ought to have been involved.

68. In addition, Mr. Omtatah submitted that the concurrence of the Speakers is not a matter for the two Speakers who have no vote in the process of enacting laws. Further, their concurrence cannot be arrived at to the exclusion of their respective Houses of Parliament. Consequently, the learned Judges erred in concluding that the recantation by the Speaker of the Senate from his previous position that the Finance Bill, 2023, was a Bill concerning county governments, without offering a reason for changing from his earlier position, was constitutional. He cited ***Council of Governors & 47 Others vs Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae) [2020] eKLR*** para **79** where the Supreme Court held that the Constitution cannot undermine its own provisions and argued that Article 96 mandates the Senate to legislate on matters pertaining to counties, including the scrutiny of revenue division between the national and county governments. He also argued that no provision of the Constitution or any other written law can be construed as restricting the Senate's authority.

69. Regarding public participation, Mr. Omtatah faulted the trial court for finding that there was adequate public participation yet the material placed before it did not show that the 18 new clauses which were not originally contained in the Bill reflected the deliberations of the public participation. Lastly, Mr. Omtatah contended that the impugned judgment favoured the respondents which suggests bias and accused the judges of failing to consider

or refer to the various provisions of the Constitution and the PFMA among several other provisions which he cited in his supplementary affidavit.

70. On his part, Mr. Otieno, in support of Civil Appeal No. **E021 of 2024** contended that the learned judges ignored a binding Supreme Court precedent in ***Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. 2 of 2011 [para 40] [2011] eKLR*** that any matters touching on county governments should be interpreted to incorporate any national-level process bearing a significant impact on the conduct of county government.

71. Mr. Matindi, (the 2nd respondent in both Civil Appeal Nos. **E003 of 2024** and **E080 of 2024**) also appeared in person. In support of the cross-appeals and opposition to the above two appeals, he maintained that the instant appeals had been rendered moot following the enactment of the Affordable Housing Act, 2024 which was assented to by the President on 19th March 2024 and its commencement date was 22nd March 2024. It was his submission that having accepted the High Court's declarations against section 84 of the Act by participating, together with the Senate, in the enactment of the Affordable Housing Act, 2024, the appellants' appeal against those declarations are unsustainable because they have been rendered moot. Therefore, the prayers sought in their appeal(s) will have no practical effect, having been overtaken by events.

72. He also contended that the principle of mootness applies equally to the appellants' appeal against sections 88 and 89 of the Act because The Statutory Instruments (Amendment) Bill, 2024, was introduced in the National Assembly and read a first time on 14th February 2024. Further, the said Bill seeks to, among others,

amend Part V and repeal section 21 of the Act, the same provisions which were amended and repealed outside the Constitution through sections 88 and 89 of the Act. Therefore, the appellants having accepted the impugned decision, they cannot at the same time challenge the declaration of unconstitutionality by way of an appeal to this Court.

73. Regarding the trial court's finding that sections 76, 78 and 87 of the Act (which amended the Kenya Roads Board Act and the Unclaimed Financial Assets Act), had been improperly included in the Finance Bill, 2023, and the resultant Act, Mr. Matindi maintained that the composition of the Kenya Roads Board and power to designate proxies for the purposes of the Unclaimed Financial Assets Act, could not be described as incidental to the constitutional definition of a money Bill set out in Article 114 (3) (a – d).

74. Regard the Senate's exclusion from participating in enactment of the Finance Act, Mr. Matindi contended that the Senate's exclusion from the legislative process is only permissible in the matters specified by the Constitution. He cited ***Institute for Social Accountability & Another vs National Assembly & 3 others & 5 Others*** ***[2022] KESC 39 (KLR),*** where the Supreme Court held that the expression 'any matters touching on county government' should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government.

75. Mr. Benson Otieno Kojo, the 3rd respondent in **E003 of 2024** and **E080 of 2023** did not attend the hearing. In his written submissions, he maintained that the Affordable Housing Levy introduced by section 84 of the Finance Act, 2023 creates an unjustified distinction between taxpayers who are employed and

those in informal employment contrary to Article 27. He cited the ***European Court of Human Rights in Willis vs The United Kingdom, No. 36042/97, ECHR 2002 –IV and Okpisz vs Germany*** in support of the holding that discrimination means treating differently, without any object and reasonable justification, persons in relevantly similar situations. He contended that the belated enactment of the Affordable Housing Act confirms the court's finding that section 84 was unconstitutional and the need for a proper anchoring legislation for the administration of the housing fund.

76. On behalf of the 11th respondent (Mr. Clement Edward Onyango), learned counsel Mr. Cherongis argued that sections 52 and 63 of the Act that amend sections 23 and 59 of the Tax Procedures Act, 2015 to introduce a mandatory and expensive electronic tax system violates consumer and economic rights of small businesses contrary to Article 46 (1) (c). It was his view that the implementation should be progressive and he relied on ***R vs The Commissioners for Her Majesty's Revenues and Customs [2011] UKSC 47.***

77. Mr. Cherongis faulted the High Court for contradicting itself by holding that there is no express obligation on Parliament to give written reasons for adopting or rejecting proposals received from members of the public, and at the same time holding that it would be desirable it if gives reasons for rejecting or adopting the proposals received. He submitted that the Constitution binds all state officers as was held by the Constitutional Court of South Africa in ***South Africa Iron and Steel Institute and Others vs Speaker of the National Assembly and Others [2023] ZACC 18*** and that reporting, feedback, monitoring and evaluation are pivotal for the process of tracking outcomes of a given public

participation opportunity thereby ensuring effective public participation.

78. He submitted that the High Court erred in holding that in view of the merger of policy and legislation, it lacked jurisdiction to interfere with tax legislation. In his view, this holding offends the principles of public finance, equality before the law, fairness and judicial authority enshrined in Articles 10, 27,159 165, 201 and 259. He relied on ***Kenya Revenue Authority vs Waweru and 3 Others*** ***[2022] KECA 1306 [KLR]*** where this Court declared the Finance Act, 2020 unconstitutional for violating principles of public finance under Article 201.

79. Learned counsel Mr. Mbithi held brief for Mr. Omogeni, SC, for the 6th, 7th 8th 9th and 10th respondents. In opposition to Civil Appeals Nos. **E003 of 2024** and **E080 of 2024**, he submitted that the Finance Act, 2023 had provisions affecting the functions and powers of the county governments, therefore, it should have been tabled before the Senate for its input. He cited the Supreme Court in ***In the Matter of Interim Independent Electoral Commission Constitutional Application [supra]*** that *"any matters touching on County government should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county governments."*

80. Regarding the issue of concurrence by the Speakers of the two Houses of Parliament, Mr. Mbithi submitted that by a letter dated 15th June 2023, the Speaker of the Senate stated that the Finance Bill, 2023 had provisions that proposed to amend not only the Statutory Instruments Act but also the Employment Act which affected counties because it had provisions which had a ripple effect on the employees of the counties. Therefore, it was mandatory for the Speakers of both Houses to resolve the question

whether it was a Bill concerning counties and, if it was, whether it was a special or an ordinary Bill. He cited ***In the Matter of the Speaker of the Senate & Another (supra)***. He also cited ***Institute for Social Accountability & another vs. National Assembly & 3 others [supra]*** where the Supreme Court stated that under Article 155 (3) (d), the courts have the power to interrogate whether the two Speakers complied with the Constitution. Therefore, the National Assembly should not have unilaterally passed the Finance Act, 2023.

81. Regarding the sections which were introduced in the National Assembly, Mr. Mbithi maintained that the initial Bill had 82 sections but the amended Bill had a raft of 102 sections, meaning that some sections were never subjected to public participation contrary to Article 10. Therefore, the failure to invite citizens to give their views meant that the Act was illegitimate and Kenyans would be taxed outside the law. Further, the failure to invite the public to give their views meant that its enactment was shrouded in opaqueness contrary to Articles 10 (2), 118 and 201. He also argued that Article 118 requires Parliament to ensure that the public participate in financial matters even at the committee stage. In support of this submission, he cited the Supreme Court decision in ***The Hon. Attorney-General & 2 Others vs David Ndii & 87 Others Petition No. 12 Of 2021 (consolidated with Petitions 11 & 13 Of 2021) (BBI judgment)*** which declared a whole schedule to an enactment unconstitutional for sneaking in 27 additional constituencies without public participation.

82. Mr. Mbithi also relied on the Constitutional Court of South Africa decision in ***South African Iron and Steel Institute & Others vs Speaker of the National Assembly & Others Case CCT 240/22***, where the central issue was whether amendments to a Bill without

further public involvement passed constitutional muster. In a unanimous judgment declaring the impugned amendments to be unconstitutional on account of procedural defects in their enactment, the court held that Parliament should have interrogated, specified and clarified the full import of the proposed amendments and afford the public adequate opportunity to comment or make representations.

83. Mr. Mbithi submitted that the Affordable Housing Levy imposed on the employed people excluding those in informal employment offends Article 27 which guarantees the right to equality before the law, equal benefit and protection of the law. He relied on the High Court decision in ***Okiya Omtatah Okoiti vs Commissioner General, Kenya Revenue Authority & 2 Others*** ***[2017] eKLR*** that for the tax to be lawful, the law introducing it must not only be lawful, but it must meet an Article 24 analysis test and the requirements of equity and fairness.

84. Mr. Ochiel on behalf of the 15th, 16th, 17th, 18th, 19th and 22nd respondents in Civil Appeal Nos. **E003 of 2024** and **E080 of 2024** in opposition to the appeals submitted that the High Court violated the Constitution by holding that the taxes were constitutional because they were "matters within the competence of the legislature and reflected the policy choices of the national government" and were "governed by policy". He contended that the High Court in the above holding misinterpreted and misapplied Articles 10 and 165(3) on its jurisdiction. Further, it abdicated its jurisdiction to test the constitutionality of *"anything"* including policy said to infringe the Constitution. He cited ***Kenya Tea Growers Association & 2 others vs The National Social Security Fund Board of Trustees & 13 Others*** ***[2024] KESC 3***

(KLR) in which the Supreme Court affirmed the High Court's jurisdiction under Article 165 of the Constitution.

85. He also submitted that the High Court violated *stare decisis* by upholding the validity of some of the challenged sections of the Act without considering their purpose or effect. In his view, had the High Court obeyed the Supreme Court (and this Court) and examined the purpose or effect of the impugned sections, it would have found that the Act violated the Constitution for the allowing unlawful purpose(s) and effect(s).

86. He also submitted that increasing excise duty from 25% to 35% on imported glass bottles (excluding imported glass bottles for packaging of pharmaceutical products) is unconstitutional because the amendment threatens the right to a clean and healthy environment under Article 42 in that it has the effect of increasing use of plastics as an alternative leading to plastic pollution. Furthermore, the effect of its implementation is irreversible and defeats the precautionary principle.

87. Counsel also submitted that the court's role is to interpret the Constitution holistically and not to add anything. Therefore, the finding by High Court that the Act was lawful though it contained non-money Bill items (like housing, retirement benefits, and statutory instruments) despite Article 114 (1) is flawed. He contended that the High Court violated Article 2 (4) by failing to strike down the entire Act for violating Article 114 (1) because it contained extraneous matters.

88. On concurrence between the Speakers of the two Houses of Parliament, Mr. Ochiel submitted that the Supreme Court in ***Institute for Social Accountability & another vs National Assembly & 3 Others*** ***[supra]*** nullified the Constituency

Development Fund Act for failure to engage the Senate. Therefore, the High Court was bound to nullify the Act for failure to involve the Senate. He argued that when the Supreme Court decided the ***Institute for Social Accountability & Another vs National Assembly & 3 Others (supra)***, it knew of this Court's 2018 decision in ***Pevans East Africa Limited & Another vs Chairman, Betting Control & Licensing Board & 7 Others [supra].*** Thus, this Court is bound by ***Institute of Social Accountability (supra)***.

89. Lastly, Mr. Ochiel faulted the High for holding that Parliament is not required, but it is "desirable for it, after conducting public participation, to give reasons for rejecting or adopting proposals received". He underscored the need for the Parliament to inform participants and the broader public how it used their views and whether or not those views had been incorporated in official policy or advice, which is the only way to satisfy the constitutional dictates on public participation.

