



**Mjengo Limited & 3 others v Parliament of Kenya & another (Petition E290 of 2021)
[2022] KEHC 13517 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13517 (KLR)

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

PETITION E290 OF 2021

HI ONG'UDI, J

SEPTEMBER 30, 2022

BETWEEN

**MJENGO LIMITED 1ST PETITIONER
SPICE WORLD LIMITED 2ND PETITIONER
SMART BRANDS LIMITED 3RD PETITIONER
DEBENHAM & FEAR LIMITED 4TH PETITIONER**

AND

**PARLIAMENT OF KENYA 1ST RESPONDENT
COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY 2ND
RESPONDENT**

Constitutionality of the Excise Duty Act, 2015 as amended by the Finance Act, 2021 which provided for a 20% excise duty on imported pasta

The instant petition challenged the constitutionality of paragraph 1 of Part 1 of the First Schedule to the Excise Duty Act, 2015 as amended by the Finance Act, 2021 that introduced excise duty on imported pasta at the rate of 20%. The court found that the petitioners failed to show how the increase of the excise duty was contrary to the constitutional mandate of Parliament or that the enactment violated the principles of the legislative process. The court further held that during the legislative process, amendments to the Bill could be moved during the committee stage and that to hold every amendment moved must undergo the process of public participation would negate and undermine the legislative process.

Reported by Kakai Toili

Constitutional Law - constitutionality of statutes - constitutionality of paragraph 1 of Part 1 of the First Schedule to the Excise Duty Act, 2015 as amended by the Finance Act, 2021 - claim that paragraph 1 of Part 1 of the First Schedule to the Excise Duty Act, 2015 as amended by the Finance Act, 2021 provided for a 20% excise



duty increase on imported pasta - whether the 20% excise duty increase on imported pasta was unconstitutional for being contrary to the constitutional mandate of Parliament, violating the principles of the legislative process and for being prejudicial to public interest - of Kenya, 2010, articles 27(4), 40(2), 47(1), 116(2) and 209.

Constitutional Law - Parliament - mandate of Parliament - legislation - legislative process - stages involved in the legislative process - whether new amendments could be introduced to a Bill under consideration after the first reading - of Kenya, 2010, article 124(1); National Assembly Standing Orders, standing order 128 and 132.

Constitutional Law - national values and principles - public participation - public participation in the legislative process - whether it was mandatory for amendments to a Bill during the committee stage to undergo the process of public participation.

Constitutional Law - supremacy of the - supremacy of the in the operation of a treaty - whether the operation of an international treaty could negate the operation of the dictates of the - of Kenya, 2010, article 2.

Brief facts

The instant petition sought among other orders; a declaration that paragraph 1 of Part 1 of the First Schedule to the , 2015 as amended by the Finance Act, 2021 was unconstitutional; a declaration that paragraph 1 of Part 1 of the First Schedule to the , 2015 as amended by the Finance Act, 2021 that introduced excise duty on imported pasta of tariff 1902 at the rate of 20% was unconstitutional. The petitioners averred that they were importers of pasta and pasta related products and that following the enactment of the , the petitioners became aware that the , No 23 of 2015 had been amended under paragraph 1 of Part 1 of the First Schedule to introduce excise duty at the rate of 20% on imported pasta.

According to the 1st petitioner the impugned amendment was unconstitutional for among other reasons; that it was passed without public participation; further that it was passed in violation of the laws and principles governing the 1st respondent's parliamentary role; additionally that there was a breach by the National Government's power to impose tax; likewise that there was a breach by the 1st respondent and the National Government of its treaty duties and obligations and lastly that the amendment was unfairly discriminatory on the petitioners and importers of pasta.

Issues

- i. Whether the 20% excise duty increase on imported pasta under paragraph 1 of Part 1 of the First Schedule to the , 2015 as amended by the Finance Act, 2021 was unconstitutional for being; contrary to the constitutional mandate of Parliament, violating the principles of the legislative process and for being prejudicial to public interest.
- ii. What were the stages involved in the legislative process?
- iii. Whether new amendments could be introduced to a Bill under consideration after the first reading.
- iv. Whether it was mandatory for amendments to a Bill during the committee stage to undergo the process of public participation.
- v. Whether the operation of an international treaty could negate the operation of the dictates of the .

Held

1. Constitutional petition No E278 of 2021; *Okiya Omtatah Okioti v National Assembly and another* had not yet been determined and was being heard alongside the instant petition. The main issue for determination formed the central subject matter in petition No E278 of 2021, which had substantially been handled by the High Court. The same was pending judgment before the instant court.
2. Public participation as a requirement was fulfilled by the respondents. The 1st respondent's committee invited the public and the relevant stakeholders to submit memoranda and views for the purposes of public participation through an advertisement in both the Daily Nation and the Standard Newspapers on May 21, 2021. Further, evidence of the public participation exercise was contained in the report of the National Assembly Departmental Committee on Finance and Planning dated June 22, 2021. Public participation was conducted for the Finance Bill, 2021.



3. One of the roles of Parliament in exercise of its legislative authority under article 94 of the of Kenya, 2010 (Constitution) was making of laws. That was actualized through the Bills passed by Parliament and assented to by the President as envisaged under article 109(1) of the . A Bill of the nature in the instant case was introduced in Parliament in the manner encapsulated under article 114 of the .
4. Article 114 of the dealt with money bills such as taxes. Article 114 informed that if, in the opinion of the Speaker of the National Assembly, a motion made provision for a matter listed in the definition of ‘a money Bill’, the Assembly could proceed only in accordance with the recommendation of the relevant committee of the Assembly after taking into account the views of the cabinet secretary responsible for finance. That in essence was the beginning of the legislative process. The Bill at that juncture was submitted to the legislative process which comprised of the first reading; committal of the Bill to the departmental committee; the second reading; committee stage; the report stage; the third reading of a Bill and finally the Bill was passed and presented to the President for assent.
5. In carrying out the legislative role, Parliament was guided by its own standing orders as required under article 124(1) of the . Part xix of the National Assembly Standing Orders which dealt with public bills detailed the stages of the legislative process. Standing order 128 of the National Assembly Standing Orders which provided for the second reading of the Bill provided that no amendment was moved at that stage but rather the Bill was committed to the committee of the whole House where the proposals and amendments were considered at length under standing order 130 of the National Assembly Standing Orders. In considering a Bill in the committee stage, standing order 132 of the National Assembly Standing Orders stipulated that the various parts of the Bill should be considered. Furthermore, standing order 132 provided the procedure of the committee of the whole house on a bill.
6. The Finance Bill, 2021 was submitted to public participation by the departmental committee on finance and national planning after the first reading of the Bill. The advertisement for invitation for public participation informed the public that the Finance Bill, 2021 was intent on amending various tax laws including the , 2015. Moreover, as per the committee’s minutes on the meetings, various parties were consulted including the Cabinet Secretary of the National Treasury. Upon conclusion of the deliberations, the committee prepared its report containing the public participation views and its own recommendations on the Finance Bill, 2021. That would go on to inform the house’s committee stage deliberations on the Bill.
7. According to the Supreme Court’s guideline 8 in the *British American Tobacco Kenya, PLC case* an allegation of lack of public participation did not automatically vitiate a process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation was to be determined on a case-to-case basis. The impugned amendment was inserted as part of the committee’s recommendation in its report that was presented to the House.
8. In the legislative process, the making of a Bill was an ongoing process from when the Bill was introduced at the first reading until the third reading. One of the components of that process was the House’s committee’s role in facilitating public participation and preparing a comprehensive report that informed the House’s deliberations and final decision on the Bill. Standing order 132(b) of the National Assembly Standing Orders informed that the sequence of the Bill presented in the second reading could include new clauses.
9. Standing order 133(5) and (b) of the National Assembly Standing Orders distinguished the new amendments from those that would change the subject matter of the Bill by introducing a different topic expanding its subject or that was inconsistent with any part of the Bill already agreed on. New amendments could be introduced to a Bill under consideration after the first reading so long as the amendment was in line with the original intent of the purposes and objects of the Bill.
10. The impugned provision amended the to include an excise duty rate of 20% on imported pasta. That was not a new subject matter contrary to the envisioned amendments by the Finance Act. The advertisement made known that the amendments to the Finance Bill dealt with tax laws including the .