90. Learned counsel for the 13th respondent (the LSK) Mr. Okwach in opposing Civil Appeal Nos. **E003 of 2024** and **E080 of 2024** and in support of LSK's cross-appeal submitted that whereas the appellants maintained that the housing levy was anchored on the Employment Act, the amendment to the Employment Act does not clearly provide how the fund is to be administered save for stating that the levy will only be used to fund the affordable housing. He submitted that anchoring the levy on the Employment Act amounts to double taxation contrary to Article 201 because section 31 of the Employment Act already places an obligation on employers to provide adequate housing to their employees.

91. In addition, Mr. Okwach maintained that there is no justification for taxing those in the formal sector for the benefit of those in the

informal sector despite the appellant trying to justify it on account of policy and practical grounds which have neither been provided nor substantiated. He argued that the imposition of the levy creates a situation where one group of citizens is taxed to benefit a totally different group which is not a justifiable reason for discrimination. He relied on ***State of Bombay vs F. N. Balsara AIR 1951 SC 318*** in support of his aforesaid argument.

92. Counsel further submitted that the learned judges erred in finding that there was sufficient public participation in the enactment of sections 24 (c) 44, 47 (a) (v), 100 and 101 of the Act despite the fact that some proposals by stakeholders were rejected by the Departmental Committee on Finance and National Planning for lack of public participation as stated at page 86 of its report where it is recorded that it rejected some proposals because they had not been subjected to public participation. Despite the foregoing, the National Assembly proceeded to enact 18 new provisions that were not subjected to public participation without any explanation on the asymmetrical treatment. Counsel cited ***British American Tobacco Kenya PLC (formerly British America Tobacco Limited) vs Cabinet Secretary for the Ministry of Health & 2 Other; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR*** in which the Supreme Court held that public participation was at the core of the concept of good governance in the execution of its functions.

93. Mr. Okwach also submitted that the trial court failed to appreciate that the 18 new provisions in the final Act which were not part of the original Bill were not considered by the National Assembly at the First and/or the Second Reading, yet they were substantive enactments which should have been subjected to public

participation. Instead, the provisions were tacked into Final Order Paper for 20th June 2023 and the Bill was passed notwithstanding lack of public participation. He cited ***Isaac Gachomo & 3 Others vs Attorney General & Another; Central Bank of Kenya & another (Interested parties) [2019] eKLR*** to underscore the importance of public participation.

94. Mr. Okwach also submitted that the National Assembly Standing Orders Nos. 132 and 133 only permit minor amendments to a Bill during the Committee Stage and not substantive amendments. Consequently, the court erred in holding that the National Assembly was not required to subject the new provisions to public participation and that they were narrow issues which were within what was contemplated in the Memorandum of Objects and Reasons. He relied on ***Attorney General & 2 Others vs Ndii & 79 Others; Dixon & 7 Others (Amicus Curiae) Petition 12, 11, & 13 of 2021 (Consolidated) [2022] KESC 8(KLR) (31 March 2022] (Judgment)*** where the Supreme Court held that new additions in a Bill ought to be subjected to public participation.

95. The 14th respondent (Azimio La Umoja One Kenya Coalition Party) opposed Civil Appeal Nos. **E003 of 2024** and **E080 of 2024** and supported the cross-appeals. Mr. Oginga invoked sections 85 and 90 of the Evidence Act and urged this Court to take judicial notice of the enactment of the Affordable Housing Levy Act, 2024 which renders the issues relating to the Affordable Housing Levy moot, thus rendering this appeal an academic exercise. He argued that courts do not act or issue orders in vain where the substratum of a matter has dissipated. Therefore, this Court is being invited to render an opinion notwithstanding that Parliament has already complied with the impugned judgment. To him, these appeals

create a dangerous precedent because it will open the door for litigants to lodge appeals for the sake of it.

96. Responding to Mr. Kiragu Kimani SC., Mr. Oginga contended that the High Court exercises original jurisdiction under Article 165 (3) (d). Therefore, it cannot be argued that the High Court is micromanaging the other arms of Government bestowed with policy-making mandate. In response to Mr. Mahat, he submitted that a policy that amendments the law cannot escape judicial scrutiny especially where it impacts on citizens' fundamental rights.

97. Regarding the amendments which were introduced at the floor of the house, Mr. Oginga cited the High Court decision in ***Dock Workers Union, Taireni Association of Mijikenda & Muslims For Human Rights (MUHURI) vs Attorney General, Cabinet Secretary, Ministry of Transport and Infrastructure & National Assembly; Kenya Ports Authority, Mediterranean Shipping Company, Kenya Seafarers Welfare Association, Seafarers Union of Kenya & Mohammed Mawira (Interested Parties) [2019] KEHC 10893 (KLR)*** which held that introducing new amendments on the floor of the House which have not been subjected to public participation is unconstitutional.

98. On behalf of Siasa Place (the 20th respondent), learned counsel Mr. Ogada contended that the High Court failed to validly weigh the failure by Parliament to give reasons for accepting some views and rejecting others. Furthermore, the High Court failed to adequately assess public participation in its qualitative sense. He contended that the High Court never supported its finding that there is no obligation for Parliament to provide written reasons for rejecting views collected from the public. Counsel contended that the said finding was erroneous because- (a) transparency and

accountability are normative principles of the Constitution under Article 10(c), and as such, inextricable imperatives; (b) there is no discretion whatsoever on the part of Parliament and /or any decision-maker when it comes to transparency and accountability as it appears to have been suggested by the High Court. Therefore, Parliament had no option but to give written reasons for its decisions; (c) the requirement to give reasons is a proper democratic demand or function and is founded on the qualitative aspects of public participation. In support of this submission, Mr. Ogada relied on ***Baker vs Canada* [1999] 2 S.C.R. 817,** where the Supreme Court of Canada stated: *"reasons ... allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed...."* Mr. Ogada also cited ***Canada (Minister of Citizenship and Immigration) vs Vavilov, 2019 SCC 65,*** where the Supreme Court of Canada justified the rationale for giving reasons to be the need to "develop and strengthen a culture of justification."

99. Mr. Ogada also submitted that no material was placed before the trial court to show that the National Government had appointed the KRA as its collection agent for the impugned levy. He also submitted that under the Fourth Schedule to the Constitution, the housing policy is a function of the National Government while county planning and development is a function of the county governments. He faulted the trial court for failing to consider the import of Articles 186, 187, 189 and 190 that deal with intergovernmental relations and the sharing of responsibilities under the Intergovernmental Relations Act.

100. Responding to the submissions by Prof. Muigai, SC, that Article 43 places an obligation on the State to ensure that there is progressive realization of social economic rights, Mr. Ogada

argued that the Government cannot saddle one section of the community with unfair taxation contrary to the Constitution. He stressed the need to read the Constitution holistically.

101. Mr. Kamwara, the 23rd respondent associated himself with the submission by the respondents' counsel.

102. On behalf of the 24th, 25th 26th and the 27th respondents, Mr. Bogonko submitted that section 84 of the Act violates the economic and social rights of employees for imposing a mandatory levy, and that it does not meet the constitutional threshold for management of public finances nor does it provide how the levy will be administered or how it will support the housing policy of the National Government. He contended that the levy lacks a clear legal framework stipulating the criteria for identifying beneficiaries and cited ***Kenya Revenue Authority vs Waweru & 3 Others; Institute of Certified Public Accountants & 2 Others (Interested Parties) [supra]*** that a tax imposed by the Government can be unconstitutional for violating or threatening fundamental rights. Further, he contended that section 84 of the Act has the effect of reducing employees' income, thus dipping their net income below a third of their gross income, and also it offends Article 201 (1) which requires tax burden to be fair. Lastly, no reasonable distinction has been put forward to justify the unfair discrimination.

103. On behalf of the 38th to 49th respondents, Dr. Arwa submitted that Acts of Parliament must originate from a Bill in line with Article 109 (1) and must be subjected to the provisions of the Standing Orders of the National Assembly and in particular, Standing Order Nos.125, 126, 127 and 128. Consequently, pursuant to Article 109 and the Standing Orders, the National Assembly has no authority to enact legislative proposals that have

been subjected to the First Reading, committed to a Departmental Committee for public participation and taken through the Second and Third Reading. He urged that since the provisions introduced on the floor of the House did not go through the First Reading, they were never committed to the Departmental Committee for public participation contrary to Article 109.

104. Dr. Arwa contended that the amendments to section 45 (a) (xii) of the Act were not part of the Finance Bill published on 28th April 2023, therefore, the new provisions which introduced a substantive amendment to the Bill ought to have been rejected as was done by the Departmental Committee as recorded at paragraphs 241, 242, 243, and 245 of its report. Further, the said provisions ought to have been re-submitted for fresh public participation as was held by the High Court in ***Kenya Bankers Association vs Attorney General & Another; Central Bank of Kenya (Interested Party) [2019] eKLR***. Counsel maintained that the trial court's finding on public participation was erroneous and it sets a dangerous precedent because it gives the National Assembly leeway to change or introduce new provisions alien to the original Bill, without undertaking public participation.

105. Dr. Arwa argued that the impugned amendments violate the principles of good governance, integrity, transparency, accountability and equality entrenched in Articles 10 (2) and (c) and 43. Lastly, Dr. Arwa submitted that where a measure puts in place a system that promotes the tax regime of other countries by encouraging importation of products and rendering locally manufactured products less competitive against imported goods, it violates Article 201 because it does not promote an equitable society by ensuring the burden of taxation is shared equally.

106. Mr. Morara, counsel for the appellants in Civil Appeal No. **E016 of 2024,** in support of their appeal submitted that the trial judges, in holding that the National Assembly Standing Orders Nos. 132 and 133 permit amendments to a Bill during the Committee Stage created an inference that the National Assembly Standing Orders are superior to the Constitution which prescribes public participation. He underscored the supremacy of the Constitution and argued that the National Assembly Standing Orders cannot allow the legislature to introduce new sections of a law without subjecting them to public participation. He maintained that the Act was not subjected to meaningful public participation and faulted the trial court for failing to consider that most of the stakeholder's views were rejected and that public participation was a mere formality and a cosmetic exercise. He contended that the Committee documented the views of professional and consulting firms but there was no effort to document the views of the general public. To support his submissions he cited this Court's decision in ***Attorney General vs Dock Workers Union & 7 Others*** ***[supra]*** that public participation must be real and not illusionary, neither is it a cosmetic exercise.

107. As stated earlier, the 5th, 12th 55th and 56th respondents neither participated in the proceedings nor filed any submissions or authorities, despite being duly served.

108. We have considered these consolidated appeals, the three cross-appeals and the parties' diametrically opposed submissions. As mentioned earlier, the issues arising from these appeals and the cross-appeals are cross-cutting to the extent that determination of issues drawn from one appeal or cross-appeal, can easily determine the other appeal(s) or cross-appeals and *vice-versa*. The bulk of the parties' submissions before us in support of their

appeals or cross-appeals do apply to the other appeals and cross-appeals. Therefore, it will be repetitive to frame different issues for each appeal or the cross-appeal. We shall therefore frame issues which address all the appeals and the cross-appeals.

109. Upon analyzing the entire record and the parties' submissions, we have distilled the following nine issues for determination.

a) ***Whether the grounds in Civil Appeals Nos. E003 of 2024 and E080 of 2024 challenging the finding that sections 84, 88 and 89 of the Act are unconstitutional has been caught up by the doctrine of mootness, and, if the answer is in the affirmative, whether the said issue falls within the exceptions to the said doctrine.***

b) ***Whether the Act was a money Bill and whether it contained provisions which ought not to have been included in a money Bill contrary to Article 114 (3) (4).***

c) ***Whether the Act included provisions which were not in the Finance Bill, 2023, which was subjected to public participation.***

d) ***Whether the Senate ought to have been involved in the enactment of the Act.***

e) ***Whether there was sufficient public participation is the enactment of the Act and whether Parliament is obligated to give reasons for adopting and rejecting views given by members of the public during public participation.***

f) ***Whether the trial court erred in upholding the constitutionality of sections 30 of 38 of the Act.***

g) ***Whether trial court erred in failing to strike out the entire Act after it held that it contained non-money matters.***

h) ***Whether the trial court abdicated its jurisdiction by holding that it cannot intervene in policy decisions.***

i) Whether the increased rates of taxation in the Act violates the economic, social and consumer rights guaranteed by Articles 43 and 46.

111. We shall now proceed to determine each of the above issues.

A. Whether the appellants' appeals in E003 of 2024 and E080 of 2024 against the finding that sections 84, 88 and 89 of the Act are unconstitutional are moot, and, if the answer is in the affirmative, whether the said issue falls within the exceptions to the doctrine of mootness.

112. In opposition to Civil Appeal Numbers **E003 of 2024** & **E80 of 2024,** Mr. Matindi and Mr. Oginga invoked the doctrine of mootness citing two grounds. First, that these appeals have been rendered moot following the enactment of the Affordable Housing Act, 2024 which received presidential assent on 19th March 2024 and commenced on 22nd March 2024. Second, the appeals have been rendered moot with regard to sections 88 and 89 of the Act because the Statutory Instruments (Amendment) Bill, 2024, was introduced in the National Assembly on 14th February 2024. On their part, the appellants' counsel maintained that the Act is an annual enactment, therefore, there is need for this Court to render itself on the principles regarding the Finance Act to provide guidance to avoid regular disputes on similar enactments in the future.

113. The law of mootness addresses the issue whether events subsequent to the filing of a suit or an appeal have eliminated the controversy between the parties. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an

adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a litigant would be entitled to, and which would be negated by the dismissal of the case or appeal. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review. (See ***Osmena III vs Social Security System of the Philippines G.R. No. 165272, 13 September 2007, 533 SCRA 313*).**

114. Time and again, it has been expressed that a court of law should not act in vain. The general attitude of courts of law is that they loathe making pronouncements on academic or hypothetical issues as it does not serve any practical or useful purpose. The Supreme Court in ***Institute for Social Accountability & another vs. National Assembly & 3 Others*** ***[supra]*** stated the following regarding the doctrine of mootness:

> ***"...a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot."***

115. Similarly, in ***Dande & 3 others vs. Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)*** the Supreme Court stated:

> ***"The instances in which a dispute is rendered moot were also discussed by the Supreme Court of Canada in Borowski v Canada (Attorney General) [1989] 1 SCR 342, where it stated that a repeal of a by-law being challenged; an undertaking to pay damages regardless of the outcome of an appeal; non-applicability of a statute to the party challenging the legislation; or the end of a strike for which a prohibitory injunction was obtained were some of the circumstances that render an appeal moot. The court further opined that determining whether an appeal is moot or not requires a two-step analysis. A court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case."***

116. *The High Court in* ***Daniel Kaminja & 3 Others (suing as Westland Environmental Caretaker Group) vs County Government of Nairobi [2019] eKLR*** stated as follows:

> ***"A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact."***

And that,

> ***"No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely***

theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity."

117. The Constitutional Court of South Africa in ***National Coalition for Gay and Lesbian Equality & Others vs Minister of Home Affairs, 2000 (2) SA 1 (CC) para 21*** remarked:

"A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

118. Notably, in the impugned judgment, the High Court declared the housing levy unconstitutional on grounds that it was discriminatory because the levy was only to be imposed on workers in the formal sector, disregarding those in the informal sector. The trial court held that imposition of the levy on a section of the citizens was discriminatory, irrational, arbitrary and in violation of Articles 27 and 201 (b) (i) regarding principles of public finance. Additionally, the High Court ruled that the amendment to the Employment Act by section 84 of the Act lacked a comprehensive legal framework in violation Articles 10, 201, 206.

119. Subsequently, in December 2023, the Affordable Housing Bill (National Assembly Bills No. 75 of 2023) was tabled before the National Assembly with the intention of addressing the concerns raised by the High Court. The Bill was first tabled in the National Assembly on 7th December 2023. A notice was published inviting public views and the Bill was subjected to public participation from 9th December 2023 to 28th December 2023. The Affordable Housing Bill, 2023 was passed by the National Assembly with amendments on 21st February 2024. It was referred to the Senate

for consideration where it was read for the first time on 22nd February 2024. It was introduced in the Senate by way of First Reading and thereafter stood committed to the Standing Committee on Roads, Transport and Housing and pursuant to Article 118 and Standing Order No. 145 (5) of the Senate Standing Orders. The Committee invited interested members of the public to submit any representations that they may have on the Bill by way of written memorandum on or before 29th February 2024. The Affordable Housing Act, 2024 received presidential assent on 19th March 2024. It is now the Affordable Housing Act, 2024. The preamble to The Affordable Housing Act, 2024. Reads *"An ACT of Parliament to give effect to Article 43(1) (b) of the Constitution; to provide a framework for development and access to affordable housing and institutional housing; and for connected purposes."* It should be recalled that one of grounds cited by the High Court in nullifying the provisions in question was absence of legal framework to *inter alia* govern the levy.

120. Section 1 of the Act provides that sections 4 and 5 shall come into operation on the date of assent while all the other sections are to come into operation on such date as may be prescribed by the Cabinet Secretary by notice in the Gazette. As stated above, the Bill received presidential assent and it is now law in our statute books. Section 4 of the Act provides for the imposition of the levy, while section 5 provides for the obligations of an employer to *inter alia* deduct and remit the levy from the gross salary of an employee. All the other sections of the Act commenced operation on 21st March 2024 pursuant to Legal Notice No. 54.

121. Regarding the trial court's finding that the Affordable Housing Levy was not backed by a comprehensive legal framework in violation of Articles 10, 201, 206 and 210, the Report on the

Affordable Housing Bill clearly stated that the Bill was necessitated by the impugned judgment. Additionally, section 3 (1) (c) and (2) of the Affordable Housing Act stipulates that, the objects of the Act is to provide a legal framework for the implementation of the affordable housing programmes and projects and institutional housing and that the implementation of the Act shall be guided by— (a) the national values and principles of governance under Article 10 (2) (b); (b) the principles of public finance under Article 201; and (c) the values and principles of public service under Article 232.

122. It's also important to mention that the trial court declared the levy unconstitutional because it was discriminatory in nature since it was to be imposed only on workers in the formal sector, disregarding those in the informal sector and that the policy was discriminatory, irrational, arbitrary and in violation of Articles 27 and 201 (b) (i). Significantly, this finding has been addressed by the Affordable Housing Act, 2024 under section 4 and 5 of the Act which provides for the imposition of the Affordable Housing Levy ("the Levy") and the obligation of the employer to deduct and remit the Levy. The said sections came into operation on the date of assent on the 19th March 2024. It is noteworthy that these two provisions are aimed at addressing the discriminatory issue raised in the impugned judgment. Furthermore, section 7 of the Affordable Housing Act, imposes a penalty of three percent (3%) of the unpaid amount for each month the amount remains unpaid, and the Government can recover the unpaid amount as a civil debt.

123. Consequently, it is our considered view that the question of the declaration of unconstitutionality of section 84 of the Act which introduced the Affordable Housing Levy without a legal framework

and whether the levy was discriminatory has been rendered moot by the enactment of the Affordable Housing Act, 2024.

124. Accordingly, it is our finding that for the purposes of the issues before us, we are satisfied that there exists no live controversy requiring determination by this Court on the question of the unconstitutionality of section 84 of the Act.

125. The other ground urged in support of the doctrine mootness is the question whether the issue relating to the declaration that sections 88 and 89 of the Act unconstitutional is also moot. These are the provisions which repealed section 21 of the Statutory Instruments Act, the consequence being that unlike before, statutory instruments shall not expire automatically ten years after their commencement. The result of the amendment was that all statutory instruments that were due to expire on their 10th anniversary were saved. The rationale behind the expiry period is the necessity for reviewing statutory instruments through public engagement to bring them into conformity with changing circumstances.

126. In opposition to the above argument, the appellants' counsel faulted the trial court for failing to take a holistic view of what the amendments entailed, and made a blanket condemnation of the amendments to the Statutory Instruments Act. They argued that section 21 of the amendment included crucial regulations made pursuant to other Acts, the expiry of which would negatively impact on operations of other bodies and adversely affect revenue collection.

127. In finding section 88 and 89 of the Act to be unconstitutional, the High Court held:

"In the absence of specificity on the subsidiary legislation affected, it is difficult to determine whether this amendment properly belongs to the Finance Act. In addition, some of the affected instruments may well have an impact upon the powers and functions of county governments and therefore require the input of the Senate. The connection between the said instruments and the Finance Act appears tenuous at best."

128. We take judicial notice of the fact that subsequent to the impugned judgment, (it is in the public domain), the Statutory Instruments (Amendment) Bill, 2024, was introduced in the National Assembly. It went through the First Reading on 14th February 2024. Notably, the principal object of the Bill is to amend the Statutory Instruments Act, Cap. 2A to provide the timelines for the making of regulations to ensure implementation of laws passed by Parliament. Its Memorandum of Objects and Reasons stipulate as follows:

"Statement of objects and reasons for the Bill

The principal object of this Bill is to amend the provisions of the Statutory Instruments Act, 2013 to streamline its provisions with the Constitution and ensure better application of its provisions.

Clause 2 of the Bill seeks to amend section 11 of the Act, to enable the Committee on Delegated Legislation to require the regulation-making authority to submit to Parliament a copy of any regulation that ceases to have effect by operation of law. The amendment further obligates Parliament to notify the general public in two newspapers of wide circulation, that a statutory instrument which ceases to have effect by operation of law is a nullity.

Clause 3 of the Bill seeks to amend section 12 of the Act, to align the Act with the constitutional provision (on) delegated legislative authority as per Article 94 (5).

Clause 4 of the Bill seeks to amend section 14 of the Act to provide that where the Committee recommends an exemption of any statutory instrument from scrutiny, then the exemption may only be done subject to approval by the House.

Clause 5 of the Bill seeks to amend section 19 of the Act, to harmonize the wording of the law, specifying the action taken by Parliament as an annulment and deleting the word revoke.

Clause 6 of the Bill seeks to amend the Title of Part V of the Act, to align it with the revised provisions.

Clause 7 of the Bill seeks to amend section 21 of the Act, to remove the mandatory requirement for the review of subsidiary legislation and the expiration of statutory instruments.

Clause 8 of the Bill seeks to amend section 24 of the Act, to increase the limit of fines and term of imprisonment in order for the law to act as an adequate deterrent for violation or breach of regulations.

Clause 9 of the Bill seeks to amend section 27 of the Act, to provide for savings provision, allowing the continuous operation of regulations that were in operation on or before the 24th of January, 2024.

129. As to whether the Bill concerns county governments, its Memorandum of Object and Reasons states:

"Statutory Instrument are a form of delegated legislation, at the National and County Government. Statutory Instruments are crucial at both levels of

government as they give effect to a number of provisions usually contained in the Parent Act. The Bill is therefore a Bill concerning county governments as County Executives and County Assemblies are central in the processing of statutory instrument in order to actualize a number of functions and powers as contained in Part 2 of the Fourth Schedule to the Constitution."

130. In compliance with Article 110 of the Constitution, the National Statutory Instruments (Amendment) Bill (National Assembly No. 3 of 2024) was introduced in the Senate by way of First Reading on 17th April 2024 and thereafter committed to the Standing Committee on Justice, Legal Affairs and Human Rights. A reading of the Statutory Instruments (Amendment) Bill, 2024 shows that it seeks to address all the issues raised in the impugned judgment. Therefore, there is no longer a live controversy to be determined by this Court regarding the trial court's finding that sections 88 and 89 are unconstitutional.

131. From the above findings, we are persuaded that the issues relating to the Affordable Housing Act (section 84) and the Statutory Instruments Act (sections 88 and 89) are now moot.