- That essentially did not deal with a different subject that unduly expanded the subject and neither was the amendment inconsistent with any part of the Bill already agreed to. That was so because the core intent of the Finance Bill was to amend taxation laws part of which the impugned amendment was.
11. How public participation was given effect would vary from case to case but it must be clear, upon examination of the legislative process, that a reasonable level of participation had been afforded to the public. During the legislative process, amendments to the Bill could be moved during the committee stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process.
 12. The amendment moved by the committee in its report was in line with the set parameters of what had been presented to the public and the National Treasury for consideration during the public participation forums held by the house's committee. Moreover, the amendment adhered to the legislative process as outlined in the National Assembly Standing Orders and did not fall in the restricted amendments cited under standing order 132(5) and (6). In the circumstances, the impugned amendment did not violate the principle of public participation.
 13. The COMESA Treaty found its application in Kenya by virtue of article 2(6) of the . Article 46 of the COMESA Treaty dealt with customs duty which was described as the import duty levied on importation of goods under the provisions of the . On the other hand excise duty was imposed on the local manufacture, importation or local supply of certain commodities and services as spelt out under the 2015. Imported pasta of tariff 1902 was listed as an excisable item in the as amended under the First Schedule paragraph 1, Part 1(iv). The two forms of taxes were distinct.
 14. Article 2 of the stressed the supremacy of the over all other laws of Kenya including international treaties and conventions that formed part of Kenya's law. In essence, the operation of an international treaty could not negate the operation of the dictates of the , in the instant case, the taxation principle.
 15. One of the constitutional functions of the National Government was its power to impose taxes and charges as envisaged under article 209 of the . While the empowered the National Government to impose taxes, it did not disclose or define how high or low the listed taxes should be thus not revealing what the threshold of reasonable taxation should be. However, that mandate at article 209(2) was left to the Legislature to decide based on various factors not within the knowledge and mandate of the court.
 16. Article 259 of the enjoined the court to interpret the in a manner that promoted its purposes and principles that advanced the rule of law and human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. Allowing the petitioner's argument that the 20% excise duty increase on imported pasta was unconstitutional when imposition of taxes in and of itself was the Parliament's constitutional mandate would be in error and untenable in light of the purposes of the .
 17. The petitioners failed to show how the increase of the excise duty was contrary to the well-defined constitutional mandate of the Parliament in enactment of laws or that the enactment violated the laid down principles of the legislative process. There was nothing to show that the impugned amendment was prejudicial to public interest intended in imposition of taxes under article 209 of the .
 18. The petitioners had failed to discharge their burden of proof to the effect that the impugned amendment violated articles 27(4), 40(2), 47(1) and 116(2) of the . In effect the impugned amendment of 20% increase excise duty on imported pasta was in tandem with the .

Petition dismissed with costs.

Citations

Cases

1. Barasa, Walter Osapiri v Cabinet Secretary Ministry of Interior and National Co-Ordination & 6 others (Constitutional Petition 488 of 2013; [2013] KEHC 1776 (KLR)) — Followed



2. Basco Products (K) Ltd & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested Party) (Petition E 286 of 2021; [2022] KEHC 168 (KLR)) — Followed
3. Bidco Oil Refineries Ltd v Attorney General & 3 others (Petition 177 of 2012; [2013] KEHC 4587 (KLR)) — Mentioned
4. British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health, Tobacco Control Board & Attorney General; Kenya Tobacco Control Alliance & Consumer Information Network (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) (Petition 5 of 2017; [2019] KESC 15 (KLR)) — Explained
5. Dida, Mohammed Abduba v Debate Media Ltd & another (Civil Appeal 238 of 2017; [2018] KECA 642 (KLR)) — Followed
6. Export Trading Company v Kenya Revenue Authority (Petition No 148 of 2013; [2018] eKLR) — Mentioned
7. Gakuru, Robert N & others v Governor Kiambu County & 3 others (Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (Consolidated); [2014] eKLR) — Mentioned
8. Havi, Nelson Andayi v Law Society of Kenya & 3 others (Civil Application 28 of 2018; [2018] KECA 731 (KLR)) — Explained
9. Institute of Social Accountability & another v National Assembly of Kenya & 3 others (Petition 1 of 2018; [2021] KESC 30 (KLR)) — Explained
10. Kagume, Peter Ngari & 7 others v Attorney General (Constitutional Application 128 of 2006; [2009] KEHC 4179 (KLR)) — Mentioned
11. Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (Civil Appeal 218 of 2014; [2016] KECA 432 (KLR)) — Followed
12. Kenya Association of Stock Brokers and Investment Banks v Attorney General & another (Petition 22 of 2015; [2015] KEHC 3794 (KLR)) — Mentioned
13. Kenya Bankers Association v Attorney General & another (Constitutional Petition 353 of 2018; [2019] KEHC 5234 (KLR)) — Mentioned
14. Kenya Revenue Authority & 2 others v Darasa Investments Ltd (Civil Appeal 24 of 2018; [2018] KECA 358 (KLR)) — Mentioned
15. Kenya Union Of Domestic, Hotels, Education Institutions And Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 others (Petition 544 of 20 of 2013; [2014] KEHC 6984 (KLR)) — Mentioned
16. Law Society of Kenya v the Hon Attorney General & others (Constitutional Petition 353 of 2018; [2019] eKLR) — Mentioned
17. Manani, Jacqueline Okeyo & 5 others v Attorney General & another (Petition 36 of 2018; [2018] eKLR) — Mentioned
18. Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others (Petition 383 of 2013; [2014] KEHC 4336 (KLR)) — Mentioned
19. Mbuti, Anthony Njenga & 5 others v Attorney General & 3 others (Constitutional Petition 45 of 2014; [2015] eKLR) — Explained
20. Moi University v Council of Legal Education & others (Petition 425 of 2015; [2016] eKLR) — Mentioned
21. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); [2015] eKLR) — Mentioned
22. Njoya, Timothy & 17 others v Attorney General & 4 others (Petition 137 of 2011; [2013] KEHC 6000 (KLR)) — Mentioned



23. Okoiti, Okiya Omtatah v Commissioner General, Kenya Revenue Authority & 2 others (Petition 532 of 2017; [2018] KEHC 8263 (KLR)) — Explained
24. Otieno, Leonard v Airtel Kenya Ltd (Petition 218 of 2017; [2018] eKLR) — Mentioned
25. Pevans East Africa Ltd & another v Chairman, Betting Control & Licensing Board & 7 others (Civil Appeal 11 of 20 of 2018; [2018] KECA 332 (KLR)) — Mentioned
26. Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties) (Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR) — Followed
27. Republic v Commissioner General, Kenya Revenue Authority Ex-parte Boc Kenya Ltd (Miscellaneous Application 340 of 2012; [2014] KEHC 2970 (KLR)) — Mentioned
28. Republic v Minister for Finance & 2 others (? 1078 of 2007; [2007] KEHC 779 (KLR)) — Mentioned
29. Republic v National Police Service Commission ex parte Daniel Chacha Chacha (Miscellaneous Application 36 of 2016; [2016] eKLR) — Mentioned
30. SDV Transami Kenya Ltd & 19 others v Attorney General & 3 others (Petition 76 of 2012; [2015] KEHC 1002 (KLR)) — Mentioned
31. Stephen, Ndoria v Minister for Education & 2 others (Petition 464 of 2012; [2015] KEHC 3437 (KLR)) — Mentioned
32. Universal Corporation Ltd v Kenya Medical Supplies Authority (Commercial Civil Case E355 of 2020; [2021] KEHC 9031 (KLR)) — Mentioned
33. Wanjiku, Beatrice & anor v Attorney General & anor (Petition 190 of 2011; [2012] eKLR) — Explained
34. Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) (Constitutional Petition E005 & E001 (Consolidated) of 2021; [2021] KEHC 9748 (KLR)) — Mentioned
35. Caron v R (20 QAC 45 [1988] RJQ 2333) — Mentioned
36. S v Mhlungu & others ((CCT25/94) [1995] ZACC 4.) — Mentioned
37. Hamdard Dawakhana v Union of India (1960 AIR 554, 1960 SCR (2) 671) — Mentioned
38. Huitson v HMRC ([2011] EWCA Civ 893) — Mentioned
39. Scotch Whisky Association & others v the Lord Advocate & another ((2017) UKSC 76) — Mentioned

Statutes

1. Capital Markets Act (cap 485A) — In general — Cited
2. Central Depositories Act, 2000 (Act No 4 of 2000) — In general — Cited
3. Constitution of Kenya, 2010 — Article 1, 2, 3, 10, 20, 21, 22, 23, 27(4); 47, 93, 94, 95, 109, 116(2); 118(1)(b); 124, 201(a); 210(1); 258, 259 — Interpreted
4. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Constitution of Kenya, 2010 sub leg) — Rule 3, 4(1); 8, 10 — Interpreted
5. Excise Duty Act, 2015 (Act No 23 of 2015) — Paragraph 1; Part 1; Schedule 2 — Interpreted
6. Fair Administrative Action Act, 2015 (Act No 4 of 2015) — Section 5 — Interpreted
7. Finance Act, 2021 (Act No 8 of 2021) — Section 32(a)(iv) — Interpreted
8. Income Tax Act (cap 470) — In general — Cited
9. Insurance Act (cap 487) — In general — Cited
10. Kenya Revenue Authority Act, 1995 (Act No 2 of 1995) — Section 5(1) — Interpreted
11. Miscellaneous Fees And Levies Act, 2016 (Act No 29 of 2016) — In general — Cited
12. Retirement Benefits Act, 1997 (Act No 2 of 1997) — In general — Cited
13. Supreme Court Act, 2011 (Act No 7 of 2011) — In general — Cited
14. Tax Procedures Act, 2015 (Act No 29 of 2015) — In general — Cited
15. Value Added Tax Act, 2013 (Act No 35 of 2013) — In general — Cited