132. Closely tied to the above issue is the argument by Mr. Murugara and Mr. Kimani SC that there is a need for this Court to pronounce itself on the above issues because the Finance Act is enacted annually, therefore it is important that this Court pronounces itself so as to provide the required guidance and resolve the issue(s) involved once and for all. Admittedly, there are instances where there have been exceptions to the doctrine of mootness where a court can exercise discretion to hear a matter even though it is moot. Thus for example, in ***Institute for Social Accountability & another vs The National Assembly & 3***

Others ***(supra),*** the Supreme Court quoted with approval the South African case of ***AAA Investments (Pty) Ltd vs Micro-Finance Regulatory Council & Another, 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC)*** to the effect that although a matter may be technically moot, the court may still exercise jurisdiction if an issue is not settled and is of critical importance to the operation of government. However, this discretion can only be exercised in a limited number of cases, where the appeal, though moot, raises a discrete legal point which requires no merits or factual matrix to resolve. In this regard, the Constitutional Court of South Africa in ***Independent Electoral Commission vs Langeberg Municipality*** ***2001 (3) SA 925 (CC), in paragraph 11*** held:

> ***"... A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others."***

133. The question is whether the appellants deserve this Court's discretion in the circumstances of this case. We do not think so for several reasons. First, it is a prerequisite that a party seeking courts' discretion to be exempted from the doctrine of mootness to demonstrate that any order which this Court may make will have some practical effect either on the parties or on others. This has not been demonstrated nor are we persuaded that the orders sought, if granted, will have any practical effect owing to the changed circumstances. Second, the appellants in the two appeals on their own motion complied with the High Court's decision. As discussed above, the Affordable Housing Act is now law, effectively repealing the impugned Act. Even if the subsequent law is silent, the doctrine of implied repeal has accrued, rendering the impugned statute spent by operation of the law. We do not

perceive that even if an order is granted as prayed, it will resuscitate the previous Act. Similarly, by tabling a Bill in Parliament which seeks to address the shortcomings identified by the High Court in nullifying sections 88 and 89 of the impugned Act, the appellants have not only accepted the court's decision, but they also have taken decisive steps in complying with the decision. The appellants cannot on one hand initiate such a process, and on the other seek a court determination which will have no functional value or purpose. Third, the argument that the Finance Act is an annual enactment and therefore it is necessary for the Court to provide guidance is equally unattractive. This Court is being invited to speculate that in future similar enactments will be unconstitutional or postulate that Parliament will undertake a flawed legislative process. We decline the invitation to issue speculative orders on what may happen in future. In any event, the said argument collapses because there is nothing to suggest that the issues involved in these appeals are capable of evading judicial scrutiny in the event they occur in the future. On the contrary, constitutionality or otherwise of the issues raised in these appeals arising from Finance Acts, public participation, legislative process, the question of concurrence and the constitutional and legislative functions of the two Houses of Parliament have been litigated and determined many times by all the Superior Courts in this country as evidenced by the ample jurisprudence generated by our courts cited by all the parties before us. It has not been suggested that there are novel issues of law which have never been determined. Fourth, and very importantly, as was held by the Constitutional Court of South Africa in ***Legal-Aid South Africa vs Mzoxolo Magidiwana (1055/13) [2014] ZASCA 141: 2015 (2) SA 568 (SCA),*** these appeals do not raise discrete legal points of such a nature that no

similar cases exist or have been determined or are anticipated so that the question(s) will most likely need to be resolved in the near future. Constitutional validity of statues has been determined times without number by our courts. Fifth, there is no compelling reason why this Court should exercise its discretion, absent of objective facts, to find that the issues raised in the appellants' appeals fall within the exceptions to the doctrine of mootness. Lastly, this Court should avoid the temptation to decide an issue that may be of academic interest and which will have no practical effect or result.

B. Whether the Act was a money Bill and whether it contained provisions which ought not to have been included in a money Bill contrary to Articles 114 (3) & (4).

134. Addressing the above issue, learned counsel Mr. Murugara submitted that the High Court having found that the Act was a money Bill, it ought to have downed its tools because its mandate ended the moment it arrived at the said finding. He contended that it was not necessary to delve into the substance of the individual provisions. He also argued that the use of the word "may" in Article 114 (1) permits provisions other than money matters to be dealt with in a money Bill under Article 114 (3). He argued that the High Court erred in holding that the amendments pursuant to sections 76, 78 and 87 of the Act were extraneous to a money Bill and therefore unconstitutional. Counsel maintained that a money Bill can deal with matters incidental to those set out in Article 114 (3), and that the impugned amendments were incidental to the management and distribution of public funds, therefore, the provisions fell within the scope of a money Bill.

135. Mr. Murugara contended that since board members are remunerated using public funds, reduction in the Board's membership as facilitated by sections 76 and 78 of the Act amending section 7 of the Kenya Roads Act, 1999; and section 87 of the Act amending section 28 of the Unclaimed Assets Act, 2011, fell within the ambit of a money Bill, therefore, the learned judges erred in declaring the two sections unconstitutional. Regarding the amendment of the Unclaimed Assets Act, he submitted that the amendment to section 28 of the Unclaimed Financial Assets Act related to payment by the Authority to a designated proxy out of the Unclaimed Assets Trust Fund which is a public fund by virtue of Article 206(1) (a).

136. Dismissing the above argument, Mr. Matindi maintained that the composition of the Kenya Roads Board and power to designate proxies for the purposes of the Unclaimed Financial Assets Act, cannot be described as incidental to the definition of a money Bill under Article 114(3) (a – d). This Court in the *Pevans* case (*supra*) stated:

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

137. Comparatively, the Supreme Court of India in ***Roger Mathew vs South Indian Bank Limited & Ors*** ***(2020) 6 SCC1*** stated as follows:

> ***"74. The learned Attorney General for India submitted that Part XIV of the Finance Act 2017 is sustainable with reference to sub-clauses (c), (d) and (g) of clause (1) of Article 110. The submission is that the certification by the Speaker is of the entire Finance Bill when it was transmitted to the Rajya Sabha. The Attorney General urged that payment of salaries is made out of the Consolidated Fund of India. Once this be the position, the other provisions of Part XIV are, it was urged, incidental in nature. It is argued that salaries, allowances and pension will have a direct nexus with the Consolidated Fund of India and are incidental to the provisions contained in the Finance Act 2017. In this context, reliance was placed on: (i) the presumption of constitutional validity (State of West Bengal v Anwar Ali Sarkar, R. K. Garg v Union of India and Subramanian Swamy v Director, Central Bureau of Investigation); (ii) the importance of the doctrine of separation of powers (Bhim Singh v Union of India).***
>
> ***75. The provisions of Part XIV of the Finance Act 2017 amend, first and foremost, the legislative enactments under which diverse tribunals, including appellate tribunals were constituted. By and as a result of the amendments, the statutory provisions relating to qualifications for appointment, the process of appointment, terms of office and the terms and conditions of service including salaries, allowances, resignation and removal are overridden and are to be governed by the provisions of Section 184. Section 184 confers a rule making power on the Central Government to stipulate all the above aspects in regard to the adjudicatory personnel appointed to these tribunals. By this process, the governing statutory provisions embodied in the parent***

legislation are overridden and authority is conferred upon the Central Government to formulate other aspects of the process from qualifications for office and the process of appointment to the terms of service, through delegated legislation.

76. This, in our view, completely transgresses the conditions stipulated in Article 110(1) for constituting a Money Bill. Article 110 does not bar the inclusion of non-fiscal proposals in a Money Bill. But while permitting the inclusion of non-fiscal subjects, sub-clause (g) of Article 110(1) embodies the requirement that such a matter must be incidental to any of the matters specified in sub-clauses (a) to (f). In other words, the inclusion of a non-fiscal matter is permissible in a Money Bill only if it is incidental or ancillary to a matter specified in sub-clauses (a) to (f). Part XIV has repealed and replaced substantive provisions contained in the enactments specified in the Eighth and Ninth Schedules which are not referable to sub-clauses (a) to (f) of Article 110(1). Part XIV of the Finance Act 2017 is thus not incidental within the meaning of sub-clause (g). The plain consequence is that by adopting the special procedure contained in Article 109, the substantive procedure governing Ordinary Bills under Articles 107 and 108 has been rendered otiose. If the provisions contained in Part XIV were to be enacted in the form of an Ordinary Bill, the Rajya Sabha would have a vital voice in deliberating and discussing on the nature of the legislative proposals. Part XIV contains provisions which lie outside the domain permissible under Article 110.

77. We are unimpressed with the submissions of the learned Attorney General that since salaries are payable out of the Consolidated Fund, Part XIV of the Finance Act bears a nexus with sub-clauses (c) and (d) of Article 110(1) and that the other provisions are merely incidental. That the amendment has a bearing on the financial burden on the Consolidated Fund of

India cannot be the sole basis of bringing the amendment within the purview of Article 110(1). On a close analysis of the provisions, it is evident that what is claimed to be incidental has swallowed up the entire legislative exercise. The provisions of Part XIV of the Finance Act 2017 canvass a range of amendments which include qualifications and process for appointment, terms of office and terms and conditions of service including salaries, allowances, resignation and removal which cannot be reduced to only a question of the financial burden on the Consolidated Fund of India. The effect of Part XIV is to amend and supersede the provisions contained in the parent enactments governing all aspects of the appointment and terms of service of the adjudicatory personnel of the tribunals specified in the Eighth and Ninth Schedules. This exercise cannot be construed as a legitimate recourse to the power of enacting a Money Bill." (Emphasis added).

138. Article 114 (1) provides that a money Bill may not deal with any matter other than those listed in the definition of a "money Bill" in clause (3) which defines a money Bill as follows:

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.

139. Clause 4 provides thus:

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

140. Mr. Murugara argued that the word "may" used in Article 114 (1) connotes that the said provision is not mandatory. We have no doubt that the word "may" generally does not mean "must" or "shall". But it is well settled that the word "may" is capable of meaning "must" or "shall" in light of the context within which it appears. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command. In the present case, it is the context which is decisive.

141. The context rule is a norm that requires courts to interpret statutory and constitutional provisions in their context, rather than in isolation. It underscores the significance of bearing in mind the entire statute, as well as the legislative history and purpose, in order to uncover the intended meaning of the law. By taking into account the surrounding provisions and the legislative intent, the context rule helps to ensure a comprehensive and holistic interpretation of a provision.

142. The Supreme Court of India in ***Rangaswami, The Textile Commissioner & Others vs Sugar Textile Mills (P) Ltd. & Another 1977 AIR 1516, 1977 SCR (2) 825*** stated:

> ***"It is well settled that the word "may" is capable of meaning "must" or "shall" in the light of the context and that where a discretion is conferred upon a public authority coupled with an obligation the word "may" which denotes discretion should be construed to mean a command. Considering the purpose of the relevant empowerment and its impact on those who are likely to be affected by the exercise of the power...."***

143. As authorities suggest, mere use of the word "may" is not conclusive. The question whether a particular provision is

discretionary has to be decided by ascertaining the intention of the statute or the Constitution by looking at the language in which the provision is clothed. The Court must examine the scheme of the Constitution, the purpose and the object underlying the provision and consequences likely to ensue if the provision is interpreted one way or the other.

144. Mr. Murugara based his arguments on Article 114 (1) in which the word "may" appears. However, taking into account the contextual and holistic interpretation of the Constitution, a party cannot cite an Article of the Constitution as has happened in this case and run away with it without paying due regard to other relevant provisions. For starters, by the time the drafters of the Constitution wrote Article 114 (3), the ink at sub-article (1) of the same provision had barely dried. Therefore, the drafters were fully aware of the cognate provisions of sub-article (1). That notwithstanding, the drafters elected to define what constitutes a money Bill at Article 114 (3). We earlier reproduced the said provision, so, it will add no value for us to rehash it here. It will suffice to mention that the word "means" used in Article 114 (3) implies a closed list. Had the drafters intended otherwise, they would have used the word "including." When a definition clause uses the word "means", and a list is provided, the definition is *prima facie* restrictive and exhaustive. The use of words 'means' indicates that the definition is a rigid definition, and no other meaning can be assigned to the expression that is put down in definition. (***See Gough vs Gough, (1891) 2 QB 665).***

145. The key to the opening of every law is the reason and spirit of the law — it is the *'animus imponentis'*, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that

particular phrase is not to be viewed detached from its context in the statute. Therefore, we do not agree with Mr. Murugara that the word *"may"* in sub article (1) grants Parliament the discretion to include in a money Bill matters outside those listed in sub-article (3). A reading of Article 114 (4) shows that it embodies the requirement that such a matter must be incidental to any of the matters specified in sub-clauses (a) to (f) of the said provision. In other words, the inclusion of a non-fiscal matter in a money Bill is only permissible if it is incidental or ancillary to a matter specified in sub-clauses (a) to (d). For a matter to be incidental to another, it is not enough that it is merely subordinate or remotely related. There must be some clear nexus to the main subject. In fact there was no attempt at all to bring the provisions within the ambit of matters listed in Article 114 (3).

146. Much as the appellants in **E003 of 2024** and **E080 of 2024** faulted the trial Court for failing to apply the pith and substance test, they made no attempt to demonstrate that the impugned provisions dealt with matters which would pass the pith and substance test. The pith and substance test requires the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the legislation is about. (See the High Court decision in ***Pevans East Africa & another vs Chairman, Betting Control & Licensing Board& 7 Others [2018} eKLR*** which was affirmed by this Court in the *Pevans case* (supra)).