16. East African Community Customs Management Act, 2004 (Revised Edition 2009) — In general — Cited

International Instruments

1. Common Market of East and Southern Africa (“COMESA”) Treaty — Article 46

Advocates

None mentioned

JUDGMENT

1. The petition dated July 23, 2021 was filed pursuant to rules 3, 4(1), 8 and 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* for the alleged contravention of articles 1, 2, 3, 10, 20, 21, 22, 23, 27(4), 47, 93, 94, 95, 109, 116(2), 118 (1) (b), 124, 201(a), 210(1), 258 and 259 of the *Constitution*.
2. Accordingly the petition seeks the following orders: -
 - a. A declaration that paragraph 1 of part 1 of the first schedule of the *Excise Duty Act, 2015* as amended by the Finance Act, 2021 is illegal and unlawful and contrary to the provisions of article 118(1)(d) of the *Constitution*, and therefore unconstitutional.
 - b. A declaration that paragraph 1 of part 1 of the first schedule of the *Excise Duty Act, 2015* as amended by the Finance Act, 2021 that introduces excise duty on imported pasta of tariff 1902 at the rate of 20% is illegal and unlawful and contrary to the provisions of article 201(a) of the *Constitution*, and therefore unconstitutional.
 - c. A declaration that paragraph 1 of part 1 of the first schedule of the *Excise Duty Act, 2015* as amended by the *Finance Act, 2021* that introduces excise duty on imported pasta of tariff 1902 at the rate of 20% is illegal and unlawful and contrary to the provisions of article 2(6) of the *Constitution* as read with article 46 of the COMESA treaty, and therefore unconstitutional.
 - d. A declaration that paragraph 1 of part 1 of the first schedule of the *Excise Duty Act, 2015* as amended by the *Finance Act, 2021* that introduces excise duty on imported pasta of tariff 1902 at the rate of 20% is illegal and unlawful and contrary to the provisions of article 116(2) of the *Constitution*, and therefore unconstitutional.
 - e. A declaration that paragraph 1 of part 1 of the first schedule of the first schedule of the *Excise Duty Act, 2015* as amended by the *Finance Act, 2021* that introduces excise duty on imported pasta of tariff 1902 at the rate of 20% is illegal and unlawful and contrary to the provisions of article 40(2) of the *Constitution*, and therefore unconstitutional.
 - f. A declaration that paragraph 1 of part 1 of the first schedule of the *Excise Duty Act, 2015* as amended by the *Finance Act, 2021* that introduces excise duty on imported pasta of tariff 1902 at the rate of 20% is illegal and unlawful and contrary to the provisions of article 27(4) of the *Constitution*, and therefore unconstitutional.
 - g. An order of prohibition be issued restraining the 2nd respondent from the implementation, further implementation, administration, application and/or enforcement of paragraph 1 of part 1 of the first schedule of the first schedule of the *Excise Duty Act, 2015* that introduces excise duty on imported pasta of tariff 1902 at the rate of 20%.
 - h. The costs of this petition be borne by the respondents.



The Petitioners' Case

3. The petition was supported by Raj Chuni Malde, the 1st petitioner's Managing Director's supporting affidavit sworn on July 23, 2021. The petition as supported by the averments in the petitioners' affidavit is that section 32(a)(iv) of the *Finance Act, 2021* amended paragraph 1 of part 1 of the first schedule of the *Excise Duty Act*, No 23 of 2015 to introduce excise duty at the rate of 20% on imported pasta of tariff 1902 which they claim is unconstitutional.
4. The deponent avers that the petitioners are importers of pasta and pasta related products including spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni and couscous which is referred to as imported pasta in their pleadings. They usually import, re-package and sell the imported pasta products in Kenya under various renowned brand names such as Dawaat, Butterfly, Santa Lucia and Santa Maria.
5. Furthermore, he avers that Kenya's imported pasta import market is worth approximately US\$ 22 million with total imports of 47,973,197 kilograms) for the year 2020. Collectively, the petitioners constitute approximately more than half of the market share of pasta sales in Kenya and as taxpayers paid a combined amount of above Ksh 950 million in respect of the year 2020.
6. The 1st petitioner deposes that following the enactment of the *Finance Act, 2021* on June 29, 2021, the petitioners became aware that the *Excise Duty Act*, No 23 of 2015 had been amended under paragraph 1 of part 1 of the first schedule to introduce excise duty at the rate of 20% on imported pasta.
7. According to the 1st petitioner the impugned amendment is unconstitutional for a number of reasons. To begin with, that it was passed without public participation; further that it was passed in violation of the laws and principles governing the 1st respondent's parliamentary role; additionally that there was a breach by the National Government's power to impose tax; likewise that there was a breach by the 1st respondent and the National Government of its treaty duties and obligations and lastly that the amendment is unfairly discriminatory on the petitioners and importers of pasta.
8. He deposes that on May 5, 2021, the Finance Bill, 2021 (National Assembly Bill No 18 of 2021) was published in the Kenya Gazette and the 1st reading of the Bill conducted on May 11, 2021. He deposes that at the time of tabling of the Bill for the 1st reading, clause 25 contained amendments to paragraph 1 of part 1 of the first schedule of the *Excise Duty Act* to the extent that it proposed the introduction of a charge to excise duty at the rate of 10% on jewelry of tariff 7113 and imported jewelry of tariff 7117. Further that it proposed introduction of excise duty at the rate of Ksh 5000 per kilogram on products containing nicotine or nicotine substitutes but excluding medicinal products. He avers that other than that there were no additional proposals in the Bill relating to the imposition of excise duty on any other goods or services.
9. He further deposes that following this, the 1st respondent on May 20, 2021 placed an advertisement in the print media requesting for comments on the Bill from members of the public and stakeholders. The relevant stakeholders were also invited by a letter dated May 26, 2021 for a stakeholder engagement retreat on the Bill. The engagements were later on published in the Report of the departmental committee on Finance and National Planning dated June 22, 2021.
10. He avers that at the time of submitting views and comments on the Bill the impugned amendment was not included as a proposal in the Finance Bill robbing the public and relevant stakeholders of the opportunity to submit their memoranda or representations on the impugned amendment.



11. It is further deposed that the 1st respondent introduced some amendments including the impugned amendment through the committee which was first read out at the 3rd reading on the floor of the National Assembly on June 24, 2021. Further, the 1st respondent's advertisements for comments and invitations for stakeholder engagement on the Finance Bill, 2021 did not meet the threshold of public participation as required under article 118(1)(b) of the *Constitution*.
12. Apart from that, it is deposed that Kenya and Egypt which is one of the countries that the petitioners import the imported past from are signatories and Member states of the Treaty establishing "The Common Market" for Eastern and Southern Africa (COMESA Treaty) which forms part of Kenya's law. It is averred that the impugned amendment violated article 46 of the COMESA Treaty which expressly restricts the imposition of customs duties and other charges of equivalent effect on or in connection with the importation of goods from member states of the common market.
13. The 1st petitioner deposes further that the impugned amendment only imposes excise duty on imported pasta while the local manufacturers making pasta are excluded from the requirement to pay the excise duty. He avers that the differential treatment is discriminatory contrary to article 27(4) of the *Constitution*.
14. He deposes that ultimately the tax burden imposed on the petitioners by virtue of the impugned amendment is unsustainable, inequitable, excessive and discriminative against the petitioners compared to producers of local pasta. Further, that the impugned amendment will render the petitioners' business futile and uneconomical. In view of this the petitioners bring this petition against the respondents for the alleged violation of their rights under articles 2(6), 27(4), 40(2), 47, 94, 95, 109, 116(2), 118, 124(1) and 201(a) of the *Constitution*.

The 1st Respondent's Case

15. The 1st respondent in opposition to the petition filed its grounds of opposition dated August 9, 2021 on the ground that:
 - i. This petition is similar in all aspects to Nairobi High Court constitutional petition No E278 of 2021; *Okiya Omtatah Okoiti v The National Assembly* where the petitioner challenges the imposition of the 20% excise duty on imported pasta of any kind under tariff number 1902 on grounds that excise duty was effected without any advance information, consultation or public participation. Accordingly for proper administration of justice, it would be prudent to stay proceedings in this petition to avoid conflicting decisions and saving judicial time.
 - ii. Under articles 94(1), 109 and 210(1) of the *Constitution*, Parliament, in every year, enacts the Finance Act to sanction measures and impose taxes to raise national revenue. As such, the Finance Act is a crucial piece of legislation that impacts on the entire budget of a particular year, if it is interfered with, then the government will have no option than to abandon part of the already approved expenditure, potentially affecting government operations and development programs.
 - iii. The Finance Bill (National Assembly Bill No 18 of 2021) proposed amendments to various Laws, including the *Excise Duty Act*, 2015 that were subject to public participation with a public hearing being held on 2nd and June 4, 2021 by the Committee on Finance and National Planning at Trademark Hotel, Village Market.
 - iv. Under article 209 of the *Constitution*, the legislature retains wide authority to define the scope of taxation through a statute. The manner in which the tax is defined, administered and



collected is a matter for Parliament to define and it is not for the court to interfere merely because the petitioner opposes to the imposition of the impugned tax.

- v. The government's main source of revenue is taxes. Therefore declaring the impugned amendment unconstitutional is a serious issue with grave ramifications in that it will impact on the entire budget for the year 2021/2022 and affect operations of the government.
 - vi. Taxes are a form of raising revenue sanctioned by the Constitution yet the petitioners have not demonstrated how their rights have been violated.
 - vii. The rate of taxation is a policy decision solely within the mandate of the executive and enacted by Parliament and so this court ought to decline to make policy decisions.
 - viii. Statutes enacted by the Parliament of Kenya pursuant to its mandate under article 94 of the Constitution, are presumed constitutional and fair and the burden falls on the person who alleges otherwise to rebut this presumption.
 - ix. In passing the Finance Act, 2021, the National Assembly adhered to its own internal procedures when considering the amendments and no reasons have been given for the court to interfere with the manner in which the house conducts its business.
 - x. It is evident that the petitioners' petition focuses on narrow and economic interests as opposed to the general public interest as the impugned amendment clearly seeks to impose taxes on commercial enterprises that make profits and stand to suffer no irreparable loss were the orders not granted.
 - xi. In enacting the Finance Act, 2021, the National Assembly was carrying out its legislative functions as opposed to administrative functions and therefore the enacting a law does not fall within the purview of article 47 of the Constitution and the Fair Administrative Actions Act.
 - xii. The petition has not disclosed how the Constitution has been violated by the State raising revenue through enactment of taxation measures neither has it adduced any or any cogent evidence to demonstrate to this court that the petitioners' rights have been infringed by the enactment of the Finance Act, 2021.
16. In addition the 1st respondent filed its replying affidavit dated September 22, 2021 sworn by Michael Sialai, CBS, the Clerk of the National Assembly who reiterated the contents of it's grounds of opposition.
 17. He deposed that the Finance Bill (National Assembly Bill No 18 of 2021) was published on May 5, 2021 and first read on May 11, 2021 before being committed to the departmental committee on Finance and National Planning to facilitate public participation in adherence to Standing Order 127(3) and article 118 of the Constitution. He informs that the Bill sought to amend the Income Tax Act (cap 470), the Value Added Tax Act (No 35 of 2013); the Excise Duty Act, 2015; the Tax Procedures Act, 2015; the Miscellaneous Fees and Levies Act, 2016; the Capital Markets Act (cap 485A); the Insurance Act (cap 497); the Kenya Revenue Authority Act (No 2 of 1995); the Retirement Benefits Act (No 2 of 1997); and the Central Depositories Act (No 2 of 2000).
 18. He deposed that the National Assembly on May 21, 2021 placed an advertisement in both the Standard and Daily Nation newspapers asking for memoranda from the public and relevant stakeholders. Soon after, the committee between 2nd and June 3, 2021 held public hearings on the Bill at Trademark Hotel, Village Market.



19. He further deposes that the committee heard views from the public and 31 stakeholders who made oral presentations before the committee. In addition the Committee held a meeting with the National Treasury and the Kenya Revenue Authority in line with the requirements of article 114 of the Constitution. In the end the committee compiled its report on the views and tabled it before the National Assembly on June 22, 2021.
20. He deposes that the committee in its report at paragraph 420 on clause 25, recommended insertion of new items including excise duty on imported pasta of tariff 1902 at an Excise Duty rate of 20%. In line with standing order 127(4), the chairperson of the committee presented the report to the House to inform its debate at its sitting held on June 24, 2021. The House after considering the amendments passed them.
21. He avers that the introduction of the impugned amendment through the committee's recommendation was not new but within the parameters of what was submitted to the public for input. This is since clause 25 which introduced amendments to the second schedule of Excise Duty Act was in the Finance Bill, 2021 published on May 5, 2021. Moreover he deposes that the Bill sought to amend the law relating to various taxes and duties and so the impugned amendment was in line with the object and purpose of the Bill as espoused in the memorandum and objects and reasons of the Finance Bill, 2021.
22. Furthermore he avers that the committee being an extension of the house, informed by views collected and deliberated on during public participation, reserves the right to recommend amendments to a Bill under its consideration. Accordingly, he contends that the committee cannot abandon its duty to recommend such amendments where it legitimately considers them important in order to have a sound legislation. As such he deposed that there is nothing unconstitutional where the National Assembly amends a legislative proposal from the initial form since as a Bill goes through debate and public participation, the House may adopt proposed amendments and drop some clauses as it deems fit.
23. He deposed that article 209 of the Constitution permits the national government to impose taxes as a means of raising national revenue and same ought to be established in a statute as required under article 210(1) of the Constitution which informs the yearly enactment of the Finance Act.
24. He deposed with reference to violation of article 46 of the COMESA Treaty that the petitioners had misconstrued the provision. This is because the provision specifically applies to customs duty whereas the impugned provision relates to excise duty. From the foregoing the 1st respondent asserts that the petitioners have not adduced any cogent evidence to demonstrate that their rights were infringed by the enactment of the Finance Act, 2021.

The 2nd Respondent's Case

25. The 2nd respondent in response to the petition filed its grounds of opposition dated August 5, 2021 on the grounds that:
 - i. The application is res-judicata having been canvassed before this honourable court in petition E278 of 2021 *Okiya Omtatah Okiti v National Assembly and Kenya Revenue Authority*.
 - ii. The application is subjudice having been canvassed before this honourable court in petition E278 of 2021 *Okiya Omtatah Okiti v National Assembly and Kenya Revenue Authority* thus the orders therein apply in rem.



- iii. Standing Orders 127, and 132 and articles 94 and 95 of the Constitution allow for introduction of new clauses to a Bill at the Committee stage and vest the power of the people in the National Assembly respectively.
 - iv. Not every breach of the Constitution deems a law to be unconstitutional.
 - v. The lack of public participation, if found to be indeed true, can only invalidate the law but not make it unconstitutional as there are steps which can be taken to regularize the law if the law is found to be invalid.
 - vi. Based on the doctrine of presumption of constitutionality, the court should presume the law to be constitutional until the merit of the case is heard and determined.
 - vii. The excise duty is a consumption tax which is levied on the final consumer of goods and where this court finds in favour of the respondents, it will be impossible to recover the taxes.
 - viii. Parliament is the organ mandated by the Constitution to make laws and the views of the public is vested in it as the people's representative by dint of article 95 as read with article 1(2) of the Constitution.
 - ix. The law was put in place to encourage local consumption and local produce.
 - x. There is equity in taxation and legislation not only widens the tax bracket but encourages consumption of local produce.
26. In the same way, the 2nd respondent vide a replying affidavit sworn by its officer, Maurice Oray on August 18, 2021 states that under section 5(1) of the Kenya Revenue Authority Act, the 2nd respondent is an agency of the government for the collection and receipt of all revenue. As such it is mandated to enforce the provisions of the Income Tax Act cap 470, Value Added Tax Act, 2013, East African Community Customs Management Act and the Excise Duty Act, 2015.
27. He deposed that the impugned amendment on imported pasta was first introduced at a public participation discussion forum. In this way the impugned amendment was based on the recommendation from the public discussion forum which was thereafter picked and presented on the floor of the House for debate. The same cannot therefore be said not to have received sufficient public discussion.
28. He deposed that on October 20, 2020, the National Treasury embarked on the budget process and invited members of the public *vide* an advertisement in all local dailies. It required them to submit taxation proposals which the Cabinet Secretary for the National Treasury and Planning could consider while preparing the National Budget for the Financial Year 2021/2022. He makes known that these taxation proposals are typically processed in the Finance Bill every financial year.
29. Soon thereafter, the National Assembly on May 5, 2021, published the Finance Bill, 2021 which had been prepared in line with the recommendation of the public participation forums undertaken by the National Treasury. The Finance Bill was thereafter referred to the departmental committee on Finance and National Planning which proceeded to consider the Bill and undertake public participation as outlined in the 1st respondent's replying affidavit and reiterated by the 2nd respondent in this affidavit.
30. He averred that the aim of taxation is to encourage local consumption and local produce, which is the purpose of the excise duty. He maintained that the excise duty was outlined as one of the agendas of the public participation forum. Additionally he deposes that standing order 132 allows for introduction of



new clauses to a Finance Bill at the committee stage and it has not been demonstrated that the National Assembly acted outside its mandate.

31. He concluded that the impugned amendment was in compliance with article 210 of the Constitution. He averred that grant of the orders sought would occasion prejudice to the public. Furthermore it will put pressure on local industries which the law sought to protect.

The Petitioners' Response

32. The petitioners through Ratital Gudhka, the 4th petitioner's Managing Director filed a further affidavit dated November 3, 2021 in response to the respondents' reply. The petitioners opposed the respondents' averments while maintaining their assertion as elucidated in their supporting affidavit.