147. The issues cited by the appellants in the above two appeals are that since board members are remunerated using public funds, reduction in the Board's membership as facilitated by sections 76 and 78 of the Act amending section 7 of the Kenya Roads Act, 1999; and section 87 of the Act amending section 28 of the

Unclaimed Assets Act, 2011 fell within the ambit of a money Bill, therefore, the learned judges erred in declaring the two sections unconstitutional. It was also submitted that the amendment to section 28 of the Unclaimed Financial Assets Act related to payment by the Authority to a designated proxy out of the Unclaimed Assets Trust Fund which is a public fund by virtue of Article 206 (1) (a). As was held by the Supreme Court of India in ***Roger Mathew vs South Indian Bank Limited & Ors (supra)***, the fact that the amendment has a bearing on the financial burden on public money cannot be the basis of bringing the amendment within the purview of a money Bill. Also, payment under the Unclaimed Assets Act to a designated proxy cannot bring the amendments within the ambit of a money Bill as defined by Article 114 (3). Accordingly, we are satisfied that the learned judges correctly held that the impugned provisions were a money Bill, though they contained matters which did not fall within the ambit of Article 114 (1) (3) (4). Accordingly, we affirm the trial court's finding that sections 76, 78 and 87 of the Act are unconstitutional for containing matters that ought not to have been in a money Bill.

C. *Whether the Act included provisions which were not in the Finance Bill, 2023, which was subjected to public participation.*

148. Addressing the question whether the 18 amendments which were not in the Finance Bill, 2023 which was subjected to public participation were introduced on the floor of the National Assembly, the trial court stated:

> ***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."

149. In support of the amendments introduced post–public participation, the appellants' counsel in both Civil Appeal Nos. **E003 of 2024** and **E080 of 2024** submitted that Parliament is not precluded from making any amendments or seeking to have new amendments to an existing law. Furthermore, it is not compelled to pursue fresh public participation on the new proposals as was held by the trial court because this would bring the legislative process to a complete halt and undermine Parliament's ability to discharge its constitutional mandate.

150. It was also submitted that the National Assembly Standing Order Nos. 132 and 133 permit amendments to be made to a Bill during the Committee Stage. In support of this arguments, Mr. Murugara cited this Court's decision in the *Pevans case (supra)* holding that Parliament has the power during the legislative process, to make changes to a Bill post-public participation. To further buttress his submissions, Mr. Murugara cited Article 1 (2) and maintained that

sovereign power of the people can be exercised through their democratically elected representatives.

151. Learned counsel Mr. Murugara, Prof. Muigai, SC, Mr. Kimani Kiragu, SC and Mr. Mutinda in their quest to persuade the Court that the impugned sections introduced on the floor of the National Assembly were properly enacted advanced three reasons - (a) that it was within the legislative competence of the National Assembly drawn from Article 95 (3) and the Standing Orders to amend Bills on the floor of the House; (b) to require Parliament to go back to the public for their views any time it is necessary to amend a Bill during the legislative process would be a recipe for chaos; and (c) that the sections complained of are incidental to provisions in the Bill and are not new sections. This Court's decision in the *Pevans case* was cited in support of Parliament's power to amend Bills on the floor of the House.

Dr. Ogola on the other hand submitted that the National Assembly standing orders cannot supersede the provisions of the Constitution on public participation. Furthermore, to permit completely new provisions of the law to be introduced on the floor of the National Assembly will open the door for mischief and defeat the purpose of public participation.

152. We have considered the arguments for and against the impugned amendments. We have read the original Bill which was tabled before the National Assembly, subjected to public participation, the First and Second Reading, and contrasted it with the final Bill as enacted. We note that sections 21, 23, 32, 38, 44, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 are totally new provisions which were not in the original Bill. Section 24 was in

the original Bill. However, in the First Schedule, paragraphs 71, 72 and 73 were introduced as follows:

> ***"71. Income earned by a non-resident contractor, sub-contractor, consultant or employee involved in the implementation of a project financed through a one hundred percent grant under an agreement between the Government and the development partner, to the extent provided for in the Agreement: Provided that the non-resident is in Kenya solely for the implementation of the project financed by the one hundred percent grant.***
>
> ***72. Gains on transfer of property within a special economic zone enterprise, developer and operator.***
>
> ***73. Royalties, interest, management fees, professional fees, training fees, consultancy fee, agency or contractual fees paid by a special economic zone developer, operator or enterprise, in the first ten years of its establishment, to a non-resident person."***

153. We have also noted substantive amendments to sections 26, 38, 47 and 72. Therefore, it is beyond doubt that the Act contained substantive provisions which were not in the Finance Bill, 2023. These new provisions were never subjected to public participation nor did they go through the First and Second Reading. The key question here is whether a Bill that has undergone the process of public participation, First and Second Reading can be altered or amended at the Committee stage or on the floor of the House beyond the scope of the original Bill by introducing substantive new provisions.

154. We note that the trial court in upholding the constitutionality of the sections which were introduced at the floor of the National Assembly stated that it was bound by this Court's decision in the *Pevans case*. Before us the appellants in Civil Appeal Nos. **E003 of 2024** and **E080 of 2024** heavily relied on the same decision

and urged us to uphold the trial court's finding on the issue at hand. A close examination of the facts in the *Pevans case* will help us to determine its applicability or otherwise to the facts of this case. This is because it is settled law that a case is only an authority for what it decides and not every observation found therein or what logically follows from the various observations made in it. This was pithily stated by the Supreme Court of India in ***State of Orissa vs Sudhansu Sekhar Misra 1968 AIR 647, 1968 SCR (2) 154, AIR 1968*** as follows:

> ***"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides...." (Emphasis added)***

155. A little dissimilarity in facts or additional facts may make a lot of difference in the precedential value of a decision. A close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In the *Pevans case,* the facts were that in the 2016/2017 fiscal year, the Finance Bill as drafted proposed to impose uniform rate of **50%** tax chargeable on revenue from betting, gaming, lotteries and prize competitions. The Bill was subjected to public participation and all key stake holders concurred with the public finance specialists, the National Treasury, as well as the Finance Committee of Parliament that **50%** tax proposed was unsustainable, unnecessary and ill-

advised. It was recommended that the same ought to be deleted in the best interests of the country and the industry. The recommendation was approved by Parliament. Subsequently, the Bill that was passed by Parliament on 30th May 2017 and presented to the President for assent omitted the **50 %** tax as was previously proposed. The President declined to assent to the Finance Bill, 2017 and in his Memorandum returning the Bill to the National Assembly stated that the Bill did not contain the provision for **50%** tax chargeable on betting, lotteries, gaming and prize competitions. In his reservations under Article 115 (1) (b), the President proposed to the National Assembly to make provision for imposing tax at the rate of **35%**.

156. The Petitioner in the *Pevans case* challenged the constitutionality of the President's reservation on grounds *inter alia* that it was arbitrary, that the President exceeded his powers under Article 115 and descended into the arena of legislating, that Parliament erred in rubber stamping the President's reservation, that the entire legislative process ought to have re-started afresh including inviting comments from the stakeholders and the public. What the Petitioners in *Pevans case* failed to appreciate is that under Article 115 (2) (b), Parliament may (a) amend the Bill in light of the President's reservations, or (b) pass the Bill a second time without reservations. Parliament passed the Bill in accordance with (a) above and lowered the tax to **35%** and in conformity with Article 115 (2), it was forwarded to the President for assent. He assented to the Bill and it became law.

157. Confronted with the above facts and the law, the High Court held that the Bill had gone through all the legislative stages including public participation. The only item added to the Bill was the tax rate of **35%.** During public participation, the stakeholders agreed

that the proposed **50 %** tax increase was unsustainable. The question was not whether the increment was to be effected, but at what percentage. As stated above, after the Bill was returned back to the National Assembly, it reconsidered it and lowered the tax rate to **35%** and passed the Bill in accordance with Article 115 (2) (a). The Bill was again transmitted to the President who assented to it. As mentioned above, Parliament acted within the ambit of Article 115 (2) (a) and amended the Bill in light of the President's reservations. It is this tax rate that the petitioners in the said case argued ought to have been subjected to a fresh public participation. The High Court considered the provisions of Article 115 and the facts before it and disagreed with the said argument holding that the question of the tax increment was not a new issue because it was in the Bill that was subjected to public participation. Further, is was discussed during public participation and it was agreed that **50%** increase was high. The High Court held that it was not necessary to return the Bill back for public participation. Aggrieved by the High Court decision, *Pevans* appealed to this Court. This Court upheld the High Court decision that it was not necessary for the Bill to be referred back to public participation. The *Pevans case* was cited before the trial court and in the judgment the subject of this appeal, it held that the decision was binding to it.

158. It appears the High Court never interrogated the facts before the High Court in the *Pevans case*. Clearly, the facts in the *Pevans case* as highlighted above are distinguishable from the facts in these appeals. Unlike in the *Pevans case,* in the instant case, totally new provisions of the law which were not subjected to public participation and were not contained in Finance Bill, 2023 which was subjected to public participation found their way into

the final enactment. Contrary to the law, the 18 new provisions did not go through the entire legislative stages. They were not subjected to the First and Second Reading. These are impermissible serious legislative flaws. Therefore, their purported enactment into law was imperfect and a mockery to the legislative process contemplated in the Constitution and the Standing Orders. The South African Constitutional Court in ***South African Iron and Steel Institute and Others vs Speaker of the National Assembly and Others*** *[2023] ZACC 18 (26 June 2023)* addressing the question of amendments to a Bill after public participation stated as follows:

> ***"[46] The impugned amendments were not subject to any further public participation process at either the national or provincial level. The argument that further public participation was not necessary because the definition of waste remained substantially the same throughout the process is unsustainable. Parliament should have interrogated, specified and clarified the full import of the proposed amendments and afforded the public an adequate opportunity to comment or make representations. That argument is untenable and misses the vital point that it ushered in a new way in which the concept of waste was to be construed. Equally unsustainable is the respondents' argument that the changes introduced by the amendments sought to narrow the class of persons who bore obligations under the Waste Act from all holders of waste to a narrower category of generators of waste. There was a significant change in the allocation of legal obligations between generators of waste and not a mere textual adjustment...***
>
> ***[48] In this case, no effort was made to further engage the public and afford them an opportunity to submit their inputs on the impugned amendments. The argument that it would be impractical and cumbersome for a new public comment process to be***

initiated every time an amendment is made to a draft Bill is misconceived. During the initial stages of the Bill, when amendments in the respects now under consideration were superficial, members of the public were invited to comment. It begs the question, why when the proposed amendments became material, the public was ignored and brushed aside. This, in my view, tends to diminish the force of the respondents' argument. It was necessary for the NA, NCOP and the Provincial Legislatures to afford the public an opportunity to submit inputs or comments on the impugned amendments given their serious and far-reaching consequences.

[49] In facilitating public involvement, the relevant bodies (NA, NCOP, Provincial Legislatures) must ensure that issues affecting the public in relation to legislation under consideration are heard and considered by the public. There is no doubt that the proposed amendments generated a lot of interest in the public and, in particular, the iron, steel and fertilizer industries. The concerns of the public for further engagement were simply ignored. No legitimate basis was advanced as to why these processes were dispensed with. I am accordingly satisfied that, in all the circumstances of this case, the failure by the NA, NCOP and Provincial Legislatures to hold further public hearings was not in accordance with their obligations to facilitate public involvement. In the result, the challenge relating to the impugned provisions of the NEMLA Act must succeed."

159. The High Court fell into grave error when it followed the *Pevans case* blindly which was inapplicable to the facts and circumstances of the case before it. It failed to appreciate that the impugned provisions were substantive sections of the law which were not part of the Bill that was subjected to public participation process. It also failed to appreciate that the legislative process was flawed. It further failed to appreciate the mandatory provisions of

Article 118 and the principles entrenched in Article 10. The enactment simply did not comply with the Standing Orders.

160. The decision to bypass public participation and the legislative path provided by the Constitution and the Standing Orders is a serious assault on the Constitution. Bearing in mind that Articles 118 and 10 (2) are justiciable and enforceable, we are satisfied that amending the Finance Bill, 2023 post-public participation to include 18 totally new provisions which were not subjected to public participation is unconstitutional and the ensuing enactment being a product of a flawed constitutional process is a nullity. The new provisions ought to have been subjected to a fresh public participation in accordance with the constitutional dictates. In the words of Dr. Ogola, these amendments were mischievously sneaked into the Act in order to steal a match. Such conduct cannot be rubber stamped by this Court. Consequently, we are satisfied that the impugned 18 new provisions of the law were improperly enacted and they by-passed the laid down legislative process. They suffer from procedural and constitutional deficiency. They are still born. They cannot be allowed to remain in our law books. Accordingly, we find that sections 21, 23, 32, 34, 38, 44, 69, 72, 80, 81, 83, 85, 86, 87, 100, 101 and 102 of the Act are unconstitutional.