Parties Submissions

The petitioners' submissions

33. The petitioners through the firm of Coulson Harney LLP filed written submissions and a list of authorities dated October 28, 2021. Counsel submitted the issues for determination to be:
- i. Public participation – whether there was public participation before the impugned amendment.
 - ii. Parliamentary role – whether the first respondent breached its parliamentary role;
 - iii. Constitutional violation – whether the impugned amendment, and the respondent's conduct in effecting the same violated the petitioner's constitutional rights under articles 116(2) and 40 of the Constitution;
 - iv. International instruments – whether enactment of the impugned amendment is a breach of various international instruments ratified by Kenya;
 - v. Discrimination – whether the impugned amendment is discriminatory of the petitioners;
 - vi. Fair administrative action – whether the enactment of the impugned amendment violates the principles of fair administrative action;
 - vii. Reliefs sought – whether the petitioners are entitled to the prayers sought.
34. On the first issue, counsel submitted that article 118 (1)(b) of the Constitution and Standing Order 127(3) of the National Assembly Standing Orders made under the provisions of article 124(1) of the Constitution requires public participation in the legislative process as emphasized in the case of Robert N Gakuru & others v Governor Kiambu County & 3 others [2014] eKLR. Counsel argued that the public participation that was conducted was in respect of the Finance Bill before the provision relating to the impugned amendment was included as a proposal in the Finance Bill.
35. It is argued that there were no consultations held regarding the imposed excise duty on imported pasta and neither were the stakeholders and public aware of the intended amendment during the consultations. For that reason the public and stakeholders were not given an opportunity to consider and respond to the impugned amendment. Counsel while relying on the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties) [2020] eKLR submits that a decision removing all sets of options from an economic sector and requiring them to channel their economic activities in a particular direction, must be arrived at after due consultations and public participation.



36. Furthermore, counsel submitted that the impugned amendment was arbitrary to the extent that it was introduced on June 24, 2021 when it was first discussed in National Assembly and signed into law on June 29, 2021. It is noted that this process took a period of one week between the time the proposal was made and when it was enacted contrary to article 116 (2) of the *Constitution*. It is argued that the 1st respondent did not provide a statutory justification for the accelerated commencement of the Act. In a nutshell he submits that the conducted public participation for the impugned amendment was not within the confines of the legal parameters and threshold set hence unconstitutional.
37. On the second issue, counsel submitted that owing to article 94(2), article 95 (1), article 109(1) of the *Constitution* the 1st respondent is mandated to represent the interests of the people of Kenya in the legislative process through public participation and formulation of the laws. According to counsel the 1st respondent exercised its legislative power unconstitutionally through the Finance Bill. This is because the National Assembly Standing Order 133(5) provides that amendment to a Bill shall not be permitted if the amendment deals with a different subject or proposes to unduly expand the subject of the Bill. He argued that the purpose of this provision is to ensure that the National Assembly does not blindsides the public by introducing new clauses. As such he contends that the 1st respondent does not have a blanket authority to move amendments during the committee stage.
38. Counsel on the third issue submitted that the respondents, in enacting and implementing the impugned amendment, illegally and unfairly deprived the petitioners of 20% of the value of their imports. This he argues amounts to deprivation of property contrary to article 40 of the *Constitution* hence going against their legitimate expectation. In support reliance was placed on the case of *Okuya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR where it was held that the imposition of tax inherently infringes on a taxpayer's right to property though it is only permitted in so far as the same is reasonable and not arbitrary. Additional reliance was placed on the cases of *Universal Corporation Limited v Kenya Revenue Authority* [2021] eKLR and *Kenya Revenue Authority & 2 others v Darasa Investments Limited MLD* [2018] eKLR.
39. On the fourth issue, counsel submitted that article 46 of the *Common Market of East and Southern Africa ("COMESA") Treaty* precludes member states from imposing custom duty on any goods manufactured/produced in the member states. In essence, counsel stressed that all member states are bound by article 46. Therefore by enacting the impugned amendment, the respondents contravened article 46 of the COMESA treaty. In support he cited *Walter Osapiri Barasa v Cabinet Secretary Ministry of Interior and National Co-Ordination & 6 others* [2014] eKLR where it was held that the obligation of a state party to comply with a treaty cannot be abrogated.
40. Moving on to the fifth issue counsel submitted that the respondents, by enacting the impugned amendment, violated the petitioners' right to freedom from discrimination under article 27 of the *Constitution*. This is since the impugned amendment solely increased the tax burden of the petitioners and other importers of imported pasta and not locally manufactured pasta. To support this point the petitioners cited *Kenya Bankers Association v Kenya Revenue Authority* [2018] eKLR where the court held that the taxpayers must be treated fairly so that discrimination between one group of taxpayers and another does not arise. Additional reliance was placed on the cases of *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR and *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR.
41. On the sixth issue counsel submitted that the respondents violated their constitutional right to fair administrative action under article 47. This is due to the fact that the impugned amendment is unlawful and unreasonable in substance and effect. Likewise, the 1st respondent did not comply with



section 5 of the *Fair Administrative Action Act*. According to counsel the impugned tax is unreasonable and oppressive causing adverse losses to the petitioners businesses.

42. To buttress this point reliance was placed on the case of *Export Trading Company v Kenya Revenue Authority* [2018] eKLR where the court held that the process and procedures leading to the collection of tax must be reasonable and justifiable in an open and democratic society. Counsel relied on *R v Commissioner General, Kenya Revenue Authority ex p BOC Kenya Limited* [2014] eKLR; *Republic v National Police Service Commission ex parte Daniel Chacha Chacha* [2016] eKLR and *Moi University v Council of Legal Education & others* [2016] eKLR. It is asserted that in view of this the impugned amendment falls short of the requirement for reasonability and lawfulness and therefore unconstitutional.
43. Lastly counsel submitted that the reliefs sought are appropriate in the circumstances and ought to be granted. He further submitted that a court may grant appropriate relief when confronted with rights violations which means that the remedy must be effective as held in the case of *SDV Transami Kenya Limited and 19 others v Attorney General & 3 others* [2016] eKLR.

The 1st Respondent's Submissions

44. The 1st respondent through its counsel Kuyioni N Josphat filed written submissions and a list of authorities dated November 25, 2021. Counsel identified the issues for determination as:
- i. Whether there was public participation prior to the enactment of the impugned amendment;
 - ii. Whether the 1st respondent breached its Parliamentary role;
 - iii. Whether the impugned amendments and the respondent's conduct in effecting the same violated the petitioners' rights under article 116(2) and 40 of the *Constitution*;
 - iv. Whether the enactment of the impugned amendment is a breach of various international instruments ratified by Kenya;
 - v. Whether the impugned amendments discriminates against the petitioners.
 - vi. Whether the enactment of the impugned amendment violates the principle of fair administrative action.
 - vii. Whether the petitioners are entitled to the reliefs sought.
45. On the first issue counsel submitted that the National Assembly conducted extensive public participation as comprehensively detailed in its replying affidavit. He submitted that it is important to note that a committee, being an extension of the House, is informed by views collected and deliberated on during public participation and reserves the right to recommend amendments to a Bill under its consideration. Further, it is submitted that the *Constitution* recognizes that a House of Parliament can amend bills and hence article 124 of the *Constitution* allows it to make Standing Orders to provide for its procedures for conducting House business. To do so Standing Order 133 of the National Assembly's Standing Orders, provides that during the legislative process, amendments to the Bill can be moved during the committee stage.
46. To support this point reliance was placed on the case of *Kenya Bankers Association v Attorney General & another; Central Bank of Kenya (interested party)* [2019] eKLR where it was held that article 94 of the *Constitution* vests legislative authority in Parliament and therefore the National Assembly House is allowed to amend a legislative proposal as a Bill goes through the various stages of enactment of legislation. Accordingly counsel submitted that the National Assembly did conduct



public participation on the impugned provision and took the views of the public into account as well as the views of all members of the National Assembly as representatives of various constituencies.