D. Whether the Senate ought to have been involved in the enactment of the Act, 2023.

In finding that concurrence of the two Speakers of Parliament is not mandatory in a money Bill, the High Court stated as follows:

> ***"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."

161. According to Mr. Murugara, the question whether all Bills are subject to the concurrence process in Article 110 (3) was conclusively dealt with by this Court in ***Speaker of the National Assembly & Another vs Senate & 12 Others [2021] KECA 282 (KLR)*** where the Court held that it was an error by the High Court to find that it is a condition precedent that any Bill published by either House be subjected to the concurrence process. Counsel maintained that the learned Judges erred in concluding that the recantation by the Speaker of the Senate of his previous position that the Finance Bill, 2023, was a Bill concerning county governments, without explaining the reasons for changing from his previous position was constitutional.

162. The Supreme Court in ***Speaker of the Senate & Another vs Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR*** at paragraph 130 and 142 had the following to say:

"[130] 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....”

163. We have considered the parties' arguments in support of their respective understanding of Article 110 (3). Undeniably, the starting point is the plain language of Article 110 (3) which provides:

Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.

164. Mr. Omtatah questioned the decision by the Speaker of the Senate to recant his earlier decision that the Act required the concurrence of both Houses of Parliament. The Supreme Court in its Advisory opinion in ***Speaker of the Senate & Another vs. Attorney General & 4 Others [supra]*** signalled that it would be reluctant to question parliamentary procedures, as long as they did not breach the Constitution. In reference to Article 109 which recognizes that Parliament is guided by both the Constitution and the Standing Orders in its legislative process, the Supreme Court held [paragraphs 49 and 55]:

“Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual

disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution...“It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the ‘internal procedures’ of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.”

165. Further, the Supreme Court in the above advisory opinion observed as follows:

“It has become clear to us that a “money Bill” in a proper case, may only be introduced in the National Assembly, ... It is important to note that the Constitution goes further to make express provision for the manner of enactment of the different forms of money Bills specified in article 114 of the Constitution. With reference to taxes, under articles 114(3)(a) and 209 of the Constitution, it is provided that only the national government may impose income tax, value added tax, customs duties and

other duties on import and export goods; and excise tax. And an Act of Parliament may also authorise the national government to impose any other tax or duty."

166. This Court in ***Speaker of the National Assembly & another vs. Senate & 12 others [2021] KECA 282 (KLR)*** observed as follows on the issue of concurrence:

"143. In view of all that we have said above, the logical inference is that, and with respect, this is where the High Court went wrong, the express application of Article 110 (3) of the Constitution to Bills concerning counties and the exclusion of the same provision from application to Bills concerning the national government rendered Article 110(3) of the Constitution applicable only to Bills concerning counties, and that it is to these Bills alone that the concurrence process would be subjected.

144. Furthermore, with the Constitution having prescribed the nature and effect of money Bills, it is unmistakable that the same Constitution removed money Bills from the enactment processes to which national government or Bills concerning counties are subjected, including the concurrence process under article 110(3) of the Constitution. The High Court having failed to discern the different nature of Bills defined by the Constitution, concluded that all Bills, including money Bills required to be subjected to joint resolution of the Speakers under Article 110(3) of the Constitution. And by so doing, and we so find, the High Court wrongly extended the legislative powers of the Senate beyond the limits contemplated by the Constitution."

167. This Court in the *Pevans case* upheld the High Court decision that a question must arise as to whether a Bill is one concerning county government before the concurrence process under Article 110 (3) applies, and held as follows:

> ***"... it must be borne in mind that Article 110(3) of the Constitution provides a specific mechanism for settling the issue whenever the question arises as to whether any particular Bill is a Bill concerning counties. In this case, the Senate, which has the constitutional mandate of representing and protecting the interests of the counties and their governments, did not raise any issue that the Finance Bill, 2017 was anything other than what it described itself to be, namely a Money Bill that did not concern the counties. As the respondents aptly point out, even when the appellants made the Speaker of the Senate a respondent to their petitions in the High Court, he did not support their view that the Finance Bill, 2017 was a Bill concerning counties. In National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR, where the Senate had not questioned a Bill as one concerning county governments, this Court held that the court should not engage itself in a theoretical exercise or purport to usurp the roles of competent institutions under the Constitution."***

168. Similarly, in ***National Assembly of Kenya & Another vs Institute for Social Accountability & 8 Others (Civil Appeal 92 & 97 of 2015 (Consolidated)) [2017] KECA 170 (KLR) (24 November 2017) (Judgment)*** the High Court had found the

Constituency Development Fund Act unconstitutional for reasons *inter alia*, that the amendment made thereto concerned county governments within the meaning of Article 110(1) and ought to have been passed by the Senate. On appeal, this Court in its judgment delivered on 24th November 2017 held as follows:

> ***"Regarding the contents of the Bill, the Bill in its object indicated that it did not concern county governments or affect the powers and functions of county governments. The object of the Bill was to clarify that the Fund was a charge on the Consolidated Fund and not an additional revenue to county governments. Contrary to the court's finding that this was not an insubstantial amendment, the amendment did not have any positive effect either on the allocation of the equitable share of national revenue or on the functions and powers of county governments. Furthermore, the Speakers of the two Houses had resolved that the Bill did not concern county governments. It is a constitutional condition precedent in the legislative process that the Speakers of both Houses resolve the question whether a Bill concerns counties before it is considered."***

169. It was contended by the respondents and the cross-appellants that having found that the Finance Act, 2023 was a money Bill, the trial Court erred by failing to find that it ought to have been subjected to the concurrence process. In resolving this question, we find support in this Court's finding in *Pevans case* in which it upheld the High Court finding on the Finance Act, 2017 as follows:

> ***"To determine whether the Finance Act 2017 affected the functions and powers of county governments, the***

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

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

170. The High Court in the *Pevans case* had the following to say:

"In the case of national legislation, the application of the pith and substance test to legislative competence may lead to a conclusion that the bill's pith and substance place it wholly within functional areas of the national government, <u>even though certain provisions of the Bill (which for this purpose would be viewed as ancillary or incidental) fall within Schedule functional areas of county governments (an exclusive county government competence). Conversely, and in the case of county legislation, the pith and substance test may lead to a conclusion that the bill's pith and substance place it wholly within Schedule 4 part two</u>

functions, even though certain provisions of the Bill (again viewed for this purpose as ancillary or incidental) may fall outside Schedule 4 part 2.

...

Thus, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires even though it might incidentally trend on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable: whether in the guise of making a law on a matter within its competence, the legislature is, in truth, making a law on a subject beyond its competence. However, where that is not the position, the fact of encroachment does not affect the vires of the law even as regards the area of encroachment.

The analysis must answer two questions: what is the pith and substance or essential character of the law? And, does it relate to an enumerated head of power in the Constitution? The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law; What is the true meaning or dominant feature of the impugned legislation? This is resolved by looking at the purpose and the legal effect of the regulation or law. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was legislating within its jurisdiction, or venturing into an area under county government jurisdiction. The

legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law. The effects can also reveal whether a law is colourable (does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?)"

171. The dominant feature in the Act was taxes, which fall within the competence of the National Assembly. The inclusion of matters alien to a money Bill did not alter the true character of the Bill. However, we are not persuaded by Mr. Murugara's submission that the High Court jurisdiction ended the moment is held that the Finance Act, 2023 was a money Bill and that it erred by proceeding to interrogate the individual clauses. Conversely, the High Court correctly applied the pith and substance test and arrived at the correct finding that it was a money Bill within the meaning of Article 114 (1) and (3) save that it contained some matters that did not fall within the purview or incidental to a money Bill although that did not change its basic character and substance as a money Bill.

172. We are persuaded by both the High Court finding in the *Pevans case* and this Court's decision in ***Speaker of the National Assembly & another vs Senate & 12 Others*** **[Supra]** that the Constitution has removed money Bills from the enactment processes to which national government or Bills concerning counties are subjected, including the concurrence process under Article 110 (3). Consequently, the lack of concurrence prior to the introduction of the Finance Bill, 2023 in the National Assembly did not vitiate the resultant Act. This is because concurrence is not a requirement under Article 114.

E. Whether there was sufficient public participation is the enactment of the Act and whether Parliament is obligated to give reasons for adopting or rejecting views given by members of the public during public participation.

173. Mr. Kimani SC urged that no one is infallible and conceded that there might be some aspects of public participation that were missed. He however maintained that the digression was not of such a significant impact as to cause an injustice.

174. Public participation is premised on the principle that those who are affected by a decision have the right to be involved in the decision-making process. Central to this is the acknowledgment that institutions with decision-making powers must involve those who are likely to be affected by such decisions. On what amounts to sufficient public participation, the trial court stated as follows:

> ***"152.Whether the public participation exercise was sufficient to meet the test in the 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."

175. There is no doubt that Parliament has a constitutional obligation to facilitate public involvement in legislative processes. This obligation stems from Articles 10 (1) & (2) and 118. Public participation is a crucial part of participatory democracy and the law-making process as it affords the public a meaningful opportunity to participate in the legislative process and strengthens the legitimacy of legislation in the eyes of the people.

176. Admittedly, Parliament has a discretion to determine the manner in which to fulfil the obligation to facilitate public involvement. The question for this Court to determine is whether public participation in the enactment of the Act was meaningful and reasonable. In ***Merafong Demarcation Forum vs. President of the Republic of South Africa [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) at para 27,*** the Constitutional Court of South Africa stated:

"The obligation to facilitate public involvement may be fulfilled in different ways. It is open to innovation. Legislatures have discretion to determine how to fulfil the obligation. Citizens must however have a meaningful opportunity to be heard. The question for a court to determine is whether a legislature has done what is reasonable in all the circumstances."

177. In ***Doctors for Life International vs. Speaker of the National Assembly [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC)*** the Constitutional Court of South Africa set out the factors to be considered in determining whether public involvement is reasonable:

> ***"The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided."***

178. 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 and Another (Interested Parties); Mastermind Tobacco Kenya Limited (the affected party), SC Petition No. 5 of 2017; [2019] eKLR*** (BAT Case) enunciated *inter alia*, the following guiding principles regarding 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 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. ..."***

179. In addition, the Apex Court in the above case stated:

> ***"(85) Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of the Constitution and is binding on all State organs, State officers, public***

officers and all persons whenever any of them: (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the sovereignty of the People "that permeates the Constitution and in accordance with Article 1(4) of the Constitution is exercised at both national and county levels". ..

180. The Supreme Court went on to issue the following guidelines on public participation: -

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

Guiding Principles for Public Participation

(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

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.

181. Our appraisal of the record leaves us with no doubt that the public participation exercise conducted by the National Assembly allowed diverse stakeholders an opportunity to present their views on the Bill. However, the point of divergence is the holding by the trial court that:

> ***"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. "***

182. The arguments for and against the above findings were strong and included a critique that the court on one hand said Parliament has no obligation to provide reasons and on the other hand it said it is desirable that Parliament provides reasons. In the midst of the alleged confusion is the question whether Parliament is obligated to give reasons for adopting or rejecting any proposal received from members of the public. As we search for an answer,

it is important to recall that the preamble to the Constitution recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. These aspirations are exemplified in Article 10 (1) and (2) which embodies the national values and principles. It reads:

> ***10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. (Emphasis added)***

183. Under Article 10 (2) (c), the national values and principle of governance include (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; (c) good governance, integrity, transparency and accountability. Perhaps we should underscore that the transparency and accountability contemplated in this provision is owed to the people of Kenya in whom sovereign powers reposes under Article 1 and it is expected from State organs, State officers, public officers and all persons whenever any of them performs any of the functions listed in Article 10 (2). Therefore, the requirement for transparency and accountability from any of the organs or person listed above who include Parliament as a State organ and parliamentarians as State officers is not a matter of choice but a mandatory constitutional imperative.