47. On the second issue, counsel contended that Parliament has a constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed by the *Constitution*. One of these obligations therefore is imposition of taxes as espoused under article 210 of the *Constitution*. To buttress this point reliance was placed on the case of *Law Society of Kenya v the Hon Attorney General & others*; petition No 334 of 2018 where the court held that it is the policy makers and the parliamentarians who are better placed to do the balancing act of determining whether taxes should be imposed on certain goods and services in order to fund the basic rights like food, medicine, shelter and education. As such the court would be overstepping its boundaries were it to direct Parliament on what goods or services to tax or not to tax.
48. The following cases were cited in support: *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiba Workers Union) v Kenya Revenue Authority & 3 others* [2014] eKLR; *Mark Obuya, Tom Gitogo & Thomas Maara Gichubi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR; *Bidco Oil Refineries Limited v Attorney General & 3 others* [2013] eKLR.
49. Counsel submitted that the power to levy taxes and to determine the rate thereof is vested by article 95 of the *Constitution* on Parliament. As such he submitted that where the *Constitution* has 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 clearly 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 as stated in the case of *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR.
50. Counsel on the third issue submitted that the right to property under article 40 is not absolute and is subject to reasonable restrictions in public interest. Besides counsel noted that the imposition of tax by a statute cannot, of itself, amount to arbitrary deprivation of property contrary to article 40 of the *Constitution*. To support this point counsel referred to the case of *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA Workers Union) v Kenya Revenue Authority & 3 others* [2014] eKLR where it was held that the imposition of taxes is a constitutional imperative and the power to impose taxes is reposed in the legislature and the imposition of tax by statute cannot, of itself, amount to arbitrary deprivation of property contrary to article 40 of the *Constitution*.
51. Additional reliance was placed on the case of *Bidco Oil Refineries Limited v Attorney General & 3 others* [2013] eKLR; *Huitson v HMRC* [2011] EWCA Civ 893. He contended that the impugned legislation does not infringe on the petitioners rights to property, but it is aimed at serving a legitimate public interest.
52. While submitting on article 116 of the *Constitution* counsel stated that it provides for coming into force of laws. The article provides that an Act of Parliament comes into force on the fourteenth day after its publication in the gazette, unless the Act stipulates a different date on or time at which it will come into force. As such, he argued that acceleration of commencement date is not absolutely barred in the *Constitution* as alleged by the petitioners.
53. On the fourth issue, counsel stated that the petitioners have misconstrued article 46 of the COMESA treaty which specifically applies to customs duty whereas the impugned provision relates to excise duty. Essentially, he explained that while excise duty is imposed on the local manufacturer or the importation



- of certain commodities and services, customs duty is defined in the *Excise Duty Act* to mean import duty, countervailing duty, or surtax charged under the *East African Community Customs Management Act, 2004*. Nevertheless it is stated that a government has the power to formulate policies and legislation to deal with matters of public interest unique to them where it deems appropriate despite International Treaties and instruments.
54. To buttress this point he relied on the case of *Beatrice Wanjiku & another v Attorney General & anor* [2012] eKLR where the court noted it was not convinced that the framers of the *Constitution* would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives. Further dependence was placed on *Scotch Whisky Association and others v the Lord Advocate and another* (2017) UKSC 76.
 55. Turning to the fifth point, counsel noted that for a court to hold that discrimination prevailed it must be shown that persons or entities undertaking similar activities are taxed at different rates. He submitted that the petitioners have not shown that persons or entities undertaking similar activities are taxed at different rates. He averred that the Court of Appeal in the case of *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR considering this noted that direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances.
 56. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute and are able to comply with, without reasonable justification. Counsel relied on *Nelson Andayi Havi v Law Society of Kenya (supra)* in support. He therefore argued that from the evidence on record, other than general assertions, no discrimination had been disclosed by the petitioners thus failing to discharge its burden of proof.
 57. On the sixth issue, he submitted that the *Fair Administrative Action Act, 2015* defines an "administrative action", as decisions by "authorities" or "quasi-judicial tribunals" which actions, decisions or omissions adversely affect the rights or interests of any person to whom the actions, decisions or omissions relate. He argued that in enacting the impugned section of the *Finance Act, 2021*, the National Assembly was carrying out its legislative function as opposed to administrative functions and so does not fall within the purview of article 47 of the *Constitution* and the Fair Administrative Actions Act. To buttress this point he referred to the case of *Kenya Bankers Association (supra)* where it was noted that the National Assembly when enacting legislation is not carrying out an administrative action in the strict sense, but exercising its constitutional duty.
 58. On the final point counsel indicated that under articles 94(1), 109 and 210(1) of the *Constitution*, Parliament, in every year, enacts the Finance Act to sanction measures and impose taxes to raise national revenue. Therefore bearing in mind that public participation was conducted, the mere fact that the impugned section imposes burdensome consequences does not suffice to render the legislation unconstitutional. He concluded by noting that the petition does not disclose how the *Constitution* was violated and so the petitioners are not entitled to the reliefs sought.

The 2nd Respondent's Submissions

59. Counsel for the 2nd respondent Mr Gaya Ochieng filed written submissions dated March 16, 2022. He identified the issues for determination as:
 - i. Whether there was violation of the principles of public participation in enacting the law;
 - ii. Whether the National Assembly breached its constitutional mandate under article 94, 95, 109 and 124 of the *Constitution* or article 2(6) and the International Treaties;



- iii. Whether the imposition of taxes under the impugned provisions is a breach of article 40(2) and 116 of the Constitution
 - iv. Whether the imposition of taxes under the impugned provisions is a breach of article 27 of the Constitution; and
 - v. Whether the imposition of taxes under the impugned provisions is a breach of article 47 of the Constitution.
60. Counsel on the first issue submitted that being that public participation had been conducted, the contentious issue was whether a new clause can be introduced at the committee stage of the National Assembly when it did not feature in the Bill submitted for public participation. He indicated that the impugned amendment was discussed at the public participation forum before being introduced at the committee stage. Moreover, he submitted that the impugned amendment had also been contemplated in the memorandum of objects of the Finance Bill, 2021.
61. He as well noted that the issue of public participation in relation to the impugned section 32 of the Finance Act, 2021 was discussed by this court in Nairobi Pet No E286 of 2021: Basco Products (K) Limited & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested party) where it was held that the public participation threshold had been met.
62. Counsel submitted that the requirement for public participation as envisaged under the Constitution should not be given a rigged or artificial interpretation to avoid distortion of the spirit ideals and aspirations of the people as held in:
- i. S v Mblungu and others (CCT25/94) [1995] ZACC 4.
 - ii. Caron v R 20 QAC 45 [1988] RJQ 2333, Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others Machakos, High Court constitutional petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR, among many others.
63. Counsel further submitted that owing to the memorandum of objects, the invitation for public comments to the committee and the minutes of the committee during the public participation forum, the National Assembly rightly considered the amendments before placing them before the House and approving them. The impugned provision is proper in law and did not breach article 118 or 201 of the Constitution.
64. Turning to the second issue, counsel while referring to the deliberations of the House on the impugned amendments indicated that from the deliberations on the floor of the House it was evident that the members of parliament envisioned protection of the local industries by taxing imported pasta. As such the issue of imposition of the excise duty is purely a policy issue and the court should not be invited into the arena as the same falls outside the mandate of this court and invokes the political question doctrine.
65. In support counsel cited the Court of Appeal case of Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR where it was held that the province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion. Additional support was placed on the cases of Kenya Association of Stock Brokers and Investment Banks v Attorney General & another [2015] eKLR; and Ndora Stephen v Minister for Education & 2 others, Nairobi High Court Petition No 464 of 2012.
66. On the third issue, counsel argued that articles 10, 201, 209 and 210 of the Constitution provide for imposition of tax as a mandatory obligation and it is itself a display of sovereignty. Accordingly, the Constitution is the supreme law of this country and is the will of the people, or the mandate they give



to dictate and direct the manner in which they ought to be governed as held in Timothy Njoya & 17 others v Attorney General & 4 others [2013]eKLR, see also Basco Products (K) Limited & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (interested party) (Petition E 286 of 2021) and Bidco Oil Refineries Limited v Attorney General & 3 others [2013] eKLR where similar findings were adopted.

67. Counsel on the fourth issue, maintained that when the constitutionality of an enactment is challenged on grounds of violation of an article, it is prudent to ascertain its purpose and intent as emphasized in the case of Hamdard Dawakhana v Union of India (1959). In the 2nd respondent's replying affidavit it is stated that the aim of the taxation was to encourage local consumption and local produce while at the same time ensuring that the government is still able to operate by getting revenue.
68. Additionally, counsel submitted that it was important to note that article 27 of the Constitution envisions equal protection and equal benefit of the law by all persons irrespective of their political, economic, cultural and social spheres. Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (interested parties) (Constitutional Petition E005 & E001 (Consolidated) of 2021) [2021] KEHC 58 (KLR).

The court was referred to the cases of Republic v Minister for Finance & 2 others [2006] eKLR and

69. Finally counsel submitted that since it had been demonstrated that the impugned provision was properly enacted and sufficient public participation conducted it was incumbent on the petitioners to prove their claim otherwise as observed in the case of Leonard Otieno v Airtel Kenya Limited [2018] eKLR. Also see
- i. Peter Ngari Kagume & 7 others v Attorney General (2009) eKLR;
 - ii. Timothy Njoya & 17 others v Attorney General & 4 others [2013] eKLR. He therefore called for the dismissal of the petition with costs.