184. This Court in ***Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017 [2017] eKLR*** held that:

> **"*In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles. Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction***

with other Constitutional Articles or Statutes as appropriate."

185. In **Merafong Demarcation Forum & Others (supra)** Sachs J. stated:-

"... the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve.... I would hold that, after making a good start to fulfill its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and

***thereby rendered the legislative process invalid*."**

[Emphasis added].

186. As was held by this Court in ***Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others*,** (Supra) the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. It is not by accident that transparency and accountability are among the core values listed in Article 10. It is well-established that exercise of public power, including legislative power, must comply with the principle of legality as an incident of the rule of law. Public bodies including Parliament have a constitutional duty to infuse public participation with transparency and accountability not as a matter of choice but as a constitutional command every time they subject a Bill to public participation.

187. Accountability**,** one of the principles in Article 10 (2) (c) means that officials must explain the way in which they have used their power. Transparency, also a requirement in the exercise of public power means openness, which is the opposite of secrecy. Therefore, the constitutional requirement for transparency and accountability imposes an obligation upon State organs to inform the general public and stakeholders why their views were not taken into account and why the views of some of the stakeholders were preferred over theirs. Such an approach will not only enhance accountability in the decision making processes by State organs but also it will enhance public confidence in the processes and in our participatory democracy. To suggest otherwise would be a serious affront to Article 10 (2).

188. Public participation is not an inconsequential process or a sheer formality. The Constitution embraces a radical form of participatory democracy. For instance, it recognizes the importance of participatory democracy in the context of meaningful public engagement in governance and decision making processes including enactment of legislation and formulation of policies which affect their rights and day to day lives. It would be strange indeed if the principles of participatory democracy and consultation are to operate only when the public are invited to give their views, then they vanish at the crucial stage when the general principles of the original statute are being converted into operational standards and procedures, only to re-surface at the stage of the implementation of the provisions impacting on specific individuals without any explanation as to why their views were rejected.

189. If, as we have found to be the case, the justification for public participation is to facilitate public involvement as a crucial aspect of participatory democracy and legitimacy, vesting in Parliament arbitrary power to reject or ignore the contribution from the public without explanation or justification is the surest way of undermining public participation. Insulating Parliament from the obligation to give reasons or justification for rejecting the views of the public is the surest way of rendering public participation illusory, cosmetic and a mere formality or public relations exercise, which the Supreme Court and this Court have loudly declared it is not.

190. Therefore, when determining whether public participation as a prerequisite to the determination of policy by a State organ has been complied with, one must ascertain whether the public participation has been done in a manner that rationally connects

the consultation with the constitutional purpose of accountability, responsiveness and transparency. We see no superimposed judicial stratagem of undermining separation of powers by upholding the explicit provisions of transparency and accountability prescribed in Article 10 (2) (c). Accordingly, we find that Parliament after conducting public participation is obligated to give reasons for rejecting or adopting the proposals received. The import of this finding is that the ensuing Act offended Article 10 (1) and (2) (c). It is therefore our conclusion that failure to adhere to the dictates of Article 10 (1) and (2) (c) renders the process leading to the enactment of the Act flawed.

F. 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.

191. It was Mr. Omtatah's case that the Appropriation Act, 2023 did not contain the estimates of revenue presented to and approved by Parliament as required by Articles 220 (1) (a) and 221 as read with section 39 (1) and (2) of the PFMA. Therefore, the Appropriation Act, 2023 (the national budget) was void *ab initio* for not containing estimates of revenue as required by the above Articles, and as a result there was no basis upon which the Finance Act, 2023 could be enacted.

192. Mr. Omtatah referred this Court to Volume 26 in the Record of Appeal particularly the 1st petitioner's further affidavit dated 28th August 2023 at page 12,271 to 12,601 which shows that only estimates of expenditure were considered and approved followed by the drafting of the Appropriation Bill 2023.

193. Article 221(1) provides that:

At least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly. (Emphasis added).

194. Section 37 of the PFMA provides:

(1) The Cabinet Secretary shall, within a period allowing time to meet the deadlines specified in this section, submit to the Cabinet for its approval—

(a) the budget estimates and other documents supporting the budget; and

(b) the draft Bills required to implement the national budget.

(2) The Cabinet Secretary shall submit to the National Assembly, by the 30th April in that year, the following documents—

(a) the budget estimates excluding those for Parliament and the Judiciary;

(b) documents supporting the submitted estimates; and

(c) any other Bills required to implement the national government budget.

(3) The accounting officers for the Parliamentary Service Commission shall, not later than the 30th April in each financial year—

(a) submit to the National Assembly the budget estimates for Parliament, including proposed appropriations; and

(b) provide the National Treasury with a copy of those documents.

(4) The Chief Registrar of the Judiciary shall, not later than the 30th April in each financial year—

(a) submit to the National Assembly the budget estimates for the Judiciary, including proposed appropriations; and

(b) provide the National Treasury with a copy of those documents.

(5) In preparing the documents referred to in subsections (3) and (4), the accounting officers for the Parliamentary Service Commission and the Chief Registrar of the Judiciary—

(a) shall ensure that members of the public are given an opportunity to participate in the preparation process; and

(b) may make and publish rules to be complied with by those who may wish to participate in the process.

(6) The Cabinet Secretary shall submit to the National Assembly not later than the 15th May any comments of the National Treasury on the budgets proposed by the Parliamentary Service Commission and the Chief Registrar of the Judiciary.

(7) The Cabinet Secretary shall ensure that the budget process is conducted in a manner and within a time frame sufficient to permit the various participants in the process to comply with the requirements of the Constitution and this Act.

(8) As soon as practicable after the budget estimates and other documents have been submitted to the National Assembly under this section, the Cabinet Secretary shall publicise those documents.

(9) <u>Upon approval of the budget estimates by the National Assembly, the Cabinet Secretary shall prepare and submit an Appropriation Bill of the approved estimates to the National Assembly.</u>

195. Regarding consideration of the budget estimates by the National Assembly, section 39 of the PMFA provides:

1) The National Assembly shall consider the budget estimates of the national government, including those of Parliament and the Judiciary, with a view to approving them, with or without amendments, in time for the Appropriation Bill and any other relevant Bills, required to implement the budget to be assented to by the 30th June each year.

2) Before the National Assembly considers the estimates of revenue and expenditure, the relevant committee of the National Assembly shall discuss and review the estimates and make recommendations to the National Assembly, taking into account the views of the Cabinet Secretary and the public on the proposed recommendations.

198. Regarding submission, consideration and passing of Finance Bill, section 39A of the PMFA stipulates:

1) ***The Cabinet Secretary shall submit to the National Assembly, on or before 30th April, the Finance Bill setting out the revenue raising measures for the National Government.***
2) ***Following submission of the Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly.***
3) ***The National Assembly shall consider and pass the Finance Bill, with or without amendments, in time for it to be presented for assent by 30th June each year.***
4) ***Any recommendations made by the relevant committee of the National Assembly or resolution passed by the National Assembly on revenue matters shall—***
    a) ***ensure that the total amount of revenue raised is consistent with the approved fiscal framework;***
    b) ***take into account the principles of equity, certainty and ease of collection;***
    c) ***consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;***
    d) ***consider domestic, regional and international tax trends;***
    e) ***consider the impact on development, investment, employment and economic growth;***

f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and;

g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

199. Regarding the submission and consideration of budget policy highlights and the Finance Bill in the National Assembly, section 40 of the PMFA provides:

1) Each financial year, the Cabinet Secretary shall, with the approval of Cabinet, make a public pronouncement of the budget policy highlights and revenue raising measures for the national government.

2) In making the pronouncement under subsection (1), the Cabinet Secretary shall take into account any regional or international agreements that Kenya has ratified, including the East African Community Treaty and where such agreements prescribe the date when the budget policy highlights and revenue raising measures are to be pronounced, the Cabinet Secretary shall ensure that the measures are pronounced on the appointed date.

3) On the same date that the budget policy highlights and revenue raising measures are pronounced, the Cabinet Secretary shall submit to Parliament a legislative proposal, setting out the revenue raising measures for the national

government, together with a policy statement expounding on those measures.

4) ***Following the submission of the legislative proposal of the Cabinet Secretary, the relevant committee of the National Assembly shall introduce a Finance bill in the National Assembly.***

5) ***Any of the recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall—***

   a) ***ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;***

   b) ***take into account the principles of equity, certainty and ease of collection;***

   c) ***consider the impact of the proposed changes on the composition of the tax revenue with reference to the direct and indirect taxes;***

   d) ***consider domestic, regional and international tax trends;***

   e) ***consider the impact on development, investment, employment and economic growth;***

   f) ***take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and***

   g) ***take into account the taxation and other tariff agreements and obligations that Kenya has ratified, including taxation and tariff agreements under the East African Community Treaty.***

200. Article 221 summarizes the budget process thus: the estimates of revenue and expenditure of the national government for the next financial year are submitted to the National Assembly by the Cabinet Secretary responsible for finance; a committee of National Assembly discusses and reviews the estimates and seeks representations from the public; takes into account the recommendations of the public and makes recommendations to the National Assembly and upon approval of the estimates by the National Assembly an Appropriation Bill is introduced to the National Assembly to authorize the withdrawal from the consolidated fund and for the appropriation of the money.

201. On the inclusion of the estimates of expenditure in the Appropriation Act, the learned judges of the High Court held as follows:

> ***"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 June 15, 2023 and 98 of June 26, 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."***

202. Regarding the issue of estimates of revenue not being included in the Appropriation Act, we have considered page 43 to 48 the National Assembly's Hansard for 20th June 2023 filed by Mr. Omtatah in support of his amended petition before the trial court. The following excerpt from the Hansard is relevant:

> ***"Hon. Speaker: Hon. Members, you will recall that during the Afternoon Sitting of Thursday, 15th June 2023, before the Budget presentation by the Cabinet Secretary for the National Treasury, Hon. Otiende Amollo, Senior Counsel, MP., rose on a point of order and sought procedural guidance on adherence to Standing Order 244(C), with regard to the introduction, consideration and passage of Finance Bill 2023 by the House. It was the contention of the Hon. Member that Standing Order 244(C) outlines a particular order requiring the Cabinet Secretary for the National Treasury to make a pronouncement of the budget policy highlights and revenue raising measures for the national Government and thereafter, present a legislative proposal which is published and introduced as a Finance Bill. According to the Member, a strict reading of Standing Order 244(C) would, therefore, indicate that the House had jumped the gun by concluding the Second Reading of the Finance Bill before the appearance of the Cabinet Secretary for the National Treasury."***

203. In answer to the point of order, the Speaker of the National Assembly on 20th June 23, made a ruling on the point of order. The abridged version of the ruling is as follows:

> ***"...As a budget-making House, we are seized of the Estimates and the Finance Bill latest the 30th of April***

every year. Save for compliance with applicable statutory timelines, the House is left to its own devices on how to consider the Budget documents submitted to it. The House is under an obligation to prioritise the consideration of a Finance Bill with a view of passing it before the lapse of the June 30th deadline imposed by Section 39A of the Public Finance Management Act, 2012. It should not be lost to Hon. Members that the procedures of the House cannot be left to the whim of another arm of Government. The House is, therefore, at liberty to prioritise consideration of a Finance Bill before or after the presentation of the Budget Statement by the Cabinet Secretary for the National Treasury. As I conclude, I note that the variance in the Sections 39A and 40(3) and (4) of the Public Finance Management Act extends Standing Order 244C which gave rise to the point raised by the Member for Rarieda, Hon. Otiende Amollo, EBS, SC, MP. The Standing Order does not take into account provisions of Section 39A and the requirement for the submission and passage of the Finance Bill before the 30th of April and the 30th of June, respectively, every year

Hon. Members, having guided that Section 39A is the operative provision with regard to the consideration of a Finance Bill, I direct the Procedure and House Rules Committee to note the variance and include the Standing Order in the items earmarked for review when it next proposes amendments to the Standing Orders. In summary, therefore, my guidance is as follows—

1. THAT, Section 39A of the Public Finance Act, 2012 requires the Cabinet Secretary for the National Treasury to submit the Finance Bill before 30th April every year and that, the Bill be passed before the end of the financial year on 30th June. The section governs the manner in which a Finance Bill ought to be introduced, considered and passed by the House.