Analysis and Determination

70. Before I commence this determination, I take note that the 1st respondent raised the issue of *res judicata* and *sub judice* in view of constitutional petition No E278 of 2021; Okiya Omtatah Okoiti The National Assembly and another. The stated case as the parties are aware had not yet been determined and was being heard alongside this petition. I however take note that the main issue for determination forms the central subject matter in petition No E278 of 2021, which was substantially handled by Makau J (retired). The same is now pending judgment before this court.
71. Having perused the pleadings and submissions of the parties herein, the key issues that arise for determination are:
- i. Whether the principle of public participation was upheld in enactment of the impugned amendment in relation to imported pasta of tariff 1902 under the Finance Act, 2021;
 - ii. Whether enactment of the impugned amendment is a breach of article 46 of the COMESA Treaty;
 - iii. Whether the imposition of the 20% excise duty on imported pasta is unconstitutional; and
 - iv. Whether the petitioner is entitled to the reliefs sought.
 - v. Whether the principle of public participation was upheld in enactment of the impugned amendment in relation to imported pasta of tariff 1902 under the Finance Act, 2021



72. The petitioners state that prior to the enactment of the Finance Act, 2021 the respondents introduced new amendments to the Finance Bill one of which was an introduction of 20% excise duty on imported pasta of tariff 1902 in the Excise Duty Act under the first schedule paragraph 1, part 1(iv). It is the petitioners contention that given the far reaching consequences of the impugned amendment on the relevant stakeholders and the general public, the respondents had a constitutional obligation to procure the public's views on the impugned amendment as required by the public participation principle before passing the Finance Act, 2021.
73. The respondents asserted that the public participation that had been conducted involved the amendment of the Excise Duty Act including a discussion of clause 25 which contained the impugned amendment. Moreover that the impugned amendment was introduced as a result of the public discussions held during the public participation forums.
74. Parliament is obligated under article 118 of the Constitution to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. This principle is unmistakably a key element in the legislative function of the government at all levels.
75. It is well noted that the parties cited numerous renowned authorities on the essence of public participation which this court is in agreement with and guided by. Likewise the Supreme Court in the case of British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR speaking to the principle of public participation and giving guidance on its determination held as follows:

“(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”.

70. The court went on to issue the following guidelines on adherence of this principle as follows:

“(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.

76. It is clear that public participation as a requirement was fulfilled by the respondents in this matter. The 1st respondent’s committee invited the public and the relevant stakeholders to submit memoranda and views for the purposes of public participation through an advertisement in both the Daily Nation and the Standard Newspapers on May 21, 2021 seen at paragraph 11 of the 1st respondent’s replying affidavit. Further it is noted that evidence of the public participation exercise was contained in the Report of the National Assembly Departmental Committee on Finance and Planning dated June 22, 2021 as noted at paragraph 15 of the 1st respondent’s replying affidavit. For all intents and purposes it is clear that public participation was conducted for the Finance Bill, 2021.

77. The question that begs an answer however is whether the additional amendments that were introduced after the submissions of the stakeholders and the public violated the principle of public participation.



This is because the public and relevant stakeholders did not get an opportunity to submit their views and comments on the additional amendments.

78. One of the roles of Parliament in exercise of its legislative authority under article 94 of the [Constitution](#) is making of laws. This is actualized through the Bills passed by the House and assented to by the President as envisaged under article 109(1) of the [Constitution](#). With reference to this matter, a Bill of this nature is introduced in Parliament in the manner encapsulated under article 114 of the [Constitution](#).
79. This article deals with money bills such as taxes. In this regard, the article informs that if, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter listed in the definition of ‘a money Bill’, the Assembly may proceed only in accordance with the recommendation of the relevant committee of the assembly after taking into account the views of the Cabinet Secretary responsible for finance.
80. This in essence is the beginning of the legislative process. The Bill at this juncture is submitted to the legislative process which comprises of the first reading; committal of the Bill to the departmental committee; the second reading; committee stage; the report stage; the third reading of a Bill and finally the Bill is passed and presented to the President for assent.
81. In carrying out this legislative role, Parliament is guided by its own standing orders as required under article 124(1) of the [Constitution](#). Part xix of the National Assembly Standing Orders which deals with Public Bills details the stages of the legislative process. This part which is very important in this petition informs under Standing Order 127 that after the first reading of the Bill under Standing Order 126 that:
 - (1) A Bill having been read a first time shall stand committed to the relevant departmental committee without question put.
 - (2) Notwithstanding paragraph (1), the assembly may resolve to commit a bill to a select committee established for that purpose.
 - (3) The departmental committee to which a bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the House.
 - (4) Subject to Standing Order 129 (second reading of a bill to amend the [Constitution](#)) the Chairperson of the Departmental Committee to which a Bill is committed or a member designated for that purpose by the committee shall present the committee’s report to the house within twenty calendar days of such committal and upon such presentation, or if the committee’s report is not presented when it becomes due, the bill shall be ordered to be read a second time on such day as the house business committee shall, in consultation with the member or the committee in charge of the Bill, appoint.
 - (5) If for any reason, at the commencement of the second reading the report of the committee has not been presented, the committee concerned shall report progress to the house and the failure to present the report shall be noted by the liaison committee for necessary action.
 - (6) Despite paragraph (1) –
 - (a) the Speaker may direct that a particular Bill be committed to such committee as the Speaker may determine.
 - (b) a Consolidated Fund Bill, an Appropriation Bill, a Supplementary Appropriation Bill or a Finance Bill shall be committed to the Budget and Appropriations Committee.



82. Standing Order 128 which provides for the second reading of the Bill provides that no amendment is moved at this stage but rather the Bill is committed to the Committee of the whole House where the proposals and amendments are discussed at length under Standing Order 130. In considering a Bill in the Committee stage, Standing Order 132 divulges that the various parts of the Bill shall be considered in the following sequence –
- (a) clauses as printed, excluding the clauses providing for the citation of the Bill, the commencement, if any, and the interpretation;
 - (b) new clauses;
 - (c) schedules;
 - (d) new schedules;
 - (e) interpretation;
 - (f) preamble, if any;
 - (g) long title;
 - (h) the clauses providing for the citation of the Bill and the commencement.
83. Furthermore Standing Order 132 provides the procedure of the committee of the whole house on a bill to be as follows:
- (1) The clerk shall call severally each part of the bill in the sequence specified in Standing Order 132 (sequence to be observed on a Bill in committee) and if no amendment is proposed or when all proposed amendments have been disposed of, the Chairperson shall propose the question “that, (as amended) stand part of the Bill” and, when members who wish to speak have spoken, the chairperson shall put that question to the Committee for decision.
 - (2) No amendment shall be moved to any part of a Bill by any Member, other than the Member in charge of the Bill, unless written notification of the amendment shall have been given to the Clerk twenty-four hours before the commencement of the sitting at which that part of the Bill is considered in Committee.
 - (3) Despite paragraph (2), where an amendment has been moved to any part of a Bill in accordance with this paragraph, any Member may move an amendment to that amendment on delivering to the Chairperson the terms of his or her amendment in writing.
 - (4) A member moving an amendment or a further amendment to any part of the Bill under paragraphs (2) and (3) shall explain the meaning, purpose and effect of the proposed amendment or further amendment.
 - (5) No amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the bill
 - (6) No amendment shall be moved which is inconsistent with any part of the Bill already agreed to or any decision already made by the Committee, and the Chairperson may at any time during the debate of a proposed amendment, withdraw it from the consideration of the Committee if in the opinion of the Chairperson, the debate has shown that the amendment contravenes this paragraph.



- (7) In the case of a Consolidated Fund Bill, an Equalization Bill or an Appropriation Bill, no amendment shall be moved whose effect would be to impose a charge or increase expenditure above that already resolved by the House or in the Committee of Supply unless the House first resolves to allow such a motion.
 - (8) The Chairperson may refuse to propose the question upon any amendment which in the opinion of the Chairperson is frivolous or would make the clause or schedule which it proposes to amend unintelligible or ungrammatical.
 - (9) Paragraph (4) of Standing Order 53 (Manner of debating Motions) shall apply, with necessary modifications, to the proceedings for amendment of a Bill in Committee.
 - (10) The consideration of any part or a clause of a Bill may be postponed until such later stage of the proceedings in Committee on such Bill as the Committee may determine.
 - (11) On any motion being made for the addition of a new clause, the clause shall be deemed to have been read a first time and the question shall then be proposed “that, the new clause be read a second time” and if this is agreed, amendments may then be proposed to the new clause and the final question to be proposed shall be “that, the clause (as amended) be added to the Bill”.
 - (12) New schedules shall be disposed of in the same way as new clauses.
 - (13) The question to be put on the preamble (if any) shall be “that, the preamble (as amended) be the preamble of the Bill.”
 - (14) The question to be put on the long title of the bill shall be “that, the long title (as amended) be the title of the Bill”.
 - (15) No question shall be put on the enacting formula.
 - (16) At the conclusion of the proceedings in committee on a bill, or, if more than one, on all such bills the member in charge shall move “that, the bill(s) (as amended) be reported to the house”, and the question thereon shall be decided without amendment or debate.
84. I have deliberately set out the law and the procedure of the legislative process so as to be able to marry the procedure and the facts presented in this case. It is not disputed that the Finance Bill, 2021 was submitted to public participation by the Departmental Committee on Finance and National Planning after the First Reading of the Bill. The advertisement for invitation for public participation informed the public that the Finance Bill, 2021 was intent on amending various tax laws including the [Excise Duty Act, 2015](#). Moreover as per the Committee’s Minute Meetings it is disclosed that various parties were consulted including the Cabinet Secretary of the National Treasury.
85. Upon conclusion of these deliberations, the committee prepared its report containing the public participation views and its own recommendations on the Finance Bill, 2021. This would go on to inform the house’s committee stage deliberations on the Bill. The petitioner’s main contention is that the new recommendations by the committee ought to have been subjected to public participation.
86. Now, according to the Supreme Court’s guideline 8 in the *British American Tobacco Kenya, PLC case (supra)* an allegation of lack of public participation does not automatically vitiate a 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. The facts of this case make known that the impugned amendment was inserted as part of the committee’s recommendation in its



report that was presented to the House. The question therefore is whether this recommendation was in error?

87. To answer this I am guided by standing order provisions that I have set out above. In the legislative process the making of a Bill is an ongoing process from when the Bill is introduced at the first reading until the third reading. One of the components of this process is the House's committee's role in facilitating public participation and preparing a comprehensive report that informs the House's deliberations and final decision on the Bill.
88. Standing Order 132(b) informs that the sequence of the Bill presented in the second reading may include new clauses. Standing Order 133(5) and (b) however distinguishes these new amendments from those that would change the subject matter of the Bill by introducing a different topic expanding its subject or that is inconsistent with any part of the Bill already agreed on. Unquestionably, new amendments can be introduced to a Bill under consideration after the first reading so long as the amendment is in line with the original intent of the purposes and objects of the Bill.
89. The impugned provision amended the *Excise Duty Act* to include an excise duty rate of 20% on imported pasta. In my considered view this was not a new subject matter contrary to the envisioned amendments by the Finance Act. The advertisement made known that the amendments to the Finance Bill dealt with tax laws including the *Excise Duty Act*. This essentially did not deal with a different subject that unduly expanded the subject and neither was the amendment inconsistent with any part of the Bill already agreed to. I say so because the core intent of the Finance Bill was to amend taxation laws part of which the impugned amendment is.
90. In the circumstances of this case I find it imperative for this court to remain alive to the caution given by the 3 judge bench in the case of *Institute of Social Accountability & another v National assembly & 4 others* [2015] eKLR, where while dealing with the question of public participation the bench opined as follows:-

“76. How public participation is given effect will vary from case to case but it must be clear, upon examination of the legislative process, that a reasonable level of participation has been afforded to the public...”

91. The court in its conclusion held that:

“79. We are aware that during the legislative process, amendments to the Bill may be moved during the committee stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process.”

92. I do not find any distinguishing circumstances in the case before this court which would make me not apply the above position. It is my considered view that the amendment moved by the committee in its report was in line with the set parameters of what had been presented to the public and the National Treasury for consideration during the public participation forums held by the house's committee. Moreover, the amendment adhered to the legislative process as outlined in the House's Standing Orders and did not fall in the restricted amendments cited under Standing Order 132(5) and (6). In the circumstances I am persuaded to find that the impugned amendment did not violate the principle of public participation.

Issue No. ii. Whether enactment of the impugned amendment is a breach of article 46 of the COMESA Treaty



93. The petitioners argued that the imposition of the 20% excise duty on imported pasta of tariff 1902 contravened the provisions of article 2(6) of the *Constitution* as read with article 46 of the COMESA Treaty. This is because the Treaty precludes member states from imposing custom duty on any goods manufactured/produced in the member states. Counsel for the 1st respondent opposed this view contending that the petitioners had misconstrued this since it specifically applies to customs duty whereas the impugned provision relates to excise duty. He stressed that excise duty is imposed on the local manufacture or the importation of certain commodities and services.
94. This treaty finds its application in Kenya by virtue of article 2(6) of the *Constitution*. Article 46 of the COMESA treaty provides as follows:

Customs Duties

1. The Member States shall reduce and ultimately eliminate by the year 2000, in accordance with the programme adopted by the PTA Authority, customs duties and other charges of equivalent effect imposed on or in connection with the importation of goods which are eligible for Common Market tariff treatment.
 2. Notwithstanding the provisions of paragraph 1 of this article, where, by virtue of obligations under an existing contract entered into by a member state and such a member state is unable to comply with the provisions of this article, the member state shall, upon the entry into force of this Treaty, notify the Council of this fact. The Member State shall, however, not renew or extend such contract at its expiry.
 3. Within the period specified in paragraph 1 of this Article, the member states shall not impose any new duties and taxes or increase existing ones in respect of products traded within the common market and shall transmit to the secretariat all information on import duties for study by the relevant institutions of the common market.
 4. The authority may at any time, on the recommendation of the council, decide that any import duties shall be reduced more rapidly or eliminated earlier than is scheduled in paragraph 1 of this article.
95. This article deals with customs duty which is described as the import duty levied on importation of goods under the provisions of the *East African Community (EAC) Customs Management Act*. On the other hand excise duty is imposed on the local manufacture, importation or local supply of certain commodities and services as spelt out under the *Excise duty Act 2015*. In the context of this case imported pasta of tariff 1902 is listed as an excisable item in the *Excise Duty Act* as amended under the first schedule paragraph 1, part 1(iv). It is clear the two forms of taxes are distinct.
96. Nevertheless, it is worthy to note that article 2 of the *Constitution* stresses the supremacy of the *Constitution* over all other laws of Kenya including international treaties and conventions that form part of our law. In essence the operation of an international treaty cannot negate the operation of the dictates of the *Constitution*, in this case the taxation principle.

Issue No. iii. Whether the imposition of the 20% excise duty on imported pasta is unconstitutional

97. It is the petitioners argument that the impugned amendment to the *Excise Duty Act* violates the fundamental rights and freedoms envisaged under articles 27(4), 40(2), 47(1) and 116(2) of the *Constitution*. This is for the reason that the implication of the excise tax is an increase in the cost of pasta and will put its accessibility out of the reach of many of Kenyans making the tax regime unreasonable, unjustifiable, and punitive and discriminatory owing to lack of the same imposition for local producers.



98. In rebuttal, the respondents argued that imposition of taxes was a constitutional mandate of Parliament hence could not be deemed as unconstitutional when its object was in public interest. It was similarly argued that the legislative process was not an administrative process under article 47 of the Constitution. The respondents cited well known cases that have affirmed this position. See *Kenya Bankers Association v Attorney General & another; Central Bank of Kenya (Interested Party)* [2019] eKLR.
99. In answering this question this court is guided by the well-known principles set out in the case of *Anthony Njenga Mbuti & 5 others v Attorney General & 3 others* [2015] eKLR; which are as follows:
107. The first principle to bear in mind is set out in the Constitution itself which, at article 259, provides for the manner in which it should be interpreted. It requires that the Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance. Further, under article 159(2)(e), the court, in exercising its judicial authority, is obliged to protect and promote the purpose and principles of the Constitution.
108. The second principle to bear in mind is the principle of the supremacy of the Constitution. At article 2, the Constitution provides that:
- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
109. The Constitution further requires that all acts are done in accordance with the national values and principles enunciated in the Constitution. These principles, set out in article 10(2), and in particular (2)(b), include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.”
100. It is not in dispute that one of the constitutional functions of the National Government is its power to impose taxes and charges as envisaged under article 209 of the Constitution which reads as follows:
- (1) Only the national government may impose --
- (a) income tax;
- (b) value-added tax;
- (c) customs duties and other duties on import and export goods; and
- (d) excise tax.
- 2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause(3)(a) or (b).
101. While the Constitution empowers the national government to impose taxes, it does not disclose or define how high or low the listed taxes should be thus not revealing what the threshold of reasonable taxation should be. It is discernable however that this mandate at sub-article (2) is left to the legislature to decide based on various factors not within the knowledge and mandate of this court.



102. The court in the case of *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR serves as an appropriate guide on this subject. The 2 judge bench pronounced itself as follows:

“The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional.”

103. The court while quoting a citation from the case of *Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and others* Nairobi Petition No 544 of 2013 [2014] eKLR at paragraph 33 took note that:

“Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. Article 209 of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax. (See *Bidco Oil Refineries v Attorney General and others* Nairobi petition No 177 of 2012, paras 53 – 56.)”

104. The court then proceeded to hold as follows:

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

105. I associate myself with the cited authorities and article 259 of the Constitution which enjoins this court to interpret the Constitution in a manner that promotes its purposes and principles that advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

106. It is my humble view that allowing the petitioner’s argument that the 20% excise duty increase on imported pasta is unconstitutional when imposition of taxes in and of itself is the Parliament’s constitutional mandate would be in error and untenable in light of the purposes of the Constitution.

107. Though the petitioners put up a spirited argument on the illegality of the impugned amendment failed to show how the increase of the excise duty was contrary to the well-defined constitutional mandate of the Parliament in enactment of laws or that the enactment violated the laid down principles of the legislative process. What becomes apparent from the material placed before this court is that there is nothing to show that the impugned amendment was prejudicial to public interest intended in imposition of taxes under article 209 of the Constitution.

108. In light of the case made out in this analysis, I come to the conclusion that the petitioners have failed to discharge their burden of proof to the effect that the impugned amendment violated articles



27(4), 40(2), 47(1) and 116(2) of the Constitution. In effect I find in conclusion that the impugned amendment of 20% increase excise duty on imported pasta is in tandem with the Constitution.

109. The upshot of the foregoing and for the reasons set out above, is that the petition dated July 23, 2021 lacks merit and is dismissed with costs.

Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