2. THAT, it is a canon of statutory interpretation that when faced with conflicting provisions, preference must be given to a specific provision as opposed to a general provision. Additionally, the last-in-time principle where the most recent addition to a statute is given precedence over a provision that was enacted earlier should be applied. Section 39A of the Public Finance Management Act, 2012 specifically refers to the introduction, consideration and passage of a Finance Bill and represents the most specific and current position of the House on the manner of consideration of a Finance Bill.

3. THAT, the Cabinet Secretary and the House have consistently adhered to the Orders of the Court in Okiya Omtatah Okoiti verses Cabinet Secretary, National Treasury & three others [2018] KLR and Section 39A of the Public Finance Management Act, 2012. This clearly signifies that Section 39A of the Public Finance Act, 2012 is the operative provision with regard to the introduction, consideration and passage of a Finance Bill. 4. THAT, the House is under an obligation to prioritise the consideration of a Finance Bill with a view of passing it before the lapse of the June 30th deadline imposed by Section 39A of

the Public Finance Management Act, 2012. The House is, therefore, at liberty to prioritise consideration of a Finance Bill before or after the presentation of a Budget Statement by the Cabinet Secretary for the National Treasury.

5. THAT, the Procedure and House Rules Committee notes the variance between Standing Order 244C and Section 39A of the Public Finance Management Act and include the Standing Order in the items earmarked for review when it next proposes amendments to the Standing Orders. The House is accordingly guided.

Allow me to thank the Hon. (Dr) Otiende Amollo for raising the issue and for allowing me to give clarity on the matter going forward. Ordinarily, we do not debate or comment on the ruling and the direction of the Chair. We will let it lie there."

204. The upshot of the foregoing ruling by the Speaker of the National Assembly is that the National Assembly is at liberty to prioritize consideration of a Finance Bill before or after the presentation of a Budget Statement by the Cabinet Secretary for the National Treasury. But what was not addressed was whether the Appropriations Act, 2023 contained the estimates of revenue presented to and approved by Parliament as required by Articles 220 (1) (a) and 221 as read with section 39A (1) and (2) of the PFMA. With tremendous respect, we are of the view that the correct position is as was stated by the Supreme Court in its advisory opinion in ***Council of Governors & 47 Others vs Attorney General & 3 Others (Interested Parties); Katiba***

Institute & 2 Others (Amicus Curiae) [2020] eKLR where it stated:

> ***"99. on the basis of the sequencing outlined in the foregoing paragraph, we can derive a number of conclusions. Firstly, the Appropriation Bill cannot be introduced into the National Assembly, unless the estimates of revenue and expenditure have been approved and passed by that House. Secondly, the Appropriation Bill comes into life after the Division of Revenue Bill since the latter would already have been introduced into Parliament at least two months before the end of the financial year. Thirdly, the estimates of revenue and expenditure must logically be based on or at the very least be in tandem with, the equitable share of revenue due to the National Government, as provided for in the Division of Revenue Bill. Fourthly, the Appropriation Act must be based on the equitable share of revenue due to the National Government as provided for in the Division of Revenue Act. Otherwise, what would the National Government be appropriating, if not its share as determined by the latter? It is for this reason that even respective County Governments, must prepare and adopt their annual budget and Appropriation Bills, on the basis of the Division of Revenue Bill passed by Parliament under Article 218 of Constitution."***

205. Our analysis of the Mr. Omtatah's arguments, the entire record, the provisions of the Constitution and the PFMA reproduced earlier and the Supreme Court advisory opinion cited above, leaves us with no doubt that the Appropriation Act, 2023 did not

contain the estimates of revenue presented to and approved by Parliament as required under Article 220 (1) (a) and 221 as read together with section 39 (1) & (2) of the PFMA. Therefore, the learned trial judges fell into a grave error when they held that although the Bill containing estimates of revenue was not tendered before the court, they 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 as published in the Kenya Gazette Supplement Nos. 87 of 15th June 2023 and 98 of 26th June 2023 respectively.

206. It is admitted in the Hansard that by the time the Finance Bill was coming up for Second Reading as expressed by Hon. (Dr.) Otiende Amolo SC., the Budget Proposals had not been done and the proposal by the Cabinet Secretary had not been presented in the House and that is the sole reason why Hon. (Dr.) Otiende Amolo SC stood on a point of order on 15th June 2023 and posed a question which triggered the Speaker's ruling to the effect that the National Assembly was obligated to prioritize the Finance Bill over the presentation of a Budget Statement by the Cabinet Secretary for the National Treasury. The budget-making process is spelt out in Article 221 and the provisions of the PFMA reproduced earlier. The only option is for the National Assembly to follow the path carefully delineated by the Constitution and the PFMA. Any other path, no matter how expedient it may be, is not only unconstitutional, but it is littered with substantive procedural flaws and highly impermissible unconstitutional transgressions all of which will end with and illegal outcome. Nothing good can come out of an illegality, no matter how attractive it may be.

207. Accordingly, we find that the estimates of revenue were not included 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. It is also noteworthy that as at 15th June 2023, the Cabinet Secretary, National Treasury had not presented the Budget Proposal, yet the Finance Bill, 2023 had been introduced in the National Assembly and was at the Second Reading. In the circumstance, we find that it was a violation of Article 220(1) (a) and 221 as read with sections 37, 39, and 40 of the PMFA for the Appropriation Bill/Act to be approved before the Budget Proposal had been presented by the Cabinet Secretary National Treasury in the National Assembly.

208. Consequently, for the above reasons, the resultant Act had no legal foundation and was unconstitutional.

H. Whether the trial Court abdicated its jurisdiction by holding that it cannot intervene on policy decisions.

209. Mr. Ochiel learned counsel for the 15th, 16th, 17th ,18th, 19th and 22nd respondents faulted the learned judges for misinterpreting Articles 10 and 165(3) on its jurisdiction thereby abdicating its jurisdiction to test the constitutionality of "anything" including policy said to infringe the Constitution in holding that the challenged taxes were constitutional because they were "matters within the competence of the legislature and reflected the policy choices of the national government" and were "governed by policy".

210. Mr. Murugara urged that the court lacks jurisdiction to interfere with tax legislation based on the merger of policy and legislation of public finance principles, equal protection of law, fairness and judicial authority, since the rate of taxation is a policy decision that rests with the legislature**.** In support of the finding by the

learned judges of the High Court, counsel cited the finding in ***Ndora Stephen vs. Minister for Education & 2 Others*** **(supra)** where the High Court held that formulation of policy and implementation thereof were within the province of the executive.

211. The learned judges of the High Court held as follows:

> ***"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...***
>
> ***Conclusions***
>
> ***220. Having considered, the matters placed before us for determination, we now conclude as follows:***
>
> ***i...***
>
> ***ii...***
>
> ***iii....***
>
> *(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."***

212. We have no doubt that the State has the constitutional obligation to collect taxes, and that the National Assembly therefore has the constitutional mandate to legislate to this effect pursuant to Article 209 (1) which empowers the national government to

impose taxes. However, Article 165 (3) (d) (i) & (ii) confers vast jurisdiction to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the Constitution and also the question whether anything said to be done under the authority of the Constitution or of any law is in consistent with, or in contravention of, the Constitution. The above provision is wide enough to cover a policy or decision made by a State organ or public body.

213. This Court in the *Pevans case* held:

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

214. Accordingly, we agree with Mr. Ochiel's argument that the High Court in the impugned holding misinterpreted Articles 10 and 165 (3) on its jurisdiction effectively abdicating its jurisdiction to test the constitutionality of "anything" including policy said to infringe the Constitution. It is only when a State organ is executing policy within the law that the courts will be slow to intervene. Accordingly, the High Court erred in making a blanket statement suggesting that courts ought not to intervene in all policy matters.

Whether the increased rates of taxation in the impugned Act violates the economic, social and consumer rights guaranteed by Articles 43 and 46.

215. In general, our constitutional framework calls for taxation according to the rule of law. The fundamentals of this framework are that :- (a) a tax can be levied only if a statute lawfully enacted so provides, (b) the burden of taxation must be shared fairly, (c) revenue raised by a tax can be used only for lawful public purposes, and, (d) public money shall be used in a prudent and responsible way. Way back in 1874, Justice Miller of the US Supreme Court in ***Citizens Savings and Loan Association vs. Topeka, 20 Wall 655,662,664 (1874)*** summed up what we believe can pass constitutional muster stipulated by Article 201 which lays down the principles of public finance in the following words:

> ***"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people...To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon the favoured individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the form of law and is called taxation. This is not legislation. It is a decree under legislative forms ...We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose."***

216. Law, means an act of the legislature enacted within its legislative competence. We have already found that the legislative process

leading to the enactment of the Act was fundamentally flawed and in violation of the Constitution. Having reached this conclusion, it will add no value for us to determine the issue at hand because the impugned provisions, namely sections 30 to 38, 52 to 63 and 23 to 59 of the Act stand equally vitiated.

217. Arising from our evaluation of the pleadings and the respective parties' submissions, the law and authorities, and our determination of the issues herein above discussed and the conclusions arrived at in respect of each issue, we hereby issue the following orders:

i. **The appellants' appeals in Civil Appeal Nos. E003 of 2024 and E080 of 2024 against the findings that section 84 (the Affordable Housing Levy) and sections 88 and 89 (the Statutory Instruments Act) are unconstitutional are hereby dismissed on grounds that the said issues have been caught up by the doctrine of mootness, therefore, they present no live controversies.**

ii. **The notices of cross-appeal by the 15th to 22nd and 38th to 49th respondents and Civil Appeal No. 064 of 2024 are devoid of merit and the same are hereby dismissed, save that we find that the High Court misconstrued its mandate under Article 165 (3) by holding that it had no jurisdiction to intervene in policy matters.**

iii. **The notice of cross-appeal by the 13th respondent (LSK) is hereby allowed in the following terms: (a) a declaration be and is hereby issued decreeing that sections 24 (c), 44, 47 (a) (v), 100 and 101 of the Finance Act, 2023 introduced post-public participation are unconstitutional and void for having been enacted in a manner that by-passed the laid down legislative stages including**

publication, First Reading, Second Reading and contrary to Articles 10 (1) & (2) and 118 of the Constitution and Standing Orders.

iv. **Civil Appeal No. E016 of 2024 is allowed to the extent that a declaration be and is hereby issued that sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Finance Act No. 4 2023 introduced post-public participation to amend 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 are unconstitutional, null and void for not having been subjected to fresh public participation and having been enacted in total violation of the constitutionally laid down legislative path;**

v. **The prayer seeking the refund of taxes collected under sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Finance Act, No. 4 of 2023 or under any other unconstitutional section of the Finance Act, No. 4 of 2023 be accounted for and refunded to the tax payers is refused on grounds that:- (a) it was not pleaded in the Petition before the High Court, therefore it is improperly before this Court; and (b), legislative enactments enjoy presumption of constitutionality up to the moment they are found to be unconstitutional in terms of Article 165 (3) of the Constitution.**

vi. **Civil Appeal No. E021 of 2021 is merited. Accordingly, we hereby issue a declaration that the enactment of the**

Finance Act, 2023 violated Articles 220 (1) (a) and 221 of the Constitution as read with sections 37, 39A, and 40 of the PFMA which prescribes the budget making process, thereby rendering the ensuing Finance Act, 2023 fundamentally flawed and therefore void ab initio and consequently unconstitutional.

vii. **Civil Appeal No. E049 of 2024 partially succeeds in terms of the following orders:- (a) a declaration be and is hereby issued that in conformity with Article 10 (1) & (2) (c), Parliament is obligated to provide reasons for adopting or rejecting any proposals received from members of the public during public participation process; (b) a further declaration is hereby issued that the failure to comply with this constitutional dictate renders the entire Finance Act, 2023 unconstitutional.**

viii. **We affirm the finding by the High Court that sections 76 and 78 of the Finance Act, 2023 amending section 7 of the Kenya Roads Act, 1999; are all unconstitutional, null and void.**

ix. **We uphold the finding by the High Court that concurrence of both houses in the enactment of the Finance Act, 2023 was not a requirement under Article 114.**

i. **Having found that the process leading to the enactment of the Finance Act, 2023 was fundamentally flawed and in violation of the Constitution, sections 30 to 38, 52 to 63 and 23 to 59 of the Finance Act, 2023 stand equally vitiated and therefore unconstitutional.**

ii. **The issues urged in these consolidated appeals are of great interest to the public and transcend the interests of the parties, therefore we make no order as to costs.**

Dated and delivered at Nairobi this 31st day of July, 2024.

K. M'INOTI

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR